BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 150

and

KETTLE MORAINE SCHOOL DISTRICT

Case 25
No. 59962
MA-11472

(Wales Elementary School food service grievance)

Appearances:

Ms. Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman S.C., 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of the Union.

Mr. David Kern, Quarles & Brady, S.C., 411 East Wisconsin Avenue, Milwaukee, WI 53202-4497, appearing on behalf of the District.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned, Marshall L. Gratz, as arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' 2000-01 through 2001-02 collective bargaining agreement (Agreement).

Pursuant to notice, the grievance dispute was heard at the District office in Wales, Wisconsin, on September 21, 2001. The proceedings were not transcribed, but the parties authorized the Arbitrator to maintain an audio tape recording of the evidence and arguments for the Arbitrator's exclusive use in award preparation. The parties exchanged initial post-hearing briefs and advised the Arbitrator by letter received on November 12, 2001, that neither party intended to file a reply brief, marking the close of the hearing.

ISSUES

At the hearing, the parties authorized the Arbitrator to formulate the proper statement of the issues for determination. The Union proposed:

> Did the District violate the Agreement when it reduced the hours of the Grievants and hired a new part-time employee to perform work previously performed by the Grievants during the additional hours? If so what is the appropriate remedy?

The District proposed:

> Did the District violate Secs. 13.6 or 14.1 of the Agreement when it added a two-hour part-time food service employee at Wales Elementary School and changed the Grievants' scheduled hours of 3.75 to 3.5 hours per day? If so, what shall be the remedy?

The Arbitrator frames the issues as follows:

> What shall be the disposition of the grievance communicated in written form to the District by documents dated January 16, February 9 and March 16, 2001?

PORTIONS OF THE AGREEMENT

ARTICLE 2 - MANAGEMENT RIGHTS

The District has the sole right to operate the school system and all management rights repose in it, subject to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

A. To direct all operations of the school system.

B. To establish reasonable work rules and schedules of work.

C. To hire, promote, transfer, schedule and assign employees in positions with the school system.

. . .

F. To maintain efficiency of school system operations.

. . .

H. To introduce new or improved methods or facilities, or to change existing methods or facilities.

I. To determine the kinds and amounts of services to be performed as pertains to school system operations, and the number and kinds of positions and job classifications to perform such services.

ARTICLE 7 - GRIEVANCE PROCEDURE

7.1 Purpose. The purpose of this procedure is to provide an orderly method for resolving problems arising during the term of employment each school year. . . .

. . .

7.7 Grievance settlement. If the grievance has been reduced to writing, a settlement to the grievance will also be reduced to writing and signed by a representative of the Employer and the Union.

7.8 Grievance procedure. All grievances except termination and suspension cases, shall be handled and adjusted in accordance with the procedure set forth below. . . .

A. Step 1. The grieving employee and/or their steward, shall orally present the grievance to the employee's immediate supervisor within ten (10) working days from the date the employee knew or should have known of the occurrence giving rise to the grievance. The immediate supervisor shall respond orally within five (5) working days.

B. Step 2. If the grievance is not settled in Step 1, the grievance may be appealed to Step 2 within five (5) working days after receipt of the Step 1 reply. The appeal will be reduced to writing and signed by the employee and/or his/her steward and be presented to the Supervisor. The grievance should provide the following information:

a. Name and position of the grievant.
b. A list of the contract provisions violated.
c. A brief statement describing the grievance, pertinent facts involved, including relevant dates, times and places.

d. Date of the oral presentation of the grievance.
e. Remedy sought.
f. Signature of grievant or steward and date signed.

The supervisor will arrange a meeting . . . to review the facts and arguments concerning a grievance. . . .

C. Step 3. If the grievance is not settled at Step 2, it may be appealed in writing to the Superintendent or his/her designee. . . .

D. Step 4. If the grievance is not resolved at Step 3, the grievance may be appealed in writing to the School Board Personnel Committee. . . .

. . .

ARTICLE 13 - PROMOTIONS/TRANSFERS/SHIFT CHANGES

. . .

13.6 Increase in hours. Should additional hours be offered within a classification, current part-time employees within the affected school will be offered the opportunity on the basis of seniority to increase their hours, before additional new part-time employees are hired, provided such additional hours do not conflict with scheduling needs of the employer.

ARTICLE 14 - LAYOFFS, RECALLS AND HOURS REDUCTION

14.1 General. Should the employer determine that a reduction in the workforce is required, the employer should first ask affected employees if they wish to voluntarily reduce their hours. Should employees not prefer any hour reduction, the employer may use layoffs in place of hour reductions whenever necessary.

14.2 Layoffs. In the event the employer decides to implement [a] layoff, temporary and probationary full-time and part-time employees shall be laid off first. If further reductions are necessary, employees shall be laid off in inverse order of seniority, the last employee hired shall be the first employee laid off providing that the remaining employees are able to perform the available work.

. . .

14.4 Job displacement rights. If an employee is laid off, he/she shall have the right to displace another less senior employee in a position for which he/she is qualified. Displaced employees shall have the same rights.

. . .

ARTICLE 18 - HOURS AND WORKING CONDITIONS

. . .

18.3 Scheduling. The Employer will establish a work schedule for starting and quitting times at the beginning of the school year. Except in cases of emergency, the Employer will give employees at least 30 days notice of changes in starting and quitting times that occur during the school year. Upon request, the Employer will meet with the Union to discuss any problems concerning the schedule.

ARTICLE 21 - INSURANCE: HEALTH, DENTAL, LIFE AND DISABILITY

. . .

B. Eligibility. All employees with a normal work schedule [of] twenty (20) hours or more per week are eligible to participate in the District's health insurance program, except as provided in 21.1.D below.

. . .

D. Open enrollment. Employees who elect not to enroll in the health benefit program, will be offered the opportunity to enroll for coverage by completing an application and providing evidence of insurability in compliance with the rules of the plan.

. . .

G. Premiums.

(1) The District will pay the cost of health and dental coverage for employees who normally are scheduled to work thirty-five (35) hours per week.

