BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CHEQUAMEGON UNITED TEACHERS**

and

**WASHBURN SCHOOL DISTRICT**

Case 53
No. 63035
MA-12480

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Appearances:

**Barry Delaney**, Executive Director, Northern Tier UniServ Council-West, appearing on behalf of the Association.

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

## ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and District, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on March 11, 2004, in Washburn, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on June 7, 2004. Based on the entire record, the undersigned issues the following Award.

## ISSUES

The parties stipulated to the following issues:

1. Has the District violated the collective bargaining agreement by employing part-time food service workers (i.e. food service workers who are scheduled to work less than 6½ hours per day)? If so, what is the appropriate remedy?

2. Has the District violated the collective bargaining agreement by prorating years of service for purposes of advancement on the wage schedule? If so, what is the appropriate remedy?

## PERTINENT CONTRACT PROVISIONS

The parties' 2002-03 collective bargaining agreement contained the following pertinent provisions:

### RECOGNITION

The Board of Education action (sic) for said District recognizes the Chequamegon United Teachers as the exclusive and sole bargaining representative for all regular full-time and regular part-time non-certified employees of the School District of Washburn, excluding supervisory, managerial and confidential employees as certified by the W.E.R.C.

### MANAGEMENT AND ASSOCIATION RIGHTS

. . .

B. The School Board, on its own behalf, hereby retains and reserves unto itself without limitation all powers, rights, and authority vested in it by applicable laws.

The Board possesses the sole right to operate the school system and all management rights repose in it subject only to the provisions of this contract and applicable laws. These rights include but are not limited to the following:

. . .

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

. . .

7. To determine the kinds and amounts of services to be performed as pertains to school system operations and the number and kind of classifications to perform such services.

8. To determine the method, means and personnel by which school system operations are to be conducted.

. . .

## DEFINITIONS

***FULL-TIME EMPLOYEE***: All non-certified employees (cooks, secretaries, aides, custodians and bookkeeper) that work the full calendar year, or the full school calendar year (minimum of 6½ hours per day) shall be considered full-time employees.

***PART-TIME EMPLOYEE***: All non-certified employees (cooks, secretaries, aides, custodians and bookkeeper) who work less than full-time as stated above shall be considered part-time employees.

. . .

## SENIORITY/LAYOFF/RECALL

A. Seniority shall commence upon the last date of hire in the District. Seniority shall be based on the actual length of continuous employment. Seniority for part-time employees shall be prorated as follows: (4 Hours/Day or less = ½ year credit. Over 4 Hours/Day = full year credit). . .

. . .

B. Classifications for the purpose of this article are as follows:

1. Secretary

2. Classroom Aide/Library Aide

3. Cooks

4. Custodial/Maintenance

. . .

D. In the event that the School Board decides to reduce staff or hours, employees will be laid off in inverse order of seniority, by classification, provided the remaining employees are capable of performing the work. The Board will provide a two (2) week notice prior to any layoff.

An employee who is reduced in hours or completely laid off may bump a less senior employee, in any classification, provided he/she is qualified for the position. If the employee wishes to exercise his/her bumping rights, the employee must so notify the District Administrator in writing no later than fourteen (14) calendar days after receipt of either the reduction of hours or layoff notice.

. . .

## SCHOOL YEAR AND WORK DAY

The work year and work day for each job classification shall be noted on the Work Schedule (page 14 of the Agreement).

. . .

## BENEFITS

All full-time employees, working a 6½ to 8 hour day, shall receive full fringe benefits.

All part-time employees who normally work 4 to 6½ hours per day, for the school year or the entire year, shall receive 50% of the fringe benefits.

Part-time employees who have a regular schedule that is less than half-time are not eligible to receive any insurance benefits.

. . .

