BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHERN EDUCATIONAL SUPPORT TEAM

and

LAC DU FLAMBEAU SCHOOL DISTRICT

Case 22
No. 57655
MA-10710

Appearances:

Mr. Gene Degner, Director, Northern Tier UniServ – Central, on behalf of the Northern Educational Support Team.

O'Brien, Anderson, Burgy, Garbowicz & Brown, LLP, Attorneys at Law, by **Mr. Steven C. Garbowicz**, on behalf of the Lac du Flambeau School District.

ARBITRATION AWARD

Northern Educational Support Team, hereinafter the Union, requested the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Lac du Flambeau School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on August 26, 1999, in Lac du Flambeau, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by November 3, 1999. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issue:

Has the District violated the contract and the rights of Mr. Albany Potts when it changed his work day back to 3:00 p.m. to 11:00 p.m.? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1998-2000 Agreement are cited:

ARTICLE II – MANAGEMENT RIGHTS

A. The Board, on its own behalf and on behalf of the Jt. School District No. 1, Town of Lac du Flambeau, retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right to:

1. The executive management and administrative control of the school system and its property and facilities and the work related activities of its employes.

2. The determination of the financial policies of the district, including the general accounting procedures, inventory of supplies and equipment procedures, and the District's public relations program.

3. The determination of the management, supervisory or administrative organization of the school or facility in the system and the selection of employes for promotions to supervisory, management or administrative positions.

4. The maintenance of discipline of students and employe control and use of the school system and facilities.

5. The determination of safety, health and property facilities.

6. The determination of safety, health and property protection measures where legal responsibility of the Board is involved.

7. The enforcement of reasonable rules and regulations now in effect and to establish reasonable new rules and regulations, not inconsistent with the terms of this agreement.

8. The direction, supervision, evaluation, arrangement, assignment and allocation of all the working forces in the system, including the hiring of all employes, determination of their qualifications and the conditions for their continued employment, the right to discipline or discharge, for just cause, and transfer employes, not inconsistent with the terms of this agreement.

9. The creation, combination or modification of any position deemed advisable by the Board, not inconsistent with the terms of this agreement.

10. The determination of the size of the working force and the determination of policies affecting the selection of employes.

11. The determination of the layout, the equipment to be used, and the right to plan, direct and control school activities.

12. The scheduling and assignment of all work activities and workloads, not inconsistent with the terms of this agreement.

B. The Board shall not be required to bargain on subjects reserved to management and direction of the school district insofar as the manner of exercise of such functions affects wages, hours and conditions of employment of the employes. When the latter occurs, the Board will be required to bargain only to the extent the Union has not waived any such requirement. Any dispute over the interpretation or application of this provision shall be determined by the Wisconsin Employment Relations Commission only.

C. The foregoing enumerations of the functions of the Board shall not be considered to exclude other functions of the Board not specifically set forth; the Board retaining all functions and rights to act not specifically nullified by this agreement.

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ARTICLE VI – GRIEVANCE PROCEDURE

A. Definitions: For the purposes of this Agreement, a grievance is defined as any complaint, a controversy or dispute between the School District and the Union or between the School District and any of its employes covered by this Agreement involving the meaning, interpretation or application of specific provisions of this Agreement.

B. Initiation and Processing: The grievance procedure shall be the method by which said disputes or complaints shall be resolved, and grievances shall be handled as follows:

Step 1: The grievance shall first be presented in writing, within fifteen (15) working days of the event or knowledge of the event became known, within the current fiscal year, upon which the grievance is based first occurred, by the aggrieved employe or a steward on his/her behalf to the immediate supervisor who will attempt to adjust it. The written grievance must include a statement of the nature of the grievance, including the provisions of the Agreement involved, the remedy requested, and the employe's signature. The immediate supervisor shall give a written answer to the grievance within five (5) working days after it is raised.

Step 2: If no adjustment is reached within ten (10) days of Step 1, above, the grievant or the union may submit a written appeal of the matter to the District Administrator. The Administrator shall meet with the grievant and/or the union within ten (10) working days after the written appeal has been filed and render a written decision within ten (10) working days after the meeting.

Step 3: If no adjustment is reached under Step 2, the grievant or the Union may submit a written appeal of the matter to the School Board. The Board shall meet with the grievant and/or the Union within thirty (30) working days after the written appeal has been filed, and render a written decision within ten (10) working days after the meeting.