(2) Employees who work at least twenty (20) hours but less than thirty-five (35) hours shall have the cost of health and dental insurance paid by the District on a prorated basis as a fractional part of that paid for thirty-five (35) hour employees. . . .

. . .

21.3 Long Term Disability Insurance.

. . .

B. Eligibility. All employees who are scheduled to work at least twenty (20) hours per week are eligible for coverage under the long term disability insurance program.

C. Changes in eligibility and status. Should an employee change his/her status such that it would change their eligibility to be insured, the District will notify the employee of such eligibility. The employee will have thirty (30) days from receipt of such notice to make application for insurance under conditions of open enrollment.

ARTICLE 23 - MISCELLANEOUS BENEFITS

. . .

23.6 Calculating pro-rated benefits. Unless otherwise stated, all pro-rated fringe benefits will be pro-rated based upon normal hours scheduled, including paid holidays, personal days, sick days and approved leave, as a percent of the same for a person scheduled forty (40) hours per week.

BACKGROUND

The District operates several educational facilities, including the Cushing, Dousman, Wales and Magee elementary schools. The Union represents a bargaining unit of full-time and regular part-time food service employees and food service aides employed by the District. The District and the Union have been parties to a series of collective bargaining agreements the first of which was negotiated in 1989. The Grievants in this case, Emily Appenzeller and Brenda O'Connor, have been employed at all material times as food service employees at Wales.

The numbers of students and meals served at each elementary school varies, as do work hours of food service employees located at each school. Wales ranks third out of the four elementary schools (after Cushing and Dousman) in terms of meals served and enrollment.

The Agreement provides that food service employees who have a "normal work schedule of twenty (20) hours or more per week" are eligible to participate in health, dental and disability insurance offered by the District. Some of the food service employees employed in the District's elementary schools do not receive those benefits, however, because their normal work schedules consist of 2-3.75 hours per day, and therefore less than the requisite 20 hours per week.

Over the past several years, the enrollment and the number of meals served at Wales have both increased. Over those years, the Grievants and District Food Service Director Sharon Boos have had discussions regarding the Grievants' desire to be scheduled for additional hours (and to thereby receive the above benefits), and Ms. Boos' concern that these employees have not been as productive as they could be, given their workload. For example, Boos wrote the Grievants on May 11, 1999, as follows:

> RE: Meals Per Labor Hours
>
> The Department of Public Instruction, Bureau for Food & Nutrition Services, gives schools guidelines to follow for scheduling. They say that for a satellite kitchen that prepares portioned food items (no baking and scratch type recipes), thirty-five meals per hour of labor should be followed. There are always some exceptions to this rule, i.e., menus that take longer to prepare (pizza bagels), equipment breakdown, etc. But on a normal day, this guideline should be followed.
>
> 2 employees at 3.75 hrs. = 7.5 hours x 35 meals = 262.5 meals
> 2 employees at 3.5 hrs. - 7 hours X 35 meals = 245 meals.
>
> In other words, you should be able to prepare, serve and clean up in less than 3.5 hours per day, as your meal counts do not go above 245. You are contracted for 3.75 hours per day because we take into consideration set-up for the salad bar and adult meals.
>
> Other elementary schools in our district are more closely following the 35 meals per hour guidelines. Therefore, I would expect you to make some adjustments, either starting later or finishing up earlier.
>
> Please feel free to discuss this with me. Perhaps there are some things I am overlooking that may warrant the extra time you have been putting in.

For another example, the Grievants wrote Boos as follows on December 7, 2000, with copies to their Union Steward Judy Dable and their Union Business Representative Steve Cupery:

> We would like to respond to you in regards to our conversation last month pertaining to the increased workload in the Wales Elementary School kitchen this year. As you know the increase in attendance in the elementary schools in the last few years has put a strain on our workload. Compounded with the decrease in the amount of precooked food delivered to our kitchen we find our work days getting longer requiring both of us to work beyond our allotted 3.75 hours. We are presently working 4 hours a day being paid 1/4 hour a day overtime (straight time) but are not given the benefits for a 4 hour worker as spelled out in our contract.

> We think that our opinions may differ from yours on what solution should be taken to resolve this or properly compensate us for our time. Last time that we spoke, you stated that you felt the best solution would be to hire a third person to help in the kitchen. We have given this idea thought and we do not feel that this is the best solution to the problem. We feel that giving both of us the entitled health benefits and having us work the four hours a day would make both logistical and financial sense.
>
> Logistically our reasoning for this decision is that even with a third person, the time it takes to open the kitchen, make the meal, serve it and clean up would not change. There are three items that set the time line each day the first being preparing the food driving by quantity and equipment we cook on. The second item is serving which is limited to the speed that the children walk through the line. The third time driven item is clean up varied by quantity and the speed of the dishwasher. We do not feel that a third person can significantly change the amount of time that any of these take. We feel that with a third person we could still find ourselves working 4 hours to complete these tasks.
>
> On the financial side, it would be more fiscally responsible to pay us the benefits [than] to hire a third person. We are including a separate sheet that shows the cost of both solutions, we realize there are some missing variables but most items are included.
>
> We feel there are other items that should be considered before a decision is made, such as the size of the kitchen. Also the probability of finding a 2 hour a day person and the availability of a substitute for that person. As this problem keeps dragging on, we are still working 4-hour days without benefits. We hope that we can all come to a mutual understanding on this as soon as possible. We would both like to meet with you at your earliest convenience to discuss the two ideas and set up a time frame for resolution.
>
> [The attachment referenced above is not reproduced as part of this Award].

Boos responded to the Grievants by a letter dated December 21, 2000, with copies to District Assistant Superintendent Roger Dickson, Dable and Cupery, among others, as follows:

> This letter is written in reference to your letter dated December 7, 2000. I appreciate the time and effort you took in developing the letter and the cost worksheet. However the cost worksheet was not accurate, therefore I gave you a copy of the actual figures (not to include all fringe benefits. See copy attached).

