BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL 346, AFL-CIO

and

HAYWARD COMMUNITY SCHOOL DISTRICT

Case 68
No. 59974
MA-11478

(Subcontracting Grievance)

Appearances:

Brown, Andrew & Signorelli, P.A., by **Attorney Timothy W. Andrew,** appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn**, appearing on behalf of the District.

ARBITRATION AWARD

Teamsters Union Local 346, AFL-CIO (herein the Union) and Hayward Community School District (herein the District) are parties to a collective bargaining agreement covering the period from July 1, 1997 to June 30, 2001, and providing for binding arbitration of certain disputes between the parties. On May 24, 2001, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the subcontracting of bargaining unit work by the District, and further over the failure of the District to award a vacated position to Peter Thayer, both allegedly in violation of the collective bargaining agreement, and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on August 7, 2001. The proceedings were not transcribed. The parties filed briefs on September 11, 2001. The District filed a reply brief on September 27, the Union filed a reply brief on September 28 and the record was thereupon closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties were unable to stipulate to a framing of the issues. The Arbitrator, therefore, frames the issues as follows:

Is the issue of the District's failure to fill the position vacated by Linda Briggs arbitrable?

If so, did the District violate the collective bargaining agreement by failing to fill the position vacated by Linda Briggs?

If so, what is the appropriate remedy?

Did the District violate the collective bargaining agreement by subcontracting with a private vendor for evening cleaning services at the Primary School?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE III – SENIORITY

. . .

Section 5: Promotions - All new and vacated positions Shall be posted at each school for a period of five (5) working days. Such posting shall state the job to be filled, the date the job is to be filled, qualifications for the job, and the rate of pay. Interested employees may apply for posted vacancies by notifying the District Administrator, in writing, of their interest, during the posting period specified above.

New positions and vacancies shall be awarded to the most qualified applicant; provided, however, that before anyone is hired from outside the bargaining unit, qualified bargaining unit employees will be given preference. Where qualifications are equal, seniority shall prevail. The qualification of employees shall be determined by the District based on physical fitness, knowledge, skill and efficiency. Any current part-time or seasonal employee may make application for year round vacancies. An employee being promoted to a higher paying position shall serve a probationary period of ninety (90) calendar days. In the event the Board determines that employee is not qualified to fill the position before the end of the probationary period, the Board reserves the right

to return the employee to his former position at his former rate of pay. The employee also has a ninety (90) day option to disqualify himself/herself and return to their former position at the former rate of pay. Probationary employees are not eligible to post for positions.

. . .

ARTICLE V – GRIEVANCE PROCEDURE

. . .

Section 2: For the purpose of this Agreement, a grievance is defined as a difference of opinion regarding the interpretation or application of this Agreement. All grievances must be submitted in writing.

Step 1: An earnest effort will be made to settle the matter informally between the aggrieved employee and the employee's immediate supervisor.

Step 2: If the matter is not resolved in Step 1, the grievance shall be reduced to writing and clearly state the specific Section(s) of the Agreement that are alleged to have been violated, the time and place of violation, and the relief sought. The written grievance should be presented by the aggrieved employee to the immediate supervisor (copy also to the steward) within ten (10) working days after meeting with the immediate supervisor. The immediate supervisor shall give his/her written answer to the employee within ten (10) working days of the time the grievance was presented to him/her in writing.

Step 3: If not settled in Step 2, the grievance shall within ten (10) working days, be appealed in writing to the District Administrator. The District Administrator shall give a written answer no later than ten (10) working days after receipt of the appeal.

Step 4: If not settled in Step 3, the grievance shall, within ten (l0) working days, be appealed in writing to the Board of Education.

Step 5: The Board of Education shall give the written answer within thirty (30) days after the receipt of the appeal.

Step 6: Any grievance which cannot be settled through the above procedure may be submitted to final and binding arbitration by either party requesting the Wisconsin Employee Relations Commission to appoint a member of the Commission or its staff as arbitrator.

The sole function of the arbitrator shall be to determine whether or not the employee's rights have been violated by the District contrary to an express provision of this Agreement. The arbitrator shall have no authority to add to, subtract from, or modify this Agreement in any way. The arbitrator shall have no authority to impose liability upon the District arising out of facts occurring before the effective date or after the termination of this Agreement. Any decision by the arbitrator within the scope of his authority shall be final and binding upon the District, the Union and the employee.

All arbitration proceedings shall be hold at such time and place as shall be mutually agreed upon between the District and the Union. If the District and the Union are unable to agree, the time and place of hearing shall be designated by the arbitrator. In all arbitration proceedings, the District and the Union shall each have the right to be represented by counsel, the opportunity to confront and cross-examine witnesses, and the opportunity to present arguments orally as well as by post-hearing brief. The arbitrator's decision shall be based upon the evidence presented at the hearing and he shall issue a written decision stating the reasons for his determination.