## WORK DAY AND WORK WEEK

***Custodial -*** 8 hours/day, 40 hours/week, 12 months/year
***Maintenance:*** (Part-time) 4 hours/day, 20 hours/week – *School Term*
8 hours/day, 40 hours/week – *Summer Employment*

***High School Secretary:*** 8 hours/day, 40 hours/week. All teacher work days plus twenty (20) additional days (*Commencing with the 2000-01 year, the High School Secretary will work an additional 10 work days each year, as assigned. Such days will be worked just before the start of the student year, during the student year on days not ordinarily scheduled to work, days following the end of the student year, or any combination of the three.)*

***Grade School Secretary:*** 8 hours/day, 40 hours/week. All teacher work days plus ten (10) additional days.

***Classroom Aides:*** 7½ hours day, 37½ hours/week. Same days as students (*Employees who are required by the District to attend inservice programs shall be paid their regular rate of pay for such hours. Classroom aides who are assigned to class inclusion programs with multiple students shall have an 8 hour work day and a 40 hour work week*.)

***Library Aide:*** 8 hours/day, 40 hours/week. Same work days as for teachers.

***Food Service Workers:*** 6½ hours/day, 32½ hours/week. Same work days as for teachers.

***Special Ed/ Guidance Secretary:*** 8 hours/day, 40 hours/week. All student days plus ten (10) additional days

. . .

## 2002-03 SALARY SCHEDULE

| | *Start* | *After 3 Years Of Service* | *After 6 Years Of Service* |
|---|---|---|---|
| Secretary | 11.72 | 13.31 | 14.74 |
| Classroom Aide | 9.49 | 10.58 | 11.87 |
| Library Aide | 9.79 | 11.02 | 12.13 |
| Head Cook | 10.82 | 11.57 | 13.08 |
| Food Service Workers | 9.18 | 10.32 | 11.78 |
| Custodians | 12.32 | 13.91 | 14.37 |

## STIPULATIONS

During the course of the hearing, the parties agreed to the following stipulations:

1. The classification of Food Service Worker includes the classifications of Cook and Dishwasher which existed prior to the 2002-2003 contract.

2. With exception of the salary schedule, references to the Cook classification include the Head Cook position.

3. The 2003-2005 collective bargaining agreement has not been settled yet.

4. The issues of paid duty free lunch periods and paid 15 minute breaks have been tentatively resolved. If they are not settled, they will be reactivated.

5. The parties acknowledge a past practice of employing part-time Food Service Workers dating back to 1983 and agree that they were aware of that practice from that date forward.

6. The Union acknowledges that this grievance represents the first time that the Union has challenged the past practice relating to the employment of part-time food service workers.

7. The Union acknowledges that this grievance represents the first time that the Union has challenged the past practice relating to the prorating of years of service for advancement on the salary schedule.

8. The Union knew or should have known back to 1998 that the District was prorating years of service for part-time employees for salary schedule advancement.

## FACTS

In addition to the facts included in the Stipulations, the following facts are pertinent herein.

The District operates a public school system in Washburn, Wisconsin. The Association is the exclusive collective bargaining representative for the District's support staff employees. The Recognition Clause in the parties' collective bargaining agreement provides that the bargaining unit includes "all regular full-time and regular part-time non-certified employees. . ."

In a letter dated October 13, 2003, the Association alleged numerous violations of the collective bargaining agreement on behalf of employees in the District's food service program. The grievance was processed through the contractual grievance procedure and was ultimately appealed to arbitration.

At the hearing, the parties resolved all but two of the matters referenced in the October 13, 2003 letter grievance. The remainder of this decision will deal with just the two matters which were not resolved at hearing. One matter involves the daily work hours for three food service workers. At issue is whether the District is precluded from employing food service workers for less than 6½ hours per day. The other matter involves determining years of service for the advancement of part-time employees on the salary schedule. At issue is whether years of service can be prorated for part-time employees who work 4 hours or less per day for purposes of advancement on the salary schedule. Hereinafter, these two matters will be referenced respectively as the first issue and the second issue.