> After I recalculated the costs, I had a conversation with Roger Dickson, Assistant Superintendent of Business Services to address your concerns. Collectively, we agreed that it would be in the best interest of the food service program to add a two-hour a day position in the Wales Elementary kitchen. Roger and I also agreed to cut back each of your contracted hours from 3.75 per day to 3.5 per day.
>
> The reasons are obvious when looking at the cost worksheet. The costs to the foodservice program are greater if we increase your time to be eligible for benefits than it is to add an additional two-hour position. Secondly, your average daily meal counts do not justify the increase. Both Cushing and Dousman meal counts average almost 30+ meals more than your school does.
>
> In our meeting we also discussed the staggered shift. Once the new position is filled, I would like to try the staggered shift for a minimum of one month. This means only the entree cook comes in at the scheduled time to begin preparing the food, and will leave after 3.5 hours. The second cook comes in 1/2 hour later and stays to clean up with the third cook. This is something that we have not experimented with at Kettle Moraine, but many other schools are successful with this method.
>
> The job posting is already in progress, and advertisements for the two-hour position are in place. I am confident that the new position will be filled before the end of January, 2001.
>
> Please contact me if you have any questions.
>
> [The attachment referenced above is not reproduced as part of this Award].

After receiving Boos' December 21, 2000 letter, the Grievants met with Dable and signed a written grievance form dated January 8, 2001 (Exhibit 7), which they intended would be submitted to Boos, but which the District ultimately did not in fact receive until the Union offered it as an exhibit at the arbitration hearing. In that grievance form, the Grievants asserted that the District had violated Agreement Sec. 14.1 and requested that the District "[c]ontract us for 4 hours and benefits and make hold [whole?] in every way." Exhibit 7 described the grievance as follows:

> The problem is that we have been working 4 hrs. without benefits, since the beginning of the school year 2000-2001. We were contracted for 3.75 hrs, but we worked 4 - 4 1/2 hrs. for 63 days and 13 days regular hrs. This covers days from Aug. 30, 2000 to Dec. 8, 2000. The problem caused by this event was Sharon, hired a 3rd person, cutting our hours, which we feel is not necessary,

> as we are very well capable of doing a good job by 2 of us. The rest of our co-workers were given their 4-hrs and benefits! We do not want our hours cut!!!

Both parties assert that the Grievants orally protested to Boos about the actions announced in Boos' December 21, 2000 letter before any attempt to submit the grievance in writing was undertaken by the Grievants. The District asserted in its opening statement at the hearing that the oral grievance initiation occurred on January 8, 2001, but the record evidence does not clearly confirm that as the date on which it occurred.

In any event, as noted above, Exhibit 7 was not received by the District until the grievance arbitration hearing. Rather, the first written communication concerning a Wales food service grievance received by the District was by letter dated January 16, 2001, in which Cupery wrote Boos as follows:

> Re: Change in hours and added hours at Wales Elementary
>
> Dear Ms. Boos:
>
> I am in receipt of your letter of December 21, 2000. I have also consulted with Judy Dable and employees at Wales Elementary. It is my understanding that their starting and quitting times were adjusted without the proper 30 day contractual notice. Furthermore, additional time was added to the school and was not offered to employees in the classification prior to hiring new part time employees. Both would appear to violate provisions of the contract. (Sections 13.6 and 18.3).
>
> I have asked that [the] employees amend their current grievance. I would like to meet with you as soon as possible to discuss these matters. Is it possible to do so on the 24th at 2:00 PM? Please let me know. Thank you.

On January 29, 2001, Dickson wrote Cupery and Dable as follows:

> The Union filed a written grievance to Sharon Boos, Food Service Supervisor, dated January 16, 2001. A hearing on this grievance was held on January 25. Representing the union: Steve Cupery, Judy Dable and grievants Brenda O'Connor and Emily Appenzeller. Representing the Board: Roger J Dickson, Assistant Superintendent and Sharon Boos. . . .
>
> The circumstances leading to the grievance, as I understand them, are:

-The two food service employees at Wales Elementary approached Sharon Boos with a request for additional hours due to difficulty completing assigned duties within the number of hours scheduled (3 3/4 each per day).

-Upon investigation Ms. Boos determined that the number of meals served at Wales did not justify additional hours. She noted that certain inefficiencies in work habits contributed to the inability to complete assigned duties.

-In an effort to be responsive to the employees' concerns and to provide for an opportunity to train the employees in improved techniques so as to eliminate inefficiencies, Ms. Boos authorized an additional staff person for 2 hours per day. This was accompanied with a reduction in hours of current employees to 3 1/2 per day.

The grievance alleged violation of Article 13--Promotions / Transfers / Shift Changes, Section 6, Increase in hours and Article 18 -- Hours and Working Conditions, Section 3, Scheduling.

The grievance states that the additional hours created as a result of adding the new staff person of 2 hours per day violates Article 13.6 of the collective bargaining agreement.

Article 13.6 reads as follows: [contract language omitted]

The employer determined that an increase in hours is not justified by the number of meals served at Wales Elementary.

The grievance notes that additional hours were added in spite of the employer's insistence that added hours were not justified by meal counts. Under the clause "provided such additional hours do not conflict with scheduling needs of the employer" the employer has the right and obligation to manage the work day in such a way as to assure duties are completed and the quality of the food served is of a high standard. The additional hours were added in an effort to provide temporary relief to the current employees so the employer could begin a training program to improve efficiencies and to improve food quality. The employer has determined that to increase the hours of the two current employees would not result in efficiencies and would not contribute to improved quality of food served. The employer notes that the kitchens at Cushing Elementary and Dousman Elementary each serve more meals than Wales Elementary. In each of these kitchens there are two food service employees each working 4 hours or more per day. The employer has

determined that this arrangement is not the most efficient and a schedule that provides for 3 employees each working less than 4 hours per day would provide greater flexibility and help to assure improved food quality. Based on this determination it would not be prudent for the employer to expand this type of scheduling to Wales Elementary.

The employer finds no violation of Article 13.6 of the collective bargaining agreement.

