BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHERN EDUCATIONAL SUPPORT TEAM (NEST)

and

LAC DU FLAMBEAU SCHOOL DISTRICT

Case 25
No. 61556
MA-11981

Appearances:

Mr. Gene Degner, Executive Director, Northern Tier UniServ – Central, P.O. Box 1400, Rhinelander, WI 54501, appearing on behalf of the Union.

Ruder Ware, S.C. by **Attorney Ronald J. Rutlin,** 500 Third Street, Suite 600, Wausau, WI 54402-8050, appearing on behalf of the School District.

ARBITRATION AWARD

The Northern Educational Support Team (NEST), hereinafter referred to as the Union, and the Lac du Flambeau School District, hereinafter referred to as the District or Employer, are parties to a collective bargaining agreement (CBA) which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the summer employment of certain bargaining unit members. The undersigned was appointed by the Commission as the arbitrator and held a hearing into the matter in Lac du Flambeau, Wisconsin, on December 10, 2002, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed. The parties filed post-hearing briefs by March 20, 2003 and reply briefs by April 21, 2003, marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

ISSUE

The parties were able to stipulate to a statement of the issue as follows:

1. Did the Employer violate the terms of the agreement when it terminated the summer employment of four bargaining unit members at the end of the summer school session?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE I – RECOGNITION

The Board recognizes the Northern Educational Support Team (NEST) as the exclusive and sole bargaining representative for all regular full time and regular part time non-professional employes (sic, applicable to each use of the word so misspelled) of the Jt. School District No. 1, Town of Lac du Flambeau, excluding supervisory, managerial, confidential, bookkeeper, head cook, head custodian, and professional employes.

ARTICLE II – MANAGEMENT RIGHTS

A. The Board, on its own behalf and on behalf of the Jt. School District No. 1, Town of Lac du Flambeau, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right to:

1. The executive management and administrative control of the school system and its property and facilities and the work related activities of its employes.

2. The determination of the financial policies of the district, including the general accounting procedures, inventory of supplies and equipment procedures, and the District's (sic) public relations program.

. . .

8. The direction, supervision, evaluation, arrangement, assignment and allocation of all the working forces in the system, including the hiring of all employes, determination of their qualifications and the conditions for their continued employment, the right to discipline or discharge, for just cause, and transfer employes, not inconsistent with the terms of this agreement.

. . .

9. The determination of the size of the working force and the determination of policies affecting the selection of employes.

. . .

12. The scheduling and assignment of all work activities and workloads, not inconsistent with the terms of this agreement.

. . .

ARTICLE IV – NEGOTIATIONS PROCEDURES

A. The parties agree to enter into collective negotiations over a successor agreement in accordance with Chapter 111.70, Wisconsin Statutes, in a good faith effort to reach agreement on all matters raised by either party concerning questions of wages, hours, and conditions of employment. Such negotiations shall begin on or about March 15, and shall take place between the collective representatives of the Board and NEST. Any agreement so negotiated shall apply to all employes covered by this Agreement, be reduced to writing, be signed by the Board and NEST, and be adopted by the Board.

B. Except as this Agreement shall hereinafter otherwise provide, all terms and conditions of employment applicable on the effective date of this agreement (sic) to employes covered by this Agreement as established by the rules, regulations and/or policies of the Board in force on said date, shall continue to be so applicable during the terms of this Agreement.

C. This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties.

. . .

ARTICLE VI – GRIEVANCE PROCEDURE

A. Definitions: For the purposes of this Agreement, a grievance is defined as any complaint, a controversy or dispute between the School District and the Union or between the School District and any of its employees covered by this Agreement involving the meaning, interpretation or application of specific provisions of this Agreement.

. . .

