BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ANTIGO EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

ANTIGO SCHOOL DISTRICT

Case 56
No. 59443
MA-11301

(Frank Jalouiec Posting Grievance)

Appearances:

Mr. Larry Holtz, Director, Central Wisconsin UniServ Council, on behalf of the Antigo Educational Support Personnel Association.

Ruder, Ware & Michler, S.C., by **Attorney Ronald J. Rutlin**, on behalf of the Antigo School District.

ARBITRATION AWARD

The Antigo Educational Support Personnel Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the parties. The Antigo School District, hereinafter the District, concurred in the request and the undersigned, Steve Morrison, was designated as the Arbitrator. Hearing was held in Antigo, Wisconsin, on February 28, 2001. The hearing was transcribed. Post hearing briefs were exchanged by April 24, 2001, marking the close of the hearing.

ISSUES

The parties stipulated that there were no procedural issues but were not able to agree on a statement of the issues to be decided leaving it to the Arbitrator to frame the substantive issues in the award.

The Association would frame the issues as follows:

Did the District violate Article 22 of the collective bargaining agreement and an established past practice when it posted a Custodian I position as a Housecleaner? If so, what is the appropriate remedy?

The District would frame the issues as follows:

Whether or not the District violated the Collective Bargaining Agreement when it eliminated a Custodial position at the high school and created a Housecleaning position in its place when the Custodial position was vacated in August of 2000?

The Arbitrator states the issues as follows:

Did the District violate the collective bargaining agreement when it reclassified the Custodial I position to a Housecleaning position? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 22 – Management Rights

The Board possesses the sole right to operate the District and all management rights repose in it subject to the express terms of this Agreement. These rights include, but are not limited to, the following:

A) To direct all operations of the District;

B) To establish reasonable work rules and schedules of work;

C) To hire, promote, transfer, schedule and assign employees in positions within the District;

D) To suspend, demote, discharge and take other disciplinary action against employees for just cause;

E) To relieve employees from their duties;

F) To maintain efficiency of District operations;

G) To take whatever action is necessary to comply with state or federal law;

H) To introduce new or improved methods or facilities;

I) To change existing methods or facilities;

J) To determine the kinds and amounts of services to be performed as pertains to District operations; and the number and kind of classifications to perform such services;

K) To determine the methods, means and personnel by which District operations are to be conducted;

L) To take whatever action is necessary to carry out the function of the District in situations of emergency.

BACKGROUND

The facts giving rise to this grievance are not contested. Prior to 1994, the District combined its high school and its middle school. This operation was known as the "junior senior high school complex." In 1994, the District opened its new high school and the old "junior senior" complex became the middle school. In preparation for the opening of the new high school, the District conducted surveys of other high schools in the area in an effort to determine staffing requirements. The survey resulted in the decision to staff the high school with two part-time Housecleaners and six Custodians. Custodians and Housecleaners both perform similar cleaning duties but the Custodians are charged with additional duties relating to the regulation of heat and air conditioning, economical use of fuel and other resources, the inspection and testing of electrical installations to ensure safety and the maintenance of motors and other mechanical equipment. Housecleaners are paid roughly two dollars per hour less than Custodian I's.

Three of the Custodians were "Custodian I" positions staffed on the second shift. Within two years of opening the new high school, the District reevaluated the staffing needs and determined that two of the second shift Custodian I positions were performing only housecleaning work. Consequently, it decided to reclassify those two positions to that of Housecleaning and to implement the reclassification at a time in the future when the positions became available through transfer or retirement of the incumbent Custodians

In the summer of 2000, one of the Custodian I's transferred to the middle school, thus, opening up the position. The District posted the now vacant position as a second shift Housecleaning position and it was filled by an employee who had held the same position at the middle school, i.e. a transfer. The posting read as follows:

POSITION: High School – Housecleaning – Second Shift

POSTING DATE: August 7, 2000

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Basic Qualifications:

- See Attached Job Description

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HOURS PER DAY/WEEK: 40 - 4:00 pm to 12:00 Midnight

TERM: - 12 Month

SALARY CLASSIFICATION: - Housecleaning

BEGINNING RATE OF PAY: - Per contract schedule

IF QUALIFIED AND INTERESTED, SUBMIT LETTER OF INTEREST TO:

Jeff Gress, Director of Human Resources
Unified School District of Antigo
120 S. Dorr Street
Antigo, WI 54409

APPLICATION DEADLINE: August 18, 2000

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The Unified School District of Antigo is an equal opportunity employer.

The second position had not been vacated as of the date of the hearing and remains filled by a Custodian I. The intention of the District is to post it as a Housecleaning position when it does become vacant.

POSITIONS OF THE PARTIES

The Association

The Association argues that the District exercised its management rights in an "inequitable" manner because it unilaterally reclassified the Custodian I position to a Housecleaning position. The Association says this was inequitable because 1) the newly

created position has the same job duties as the old position, 2) the new position does more than simple cleaning duties, i.e. it replaces floor tiles, installs pencil sharpeners, adjusts faucets, paints, puts up snow fences and other duties not normally associated with cleaning, and 3) the new position is paid approximately $2.00 per hour less than the old position. These inequities, argues the Association, result in unequal pay for equal work.

It also says that the reclassification violates a "clear past practice" of notifying the Association before a position has been eliminated or altered. The Association points to two examples of this "past practice." The first involved the District's alteration of the work hours of a Custodian position from five nights to four nights and one day. The second involved the proposed elimination of two Audio Visual positions. Following discussions between the District and the Association these two issues were resolved.