Grievance states that the reduction in hours from 3 3/4 to 3 1/2 violates Article 18.3 by not providing the proper 30-day notice prior to reducing hours.

Article 18.3 reads: [contract language omitted]

The employer acknowledges that the proper 30-day notice was not given. The employer will pay the current employees for the lost 15 minutes per day for all work days from the period Jan. 12 through Feb. 10 (30 days).

On February 9, 2001, Cupery submitted a Grievance Form on behalf of the Grievants identifying itself as a second step grievance relating to a grievance initiated on January 8, 2001. In it, Cupery asserted as follows:

[DESCRIBE THE GRIEVANCE:] Hours were added to the kitchen and were given to a junior employee when they should have been given to senior employee(s). Senior employees had hours cut or reduced in violation of the contract.

ARTICLES AND SECTION OF CONTRACT VIOLATED: Art. 14, Section 1 and Article 13, Section 13.6

REMEDY REQUESTED: The affected employees should be made whole and be given additional time in accordance with the contract.

By memo dated March 6, 2001, Dickson responded as follows:

Wales Elementary Hour of Work Grievance (Step 3)

The Union filed a grievance appeal on February 9 to the January 20 employer response to the above matter. The employer, represented by Roger Dickson, and the union, represented by Steve Cupery discussed the appeal by phone on March 6, 2001. The employer's position, stated in the written response of January 29 is not changed as a result of the March 6 conversation. Please refer to the January 29 response.

Cupery then submitted a grievance form dated March 16, 2001, identifying itself as a 3rd step grievance and containing the same assertions as did his February 9 form.

Dickson responded to Cupery in writing on May 1, 2000, as follows:

> GRIEVANCE HEARING BEFORE PERSONNEL COMMITTEE
>
> This is to inform you that the Personnel Committee of the [District School Board] denied the grievance heard by the committee on Monday, April 23, 2001, alleging violation of Article 13, Section 6 of the [Agreement].
>
> Your grievance alleged violation of Article 13, Section 6, which reads: [contract language omitted]
>
> As the additional hours required to meet the service needs of the employer fall at the same time the current employees are working, and to add additional time to the current employee's work schedule does not contribute to the needs of the program, the grievance is denied.
>
> Further, in accordance with Article 2, Item I, the District has the right "to determine the kinds and amounts of services to be performed as pertains to school system operations, **and the number and kinds of positions and job classifications to perform such services**" (emphasis added). Nothing in your presentation before the Personnel Committee provided evidence that this management right was in any way inappropriately applied.

The dispute was subsequently submitted to arbitration as noted above. At the arbitration hearing, the Union presented testimony by Cupery, Dable, bargaining unit member Annette Kozlowski and Grievant O'Connor. The District presented testimony by Boos and Dickson.

Additional background information is set forth in the summaries of the positions of the parties and in the discussion, below.

POSITIONS OF THE PARTIES

The Union

The District improperly seeks to limit the issues to whether the Grievants' scheduled work time should be reduced from 3.75 to 3.5 hours and to thereby remove from arbitration some of the claims and requests expressed in Exhibit 7. For example, the District would

thereby improperly remove from arbitration the claim that the Grievants should have been offered four hours of work per day which, in turn, would have entitled them to pro-rata fringe benefits (health, dental and disability insurance) under Article 21. Consistent with Sec. 7.8 of the Agreement grievance procedure, the Grievants initially orally presented the instant grievance to Boos. Boos testified that she understood the nature of the grievance to include the Grievants' request that they be allowed to continue to work 20 hours per week, i.e, an average of four hours per day and receive fringe benefits. Consistent with their oral presentation to Boos, the Grievants also attempted to reduce their grievance to writing in the form of what became Exhibit 7, requesting as relief that the District "contract us for four hours and benefits and made whole in every way." Even if the District never received Exhibit 7, Boos' testimony makes it clear that the dispute was not limited to a reduction of scheduled hours from 3.75 to 3.5 hours, but that it also addressed reduction of the Grievants' actual work schedule of four hours per day or 20 hours per week and the denial of fringe benefits. To the same effect, the Union's February 9, 2001, second step appeal is broadly drafted to state "[h]ours were added to the kitchen and were given to a junior employee when they should have been given to Union employees or senior employees" and to request that ". . . the employees be made whole for all losses and be given the additional time in accordance with the contract." Cupery also testified that, at the third step grievance meeting, he confirmed to the District's representatives that the Union was seeking relief including receipt of fringe benefits as well as return of the additional time. The junior employee had been given two hours of work per day while the Grievants were each reduced to 3.5 hours per day. Had the two hours been split between the two existing employees, each would have been scheduled for more than enough hours to qualify for benefits. Thus, District's attempt to limit the issues has no support in either the testimony of the District's witnesses or the documentation of the grievance at any step, and it must be rejected.

In January of 2001, the District changed the food service hours worked at Wales from the Grievants working four hours each to the Grievants working 3.5 hours each and a new employee working 2 hours. By doing so, the District violated Secs. 13.6, 21.1.B, 2.3.B, 14.1 and 14.2. The reason given by the District for taking this action is set forth in Boos' letter of December 21, 2000, which stated "[t]he reasons are obvious when looking at the cost worksheet. Costs to the food service program are greater if we increase your time to be eligible for benefits than it is to add an additional two-hour position." That admitted purpose violated the mutually understood purpose of Sec. 13.6. In that regard, Cupery's uncontradicted testimony was that when Sec. 13.6 was negotiated as part of the parties' initial agreement in 1989, the Union explained to the District that the section was intended to provide part-time employees with the opportunity to obtain 20 hours of work per week and fringe benefits before additional employees were hired. Long-term disability insurance benefits and pro-rata health and dental insurance benefits are provided for employees with at least 20 hours of work per week under Secs. 21.3,B, 21.1,B and 21.1,G(2). Additionally, to the extent that the Grievants' hours were reduced, the District failed to follow the provisions of Secs. 14.1 and 14.2 which required that if any employee's hours would be reduced it would be those of the newly hired two hour employee rather than those of the more senior Grievants.

