BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1667, AFSCME, AFL-CIO

and

VERNON COUNTY

Case 118
No. 58775
MA-11054

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Klos, Flynn & Papenfuss, by **Attorney Jerome J. Klos,** appearing on behalf of the County.

ARBITRATION AWARD

Local 1667, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Vernon County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the parties' agreement. The undersigned was so designated. Hearing was held in Viroqua, Wisconsin on June 8, 2000. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on November 27, 2000.

BACKGROUND

The County operates a nursing home, Vernon Manor, which has a capacity of 120 beds but due to a decreasing census is not operating at full capacity. In October, 1999, the County utilized school-to-work students for three hours per day, one student on each of the three wards to make up residents' beds. The Union filed a grievance claiming that the students were performing bargaining unit work while bargaining unit employees had their regular work schedules reduced or adjusted. The grievance was denied and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the County violate the collective bargaining agreement by the manner in which it utilized the school-to-work students?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE I
Recognition

1.01 The County hereby recognizes the Union as the exclusive bargaining agent for all employees of the Manor except the supervisory employees, Administrator's Secretary, and Registered Nurses for the purposes of bargaining on all matters pertaining to wages, hours, and all conditions of employment.

Union's Position

The Union advances two arguments to support its position. The first is that the County's use of school-to-work students entails a loss of earning opportunities for bargaining unit employees. It submits that the work performed by students has traditionally been performed by bargaining unit employees. It points out that two vacancies on the day shift have not been filled and employees who would have worked were crossed off the schedule because of the use of the students. It argues that the County should not use non-bargaining unit employees to replace bargaining unit employees or reduce their available work hours. The second argument is that if the County can utilize school-to-work employees, they should be members of the bargaining unit. It submits that the students are under the supervision and control of the County and perform work historically performed by bargaining unit members and are covered by the terms of the recognition clause. It cites VERNON COUNTY, DEC. NO. 6203-B (WERC, 8/98), wherein students were included in the unit. It also cites COUNTY OF OTTAWA (OHIO), 111 LA 833 (FRANKIEWICZ, 1998) in support of its position. It notes that the recognition clause is broad and the school-to-work students should be covered by the collective bargaining agreement. It concludes that the County violated the parties' agreement and requests that the County cease and desist from using school-to-work students and, if this remedy is inappropriate, the school-to-work students should be placed in the bargaining unit with the terms and conditions of their employment to be subject to negotiations between the parties.

County's Position

The County contends that neither Union President Clark's testimony nor the work schedules show that bargaining unit employees' schedules have been reduced or adjusted by the school-to-work program. It claims that the evidence establishes that the only reductions that occurred resulted from the reduced census of residents. It states that VERNON COUNTY, DEC. NO. 6203-B (WERC, 8/98) would impact a petition by the Union to clarify the bargaining unit but that is not the issue in this proceeding and the County does not address it. It concludes that as there is no evidence of the specific contract violation alleged, the grievance must be denied.

DISCUSSION

The Union's first argument, that use of the school-to-work students entails a loss of earnings to bargaining unit employees, is not supported by the evidence. Judy Clark, the Union's President, testified that the census was down at Vernon Manor and that was the reason for the cut in bargaining unit positions. The students are not assigned to replace any bargaining unit employees as the students have no certification to work with residents. The undisputed evidence establishes that the students make up residents' beds three hours a day, seven days a week and if they didn't do this the regular Nursing Assistants would perform this work and spend less time with the residents. Although bed making is work performed by Nursing Assistants, it is an ancillary duty and there is no position at the Manor that is assigned to simply make beds. It appears that no one was displaced by the students and if the students were not there, no additional personnel would be hired or would have their hours increased. Thus, this argument is not persuasive.

The Union's second argument is that the students should be included in the bargaining unit. It should be noted that this issue should be the subject of a unit clarification petition rather than arbitration, however Article I, Section 1.01 of the agreement is a broad recognition clause which may be subject to interpretation by an arbitrator. Article I states the County recognizes the Union as the exclusive bargaining agent for all employees of the Manor. The question is whether the school-to-work students are employees. The Union states they are because they are under the supervision and control of the County. The evidence in this matter is insufficient to reach a conclusion that these are employees. There is no evidence that the County selects these students, evaluates them, fires them or determines which days they work. The students may be doing this work as an educational experience. It was not shown that making up beds was a "job" or position regularly assigned to the same student. The facts in this case are distinguishable from the facts in VERNON COUNTY, DEC. NO. 6203-B (WERC, 8/98). There is no evidence of particular students being regularly scheduled and no evidence of any continued assignment beyond school. There was no showing that the school-to-work students were in an employment relationship sufficient for them to be considered employees under Article I of the contract, and the Union's second argument fails.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The County did not violate the collective bargaining agreement by the manner in which it utilized school-to-work students, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 5th day of December, 2000.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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