Step 4: If no adjustment is reached under Step 3, it may be appealed to arbitration. In order to appeal a grievance to arbitration, the Union shall, within twenty (20) working days after receipt of the Board's decision, give written notice of its desire to arbitrate. The grievance must have been processed according to the above prescribed time limits or the grievance is considered waived.

Step 5: Either party may request the Wisconsin Employment Relations Commission to appoint a member of their staff to act as an arbitrator. The decision of the arbitrator shall be final and binding. The arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this Agreement. His/her decision and award shall be based solely upon his/her interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented.

C. Employe Right: Any employe shall have the right to present, process and settle grievances without the assistance of the Union, provided the Union shall have the right to be present at any settlement.

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ARTICLE XVI – DISCIPLINE PROCEDURE

A. All new employes shall serve a six (6) month probationary period. During such period, they shall not be entitled to just cause for discharge.

B. After serving a six (6) month probationary period, no employe shall be discharged, suspended, disciplined, or reprimanded, or reduced in rank or compensation without just cause. Information forming the basis for disciplinary action shall be made available to the employe and the union.

C. All employes shall at times be entitled to have present a representative of the union when being discipline for any infraction of the rules or delinquency in job performance.

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ARTICLE XVIII – ASSSIGNMENT, WORKLOAD, AND HOURS

A. The work day/week for employees covered by this agreement shall continue as currently in effect. In the event the Board changes the working schedule for any employe, the union shall be notified of such change in writing two (2) weeks prior to the implementation date, except in emergencies, and the parties agree to bargain the impact prior to implementation. All employes shall receive the appropriate breaks and a duty free paid one-half-hour lunch break near the middle of their shift.

B. All work over forty (40) hours a week or hours worked beyond the fifth day in a week shall be at time and one-half, except Sundays and holidays shall be at double time.

C. All employes called in on off-hours shall receive a mimimum of two (2) hours of pay at the applicable rate. For weekend building checks, the custodian shall receive two (2) hours of regular pay for each visitation.

D. Employes asked to assume the responsibilities for a regular teacher shall receive double time for all such hours worked only after working four (4) hours.

E. Compensatory Time. (1) Compensatory time may be granted at the superintendent's discretion. If an employe works less than forty (40) hours per week but over his/her regular scheduled hours, he/she shall be granted one (1) hour compensatory time for each hour worked beyond his/her regularly scheduled hours. If an employe works over forty (40) hours per week, compensatory time shall be granted at time and one half for those hours worked beyond forty (40) hours per week.

F. Custodians called in on off hours, to perform routine duties such as boiler and/or building checks, shall be asked on a rotating basis.

G. Custodians and food service workers substituting in higher pay levels, including supervision shall be paid at 90% of the higher rate for all time worked at that level after ten (10) working days and shall be asked on a rotating basis.

H. The interpreter paraprofessional position as currently defined shall receive additional compensation equivalent to five percent (5%) of the teacher base pay.

BACKGROUND

The Grievant is currently employed by the District as a Custodian. He began employment with Head Start as a bus driver/custodian in 1993 and was under the supervision of Head Start. Head Start is housed in one area in the District's facility. By the 1997-98 school year, the Grievant was a District custodian in the primary wing of the building which housed the first, second and third grades. He only drove a bus for Head Start when a work order was approved in that regard by the Director of Buildings and Grounds, William Cross. Except during the summer, custodians work 3 p.m. to 11 p.m. Monday through Friday (i.e. when students are not present.) During the summer they may work 10 a.m. to 6 p.m. by agreement of the custodians and Cross.

The Grievant began the 1998-99 school year working in the primary area of the building. Sometime in the fall of 1998 personnel in the Head Start area complained that the custodian assigned to that area of the building, C, was not doing his job properly and they asked the Grievant if he would return to that area to clean. Thereafter, the Grievant and C traded work areas with Cross' approval and both continued to work from 3 p.m. to 11 p.m., Monday through Friday.