The parties' interactions regarding food service staffing at Dousman and Cushing during the 1998-99 school year support the Union's position in this case. In those schools, as in the instant case, the food service employees began working four hours per day on a regular basis because of an increase in the number of meals served at each school. Boos recognized the need for increased hours and told Cupery she would allow the employees to work the extra hours if they did not seek the fringe benefits to which they were entitled. If, however, the employees claimed the benefits, Boos said the District would hire a third employee, instead. Only when the Union threatened legal action did the District agree to allow the two employees at each school to work the additional hours needed to entitle them to benefits. Later, when two food service employees left Dousman, the District moved one senior employee from Cushing to Dousman and employed two new employees at each location. Cupery explained that no grievance was filed on account of those hirings because the only senior employee at each location was already working four hours per day and did not desire to work additional hours. None of the four newly hired employees at Dousman and Cushing had rights under Sec. 13.6 to the hours assigned to the other new employee at their location.

The District's scheduling practices at the high school involving a second sub sandwich maker and an additional employee added to provide food service for a parochial school are not relevant because there is no evidence that any senior employee wanted the additional hours involved and no showing that the high school scheduling practices are otherwise relevant to the Wales elementary school situation at issue in this case.

There is no merit to any District contention that the Grievants should be able to perform all of the available food service work at Wales in 3.75 hours per day without the necessity of increased hours or a third employee. Over time, and particularly since 2000, more and more food items are being prepared from scratch at Wales, with less and less being brought over from the high school. The District's decision to hire a third Wales employee in order to increase the overall food service hours to nine per day undercuts any claim that the Grievants should be able to perform the work in fewer hours. There is no evidence that the Grievants are inefficient, only that the increased meal count and food preparation performed require an average of over eight hours per day total.

There is also no merit to the District's contention that the additional hours assigned to the new employee at Wales would have conflicted "with scheduling needs of the employer" so as to fall within the proviso to Sec. 13.6. The District has failed to prove the requisite "scheduling need" in this case. The District's only claim in that regard is that the additional employee was added to implement a program of "cook to serve" rather than "cook to hold." Notably, however, that claim was not raised in Boos' December 21 letter when Boos first informed the Grievants that they would not be allowed to work four hours per day because the "[c]osts to the food service program are greater if we increase your time to be eligible for benefits than it is to add an additional two hour position."

That letter and the record evidence in this case show that the District's purpose in adding a third employee was not to improve freshness but rather was to reduce the hours of the existing employees. The "cook to serve" philosophy was introduced by the District to food service personnel in 1999 by a brochure and inservice training. The brochure was not provided to some of the food service employees, attendance at the inservice training was voluntary, and the emphasis was on improving overall quality, not just freshness. The addition of a third food service employee has not been shown to have improved food quality at any District school. For many meals, such as hot dogs and hamburgers, "bunning" the sandwich in advance of serving provides a better product since the bun is warm. The preparation of vegetables was the only circumstance of record in which cooking to serve could improve food quality, but elementary school vegetables are either brought over from the High School to Cushing or prepared in advance at Wales in order to allow the limited stove equipment to be used for baking.

Dickson's February 16, 1999, letter to the Union acknowledges that two food service employees working more than four hours each at Cushing and Dousman elementary schools "have proven to be efficient and effective in providing the level of service the School District expects." The third employee initially hired at Wales had no experience or interest in preparing or serving food. She did, however, start clean-up duties while the Grievants were serving, thus allowing for a reduction in the Grievants' hours. After that employee quit, the Grievants implemented the "cook to serve" policy successfully with the Grievants as the only two food service workers at Wales. For example, the Grievants placed french fries on trays in advance but started baking them in shifts in order to serve them fresh. Thus, the introduction of a third employee has not improved the freshness of the food served, but rather has allowed cleaning to begin while students are still being served. If the additional employee were used to provide cooking in smaller batches beyond what is possible with two employees, then cleaning would not commence until after food service is completed and there would be no reduction in the hours of the Grievants. That reduction could only occur if the Grievants' duties were transferred to the additional employee.

For all of those reasons, the Arbitrator should sustain the grievance and hold that the District violated the Agreement when it reduced the Grievants' hours and provided additional hours to a third employee at Wales. By way of remedy, the Arbitrator should order the District to allow the Grievants to work four hours per day as they did prior to the time the present grievance arose and to offer the Grievants additional hours which are available, and to make the Grievants whole for all losses resulting from the violation including back wages and fringe benefits.

The District

There is no basis for granting either of the Grievants any relief in this case.

The District did not violate the Agreement when it added a third food service employee at Wales instead of offering additional hours to the Grievants. The record shows that offering the additional hours to the Grievants would have conflicted with the scheduling needs of the employer, such that the District's actions were authorized by the proviso to Agreement Sec. 13.6. As in other situations when the District found the need to have more hands at one time rather than the same number of hands for a longer period of time, the District concluded that in order to implement the "cook to serve" philosophy at Wales, it would be preferable to add a third person to be present during food service times. This would enable two employees to serve the students while a third continued to cook. Such a goal could not be accomplished by having the same number of employees work longer hours at the school. The District's actions in that regard are supported by its ungrieved additions of employees to enable implementation of a High School sub sandwich line in 1996-97, to offer meal service through the High School to parochial school students in August of 2000, and to provide adequate food service at Cushing and Dousman subsequent to the February, 1999 grievance settlement. In communications regarding the latter situations, Union representative Cupery specifically acknowledged that the District would have the right to reduce the Cushing and Dousman employees' hours and add a third person in the event service was not adequate. Moreover, any uncertainty about the meaning of Sec. 13.6 must be resolved against the Union as drafter of the language involved.