ARTICLE XIV – REDUCTION IN FORCE

A. Layoffs: If there is a need or a reduction in available work, the Board may consider layoff or reduction in hours of the necessary employe(s). For the purpose of layoffs or a reduction in hours, seniority shall mean the

continuous length of service with the School District. For the purposes of computing seniority, the following departments are to be utilized: 1) Custodial; 2) Paraprofessionals; 3) Food Services; 4) Head Start; 5) Clerical.

When the employer decides to layoff or reduce the hours of employment of employes, the employes with the least amount of seniority in a specific department shall be laid off first, provided the remaining employes are qualified to perform the available work. A least senior employee may be exempt if it is necessary, by the guidelines, for the continuation of a program and no other employe in the department has the necessary qualifications.

. . .

ARTICLE XV – VACANCIES AND REASSIGNMENTS

A. All vacant or new positions recognized under Article I – Recognition of this Agreement shall be posted in a conspicuous place internally for three (3) working days prior to being posted externally. The job posting shall set forth the job title, pay range, work location, and the name of the person to whom the application is to be returned to. (sic) During non-school months, a copy of all postings will be sent to the unit director.

. . .

ARTICLE XXI – DEFINITION OF EMPLOYES

A. Regular Full Time Twelve-Month: A regular full time twelve-month employe is defined as an employee who normally works at least thirty-seven and one-half (37 ½) hours per week on a twelve-month basis, exclusive of paid holidays, vacations and other leave provisions.

B. Regular Part Time Twelve-Month: A regular part time twelve-month employe is defined as any employe who is regularly scheduled to work seventeen and one-half (17 ½) hours or more per week, but less than thirty-seven and one-half (37 ½) hours per week.

C. Regular Full Time School-Term: A regular full time school-term employe is defined as an employe who normally works at least thirty-seven and one-half (37 ½) hours per week during the academic school year.

D. Regular Part Time School-Term: A regular part time school-term employee is defined as an employe who is regularly scheduled to work at least seventeen and one-half (17 ½) or more hours per week, but less than thirty-seven and one-half (37 ½) hours per week during the academic school year.

E. Regular Part Time Employes Less Than 17 ½ Hours: Such an employee is defined as a part time employe who is regularly scheduled either school –term or twelve-month to work less than seventeen and one-half (17 ½) hours per week. Such employes are not entitled to the fringe benefits of health, dental, long term disability, and life insurance.

F. Temporary Employes: A temporary employee is defined as an employe who is not regularly scheduled to work or who is hired to replace a bargaining unit employe who is absent or on leave under the provisions of this contract, who is hired for a specific job, or who is hired for a specific time period not to exceed thirty (30) days. This employe is not a part of the bargaining unit.

BACKGROUND

The District and the Union are parties to a collective bargaining agreement covering the contract years 2001 – 2002 and 2002 – 2003. Each of the four Grievants in this case, Donna Harris, Beverly Krueger, Paul Lueders and Phyllis Werner, were, at all relevant times, employed by the District as "Regular Full Time School-Term" employees and were all members of the Union. As Regular Full Time School-Term employees they worked at least 37 ½ hours per week during the academic school year. Although their contractual obligation to work for the District ended with the end of the academic school year historically they had been offered work around the school during the summer months to keep them busy. Each Grievant was allowed to work during the summer school session and that period of employment is not in issue here.

Following the summer school session which ended on June 27, 2002, the District, as it had done for many years in the past, hired part time custodial workers to perform odd jobs around the school in preparation for the new school year. The four Grievants were each hired to perform various jobs during this period. On or about July 15 the Grievants were notified that their services would not be needed beyond Friday, July 19 due to financial restraints. (The normal hourly rate of pay for the part-time summer custodial workers was $7.00 but the Grievants were being paid at their normal school year rate which was substantially higher). The Grievants then sought to "bump" into the temporary summer custodial positions. This attempt was denied by the District Board and this grievance followed.

There are no procedural impediments to this grievance coming to arbitration and the case is properly before the Arbitrator.