Both parties shall share equally the costs and expenses of the arbitrator, if any, including transcript fees and other expenses of the arbitrator. The cost of the WERC filing fee shall be paid by the party requesting arbitration.

The time limits set forth above are mandatory. Failure to act within prescribed time limits shall constitute a waiver of the grievance. Unless otherwise noted, “days” refer to “calendar days”.

. . .

ARTICLE XVII – MANAGEMENT RIGHTS

Except as expressly modified by other provisions of the contract, the School Board possesses the sole right to operate the School District and all management rights repose in it. These rights include, but are not limited to, the following:

Section 1: Operational Rights

. . .

4. To contract out for goods and services provided no present bargaining unit employee is reduced in hours or placed on layoff as a result thereof;

. . .

Section 2: Personnel Management

2. The District reserves the right to hire, promote, transfer, schedule and assign employees in positions within the school District and to create, combine, modify and eliminate positions within the School District. Any layoffs that are necessary for the efficient operation of the District will be determined by seniority, provided the remaining employees are qualified to perform the available work.

. . .

OTHER RELEVANT LANGUAGE

ARTICLE VI – HOURS OF WORK, WORKWEEK, AND OVERTIME COMPENSATION

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Section 2: Hours - The normal daily work shift for all full-time employees shall consist of eight (8) hours. The normal work shifts shall run from 7:00 a.m. to 3:30 p.m. and from 3:30 p.m. to 12:00 midnight each including a thirty-minute unpaid lunch period. Summer hours shall be 7:00 a.m. to 4:00 p.m. with a one hour lunch break for all employees. Shifts will be rotated equally except for the occupants of six (6) positions: Building supervisors, Stone Lake custodian, custodian with locker room supervision, and custodian with mail pickup duties.

. . .

Section 5: Overtime - Employees shall receive time and one-half (1 1/2) their regular rate of pay for all time worked in excess of forty (40) hours per week and shall receive time and one-half for any hours worked on Sundays and holidays. The employer shall not change the normal eight (8) hour shift to avoid payment of weekly overtime.

BACKGROUND

Linda Briggs was a full-time employee of the Hayward Community School District, working as a housekeeper at the District's Primary and Intermediate Schools. Late in February, 2001, Briggs resigned her position. Subsequently, the District posted the position vacated by Briggs and Peter Thayer, another member of the bargaining unit, sought to transfer into the position. Eventually the District elected not to fill the position, but instead

restructured the custodial staff by reassigning three other custodians, Roger Jones, Mike Kanzler and Terry Porter, who had previously worked part-time days at the Intermediate School and part-time nights at the Primary School, to full-time day positions at the Intermediate School and using a substitute employee at the Primary School for the balance of the school year. Also, in March, 2001, the District elected to subcontract the night cleaning at the Primary School to Ron's Quality Cleaning, a private contractor which had been providing cleaning services at the District's Middle School since August 7, 2000.

The Union grieved the District's action and, on March 27, 2001, Union Representative Roderick Alstead issued a Step 3 grievance letter to District Administrator William Trautt as follows:

. . .

> Consider this letter a grievance filed on behalf of the Bargaining Unit disputing the District's plan on sub contracting Bargaining Unit work.
>
> Per our Phone conversation on Monday, March 26, 2001, you informed me that the School District has made the decision to sub contract work that was being done by a Bargaining unit employee until her resignation. You posted this vacancy but decided not to fill this position and sub contract this work, claiming Article XVII – Management Rights, allows you this latitude.
>
> We're disputing this action and disagree with your interpretation of Article XVII. This position should be posted/filled and remain in the Bargaining Unit.
>
> Please respond to me per Article V - Grievance Procedure. If you have any questions, I can be reached at (218) 628-2545.

. . .

Trautt denied the grievance in writing on April 3, 2001, whereupon Alstead issued a Step 4 letter to the Board of Education on April 5. The Board likewise denied the grievance pursuant to a letter issued by the Board's legal counsel to Alstead on April 23.

Separate from the above events, the Union filed a grievance on behalf of Peter Thayer on April 9, 2001, over the failure of the District to grant his request to transfer into Briggs' vacated position. On May 1, Administrator Trautt responded in writing to the effect that, according to his understanding of the collective bargaining agreement's requirements, Thayer would be given consideration prior to hiring a new employee for a housekeeping position. There was no further exchange of correspondence regarding the Thayer grievance and the Union's request to initiate grievance arbitration on all the foregoing matters followed thereafter.