The District also did not violate the Agreement by reducing the Grievants' scheduled hours from 3.75 per day to 3.5 per day. There was no "reduction in the workforce" within the meaning of Sec. 14.1 at Wales in January of 2001 because the District added a third employee at that location and the overall work hours at that location were increased by 1.5 hours. While the individual schedules of the Grievants were reduced, those reductions do not constitute a "workforce reduction" within the literal meaning of Sec. 14.1 standing alone, or when read in conjunction with the District's Sec. 18.3 right to establish and change starting and quitting times during the school year and the District's Article 2 rights to direct all District operations, to "schedule and assign employees," to introduce new or improved methods, and to determine the kinds and amount of services to be performed and the number and kinds of positions to perform such services. So long as the District acted reasonably and not in an arbitrary fashion, it had the right to modify an employee's work schedule to reduce individual hours without running afoul of Sec. 14.1. Additionally, the District had every right to make such decisions based upon its desire to provide the best service in an economical fashion, by avoiding incurring the expense of costly health insurance benefits. The District exercised those rights in an analogous situation at Cushing and Dousman subsequent to the February, 1999 grievance settlement, by changing a previous four-hour position to a three-hour position and adding a third person at each school, all without objection or grievance being raised or filed by the Union. Moreover, any uncertainty about the meaning of Sec. 14.1 must be resolved against the Union as drafter of the language involved.

The Union's claim at the arbitration hearing that the Grievants had been improperly denied the right to insurance benefits under Sec. 21.1 is not properly before the Arbitrator. Exhibit 7, a Union grievance form dated January 8, 2001, was never received by the District

prior to the arbitration hearing. The District's January 29, 2001, grievance answer refers to the grievance as having been filed on January 16, 2001, in which Cupery alleged only violations of Secs. 14.1 and 13.6, based on the District's addition of a third employee in lieu of offering additional hours to the Grievants and the reduction in the Grievants' scheduled hours. The stated request in Cupery's January 16 document for a "make whole" remedy is insufficient to raise a claim that the District violated Sec. 21.1. While Cupery's subsequent February 9, 2001, written grievance form refers to a January 8 first step submission, the District logically assumed that that referred to a verbal conversation between the Grievants and Boos regarding the District's actions and Boos' letter announcing the disputed changes. It would be unfair and inconsistent with the purposes of the grievance procedure to allow the Union to assert in this arbitration that the District violated Sec 21.1 by not providing benefits to the Grievants based on the hours they previously worked.

In any event, the District has not been shown to have violated Sec. 21.1 in this case. Under the plain language of Sec. 21.1, the Grievants did not have a "normal work schedule" of 20 hours or more per week, even though they sometimes actually worked 20 or more hours in a week. The evidence shows that it was the parties' established and mutually understood practice that an employee's "work schedule" dictates eligibility for benefits, not the actual hours that someone may work beyond their work schedule. Thus, although the employees at Cushing and Dousman worked in excess of their scheduled hours on occasion, they were not provided insurance benefits until they were scheduled to work 20 or more hours per week. Consistent with an understanding to that effect, the Grievants requested an increase in their scheduled hours to four hours in order to entitle them to benefits, and they did not file a grievance under Sec. 21.1 throughout the Fall of 2000 even though they actually worked more than their scheduled 3.75 hours per day on a number of occasions. The evidence would also not support a claim for benefit eligibility on the Grievants' part based either on comparisons to the hours worked by benefit-eligible employees at Cushing and Dousman during 2000-01 or on a claim that the Grievants had an excessive workload.

Any claim that the District — by adding a third person and reducing their scheduled hours — was retaliating against the Grievants for raising their concerns is not properly a part of this proceeding. The appropriate method for raising such a claim would have been a prohibited practice complaint under the Municipal Employment Relations Act, an option referred to by the Union in its prior communications with Dickson regarding the Cushing and Dousman situations in February of 1999. Moreover, if fairness or motives were relevant, it would be just as easy for the District to assert that the Grievants acted unreasonably by deliberately failing to perform their work in a timely manner so as to bolster their argument for insurance benefits. Neither argument is relevant to this proceeding.

For those reasons, the Union's requests for relief in this matter should be denied in all respects.

DISCUSSION

Scope of the Grievance

A threshold issue relates to the scope of the issues properly before the Arbitrator in this case.

Despite the District's showing that it never received Exhibit 7, the Arbitrator is satisfied that the District was put on fair notice by Cupery's written communications of January 16, February 9, and March 16, 2001, that the Union and Grievants: were grieving "that their starting and quitting times were adjusted without the proper 30 day contractual notice," that "additional time was added to the [Wales Elementary] School and was not offered to employees in the classification prior to hiring new part time employees" and that "Senior employees had hours cut or reduced and given to junior employee in violation of the contract;" were alleging that the grieved District actions had violated Secs. 18.3, 14.1 and 13.6 of the Agreement; and were requesting as remedies that "The affected employees should be made whole and given added time in accordance with the contract." The Arbitrator is further satisfied that the District was put on fair notice by those written communications that the Union was protesting not only reductions of the Grievants' scheduled hours but also reductions of the Grievants' actual hours worked, and that the Union was requesting that the Grievants be made whole for any wages or fringe benefits lost by reason of the District's failure to offer the Grievants the hours of work at Wales that were assigned to the junior employee.

However, the Arbitrator is also satisfied that the pre-arbitral processing of the instant grievance has not fairly put the District on notice that the Union and Grievants are claiming that the District is violating Article 21 independent from any alleged violation of Secs. 13.6 or 14.1. There is no reference to Article 21 or to working an average of 20 or more actual hours or to a denial of fringe benefits, in any of the Union's various written communications that — unlike Exhibit 7 — have been shown to have been received by the District during the processing of the grievance. While the Grievants' various communications with Boos prior to Cupery's January 16 letter were consistent with the broader description of "the problem" as the Grievants expressed it in Exhibit 7, Cupery's written formulations of January 16, February 9, and March 16 were not. Those written Union communications focused only on the Employer's actions announced in the December 21, 2001 letter, and they advanced no claim concerning District nonpayment of fringe benefits as regards periods of time when the Grievants were in fact working on average 20 or more hours per week. That remained true even after the Union received the District's January 29 and March 6 responses which made no reference to such a claim.