THE PARTIES' POSITIONS

The Union

The Union asserts that the District has always had two types of summer employment opportunities for "school term" employees: Summer school work during the actual summer school session and other "summer work" which occurred after the summer school session

ended. It is this other "summer work" which is at issue in this case. In the past, any school term employee interested in a "summer work" position need only let the District Administrator, Richard Vought, know of his or her interest and he/she was given work. The process was informal and there had always been more work than employees. Each of the Grievants so notified Vought during the regular school year and each was given assurances that there would be work for them. The Union notes that one of the Grievants was a widow and one was a single parent and that they needed the job. By relying on the word of the Administrator that there would be work for them, they did not seek other jobs in the community for the summer. Grievant Lueders "hounded" Vought about giving him summer work and relied on Vought's assurances not to "worry about it."

The Union argues that because the District had always provided work for the four Grievants in the past during this period in the summer that a past practice had been established and when, on July 15 or 16 the four were advised that their services would not be needed beyond July 19, this past practice was breached. The Union says that the Grievants had learned to rely on the word of their Administrators and the District had a past practice of allowing the Administrators "to hire the necessary help they felt were (sic) needed for summer work." The foregoing events and facts violate Article V, paragraph B (Negotiations Procedures).

The Union next argues that the facts of this case support the conclusion that the District's actions should be barred by the doctrine of promissory estoppel. It says that "it is clear that the District made a promise, the employees had a right to expect Mr. Vought would deliver on that promise, they did not seek other employment, and they relied totally on the District for their financial needs for the summer of 2002." Because the District broke that promise each was harmed financially and the doctrine of promissory estoppel should apply. In support of this theory the Union directs the Arbitrator's attention to MILWAUKEE SCHOOL DISTRICT, WERC CASE M-99-183 (OBERMEYER, 6/01).

The Union says that the actions of the Board violate several other provisions of the collective bargaining agreement. To wit: Article I which gives the Union bargaining rights over all hours, wages and conditions of employment which mitigates the management rights of the District; Article V, the "uniformity clause" was violated because "Darlene Poupart was allowed to continue work, checking in orders, as she had done for the last several years."; Article XXI, Definition of Employees, paragraph B, because "If on the one hand the Board created these positions as they indicated and employees were to fill out an application for the position, then those went beyond the temporary positions allowed for under Article XXI."; Article XV, Vacancies and Reassignments, paragraph A, because the summer positions should have been posted in accordance therewith. This Article was further violated because this Article dictates that "bargaining unit members should have been given those jobs over people who were not."; Article XV, paragraph H dictates that the District notify the Union if it created summertime positions within 15 days of the creation of those jobs.

Finally, the Union argues that although past correspondence indicates that, at one point, the Union "had given a written agreement to waive the posting requirements for a temporary job of 30 days" that "there was to have been a clear understanding that the District would give

the Union a list of those jobs and that bargaining unit members would be given first opportunity should they request the jobs."

The District

The District argues that the manner in which it filled the temporary summer positions and its subsequent discontinuance of the Grievant's summer employment was consistent with its inherent managerial rights and those managerial rights set forth in the agreement. It says the Grievants had no contractual right to the work they performed following the summer school session and that this work was provided to them by Vought, not the contract. Because this work was not guaranteed to the Grievants via the agreement, management's decision to terminate it is not subject to challenge. Article XXI clearly establishes that temporary employees are not a part of the bargaining unit and thus, temporary positions are not subject to the posting requirements of Article XV. Consequently its failure to post the temporary summer jobs could not have violated the agreement. If the Arbitrator decides that the District's decision is subject to challenge though, the District's decision should be subject to an arbitrary and capricious standard. This standard was satisfied because the District's decision was based upon financial concerns. Moreover, the District filled these jobs on June 5, 2002 and if the Union thought that action constituted a violation of the agreement it was contractually obligated to file its grievance within fifteen (15) working days. The grievance was filed on August 1, 2002. The Union's failure to file its grievance on time constitutes an acquiescence to the process used by the District to fill these positions.