At the hearing, Union Representative Rod Alstead testified that he was informed by Superintendent Trautt that the District intended to subcontract Linda Briggs' hours, which prompted his March 27 grievance letter to Trautt objecting to the subcontracting and demanding that the position, which had been posted, be filled according to the terms of the contract. He later learned that Briggs' hours were reassigned and that the subcontracted hours were evening cleaning hours at the Primary School. It was Alstead's testimony that he was unaware of any bargaining unit member whose regular hours were reduced, or who were laid off, as a result of the subcontracting. There were employees who lost overtime opportunities as a result of the action, however. It was his position that the contract precluded the District from subcontracting a vacant position and, further, that once a position is posted Article III, Section 5, requires that it be filled according to the procedure set forth therein. He testified that the District may, and does, offer overtime hours during vacations and absences to seasonal or casual employees, but that it may not offer the hours to a subcontractor. Overflow work may be subcontracted because it does not take away work usually done by bargaining unit members. Likewise, the work at the Middle School could properly be subcontracted because it had not previously been done by the bargaining unit, hence the subcontracting of that work was not grieved.

Custodian Gordon McClurg testified that Linda Briggs had worked days as a housekeeper, splitting time between the Primary and Intermediate Schools. The evening cleaning had previously been done on a rotating basis by bargaining unit members Ron Reisner, Roger Jones, Mike Kanzler and Terry Porter. After Briggs' resignation, her hours were ultimately redistributed between Reisner, Jones, Kanzler and Porter, at which point the evening hours were subcontracted. He further testified that if one of the former evening cleaners was unavailable, the District attempted to obtain a substitute and, failing that, offered the hours to him, which he occasionally accepted. He does not get offered evening hours now that they have been contracted out. He admitted, however, that overtime opportunities do still arise within the unit.

Jeff Coddington, Head Custodian at the Middle School, corroborated McClurg's testimony regarding the method in which overtime hours for evening cleaning at the Primary School were assigned prior to the subcontracting. He stated that, due to the variable nature of overtime, he was unaware of any employee who actually lost overtime as a result of the subcontracting, but stated that the loss of the opportunity was the basis of the grievance, despite the fact that the contract does not guarantee overtime.

For the District, former Superintendent William Trautt testified that when the Middle School was built, the School Board considered all options in providing for evening cleaning and ultimately determined to subcontract based on cost and administrative factors, as well as previous success with subcontracting. When Briggs resigned, the District initially used a long-term substitute to fill her hours until it determined a permanent solution. Ultimately, the Board considered it more cost effective to reassign employees to Briggs' hours and subcontract the evening cleaning at the Primary School. He indicated that the Union had never objected to the

use of substitutes to clean at the Primary School and, in fact, both McClurg and Union Steward John Bohmann had argued in the past that more substitutes were needed because bargaining unit members did not want all the overtime hours. Trautt indicated his understanding that Article III, Section 5, does not mandate filling a posted position, but only specifies the procedure to be followed if a decision to fill is made. He further stated that the language of Article XVII, Section 1, Paragraph 4, only refers to "regular" working hours, as defined in Article VI, Section 2, not overtime hours.

The District offered additional testimony from Attorney Kathryn Prenn regarding bargaining history relative to the subcontracting language. Ms. Prenn testified that the subcontracting clause had been negotiated by her late law partner, Stevens Riley. She further testified that within her firm the reference to hours in the clause is understood to mean only regular working hours and that Riley would have had the same understanding when he negotiated the language.

POSITIONS OF THE PARTIES

The Union

The subcontracting of evening cleaning work at the Primary School has resulted in reduced hours for bargaining unit employees. In the past, bargaining unit members were regularly offered overtime hours when one of the regular evening workers was absent. Since the District has subcontracted this work, overtime opportunities have been significantly reduced. Although overtime is not guaranteed, and no employee has had their regular hours reduced due to the subcontracting, nonetheless the term "hours" in Article XVII, Section 1, Paragraph 4, is unqualified and the loss of overtime, therefore, does constitute the loss of hours. This is analogous to CITY OF OSHKOSH, CASE 213, NO. 49934, MA-8109 (GRATZ, 7/18/95), wherein the arbitrator held that the unqualified term "hours" as used in that contract included extra as well as regular hours and that if they had intended a more restrictive definition they should have included it.

The District contends that the use of the heading "Hours" for Article VI, Section 2, the section that defines regular working hours, establishes that this is the true meaning of the term. As with words used to head other sections, however, "hours" is not defined, but is merely used as a general subject heading. The section itself does not define "hours," but merely sets forth the bargaining unit's right with respect to setting shifts. The District would have the Arbitrator add the word "normal" or "regular" to "hours," which the contract prohibits the Arbitrator from doing.

The District's interpretation of "hours" would also make the language restricting subcontracting superfluous, because the employees' regular work hours are already protected by Article VI, Section 2 and Article VI, Section 7. It is established that, given a choice

between alternatives, an arbitrator should prefer an interpretation that gives effect to all contract language over one which renders a provision meaningless. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 493 (1997).

