BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN COUNCIL 40, LOCAL 1752-E, AFSCME, AFL-CIO

and

BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT

Case 34
No. 57596
MA-10686

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, Wisconsin 54311-6051, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Attorney Robert W. Burns**, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of the District.

ARBITRATION AWARD

Wisconsin Council of County and Municipal Employees, Local 1752-E, AFSCME, AFL-CIO, hereafter the Union, and Beecher-Dunbar-Pembine School District, hereafter the District, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the District concurred, in the appointment of a Commission staff arbitrator to resolve a pending grievance. The undersigned was so designated and an arbitration hearing was held in Pembine, Wisconsin, on September 16, 1999. The hearing was transcribed and the record was closed on November 16, 1999, upon receipt of post-hearing written argument.

ISSUE

The Union frames the issue as follows:

> Did the District violate the parties' collective bargaining agreement when it altered the Grievant's work schedule on October 8, 1998?

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If so, what is the appropriate remedy?

The District frames the issue as follows:

Did the District violate the collective bargaining agreement by way of the work duties assigned to the Grievant?

If so, what is the appropriate remedy?

The undersigned adopts the Union's statement of the issue.

RELEVANT CONTRACT PROVISIONS

ARTICLE VI – SENIORITY

1. Seniority shall be defined as an employee's length of continuous service with the School District from his/her last date of hire.

2. Seniority shall be used to determine the rights of employees. The Employer shall provide a seniority list to the **UNION** on or about September 15th of each year.

. . .

ARTICLE VII – JOB POSTING

1. A vacancy shall be defined as a job opening not previously existing in the Table of Organization, or a job opening created by the termination, promotion, or transfer of existing personnel. The **EMPLOYER** shall notify the **UNION** of its intent to fill or not fill a vacancy, in writing, within ten (10) working days of the occurrence of any vacancy. The **EMPLOYER** will post on all **UNION** bulletin boards notice of the vacancy for a period of five (5) working days before filling such vacancy. The notice shall contain the starting rate for the position, job description and hours of work. The **EMPLOYER** shall consider all qualified employees who make written application for the vacancy in line with their seniority.

2. Any employee filling a job vacancy under the procedure outlined in Section 1 above, will be required to fulfill a thirty (30) day probationary period during which she/he may be returned to his/her former job if the **EMPLOYER**

determines that she/he is unable to satisfactorily perform the job. Within the first thirty (30) days the employee may return to her/his former job at the employee's request.

3. Where no employee with the proper qualifications applies within the time required, the **EMPLOYER** may fill such opening by recruitment.

4. The **EMPLOYER'S** conclusions with regard to employee's qualifications shall be subject to the grievance procedure.

5. The **EMPLOYER** may make a temporary assignment to any vacant position until posting provision is completed.

6. A steward may sign another employee's name to any posting if the employee is off due to illness or on vacation.

. . .

ARTICLE VIII – WAGE SCHEDULE, PAY POLICY AND SNOW DAYS

1. Attached to, marked Exhibit "A", and made a part of this Agreement are the mutually agreed upon index and job classifications. During the term of this Agreement each employee shall receive the rate as indicated on the index for his/her classification.

. . .

ARTICLE XXII – SUBCONTRACTING

The District has the right to subcontract work, provided that no present employee(s) shall be laid off or suffer a reduction of hours as a result of subcontracting or by the use of volunteers and/or teachers.

. . .

ARTICLE XIX – MANAGERIAL RIGHTS

1. During the course of negotiations, which preceded the execution of this Agreement, the parties discussed matters pertaining to custodial and maintenance operations, supervision of the work force and managerial prerogatives. Pursuant to these negotiations the parties agreed that all functions

of management to run its operations and to direct its employees, are retained by the School District. This would include scheduling work hours in a manner which is deemed most advantageous to the School District.

2. Nothing contained in this Article shall be construed as divesting an employee of any right granted elsewhere in this Agreement or the Wisconsin Statutes.

3. The Employer agrees that it will exercise the rights enumerated above in a fair and reasonable manner, and further agrees that the rights contained herein shall not be used for the purpose of undermining the **UNION** or discriminating against its members.

. . .

BACKGROUND

Nancy French, hereafter the Grievant, has been employed by the District since 1979. On July 6, 1998, District Administrator Dan Nylund issued the following letter to the Grievant:

Your tentative schedule for the coming year will be as follows:

7:30 – 8:15	Office work
8:15 – 11:15	Special Education aide
11:15 – 12:15	Office work
12:15 – 12:45	Lunch
12:45 – 1:30	Special Education aide
1:30 – 3:30	Office work

Your first day of work will be Monday, August 23, 1998. You will work in the office during the day.