The only limitation imposed upon the District in filling temporary summer jobs is that they may not be employed more than thirty (30) days and the Union waived this limitation as evidenced by Union Exhibit 2:

> This letter is in regards to temporary summer employees. The NEST negotiation team has met on this matter and has agreed to waiver (sic) the 30 day requirement for temporary employees to be excluded from the bargaining unit for the summer months beginning June 1, and ending August 31. All other temporary positions over 30 days will follow the Nest contract agreement. The Nest bargaining unit still retains the right to be provided with a list of summer jobs and be given the first opportunity for those positions, provided they are qualified and want the summer employment.

The Grievants are all school-term employees as defined in the agreement, i.e. their contractual term of employment is limited to the academic school year. Summer is not the academic school year and thus the Grievants had no contractual right to the temporary summer jobs. Hence, since the agreement contains no contractual rights to the work, the District's decision to terminate their employment in this regard could not have violated the contract. Furthermore, the Union's argument that the District violated Article XIV (Reduction in Force)

by failing to lay off the individuals in the temporary summer positions in favor of the Grievants is without merit because the summer positions are not part of the bargaining unit and, consequently, not subject to the layoff provisions of Article XIV. Ergo, the District's refusal to apply the language of Article XIV to the temporary positions could not have constituted a violation of the agreement. In response to the Union's argument that the Grievants should have had the right to "bump" into those positions, there are no contractual provisions allowing members of this unit the right to bump. Also, the temporary positions aren't even in the unit and so even if the agreement did allow bumping rights they would not apply to these positions.

In response to the Union's argument that the Grievants should be allowed to rely on Vought's representation that they would have work for the summer, and assuming the undersigned were to find that because of this representation a proper challenge to the District's decision were in order, its decision must be upheld because it passes the arbitrary and capricious test due to the fact that it was based solely on rational and justified financial considerations. The hourly rate for the temporary summer positions was $7.00. The Grievants were being paid at their normal school-term rates which were substantially higher. Given the tight budgetary constraints under which the District is operating the Board rationally and justifiably determined that it could not pay the higher hourly rates for what amounted to odd jobs. The District points out that the Union's "sympathy" argument, i.e. that Grievants relied on Vought's representations to their detriment (they failed to seek other employment for the summer) lacks merit because had they worked elsewhere they would have been at-will employees, just as they were here, and subject to the same "employment contingencies" as they were at the school. (One presumes this means they would have been subject to dismissal without cause).

The Union's Reply

The District Administrator is part of the management team and functions both as a supervisor and a manager. As such he is exempt from engaging in collective bargaining with the Employer. He acts on behalf of the Board and is the District's chief operating officer. Bargaining unit members must adhere to his directives or face discipline and thus have been "conditioned by contract" to follow his advice. They rely on his word in matters of employment. If this were not the case, chaos would reign. It makes little difference whether he promised summer work and pay to the Grievants under his "Management Rights" or under his "authority as District Administrator." The fact remains that the work was offered and in return for the work the Grievants would receive a "salary."

The Union asserts that "The issue here is that the Grievants clearly asked the District Administrator in advance if there was work available" because they needed the work. By promising them the work he "took the Grievants out of the job market" for the summer. By the time they were told that there would be no more work for them to do they had little chance of finding other suitable work for the remainder of the summer.

All the Grievants indicated they were promised the work and that they did not care what type of work it was. The right of the Administrator to grant summer work has "clearly been the past practice in the District and is protected by the Standards Clause." Further, "the authority of the District Administrator to direct the work force under Management Rights is a textbook case for Promissory Estoppel."