The Association claims that the elimination of the Custodian position has deprived the Housecleaners of the "benefit of upward mobility" because many of the members who started out as Housecleaners have moved up to the Custodian position.

Finally, the Association contends that nothing has changed since the District's initial staffing survey which would support the District's reclassification of the position and it accuses the District of "merely trying to get the same amount of work out of an Association member while paying less for it."

The District

The District argues that it acted well within its management rights because Article 22 of the collective bargaining agreement explicitly provides it with the authority to determine the number and kinds of job classifications for the services it provides and that its rights under this article are not restricted in any way by other contract language. It also argues that it did not act arbitrarily or capriciously in exercising the rights enumerated under Article 22 because it had a rational basis for making the reclassification and its decision did not result from an "unconsidered, willful and irrational choice of conduct," citing DEERFIELD COMMUNITY SCHOOL DISTRICT, WERC MA- 52550 (CROWLEY, 10/95).

The District maintains that the past practice the Association alleges has been violated by the reclassification is not relevant to this dispute since the agreement clearly gives the District the authority to reclassify the position and in the face of such clear contractual authority past practice is irrelevant. It also says that the past practice cited by the Association is irrelevant because the events comprising the past practice are too dissimilar to the matter in dispute here and, further, that no past practice could exist because the circumstances of the instant case have never arisen before.

DISCUSSION

Article 22 of the parties' collective bargaining agreement, entitled "Management Rights," provides in pertinent part that:

> The Board possesses the sole right to operate the District and all management rights repose in it subject to the express terms of this Agreement. These rights include...(the right)
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> A) To direct all operations of the District;
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> . . .
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> F) To maintain efficiency of District operations;
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> . . .
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> J) To determine the kind and amounts of services to be performed as pertains to District operations; and the number and kind of classifications to perform such services;
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> . . .
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> K) To determine the methods, means and personnel by which District operations are to be conducted;
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> . . .

Article 22 of the contract expressly, clearly and unambiguously provides the District with the authority to reclassify the position of Custodian I, but in doing so the District is held to a reasonable standard. In other words, the District's action may not be arbitrary or capricious nor may it be exercised in bad faith. The District's discretion in this regard is subject to an implied covenant of good faith and fair dealing which is ordinarily presumed to be a part of all agreements. E.g., Antoine (ed.) The Common Law of the Workplace – The Views of Arbitrators, 75 (NAA/BNA, 1998). There is a generally recognized principle of contract interpretation that a covenant of (or commitment to) good faith and fair dealing is ordinarily presumed to be implied in all agreements. That commitment is that rights reserved to a party will not be exercised arbitrarily, capriciously or in a bad faith effort to undercut the benefits the contract elsewhere provides to the other party. VILLAGE OF GERMANTOWN, WERC, MA-7618 (GRATZ, 2/94). Contractual language may also limit the District's authority. In the instant case there is no such limiting language and so the analysis of the District's action turns on whether it was arbitrary, capricious or in bad faith. The record does not support such a conclusion.

The District, prior to reclassifying the Custodian I position, spent roughly two years following the opening of the new high school analyzing the operation and the job duties being performed by staff. Following this analysis, the District made a reasoned determination that since two of the Custodian I positions were performing housecleaning duties rather than custodial duties, (the reclassified positions did not perform duties relating to the regulation of heat, ventilation and air conditioning; they did not have a responsibility to ensure the economical usage of fuel, water and electricity; they did not perform maintenance on motors or other mechanical equipment and they did not conduct periodic inspections or tests of the school's electrical installations to ensure their safe condition) the positions should be reclassified to that of Housecleaning. The decision to reclassify had a rational basis, was well considered and was, consequently, not arbitrary or capricious. It was consistent with the District's authority to make operations more efficient.

The record contains absolutely no evidence that the reclassification decision was made in bad faith. On the contrary, when the reclassification took place in 1996, the District recognized that if it were implemented immediately the incumbents would be adversely effected. So, it made the decision not to implement the reclassification until the current incumbents retired, transferred or otherwise vacated the position. In the summer of 2000, the first of the two incumbents, Don Fermanich, transferred to the middle school leaving the first Custodian I position vacant. Only then was the reclassification implemented. The other position is still held by the same incumbent who held it in 1996 and the implementation of that position's reclassification will not occur until she vacates it.

Relative to the Association's assertion that the past practice of the parties prevents the District from reclassifying these two positions without the Association's approval, this argument has no merit under the facts of this case. The Arbitrator's job is to find out what the parties intended by the language they used in the contract. Past practice may be used to add meaning to language which is ambiguous or uncertain but where the language, as here, is plain and unambiguous they become, in the words of Arbitrator Justin "undisputed facts." PHELPS DODGE COPPER PRODS. CORP., 16 LA 229, 233 (JUSTIN, 1951) To allow the past practices alleged herein to prevent the District from exercising the rights given to it by the clear and unambiguous language in the instant dispute, as the Association suggests, would result in the *de facto* rewriting of the party's contract and that is not the job of the Arbitrator.

Regarding the Association's argument that the actions of the District adversely effected the upward mobility of the membership, employers, in the exercise of their contractual rights, do occasionally adversely effect employees. Layoffs, decisions not to fill vacancies and reclassifications such as the instant one all adversely effect employees. The question is whether the exercise was within the rights of the employer and whether it was done in good faith, and was not arbitrary or capricious. That was the case here.

In light of the above, it is my

AWARD

That the District did not violate the collective bargaining agreement when it reclassified the Custodian I positions to Housecleaning positions.

Dated at Wausau, Wisconsin this 19th day of July, 2001.

Steve Morrison /s/
Steve Morrison, Arbitrator

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