It was also recognized in SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE, CASE 30, NO. 56866, MA-10441 (GRECO, 8/30/99) that where a subcontracting clause exists, subcontracting cannot be used to undermine the Union by farming out bargaining unit work. Subcontracting clauses exist for the purpose of protecting bargaining unit employees and, therefore, it requires more compelling justification than merely reducing the employer's costs of operation. Here, if the subcontracting is upheld employees will not be protected because bargaining unit hours will be lost. In fact, Article XVII, Section 1, Paragraph 4, will have no protective effect whatever if it is interpreted to refer only to regular working hours, because those protections exist elsewhere in the contract. The subcontracting of work at the Junior High School is a different situation because the building is new and the District has always subcontracted the cleaning services there, resulting in no reduction of hours to the bargaining unit. The Primary School has always been cleaned by bargaining unit employees, however, and is a different case completely.

The Arbitrator should disregard the testimony of the District's counsel regarding the meaning of the contract language. She testified as to what her firm interprets the word "hours" to mean and thus implied that was likewise the meaning given it by her late law partner, Stevens Riley, who actually negotiated the language. Inasmuch as there is no evidence that Mr. Riley conveyed his interpretation of the language to the Union negotiators, his belief as to its meaning has no relevance. Further, since the language in question was proposed by the District, it is a recognized principle of contract law that, to the extent the language is ambiguous, it must be construed against the drafter. Riley did not seek to clarify the meaning of the term, which he could have done, thus it must be given the meaning proffered by the Union. This is also consistent with the opinion of Arbitrator Gratz in OSHKOSH.

The District contends that the issue of the filling of Linda Briggs' position is not arbitrable because the Union did not properly grieve it, but the record indicates otherwise. Union Representative Alstead informed the District in writing on March 27, 2001, that the Union was protesting the failure to fill Briggs' position. Alstead believed, incorrectly, that the subcontracted hours were those previously worked by Briggs, but the point is that Briggs' position was posted and was not filled and the Union objected to this in a timely and appropriate fashion. The Peter Thayer grievance is not at issue and the time of its filing is not relevant to the filling issue. The filling issue was raised simultaneously with the subcontracting issue because the District Administrator had linked them in his conversation with Alstead. It is, however, a separate issue and should be decided by the Arbitrator.

Article III, Section 5 of the contract contains mandatory language regarding the posting and filling of vacant positions, requiring the District to post the positions at specified places for specified times, and requiring it to award the positions to the most qualified applicant, giving

preference to applicants from within the bargaining unit. This language guarantees bargaining unit members the rights to have their qualifications judged, to have their seniority considered, and, if qualified, to be promoted to available positions on the basis of their seniority. This is an important protection to bargaining unit members.

The former Administrator testified that the District posted Briggs' position and, after seeing who applied for the position, decided to hire a long-term substitute instead. The District assumes that it can follow Article III, Section 5, or not as it chooses by simply avoiding the issue by using long-term substitutes or subcontractors, but this is not so. The provision requires all new and vacant positions to be posted and ultimately be awarded to the most qualified applicant. The District's interpretation impairs the rights of bargaining unit members to be considered for promotions and must not be upheld.

The District

The grievance filed on behalf of the bargaining unit on March 27, 2001, concerned the District's decision to subcontract night cleaning work and specifically referenced Article XVII. (Jt. Ex. #2) It did not mention Article III, which deals with job posting. The job posting issue was not raised until a separate grievance was filed by Peter Thayer on April 9, 2001. (Union Ex. #1) The Thayer grievance was not advanced and is not arbitrable, nor, therefore, is the issue of the failure to fill Linda Briggs' former position.

The Union's grievance on the issue of filling Briggs' position must also fall on the merits. Article XVII gives management broad powers over the area of staffing. After Briggs resigned, the District weighed its options, which included reassigning other staff, subcontracting and hiring a replacement. The job was posted to avoid undue delay and Peter Thayer posted for it. The District, however, opted to reassign other employees to fill Briggs' hours and subcontract the night cleaning hours vacated by those employees. The Union argues that once a vacancy has been declared, it must be filled, but this is not mentioned in the contract. The contract merely requires that if the District intends to fill a position it must give preference to qualified members of the bargaining unit. As stated, however, the District decided not to fill the position, but subcontract the night cleaning work instead.

The Union argues that the phrase "New positions and vacancies shall be awarded." Arbitration is not the appropriate forum for rewriting contract language and the section does not require filling all positions. It only states that if a position is filled it must be done according to the method set out in the contract. The Union's interpretation, if adopted, would make the language regarding subcontracting superfluous. It is a principle of contract interpretation that contracts should be read in such a way as to give all provisions meaning, if possible, therefore the job posting section cannot be read to mean that all open positions must be filled. The District's action of posting a position did not void its management rights to eliminate positions. The contract does not restrict management's power in the way sought by

the Union. To hold otherwise would require the Arbitrator to modify the terms of the contract, which the grievance procedure forbids. Where no restriction exists, the District's action must be upheld unless it is found to be arbitrary, capricious, or in bad faith. No such evidence exists in the record.