I hope you are enjoying the summer. See you in August.

On August 18, 1998, Principal Leonard Trudeau issued the following letter to the Grievant:

Your schedule for the coming year will be as follows:

7:30 – 8:15	Office work
8:20 – 10:40	Special Education aide
10:45 – 11:15	Lunch room scanning
11:20 - 12:20	Recess duty

12:25 – 12:55	Lunch
1:00 – 3:00	Office work

Your first day of work will be Monday, August 24, 1998. You will work in the office during that day.

I hope you enjoyed the summer. See you on Monday.

On October 8, 1998, the Grievant was informed that her new work schedule would be as follows:

7:30 – 8:15	Office work
8:15 – 10:30	Special Education Aide
10:30 – 11:30	Lunch room
11:30 – 12:30	Playground
12:30 – 1:00	Lunch
1:00 – 3:00	Special Education Aide

On or about October 12, 1998, the Union filed a written grievance that states, inter alia, as follows:

. . .

On October 8, 1998, the Grievant was informed that her work schedule was being changed. She was told she would no longer be working in the office in the afternoons and that her office duties would be performed by the Green Thumb worker.

. . .

The District violated Article XXII – Subcontracting, by using the Grievant to replace bargaining unit employes on lay off and then utilizing the Green Thumb worker to replace the Grievant. Any other contract provisions that may apply, including, but not limited to, Article VI – Seniority.

. . .

Reinstate the Grievant's original work schedule. Cease and desist using Green Thumb worker to replace bargaining unit employees and performing work historically performed by bargaining unit employees.

On November 17, 1998, District Administrator Nylund issued the following letter to the Grievant:

> On October 21, 1998, in a letter to Mr. Dave Campshure, I outlined why you should know that your supervisor is the Building Principal. In the same letter, I stated that if you started from scratch by reinitiating the grievance at Step 1, the time limits would be waived. (See enclosed copy.)
>
> By simply adding Mr. Leonard Trudeau's name after my name on the form and resubmitting a copy of the original grievance does not, in my opinion, constitute starting from scratch.
>
> Your statement of the circumstances of facts is false. You were not told that the Green Thumb worker would be performing your duties.
>
> Your contention of what management did wrong also contains a falsehood because the Green Thumb worker is not being used to replace work previously done by a union employee.
>
> Since management has not violated any part of the Agreement and, according to your job description, other duties can be assigned by the Principal, your grievance is denied.

Thereafter, the grievance was submitted to arbitration.

POSITIONS OF THE PARTIES

Union

The Grievant was hired into the District as a secretary and never posted into any other position during her approximately 20 years of employment. After the Grievant's work schedule and duties were changed on October 8, 1998, the Grievant, for all practical purposes, held the position of Teacher Aide.

The District assigned Teacher Aide duties to the Grievant under the catchall phrase of "Perform other duties as requested by the Principal" and "Other tasks as assigned by the District Administrator or Secretary." Superintendent Trudeau's testimony that this statement in the job description gives the District the right to assign any employe holding that position any duties which the employe is capable of performing grossly overestimates the District's management rights.

The District has failed to acknowledge that there is a difference between its right to assign employes duties and its right to assign employes jobs. To accept the District's position

that there is no contract language that restricts the District's ability to assign jobs to bargaining unit employes, would be to render meaningless portions of the parties' job posting and seniority language, as well as the listing of separate positions in Appendix A.

The Union acknowledges that, in the past, it grieved, but did not process to arbitration, changes to the Grievant's work schedule or duties. However, in none of the previous instances, did the changes come close to transforming the position from secretary to another job.

For the 1998-1999 school year, the District eliminated two Teacher Aide positions. Arbitrator Greco has ruled that the District violated the subcontracting provision of the agreement when it laid off the two bargaining unit Teacher Aides for the 1998-1999 school year while retaining subcontracted aides to perform bargaining unit work the laid off Teacher Aides were capable of performing. The instant grievance presents similar facts.

By essentially involuntarily transferring the Grievant from her secretary position to a Teacher Aide position, the District eliminated one Teacher Aide and one Secretary. The Green Thumb worker effectively replaced the Grievant, who in turn replaced one of the laid off Teacher Aides. By this conduct, the District has violated the contractual subcontracting clause.