The District's Reply

The record established that there are three types of summer employment: (1) individuals employed during the summer school session; (2) individuals employed to perform miscellaneous projects after the summer school session has concluded; and (3) individuals employed in temporary summer custodial positions. Different wage rates apply to categories (2) and (3) above. Category (2) employees, the Grievants in this case, receive a much higher wage rate than the Category (3) employees. The Union's confusion over this fact impacts a number of its arguments. For instance, the posting argument fails because the summer custodial positions are "not part of the bargaining unit" per Article XXI (Definitions) and thus, could not be subject to the posting requirements. Hence, the District's failure to post them could not violate the agreement.

The Union's argument that the agreement to waive the thirty day period during the summer months had "gone out the window" is incorrect because the quid pro quo for that waiver was notice to the membership of the summer jobs available. This condition was fulfilled when the District informed the Grievants of the positions and the Grievants declined to take them. They declined because they wanted the "miscellaneous project" jobs (Category (2) instead of the lessor paying Category (3) jobs).

The Grievants are all classified as school-term employees. As such they do not have a contractual right to summer employment. The agreement does not contain any language addressing summer employment and try though it may to categorize summer employment as "guaranteed" based on past practice, the Union cannot bring summer employment within the scope of the contract.

At no time has the District guaranteed summer employment for the Grievants. At no time has the District relinquished its right to control the summer employment and at no time has the District established any rule, policy or regulation providing that school-term employees are entitled to summer employment. The Union's argument that the District has never in the past discontinued summer employment early is irrelevant to the issue of past practice. Citing ESSO STANDARD OIL CO., 16 LA 73, 74 (MCCOY, 1951); CITY OF AUBURN POLICE DEPARTMENT, 78 LA 537, 540 (CHANDLER, 1982), standing for the principle that the failure to exercise a right over a period of time does not amount to a surrender of that right, the District says that it always had the right to discontinue summer work early and by failing to exercise that right in the past it did not give it up. (Also citing CITY OF RICE LAKE, WERC CASE A/P M-94-341 (VERNON, 1995) in support.) Because the District unilaterally assigned the summer work to the Grievants and the Union was never involved in this process nor was it

consulted in any way in the past, the reasoning of Arbitrator Shulman in the case of FORD MOTOR CO., 19 LA 237 (SHULMAN, 1952) applies here. Shulman's seminal decision stands for the proposition (paraphrasing) that a practice based on mutual agreement may be changed only by mutual agreement and that there are certain practices which are not the result of joint determination. These cases are mere happenstance resulting in methods which develop without design or they are choices by management in the use of its discretion. The managerial freedom with respect to the methods is the key. Since they are products of managerial determination exercised in management's permitted discretion they are subject to change in the same discretion absent contractual provisions to the contrary. In short, "there is no requirement of mutual agreement as a condition precedent to a change of practice of this character." The District argues that the facts of this case parallel Shulman's reasoning and support its assertion that a past practice does not exist here.

The Union's promissory estoppel argument lacks merit. An action for promissory estoppel cannot be sustained absent affirmative answers to the following questions:

1. Was the promise on which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?

2. Did the promise induce such action or forbearance?

3. Can injustice be avoided only by enforcement of the promise?

(FORRER V. SEARS, ROEBUCK & CO., 36 WIS.2D 388, 392, 1153 N.W.2D 587 (1967) (CITING HOFFMAN, 26 WIS.2D AT 698)

Since the Grievants were promised summer employment, and received summer employment, even though of a duration less than they wanted, the promise was fulfilled and any action for promissory estoppel must fail.

DISCUSSION

The threshold question to be addressed in this matter is whether the collective bargaining agreement applies to the facts of this matter so as to bestow contractual rights and obligations upon the parties. Specifically, were the Grievants entitled, by the terms of the agreement, to the summer work in which the Grievants were engaged, and from which they were terminated? If the agreement does apply then the question moves to whether or not the District violated its terms when it terminated the part-time summer work of the Grievants.

I quite agree with the Union's assertion that the District did not treat the Grievants well. It offered them work for the roughly six weeks between summer school and the beginning of the following school year and, two weeks into that period abruptly let them go. Providing work for

these Grievants during that period of the summer vacation was a practice of long duration and the Grievants had grown to anticipate that the Administrator would find work for them following summer school.