There is no Head Start on Fridays, and there is only a kindergarten class in that area on Fridays. There is a factual dispute as to whether the Grievant sought and received permission, but at some point in 1998 the Grievant began working 10:00 a.m. to 6:00 p.m. on Fridays. The Grievant testified that he asked Cross if he could change his hours to 10 a.m. to 6 p.m. on Fridays, since there were no students in the area except the kindergarten class on those days and that Cross agreed to the change the same day that Cross agreed to the Grievant and C exchanging work areas. He testified that he also approached another administrator, Mr. Rogers, and the District Administrator, Mr. Vought, individually, and sought and received their approval for his hours change on Fridays. The Grievant further testified that no one said anything to him about his Friday hours until he complained to Cross on behalf of another custodian who felt she should have received certain weekend work, and that it was after his complaint that Cross told him he had received complaints from other custodians about the Grievant's coming and leaving early on Fridays, and that he (the Grievant) would have to change his hours back to 3 p.m. to 11 p.m. on Fridays.

Cross testified that he did not give the Grievant permission, verbally or otherwise, to change his hours on Fridays and that his only discussion with the Grievant was when he and C came to Cross to ask about exchanging areas. Vought testified that he did not recall the Grievant ever coming to him to ask about changing his hours and that if the Grievant had, he would have told him to talk to Cross about it. Cross also testified that he initially did not take any action when he discovered that the Grievant was working different hours on Fridays after another custodian had complained about it, but waited until he received additional complaints from other custodians before telling the Grievant he had to return to working 3 p.m. to 11 p.m. on Fridays. Four of the six custodians filed written complaints with Cross about the Grievant's Friday hours after Cross told them he needed them to put their verbal complaints in writing; however, the written complaints were submitted after Cross had informed the Grievant that he had to revert back to the 3 p.m. to 11 p.m. hours on Fridays. Both Cross and Vought testified that the primary reason they would not permit the Grievant to work 10 a.m. to 6 p.m. on Fridays was to avoid dissention among the custodians. Vought testified that if Cross had approved the change, he would not have objected.

After being directed by Cross to revert to the 3 p.m. to 11 p.m. schedule on Fridays, the Grievant filed the instant grievance. The matter was processed through the parties' contractual grievance procedure and, being unable to resolve their dispute, the parties proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the Grievant did the District a favor by agreeing to go back to the Head Start area and there is no valid reason that he cannot work a 10:00 a.m. to 6:00 p.m. schedule on Fridays in that area. There are no students, except the kindergarten class on Fridays in that area, and he can clean the kindergarten area after the class is over and before 6 p.m.

While management has the right to direct staff, it may not single out one staff person and discipline him because of jealousy on the part of other staff. The only method management tried in dealing with that jealousy was to discipline the Grievant and change his schedule, even though he had sought approval for working the 10:00 a.m. to 6:00 p.m. schedule on Fridays. By doing so, the District engaged in unequal treatment and discipline against the Grievant.

Because there were no students in that area on Friday, the Grievant requested to change his Friday hours and it was approved. This is totally consistent with the philosophy followed in the summer when students are not in school and custodians are allowed to adjust their schedules to avoid working evenings. Clearly, the custodian work schedule is designed around the students' presence in the building.

Beyond the jealousy of the other custodians, the Grievant believes that Cross' change of heart about his Friday hours had more to do with his advocating on behalf of a fellow custodian than it did with complaints from other custodians. It is the Union's position that management erred in this case by using its management rights to take the easy way out, i.e., satisfy the jealous co-workers instead of dealing with the problem. If faced with a substantive reason for changing his schedule back to 3 p.m. to 11 p.m., the Grievant would have gladly complied. However, both Cross and Vought conceded there was no such reason, only the jealousy of the other custodians. Thus, the Grievant is being punished and unfairly treated in an arbitrary fashion. The Grievant deserves better after having done the District a favor.

The Union concludes that the Grievant should have been permitted to continue to work 10 a.m. to 6 p.m. on Fridays absent complaints from Head Start, and that his schedule was changed for disciplinary reasons and without just cause. The Union requests that the Arbitrator return the Grievant to his rightful 10 a.m. to 6 p.m. Friday schedule.

District

The District takes the position that there has not been a violation of the Agreement. The allegation that the District violated Article XVI – Discipline Procedure, is not supported by any evidence. There has been no showing that the Grievant has been disciplined and/or reduced in compensation in any fashion. The Grievant has not lost any wages as a result of his being returned to his normal hours, nor have his duties increased. He was simply returned to the hours he has always worked for the District.