Upon elimination of the Grievant's secretary position, she would have the contractual right to bump into a job held by a less senior employe. By transforming her Secretary position into that of a Teacher Aide, the District has denied her that right.

The Union requests that the Arbitrator sustain the grievance. The Union further requests that the District be ordered to reinstate the Grievant's original work schedule and to cease and desist from using subcontracted and other non-unit employes to perform any and all work performed by the Grievant. In the event the grievance is sustained, the Union also requests the Arbitrator to retain jurisdiction for a period of time to ensure compliance with the specified remedy.

District

The management rights clause in the contract grants the District broad authority to run its operation and direct its employes. This authority includes scheduling work hours in a manner that is most advantageous to the School District.

There is no specific language in the contract restricting the District's authority to assign jobs to employes in the bargaining unit. Arbitral authority supports the District's position that, in the absence of an expressed limitation in the parties' collective bargaining agreement, an employer has the discretion to change individual duties and job content of employes.

Reinforcing this principle is the fact that two previous grievances brought on behalf of the Grievant resulted in no restriction of management's right discussed above. One grievance was abandoned and the other resulted only in the understanding that future job assignments would be explained verbally rather than by memorandum.

The Grievant's current duties and responsibilities are not outside the scope of her job. The Grievant's current duties and responsibilities are consistent with historical work assignments in that the Grievant's position has included both teacher aide and secretary duties.

The mere listing of classifications, without detailed job content description, does not limit an employer's discretion to change job content. An employer, absent any express restrictions, may abolish job classifications, establish new ones or combine jobs. The District's right to change duties and responsibilities are specifically acknowledged in the job description, which states "Perform other duties as requested by the Principal" or "Other tasks as assigned by the District Administrator or Secretary."

The District had legitimate business reasons for changing the allocation of the Grievant's duties on October 8, 1998. The change did not reduce the Grievant's compensation. The Grievant was not laid-off, nor was she reduced in hours. There has been no subcontracting or volunteer use that would be pertinent to the grievance.

Both the facts and issue presented in this case may be distinguished from those in the recent Award of Arbitrator Greco. In the present case, the Grievant was not laid off, her hours of work were not reduced, nor were her work hours changed. The subcontracting clause is not triggered by the facts of this case. The grievance must be denied in all respects.

DISCUSSION

Article VIII, Section 1, and Appendix A, read together, establish that the parties have recognized that Secretary and Teacher Aide are two distinct classifications. While it is true that the two classifications are paid the same rate, the existence of separate classifications militates against an assumption that the duties and responsibilities of the two classifications are interchangeable.

Article VII - Job Posting provides employes with posting rights to vacancies. The posting provision requires the posting notice to include a job description.

All of the Grievant's job descriptions have reflected that the Grievant's classification is a "Secretary". Given the evidence that job descriptions identify a specific classification and the contractual requirement that the posting notice include a job description, it is reasonable to conclude that, when an employe posts into a position, the employe posts into a specific classification.

To permit the District to unilaterally change an employe from "Secretary" to "Teacher Aide" would deprive the affected employe of the employe's contractual right to occupy the classification into which the employe posted. Additionally, it would deprive other bargaining unit employes of their contractual right to post into a "Teacher Aide" position.

As the District argues, the Grievant's job description states "Perform other duties as requested by the Principal". However, to conclude that this language permits the District to unilaterally change an employe from a Secretary to a Teacher Aide would be to abrogate rights granted in Article VII. Therefore, such a conclusion must be rejected.

Article XIX - Managerial Rights provides the District with the right to "run its operations and to direct its employees." Article XIX expressly recognizes that these management rights may not be construed to divest an employe of any right granted elsewhere in the agreement.

To construe Article XIX as providing the District with the right to unilaterally change a Secretary to a Teacher Aide would divest the employe of rights granted under Article VII - Job Posting. Thus, such a construction must be rejected.

Neither party introduced the Teacher Aide job description. Thus, the undersigned is unable to determine the extent to which the Grievant's job duties and Teacher Aide job duties overlap.

The Union argues that it is the reduction in the amount of "office work" that has converted the Grievant from a Secretary to Teacher Aide. As demonstrated by the change in the Grievant's job descriptions and the testimony elicited at hearing, the Grievant's position has evolved over time.