The District's ragged treatment of the Grievants, though, is one question, while the issue of the applicability of the contract to that treatment is another.

The Union says that there have always been two types of summer employment opportunities for "school-term" employees. The first type is summer school work during the actual summer school session and the second is other "summer work" between the summer school session and the beginning of the next regular school year. It is the latter category which is at issue in this case. The parties do not disagree that all Grievants are regular full time school-term employees as defined by the contract.

The District, on the other hand, maintains that there are three categories of summer work: work during the summer school session; work for bargaining unit school-term employees following the summer school session with hourly pay at the rate paid to them during the regular school year; and part time summer custodial work paid at the rate of $7.00 per hour. For the purposes of this analysis this is a distinction without a difference. Since the Grievants here were all hired by the District to perform miscellaneous jobs *following* the summer school session, they fall into the category of employee defined under Article XXI, subparagraph F as "temporary employees". A temporary employee is defined as ". . . an employee who is not regularly scheduled to work . . . who is hired for a specific job, or who is hired for a specific time period not to exceed thirty (30) days. This employee is not a part of the bargaining unit." (Emphasis mine) The District argues that the Grievants were offered summer work not because they were contractually entitled to it but because it was simply exercising its inherent management rights to hire part-time summer help as "at will" employees, just as it had done in the past. The testimony of each Grievant clearly supports the conclusion that they did not believe they were contractually entitled to any summer work; that summer work with the District may not be available for them; that they were free to seek other employment for the summer if they chose or, in the alternative, that they were free to take the summer months off:

TESTIMONY OF PHYLLIS WERNER: (Tr. 54 – 56)

> *Q. Okay. And how did you come to think that you were going to be doing that the remainder of the summer?*
>
> *A. Okay. I had a conversation with Mr. Vought, oh, I think it was toward the end of March, first part of April.*
>
> *I asked him if there would be anything that I could do this summer to work, because I'm a single parent, and I need to work for the whole summer, and if there was nothing here for me to do, then I'd have to go and look for another job so that I'd have the income for summer.*

Q. And when you say you talked to Mr. Vought, what did you say or what did you ask him?

A I asked him if there would be any work for me to do this summer, and he said, "I'll get back to you," and then within a couple of days he did get back to me, and he told me about doing the assets.

Q. Okay. And did he tell you that you would be doing that the remainder of the summer after summer school?

A. Right.

Q And what did – did you talk about how many weeks?

A. No, we didn't talk about the weeks, because I've spoken to Mr. Vought in the past about working in the summer, and I felt he knew that it was for the rest of the summer, because I've worked the rest of the summer in the past.

I didn't – he didn't give me a contract and say, "The next six weeks you'll be doing these assets," but I did believe that I would be doing it for the rest for the summer.

UNDER CROSS EXAMINATION: (Tr. 67)

Q. But as I understand the grievance, you are contending that you should have been allowed to perform the summer work that was being performed by people that are not part of your bargaining unit, cleaning up, doing whatever they do –

A. Right.

Q. is that correct?

A. We did, yes.

There is another letter where we did stipulate that we would bump those people that were hired to do the other jobs.

Q. There's a letter where the District agreed that you would be able to bump?

A. No. The four people came into Mr. Vought's office, and we asked to bump the people that were working, and we were refused that.

TESTIMONY OF DONNA HARRIS: (Tr. 76 – 79)

Q. Did you say you were asked – you asked for summer school employment or they asked you?

A. I asked.

Q. Okay. Who did you ask?

A. I asked Mr. Vought and Mr. Grams.

Q. When did you ask Mr. Vought and Mr. Grams?

A. It had to have been early April.

Q. Did you ask Mr. Vought first or Mr. Grams?

A. Mr. Vought.

Q. And what did Mr. Vought tell you?

A. To fill out an application; it shouldn't be a problem.

Q. And did you fill out and application?

A. Yes, I did.

Q. Did you follow that up with Mr. Vought?

A. Yes.

Q. And when approximately did you follow it up?

A. A week and like every week after that, I questioned him as to whether I'd have summer work or if I'd need to get another job.