Article XVII, Section 1, Paragraph 4, gives management the right to subcontract for goods and services as long as such subcontracting does not reduce the hours or result in the layoff of a present bargaining unit employee. The Union characterized its grievance in terms of objecting to the subcontracting of bargaining unit work. The contract does not prohibit the subcontracting of bargaining unit work, however, only the reduction of hours or layoff of present employees. All parties agree that no layoffs resulted from the decision to subcontract. The Union argues, however, that bargaining unit employees will lose hours, based upon the loss of overtime opportunities.

"Hours," as used in Article VI, clearly and unambiguously refers to the employees' normal or regular daily work shifts. Had they intended a more expansive definition, they could have negotiated different language, but they did not. The term "hours" is commonly understood to refer to the regular shift and was even used in that way by the Union's own witnesses, Gordy McClurg and Jeff Coddington. Both Coddington and Union Representative Alstead further testified that no bargaining unit employee had had their hours reduced due to the subcontracting. Article VI, Section 7, provides that employees' hours shall not be reduced in the event of a layoff. Here, again, it is clear that only regular hours are considered, not overtime.

Former Administrator Trautt testified that in other school districts with similar contract language, there is no restriction on subcontracting vacant positions and such actions are not challenged. This is consistent with the practice followed by the Hayward School District. Further, the language found in the contract was negotiated by Attorney Stevens Riley, a late partner of Attorney Kathryn Prenn. Ms. Prenn testified that the language is considered "boilerplate" within the firm and is commonly understood to refer only to regular work hours, not overtime, an interpretation that Riley would have adhered to, as well.

Article VI, Section 2, defines hours as the normal work shift. The subcontracting language contains no alternative interpretation. No member of the bargaining unit has had their hours reduced. In CITY OF PARK FALLS, CASE 20, NO. 57383, MA-10605 (HOULIHAN, 9/26/00), the arbitrator held in a similar case that hours of work are created by the contract. As in that case, the hours of work here are established by contract and have not been altered by the subcontracting.

The Union's argument is further undercut by the fact that the contract does not guarantee overtime. Article VI, Section 5, provides that overtime work shall be paid at time and one-half, but does not guarantee a minimum amount of overtime or require that all overtime hours be offered to the bargaining unit, which was admitted by the union's witnesses.

It has been held that the fact that subcontracting may result in fewer overtime hours does not necessarily constitute a contract violation. See, VIDEOTAPE PRODUCTIONS OF N.Y., INC, 51 LA 600 (TURKUS, 1968); CITY OF KENOSHA, CASE 17, NO. 49810, MA-8072 (MAWHINNEY, 7/12/94). There is no guarantee of overtime in this contract and no employee has had their regular hours reduced.

The District has subcontracted cleaning work at the Middle School. This decision eliminated potential hours of overtime work, but the Union did not grieve the action. Further, Representative Alstead conceded that the District could subcontract overflow and construction work without violating the Union's rights under the contract. These also would result in overtime opportunities for bargaining unit members, so clearly the Union does not feel that all work is protected on the basis that it would provide available overtime hours to the bargaining unit. In fact, when hours need to be filled the first option is to seek substitute employees and to only offer overtime when none are available. (See, Union Ex. 1 and 2). Former Superintendent Trautt testified that bargaining unit members complained about overtime and wished for more substitutes. Further, they are free to decline overtime. Thus, there is no way to clearly determine if any employee has even been reduced in the amount of overtime they are offered. It is the speculative nature of overtime that accounts for why it is generally not considered as "hours" for subcontracting purposes. See, IDEAL ELECTRIC AND MFG. CO., 67 LA 227 (CHUCKLEY, 1976); APPLETON AREA SCHOOL DISTRICT, CASE 66, NO. 53156, MA-9261 (GRECO, 9/19/96).

There is no evidence that the District's action was arbitrary, capricious or taken in bad faith. Trautt testified that, at the time of the action, Union Steward John Bohmann admitted it was within the District's rights. The Union did not refute this testimony. The District considered many alternatives to addressing its need and listed the factors that favored subcontracting, including cost, supervision, non-availability of substitutes, need to purchase equipment and prior experience with subcontracting. The Superintendent consulted with the Head Custodian before reassigning the custodians and subcontracting the evening hours and he did not challenge the District's authority to do this. Clearly, the action was within the District's management rights and should be upheld.

What the Union seeks is to alter the language of the contract. The Union has claimed throughout that it seeks to prevent the subcontracting of bargaining unit work. There is, however, no restriction on subcontracting bargaining unit work in the agreement. The contract language restricts reducing the hours of current employees, which is an entirely different matter. If the Union wants to change the language of the contract, it must do so through negotiation, not grievance arbitration. For all of the foregoing reasons, the grievance must be denied.