While the Agreement Grievance Procedure begins with an oral step, it also provides for subsequent steps in which the grievance is to be reduced to writing. The purpose of written grievance steps is to assure that the parties are fairly on notice about what claims are being advanced. The District's various grievance responses do not reflect an understanding on the

District's part that the Union was advancing a claimed violation of Article 21 independent from any alleged violation of Secs. 13.6 or 14.1. Because the Union's processing of the instant grievance did not give the District fair notice of a claim that the District had violated Article 21 independent from any violation of Secs. 13.6 or 14.1, that claim is not properly before the Arbitrator in this case and is not ruled upon by the Arbitrator

Claimed Violation of Sec. 18.3

The claim that the District violated Sec. 18.3 by failing to give Grievants 30 days notice of the changes in their starting and quitting times was admitted by the District in its letter of January 29, 2001. That violation has apparently been remedied by the District. If that is so, it is no longer a matter in dispute. In case that remedy has not yet been implemented, the Arbitrator has ordered that it be so.

Claimed Violation of Sec. 14.1

The claim that the District violated Sec. 14.1 by reducing the Grievants' hours is without merit.

As regards those periods when the District employed a third employee junior to the Grievants at Wales, this case involves an increase in hours of work available at Wales, not a reduction. Section 13.6 addresses increase in hours situations. By contrast, Sec. 14.1 and Article 14, generally, appear intended to provide the procedures to be followed in case of reductions in available work. For that reason, the Arbitrator concludes that Sec. 14.1 has not been shown to have been violated as regards those periods.

As regards those periods after the December 21, 2000, letter when the District did not employ a third employee junior to the Grievants at Wales, to the extent that the District offered the Grievants fewer hours of scheduled or actual work than they had prior to the issuance of that letter, the District was exercising rights generally reserved to it under Article 2 and further supported by Sec. 18.3, except to the extent that the District failed to provide the 30-day notice required by Sec. 18.3. Section 14.1 does not regulate how much work the District will make available at any particular location, and the Union has not claimed or shown that Sec. 14.1 entitled either Grievant to work that was being performed by a junior employee at another school or to work that was being performed by the other Grievant at Wales. For those reasons, the Arbitrator concludes that Sec. 14.1 has not been shown to have been violated as regards those periods, either.

Claimed Violation of Sec. 13.6

The central issue in this case is whether the District violated Sec. 13.6 when it hired a new employee to perform additional work at Wales rather than first offering the additional hours to the Grievants.

The District initially argues that, reading Sec. 13.6 in the context of the Agreement as a whole, "the District had every right to make such decisions based upon its desire to provide the best service in an economical fashion, by avoiding incurring the expense of costly health insurance benefits." [District Brief at 10]. In the Arbitrator's opinion, that District interpretation of the Agreement must be rejected.

Section 13.6 reads as follows:

> 13.6 Increase in hours. Should additional hours be offered within a classification, current part-time employees within the affected school will be offered the opportunity on the basis of seniority to increase their hours, before additional new part-time employees are hired, provided such additional hours do not conflict with scheduling needs of the employer.

The language of the section on its face clearly and unequivocally requires that if the District decides to offer additional hours within a classification, current part-time employees within the affected school must be offered the opportunity on the basis of seniority to increase their hours before additional new part-time employees are hired unless the additional hours conflict with scheduling needs of the employer. The language expresses one and only one exception to the requirement that the additional hours be first offered to current part-time employees within the affected school, to wit, that offering the additional hours to the current part-time employees would "conflict with scheduling needs of the employer." By expressing that exception, the parties have excluded all other exceptions, including a District desire to avoid the cost of additional fringe benefits.

The claimed violation of Sec. 13.6 in the instant case therefore turns on whether offering the additional hours to the Grievants would "conflict with the scheduling needs of the [District]." The scheduling needs of the District would include steps necessary to enable the District to use the “cook to serve” method at Wales. The scheduling needs of the District would not include avoidance of the cost of additional fringe benefits for which the Grievants would be eligible if the additional hours were allocated to them rather than to a junior employee.

The District's actions must, therefore, be scrutinized to determine which of those purposes primarily drove the instant actions.

The District's December 21, 2000, letter explaining the reasons for its actions lends strong support to the Union's position. Boos' letter states:

> The reasons are obvious when looking at the cost worksheet. The costs to the foodservice program are greater if we increase your time to be eligible for benefits than it is to add an additional two-hour position. Secondly, your average daily meal counts do not justify the increase. Both Cushing and Dousman meal counts average almost 30+ meals more than your school does.

The first of the two reasons plainly stated in that letter is the comparatively greater cost of allocating hours to the Grievants that would make them eligible for fringe benefits. The District's interest in more effectively implementing the “cook to serve” method at Wales is not referred to anywhere in that letter.

In the Arbitrator's opinion, that letter is worthy of great weight. It was a contemporaneous statement of the District's rationale directly accompanying the District's notification to the Grievants and the Union of the actions the District was taking. It was not merely Boos' explanation of the Districts reasons, but it was the result of Boos having conferred with and agreed with Dickson regarding what actions the District would take regarding the Wales kitchen.

The District's assertions in the grievance procedure that its actions were motivated by an interest in more effectively implementing the “cook to serve” method at Wales would fall within the "scheduling needs" proviso of Sec. 13.6. However, the evidence concerning that interest does not persuasively overcome the words of the District's December 21, 2000, letter regarding the primary reasons for the District's actions giving rise to the subject grievance.

In that regard, it can be noted that the “cook to serve” method was one of several concepts presented to employees in a voluntary rather than mandatory in-service training program in the 1999-2000 school year. While the evidence suggests that the number of available burners at Wales somewhat limits the extent to which the “cook to serve” method can be utilized there, the Grievants were able to more effectively implement that method when they were working without a third employee after the initially hired junior employee quit. While the evidence also establishes that the Grievants attended the in-service training program, there is no showing that the District had given the use of “cook to serve” any particular emphasis at Wales prior to the references to it contained in the District's grievance responses.