Q. And when you say whether you'd need to get another job, did you tell him that?

A. Yes.

Q. What did he say?

A. Not to worry about it.

Q. Okay. Is that all he said?

A. He said that he had to go to the School Board and that there would be a School Board meeting but not to worry about it and he'd let me know.

Q. And did he let you know?

A. Yeah.

Q. When?

A. There was approximately two, three weeks before school was out, so that would have been May.

Q. Did he come to talk to you?

A. I had seen him in the hallway.

Q. And what did he say?

A. He said that it wasn't a problem and that to go to the summer school meeting, which unfortunately I couldn't attend, and someone had to sign me.

Q. When you said the summer school meeting, what is the summer school meeting for?

A. They have a meeting with all the summer school staff to make arrangements for what they are doing and where they are.

Q. That's the program with students?

A. Yes.

Q. And who's in charge of that?

A. Mollie West is in charge of coordinating that.

Q. Is Mollie West also in charge of the work beyond the summer school?

A. Not that I'm aware of.

Q. Okay. And did you – when you filled out an application, what was your understanding of what that application was for?

A. It was for summer work, for the full summer.

Q. Okay. For summer work such as you were going to be doing checking in –

A. I had no idea. Anything. It didn't -- just summer work.

Q. When you talked to Mr. Vought about working during the summer, did you talk to him about the number of weeks that you might be working?

A. I did say the full summer, also.

Q. Did you talk about any pay for that work?

A. No.

Q. What was your understanding about the pay?

A. I'd maintain my regular pay.

Q. During the summer of 2001 did you work for the School District?

A. No, I did not.

TESTIMONY OF BEVERLY KRUEGER (Tr. 86 – 87)

Q. Okay. For this past summer, what was your job?

A. I had asked Rich, talked to Rich, and I talked to Mr. Grams. I needed to know if there would be a possibility for me to be working all summer, because I'm a widow, and if I couldn't work all summer, I would have to get myself a different job and not work here at all in the summertime.

Q. When you talked to Mr. Vought, when was that?

A. Oh, I would say in March, a couple times in March and April, always kind of asking if there would be a chance, and then finally I got to work for Jan Jubert, because she had things for me to do in the summer.

Q. When you first asked Mr. Vought, what did he tell you?

A. That there would probably be a possibility; we'd have to check, wait until the time came.

TESTIMONY OF PAUL LUEDERS: (Tr. 101)

Q. And how did it come about that you worked during the summer?

A. I filled out an application, heard about it from who I don't remember, that I had to do an application for the summertime work.

I must have done that, I'm really guessing, sometime early April, because I remember every time I saw Mr. Vought in the hall, I asked him, because he couldn't give me – I asked him if, you know, "Sure you can keep me busy this summer?" He said, "Yes, yes. Don't worry about it. Make sure you fill out an application."

So I did that, and I also worked the summer school program.

Q. Okay. Did you have any in-depth conversations or any conversations with Mr. Vought about summer work?

A. No, but he – I like to plan my life ahead of me quite a bit, and I just kept – every time I'd see Mr. Vought in the hall, I'd ask him, "Make sure you keep me busy this summer." He said, "Yeah, don't worry about it."

In sum, the Grievants were no different than anyone else in the community looking for summer work. It was only when the Board determined that it could not afford the luxury of paying summer help in excess of the $7.00 per hour rate that the Grievants were terminated. The testimony clearly established that the decision to terminate the Grievants was made for fiscal reasons and thus was not arbitrary or capricious.