In Reply

The Union

The District suggests that the work it subcontracted was that done formerly by Linda Briggs. This is not the case. The work was formerly done by other bargaining unit members who were subsequently transferred to other duties. The District further suggests that the Union is prosecuting the Peter Thayer grievance and that such is not arbitrable. The Union is not advancing the Thayer grievance, but rather the grievance filed by Representative Alstead on March 27, which clearly puts the matter of the filling of Briggs' position in issue and is arbitrable.

The District argues that the contract must be read as a whole and that Article III, Section 5, cannot be interpreted to mean that all positions must be filled. The Union does not dispute that it is within management's right to determine the numbers and kinds of classifications to perform services. It does argue, however, that the language of Article III, Section 5, is mandatory and that, once posted, the District is required to fill a vacant position according to the method set forth therein.

The District's arguments that the words "normal" or "regular" should be inferred when interpreting the meaning of "hours" are specious. The testimony of the Union's witnesses that their "hours" are their normal shifts does not support the District, because they were not called upon to testify to the meaning of contract language, but to when they were regularly scheduled to work. Further, Trautt's testimony about his experiences with subcontracting in another school district is irrelevant, because there was no comparison of the relevant contract provisions, nor evidence of the effect of the subcontracting on the available overtime to the other bargaining unit. Also, no inference can be drawn from the fact that the Union did not grieve the subcontracting of work at the Middle School. The Middle School was a new building and bargaining unit members had never worked there, so no bargaining unit members lost work by the subcontracting.

The District cites several cases in support of its arguments, all of which are irrelevant to the issues here. None of them address the issue of whether the employer's actions reduced hours to the bargaining unit employees, nor do they interpret identical contract language. Further, the view expressed in VIDEOTAPE PRODUCTIONS OF N.Y., INC, 51 LA 600 (TURKUS, 1968) clearly a minority view regarding the importance of overtime opportunities and most authorities recognize that overtime is often viewed as a central feature of collective bargaining relationships. Further, the Union does not contend that the District's action was "arbitrary, capricious, or in bad faith," but that it directly violates the language of Article XVII, Section 1, Paragraph 4.

The Union is not attempting to alter contract language, but is asking the Arbitrator to enforce the contract. It is the District that is seeking to amend the contract by reading the words "regular" or "normal" as modifiers to the word "hours" though they do not appear.

Hours is an unqualified term and, given its ordinary meaning, includes overtime hours. The Arbitrator should give the language its ordinary meaning and uphold the grievance. To do otherwise would render the protections of Article XVII, Section 1, Paragraph 4, meaningless, because regular work hours are already protected elsewhere in the contract.

The District

The Union's reliance on CITY OF OSHKOSH, CASE 213, NO. 49934, MA-8109, (GRATZ, 7/18/95) is misplaced. That case involved transit workers who were permitted to post for regular runs as well as shorter runs, known as "trippers." The City decided to contract out two of the five "tripper" runs, which were regularly scheduled runs, posted and awarded by seniority, not sporadic overtime opportunities, as is the case here.

Contrary to the Union's assertion, the District did not hire a long-term substitute to fill Linda Briggs' position, but only used a substitute in the interim while it considered its options. Finally, it would not be feasible to now post and fill Briggs' position as the Union requests. Briggs' hours were reassigned to other bargaining unit members and their former hours were, in turn, contracted out. No existing bargaining unit member has experienced a reduction in hours and there is no current vacancy to be posted or filled. The grievance should be denied.

DISCUSSION

Arbitrability

The District maintains that only the subcontracting issue is arbitrable. It argues that the issue of filling Linda Briggs' position was only raised later, with the April 9 filing of the Peter Thayer grievance, and was not properly pursued through the grievance procedure. 1/ I disagree. In his March 27 letter, initiating the principal grievance, Mr. Alstead not only objects to the subcontracting of Briggs' hours, but also places the posting/filling issue into dispute, by stating:

> You posted this vacancy, but decided not to fill this position and sub contract this work, claiming Article XVII – Management Rights, allows you this latitude.
>
> We're disputing this action and disagree with your interpretation of Article XVII. This position should be posted/filled and remain in the Bargaining Unit.

Mr. Alstead's testimony that he was informed by Trautt that Briggs' hours were being subcontracted was credible and was not disputed by the District. Thus, there is at least a reasonable inference that the Union was objecting both to the subcontracting of bargaining unit

work and the failure to fill Briggs' position once it had been posted. Inasmuch as there is notice of the posting/filling issue within the Union's initial grievance letter and in keeping with the arbitral preference for avoiding forfeiture, I hold that the posting/filling issue is arbitrable.

1/ In its briefs, the Union concedes that the Peter Thayer grievance is not arbitrable, but bases its argument regarding the posting/filling issue on the March 27 grievance letter. Thus, the Thayer grievance will be deemed moot for the purposes of this award.