The Arbitrator, therefore, concludes that the District violated Sec. 13.6 by its addition of a two-hour a day position in the Wales Elementary kitchen announced in Boos' December 21, 2000, letter, without having first offered the net additional hours of available work at that school to the Grievants. The Agreement in Article 2 and Secs. 13.6 and 18.3 reserves to the District substantial discretion regarding whether to increase or decrease the available hours at a work location and regarding at what times those hours will be worked. In the instant case, the District decided to increase the hours of available work at the Wales location. The record indicates that the District employed a junior two-hour a day employee at Wales for approximately a one month period beginning in early 2001 and again beginning in the Fall of that year and continuing at least through the time the grievance arbitration hearing was conducted, without offering the net increased available hours of work at Wales to the more senior Grievants. The "scheduling needs" proviso of Sec. 13.6 does not permit the District to allocate those additional hours to a junior employee without first offering them to a senior employee where, as here, it is shown to have done so for the primary purpose of avoiding the cost of additional fringe benefits to which the senior employees would be entitled if they were allocated the additional hours.

The conclusion that the District violated Sec. 13.6 in this case is not undercut by the grievance settlement reached in 1999 regarding the distribution of hours in the Dousman and Cushing kitchens. Dickson's February 16, 1999, letter memorializing the settlement added that the District reserved "the right to modify hours, and consequently the eligibility for benefits, based on continued satisfactory service, including but not limited to, efficient and effective line speed, health and safety issues, and quality of food." Cupery's testimony, contrary to Dickson's, was that Cupery did not agree to the rights claimed reserved in the quoted portion of Dickson's letter and that Cupery so informed Dickson in a conversation following Cupery's receipt of Dickson's February 16, 1999, letter. Given the dispute about whether the Union agreed with the quoted portion of Dickson's letter, and the requirements of Sec. 7.7 of the Agreement regarding grievance settlements where, as here, the grievance involved had been reduced to writing (in Cupery's February 2, 1999, letter to Boos), the Arbitrator does not find it appropriate to bind the Union to the quoted portion of Dickson's letter. In any event, an avoidance of fringe benefit costs was not one of the factors listed by Dickson in that letter.

The conclusion that the District violated Sec. 13.6 in this case is also not persuasively undercut by the absence of objections or grievances when increased hours were ultimately assigned to junior employees at Cushing and Dousman or when additional hours were assigned to junior employees at the high school. When hours were added at Cushing and Dousman without first being offered to senior employees actually working there, the senior employees affected were scheduled to work enough hours to be entitled to fringe benefits such that they may well have had no interest in working the additional hours allocated to the junior employee or therefore in grieving the District's failure to offer them the additional hours allocated to the junior employees at each location. The operational circumstances surrounding the addition of a second sub sandwich line and the provision of parochial school meals by the high school kitchen staff have not been shown to be sufficiently parallel to the circumstances at Wales to constitute a persuasive basis on which to resolve the instant dispute.

Remedy

By way of remedy, the Arbitrator has ordered that the District cease employing junior part-time food service employees at Wales without first offering the net increased work available at that location to the Grievants, except as permitted by the "scheduling needs" proviso in Sec. 13.6 as interpreted in this Award. The Arbitrator has also ordered that the Grievants be made whole for their economic losses both of wages and fringe benefits resulting from the District's allocation of the net increased hours of available work at Wales to junior employees without having first offered those increased hours to the Grievants. The Arbitrator has not, however, ordered that the District make the Grievants whole in those respects for periods of time when the District did not employ a junior food service worker at Wales. The Arbitrator has also retained jurisdiction for a limited period of time for the purpose of resolving any dispute that may arise concerning the meaning and application of the remedies ordered.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the ISSUE, as framed above, that:

1. The disposition of the grievance communicated in written form to the District by Cupery on January 16, February 9, and March 16, 2001, shall be as follows:

a. The District violated Sec. 18.3 by its failure to give the Grievants 30 days notice of the changes in their starting and ending times referred to in Boos' December 21, 2000, letter.

b. The District did not violate Sec. 14.1 by its reductions of the Grievants' scheduled and actual hours of work after issuance of Boos' December 21, 2000, letter.

c. The District violated Sec. 13.6 by employing part-time Wales food service employees junior to the Grievants at various times after issuance of Boos' December 21, 2000, letter, without having offered the net increased hours of available work at that location to the Grievants.

d. The Union's processing of the instant grievance did not give the District fair notice of a claim that the District had violated Article 21 independent from any violation of Sec. 13.6 or 14.1. Accordingly, that claim is not properly before the Arbitrator in this case and is not ruled upon by the Arbitrator.

e. The violation noted in a., above, has apparently been remedied, such that no additional remedy is necessary or appropriate for that violation. If the remedy the District agreed to implement in its letter of January 29, 2001, has not been implemented, then the District shall promptly implement that remedy.

f. By way of remedy for the violation noted in c., above, the District shall promptly:

1. Cease employing junior part-time food service employees at Wales without first offering the net increased work available at that location to the Grievants, except as permitted by the "scheduling needs" proviso in Sec. 13.6 as interpreted in this Award.

2. Make the Grievants whole, without interest, for the additional wages they would have earned had they worked additional hours consisting of one-half of the hours worked by employees junior to the Grievants at the Wales kitchen after issuance of Boos' December 21, 2000, letter.

3. Make the Grievants whole, without interest, for the fringe benefits they would have received had the District increased the normal work schedule of hours that each was in fact offered by the District after issuance of Boos' December 21, 2000, letter by one-half of the normal work schedule of hours of the less senior employees who were hired and employed at the Wales kitchen after issuance of Boos' December 21, 2000, letter.

g. The Union's requests for relief in addition to that ordered above are denied.

h. The Arbitrator retains jurisdiction for a period of 60 calendar days after the date of this Award for the sole purpose of resolving, at the request of either party, any dispute(s) that may arise concerning the meaning and application of the remedies ordered above.

Dated at Shorewood, Wisconsin, this 6th day of February, 2002.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator

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