The undersigned has carefully reviewed the parties' collective bargaining agreement and agrees with the District's assertion that the agreement does not apply to the facts set forth in this grievance. The Arbitrator cannot find any language in the contract which remotely suggests that the Grievants here have a contractual entitlement or right to the summer work following summer school.

The Union urges the Arbitrator to find merit in the grievance on the basis, among others, that the past practice of hiring school-term employees for summer work was breached when the Grievants were terminated. The written agreement between the parties is the best evidence of the parties' mutual intent. Here, the intent of the parties is clear regarding

the

employment status of the Grievants. They are school-term employees and their contractual rights and obligations terminate at the end of the regular school year. What's more important about the past practice asserted by the Union is that it does not meet the test of a past practice. One of the gravemans of a binding past practice is that it have a mutuality of understanding that the conduct is the appropriate course of action. The Union says that this element exists here and that the mutual understanding of the parties was that these Grievants would get summer work if they wanted it. The District certainly doesn't agree that this is the case. Even more importantly, neither do the Grievants. Their testimony clearly demonstrates that the "past practice" was for the Grievants to ask Mr. Vought *if* he had any summer work, and, *if so*, could they have it. The "past practice" left the decision to hire summer workers entirely with the District administration. Thus, the "past practice" argument does not carry the day. The Arbitrator agrees with the District that the hiring of part-time summer workers, and their subsequent termination, is a proper exercise of its inherent managerial right to control the workplace.

The grievance procedure language found in Article VI clearly states that a grievance is ". . . any complaint, a controversy or dispute between the School District and the Union or between the School District and any of its employees *covered by this Agreement*. . ." (emphasis mine) Since the Grievants were temporary employees and thus not bargaining unit members, the grievance procedure would not have been available to them but for the fact that the parties submitted the issues to the Arbitrator voluntarily.

The Union's argument that the District's decision to terminate the Grievants may be challenged on the premise of "promissory estoppel" must fail because my jurisdiction is drawn from the contract's applicability to the facts. I have determined that the contract is not applicable to these grievances. If there is a case to be made for promissory estoppel, and I do not mean to suggest one way or another my thoughts on the matter, it must be made before a different tribunal because the question is beyond my jurisdiction. The Union's reliance on the MILWAUKEE SCHOOL DISTRICT case is misplaced because unlike here the agreement in that case was applicable to the facts.

The Union's argument that the Grievants should have been able to "bump" into the part-time summer positions must fail for two reasons. First, as I have said, the provisions of the contract do not apply here, and, second, even if the contract were applicable it does not provide bumping rights to these Grievants anyway. In short, the Union is suggesting that bargaining unit employees should have been able to bump non-bargaining unit employees from positions the bargaining unit employees had no right to in the first place.

Any suggestion that the District is bound by the Union's assertion that it had a right to notice of the summer jobs available and some sort of right of first refusal to those jobs is wrong. The evidence clearly establishes that the Union sought these rights in 1997 in exchange for the waiver of the 30 day restriction found in Article XXI, subparagraph F and the District

rejected the Union's offer. It is also clear that the reference to 30 days means 30 days of actual

employment as opposed to being hired for a period exceeding 30 days. Gene Degner's letter to Vought dated September 16, 1997 and received as Union exhibit 7 confirms this:

> ". . . However, in the future, should the district not make any requests to extend a 30 day temporary assignment. (sic) We will request that the employees become bargaining unit members at the end of 30 days and afforded all rights therein."

Thus, even if the Union had not waived the 30 day restriction it would not apply to these Grievants anyway because they only worked for a period of, at most, two weeks.

The remaining allegations put forth by the Union have no merit since this dispute centers on employment which is not covered by the agreement.

In light of the above, it is my

AWARD

The Employer did not violate the terms of the agreement when it terminated the summer employment of four bargaining unit members at the end of the summer school session.

Dated at Madison, Wisconsin, this 16th day of July, 2003.

Steve Morrison /s/
Steve Morrison, Arbitrator

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