Posting/Filling

The Union's argument on this issue is predicated on the language of Article III, Section 5, which states, in paragraph 1:

> All new and vacated positions shall be posted . . .

And which states in paragraph 2:

> New positions and vacancies shall be awarded to the most qualified applicant; Provided, however, that before anyone is hired from outside the bargaining unit, qualified bargaining unit employees will be given preference.

The Union concedes that it is management's prerogative to determine the existence of a vacancy, but argues that this is mandatory language requiring that once a vacancy is posted it must be filled according to the method set forth. I disagree.

Absent limiting language in the contract, it is management's right to determine whether a vacancy exists and whether and when it should be filled even after positions have been posted. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 723-24 (1997). Thus, in COMPUTING & SOFTWARE, INC, 61 LA 261, (SCHREIBER, 1973), the employer withdrew postings for three computer operator positions, resulting in a grievance from the Union on behalf of eligible employees, citing contract language similar to that at issue here. In denying the grievance, Arbitrator Benjamin Schreiber stated:

> The Union's argument cannot be accepted because it is based on a misconception of the scope of the contractual provision on which it relies. Thus, while Art. XV, Sec. 1 requires that permanent vacancies as well as newly created jobs be posted, it does not limit management's authority to determine whether "permanent vacancies" exist any more than it limits its authority to determine whether there should be "newly created jobs. ID. at 267

Similarly, in R.C. CAN CO., 52 LA 894 (KESSELMAN, 1969), Arbitrator Louis Kesselman upheld the Employer's action in withdrawing a posting after the previous incumbent in the position requested to be returned to his former job, even though six other employees had already posted for the vacated position. In reviewing the relevant contract language, Kesselman stated:

> 2. Section IX – Job Vacancies provides no definition as to what a vacancy is or when it ceases to exist nor does it prohibit the Company from changing its mind and deciding to withdraw a bid sheet on its determination that there is no vacancy to be filled.
>
> 3. Paragraphs 1 and 4 of Section XI, cited by the Union as a positive statement of Company obligation, merely describe *how* a vacancy is to be filled and not *when* or *whether* it must be filled. ID. at 897-98.

Here, likewise, Article III, Section 5, does not define the term "vacancy" nor does it indicate that it is established by posting. Superintendent Trautt testified that Briggs' position was immediately posted in order to expedite the process should the Board have ultimately decided to fill it, but that at the time it was considering several options. On its face, this does not appear to have been an unreasonable course of action. Ultimately, the District decided to fill Briggs' hours by reassigning other bargaining unit employees. This power is reserved to the District under Article XVII, Section 2, Paragraph 2, and the Union does not dispute it. For the foregoing reasons, therefore, I hold that, despite the posting, the District was not required to fill Linda Briggs' position under the methodology of Article III, but was within in its rights to reassign other employees in the fashion that it did.

Subcontracting

Article XVII, Section 1, Paragraph 4 of the contract permits the District to ". . . contract out for goods and services *provided no present bargaining unit employee is reduced in hours or placed on layoff as a result thereof*" (emphasis added). As the arguments put forward by the parties reveals, the wording of this provision requires careful consideration, and the success or failure of the grievance depends upon its meaning. There is no dispute that no employee experienced a layoff or was reduced in his or her regular work hours as a result of the District's subcontracting of the evening cleaning hours at the Primary School. What is at issue is the loss of overtime hours which arose occasionally when one or more of the regular evening cleaners was unavailable for work.

The Union argues in this regard that the use of the term "hours" in Article XVII, Section 1, Paragraph 4, is not limited to regular work hours, as defined in Article VI, Section 2, but includes overtime hours, as well. It contends that the fact that the term is unqualified requires the broadest interpretation. Thus, while the regular subcontracted hours,

themselves, were not removed from any bargaining unit members, the effect of subcontracting in eliminating the possibility of overtime makes the action impermissible. The District contends, to the contrary, that "hours" should be restricted to the meaning ascribed to it in Article VI, Section 2, that of regular hours. On its part, the District points out that the contract does not guarantee overtime and that the provision is limited in scope to the protection of the hours of existing employees, not the bargaining unit, in general. In support of their positions both parties admonish the Arbitrator to observe the restrictions in Article IV, the grievance procedure, which denies the Arbitrator authority ". . . to add to, subtract from, or modify this Agreement in any way."

While both parties raise interesting semantic points, in my view, it is not necessary to resolve them in order to decide the issue. The language of the contract ties the limitation on subcontracting directly to an actual reduction in hours to an existing bargaining unit member. Whether the hours lost are characterized as "regular" hours or "any" hours, the Union has the burden of establishing that someone has experienced an actual loss of work due to the subcontracting. This, the Union failed to do.