The allegation that the District violated Article XVIII – Assignment, Workload and Hours, also has not been established. Section A of that provision requires that if the Board changes an employe's work schedule, it must notify the Union prior to the implementation date. Since the District did not change the Grievant's hours, no prior notice was required. There are no allegations that the Grievant did not receive his appropriate breaks, or that he was not paid in accord with the provisions of Article XVIII.

If no provision of the Agreement has been violated, the only argument the Grievant could make was that he had established a past practice of working 10 a.m. to 6 p.m. on Fridays in the Head Start area. The facts would not support such an argument. At best, he worked those hours for only a few months before it was discovered and he was returned to the normal schedule. The Grievant's hours, like the rest of the custodians, have been posted and are 3 p.m. to 11 p.m. The Grievant did not give his supervisors notice sufficient to find they impliedly consented to the change. Rather, when Cross had time to verify the complaints he had received from other custodians, he immediately returned the Grievant to his normal hours.

While the Grievant's recollection is that he received permission from both Cross and Vought for the change, he could not recall when or where that occurred. Both Cross and Vought indicated they did not have such a conversation with the Grievant and would not have granted the request had it been made to them. Cross' letter of April 27, 1999 to the Grievant and the steward specifically states there was no such request made and that the only request was to exchange work areas. The letter also states Cross would not permit his staff to set their own hours. The letter is consistent with Cross' testimony. Given the complete lack of supporting data, the Grievant's testimony he received permission from both Cross and Vought is not credible. Further, it would have been extraordinarily poor management practice to grant such permission, as it would only have given rise to even more conflict among the custodians.

Article II – Management Rights, specifically provides that the District has the authority to direct, supervise, arrange, assign and allocate work forces and to schedule and assign work and work load. Article XVIII does not give employes any right to set their own hours and does not even provide what the work hours are to be. Those matters are within the District's authority and it has exercised its authority appropriately.

As to the allegation that the District changed the Grievant's hours as a result of his complaining about overtime from outside organizations using school facilities, there is absolutely no evidence to support that allegation and a plausible explanation about how custodians are assigned and paid in those situations was given by both Cross and Vought.

The District concludes that the Union has not proved any violation of the Agreement and that, therefore, the grievance must be denied.

DISCUSSION

The Union essentially alleges that the Grievant was punished without just cause and treated in an arbitrary fashion when he was directed to return to the regular work hours of 3:00 p.m. to 11:00 p.m. on Fridays. Other than Cross' letter of April 27, 1999 to the Grievant and Don Smith threatening "further action" if he does not follow Cross' memorandum to return to regular hours on Fridays, there is simply no evidence as to any discipline in this case, and there is no evidence that any disciplinary action of any sort was taken. Other than the Grievant's testimony as to his suspicions, there is also no evidence that the directive to the Grievant to return to normal hours on Fridays was in retaliation for his complaint about weekend work opportunities on behalf of another custodian. The allegation that the District exercised its management rights in an arbitrary manner in this case, however, presents a thornier issue. There is conflicting testimony as to whether the Grievant requested, and received, permission to change his hours on Fridays. There are also conflicting opinions on whether avoiding jealousy and disharmony among the custodial staff is sufficient reason to require the Grievant to return to normal hours on Fridays.

While it might well be reasonable to permit the Grievant to work earlier hours on Fridays due to the unique circumstances in the Head Start area, the fact that he would be the only custodian who could do so and the disharmony that would cause, and apparently did cause, or at least exacerbated, is a reasonable basis for not permitting the Grievant to continue to work hours different than those worked by the rest of the custodians. For that reason, and because it treated the Grievant no differently than the rest of the custodians and placed no greater hardship on him, the District's action in returning the Grievant to normal hours on Fridays was not arbitrary or unreasonable. Having reached that conclusion, it is not necessary to determine whether the Grievant had initially been given permission to change his hours on Fridays, as, even if he had, there is nothing in the Agreement that would require the District to maintain that change once it had a reasonable basis for changing the hours back to the normal 3 p.m. to 11 p.m. The only contractual requirement would be to give notice to the Union prior to implementing the change; however, as no notice was given when the Grievant initially changed his hours and the Union made no complaint in that regard, it would seem to be superfluous to require it at this point.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 20th day of December, 1999.

David E. Shaw /s/
David E. Shaw, Arbitrator

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