In the 1997-98 school year, the Grievant no longer primarily performed office work. Rather, the Grievant performed a significant amount of non-office work. The Grievant's 1997-98 schedule was as follows:

7:30 – 8:30	Office Work
8:35 – 10:10	Special Education Aide for Ms. Johnson
10:15 – 10:25	Break
10:30 – 11:45	Cafeteria Supervision & checking of student ID's
10:45 – 11:55	Break
12:00 – 12:30	Cafeteria Supervision & checking of student ID's
12:35 – 1:20	Office Work
1:25 – 1:40	Elementary detention (when needed)
1:45 – 1:55	Break
2:00 – 3:00	Office Work

On August 6, 1997, the Union filed a grievance alleging that the District had violated the collective bargaining agreement by changing the Grievant's job duties to a substantial degree when the job duties of a less senior clerical employe remained unchanged. As a remedy, the grievance requested that non-clerical duties assigned to the Grievant be assigned to the less senior clerical employe. The undersigned notes that the grievance does not object to the assignment of Special Education Aide and other non-clerical duties to a "Secretary", but rather, objects to the fact that such duties were not assigned to a less senior clerical employe. This grievance was denied by the District and not pursued to arbitration.

The fact that the August 6, 1997 grievance was not pursued supports the inference that the Union has recognized that it is appropriate to assign the Grievant non-clerical duties, such as Special Education Aide, cafeteria supervision, and elementary detention. This inference is further supported by the fact that, when the Grievant was given her first assignment for the 1998-99 school year on July 6, 1998, no grievance was filed over the assignment of "Special Education Aide" work from 8:15 – 11:15 and from 12:45 – 1:30 and, when the Grievant was given her second assignment for the 1998-99 school year on August 18, 1998, no grievance was filed over the assignment of the additional duties of lunch room scanning and recess duty.

In summary, the record does not demonstrate that the District unilaterally changed a Secretary into a Teacher Aide. Rather, the evidence of prior conduct persuades the undersigned that the District and the Union have mutually recognized that the "Secretary" position occupied by the Grievant may be assigned to perform non-clerical duties of the type assigned to the Grievant on October 8, 1998. Under the circumstances of this case, the October 8, 1998 alteration of the Grievant's work schedule did not abrogate the posting rights contained in Article VII. Nor did it render meaningless the classifications set forth in Appendix A.

Article VI, Section 2, states that "Seniority shall be used to determine the rights of employees." Neither the language of this provision, nor any other evidence, establishes that the Grievant has a seniority right to accept or reject job assignments that have been recognized to be assignments of her Secretary position. Notwithstanding the Union's argument to the contrary, it is not evident that the October 8, 1998 alteration of the Grievant's work schedule has abrogated any of the Grievant's contractual seniority rights.

Although the Union argues that the Grievant would have bumping rights to another Secretary position if her position were to be eliminated, the Union has not cited any contract language addressing lay-off procedures in general, or bumping rights in particular. The only contract language relied upon by the Union that references lay-off is the subcontracting language. Specifically, this language permits the District to subcontract work provided that no present employe(s) is laid off or reduced in hours as a result of the subcontracting or by use of volunteers and/or teachers.

As the Union argues, two Teacher Aides were on lay-off at the time that the Grievant was assigned Special Education Aide work. As the parties recognized at hearing, the

undersigned does not have jurisdiction to determine whether or not these lay-offs violated the parties' collective bargaining agreement because that issue was placed before Arbitrator Amedeo Greco.

It is not appropriate for the undersigned to decide whether or not any of the work performed by the Grievant was rightfully the work of the two laid-off employes. Nor is it appropriate for the undersigned to determine whether or not the lay-off of the two Teacher Aides impacted upon the District's right to use the Green Thumb Worker. Rather, these issues were for Arbitrator Greco to hear and decide.

Contrary to the argument of the Union, the record does not demonstrate that the Green Thumb Worker replaced the Grievant in the office. Rather, the record demonstrates that the Green Thumb worker performed duties historically performed by the Green Thumb Worker. This argument, however, is not germane to this grievance because the contractual limitation on the use of non-bargaining unit employes relied upon by the Union is found in the subcontracting clause. As the District argues, for the subcontracting language to be implicated in this grievance, the Grievant must have been laid off or reduced in hours. Since neither event has occurred, the subcontracting language is not applicable.

In conclusion, the District's conduct in altering the Grievant's work schedule on October 8, 1998 has not violated the collective bargaining agreement as alleged by the Union. Accordingly, the grievance is denied and dismissed.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following:

AWARD

1. The District did not violate the parties' collective bargaining agreement when it altered the Grievant's work schedule on October 8, 1998.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 8th day of February, 2000.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

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