The testimony established that in the past when extra evening hours at the Primary School became available, the District's first recourse was to use a substitute from outside the bargaining unit and that overtime was only offered when a substitute could not be obtained. According to Jeff Coddington, in such cases the overtime hours were offered to bargaining unit members Gordon McClurg or Linda Briggs. Briggs had previously resigned and, therefore, cannot have been grieved by the action. McClurg testified that he continues to work overtime when opportunity arises, but could not state that his aggregate overtime hours have been reduced by the subcontracting. Superintendent Trautt testified that McClurg had complained in the past that more substitutes were needed because he did not wish for as much overtime as was being offered and, as a result, necessary work was not getting done, which McClurg did not dispute. Finally, Coddington further testified that he was unaware of any bargaining unit member who had actually lost overtime as a result of the District's action – that the basis for the grievance was the lost opportunity for overtime. To be sure, the reduction in overall overtime availability could potentially negatively affect another, unnamed, bargaining unit member, one perhaps who lost overtime previously available, but now co-opted by McClurg by virtue of his seniority, but the record does not support such a conclusion. On this basis, therefore, I cannot find that the District's subcontracting of the evening cleaning at the Primary School resulted in an actual, loss to any employee and thus constituted a violation of the contract.

The Union relies heavily on the decision in CITY OF OSHKOSH, CASE 213, NO. 49934, MA-8109, (GRATZ, 7/18/95) in support of its position, but I find that that decision is distinguishable from the case at hand. In CITY OF OSHKOSH, the employer had subcontracted extra city bus runs, known as "trippers," which were separate from regular bus runs, but which were bid upon semiannually at the same time and in the same way as the regular runs. The "tripper" runs involved approximately two hours per day of extra work for the successful

bidders. In upholding the grievance, Arbitrator Gratz rejected the restrictive definition of "hours" as being only "regular" hours urged by the employer, there as here, and found that he was precluded from inferring the qualifier by the same contract restriction imposed upon this arbitrator. He reasoned that, inasmuch as no "tripper" run had ever failed to be bid upon, it followed that the removal of two such runs directly eliminated the work for two employees. This finding was supported by the introduction of actual wage information showing a drop-off in pay for a bargaining unit member, who had previously regularly driven "tripper" runs, subsequent to the subcontracting.

Here, the subcontracting followed the resignation of a bargaining unit employee. Due to the reassignment of other employees, the subcontracting did not remove "regular" hours from any employee, although the bargaining unit, as a whole, did lose the hours represented by the evening cleaning work. The subcontracting provision, however, does not protect a fixed amount of work for the bargaining unit generally, but only the actual hours of its members. Thus, it does not prevent the District from subcontracting and thereby replacing bargaining unit positions through attrition, which was the ultimate result here. In CITY OF OSHKOSH, there was no corresponding resignation, therefore, the result was a reduction of available work for the same number of employees, a clearly different situation. Further, the overtime work at issue here is qualitatively and quantitatively distinguishable from the "tripper" runs in CITY OF OSHKOSH. The tripper runs were regular, involved a significant amount of extra hours, and were competitively sought for by the bargaining unit members. Here, the overtime in question was described by witnesses on both sides as speculative and sporadic. Further, it is at least questionable as to whether the evening overtime was generally desired by the members of the bargaining unit, outside, perhaps, McClurg. McClurg, however, as previously noted, could not say that his overall overtime has been reduced, only that he is no longer offered evening overtime. In sum, therefore, the circumstances in CITY OF OSHKOSH are distinct from those here and do not compel the same result.

The Union also cites SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE, CASE 30, NO. 56866, MA-10441 (GRECO, 8/30/99), in support of its position that the District may not subcontract bargaining unit work. I find that Arbitrator Greco's rationale in that case is consistent with my own, although the result was different due to a distinctly different fact scenario. In that case, the District laid off two bargaining unit aides due to economic difficulties, while continuing to retain the services of two subcontracted aides from CESA 8. There, the arbitrator found that the District's action of reducing the bargaining unit through layoff, while continuing to subcontract work that could have been done by bargaining unit members, had a chilling effect on the job security of the bargaining unit members, which the subcontracting language in the contract had been intended to protect. There, employees actually lost their jobs, or had hours reduced, due to the preference given the subcontractors. That is distinctly different from the situation here, and, absent an actual showing of lost hours or employment by a current bargaining unit member as a result of the subcontracting, I cannot find the District in violation on this record.

For the reasons set forth, and based upon the record as a whole, the undersigned hereby enters the following

AWARD

1. The Union properly raised the issue of the posting and filling of Linda Briggs' former position in its initial grievance and the issue is, therefore, arbitrable.

2. The District did not violate the collective bargaining agreement by failing to fill the position vacated by Linda Briggs.

3. The District did not violate the collective bargaining agreement by subcontracting with a private vendor for evening cleaning services at the Primary School.

The grievance is denied.

Dated at Eau Claire, Wisconsin, this 20th day of December, 2001.

John R. Emery /s/
John R. Emery, Arbitrator

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