The following facts relate to the first issue (i.e. whether the District is precluded from employing food service workers for less than 6½ hours per day). The District currently has four employees working in its food service program – one head cook and three food service workers. It is the three food service workers that are involved herein. They all work 5½ hours per day or less. The nature of the District's food service program is that it requires a significant amount of work only for a short period of time, namely when lunch is actually being served to the students. Before and after that time, fewer hands are needed. As noted in Stipulation #5, the District has employed part-time food service workers since 1983. The Association has never attempted to negotiate contract language prohibiting the creation of part-time food service workers.

The following facts relate to the second issue (i.e. prorating years of service for salary schedule advancement). The District's bookkeeper, Winnie Plizka, testified that the District has prorated years of service for salary schedule advancement since the mid-1980's. She testified that she has done so since she became bookkeeper in 1992, and that her predecessor as bookkeeper, Shirley Thoen, also prorated years of service for salary schedule advancement. The food service worker whose status is at issue herein, Monique Mattson, is a part-time employee who works less than 4 hours per day. In the year 2000, when Mattson had been employed by the District for 3 years, she asked Bookeeper Plizka why she had not advanced to the "After 3 Years of Service" step on the salary schedule. Mattson testified that Bookkeeper Plizka told her that the District's practice was to prorate years of service, and since Mattson was always employed less than 4 hours per day, it would take her 6 years to advance to the second step on the schedule. When Mattson completed 5 years of employment with the District, she was given a 5-year service pin by the District.

Some of the contract language involved herein is 20 years old and goes back to the first labor agreement for the support staff employees. The Definitions and Benefits sections have not changed during that time period. Both those sections have language dealing with part-time employees. The portion of the Work Day and Work Week section dealing with cooks has not changed over the years, except that cooks are now called food service workers. The record indicates that when this language was included in the first labor agreement for the support staff employees, the District employed two cooks and they both worked 6½ hours a day. The Work Day and Work Week section does not list all support staff positions. For example, the District currently employs cleaners, tutors, a head cook, a secretary and a coordinator, and they are not referenced in the Work Day and Work Week section.

## POSITIONS OF THE PARTIES

### Association

The Association's position is that under the terms of the parties' collective bargaining agreement, the District cannot employ food service workers for less than 6½ hours per day or prorate years of service for purposes of advancement on the salary schedule. Since the District has been doing both of the foregoing (i.e. employing part-time food service workers and prorating years of service for purposes of advancement on the salary schedule), the Association believes the District has violated the collective bargaining agreement.

It makes the following arguments concerning the first issue (i.e. the District's employing food service workers for less than 6½ hours per day).

First, the Association responds to the assertion (which the Employer raised when the grievance was being processed), that the grievance was untimely filed. The Association avers that the grievance was timely filed, based on the continuing violation theory.

Second, the Association relies on the language contained in the School Year and Work Day and Work Day and Work Week provisions of the collective bargaining agreement. According to the Association, those provisions are clear and unambiguous in that they apply to all employees – both full-time and part-time. It notes that the School Year and Work Day provision says that "the work year and work day for each classification shall be noted on the Work Schedule." The Association avers that since no exceptions are listed, this language covers all the employees whose jobs are subsequently listed on the work schedule. Turning next to the Work Day and Work Week provision, the Association calls the arbitrator's attention to the fact that the job classification of custodial/maintenance has one work schedule listed for full-time employees and another work schedule listed for part-time employees. According to the Association, this language shows that the parties knew how to write contract language for part-time employees. Next, the Association notes that, in contrast, the job classification of food service worker makes no distinction between full-time and part-time status. In other words, it does not specify one work schedule for full-time employees and another for part-time employees. The Association argues that this language shows that the parties could have included language regarding part-time food service workers in that classification if they had wanted to do so, just like they did for the custodial/maintenance classification. The Association submits that since the language referencing food service workers does not specify one work schedule for full-time employees and another for part-time employees, the parties intended that all food service workers were to work the same number of hours, namely 6½ hours a day and 32½ hours in a week. As the Association sees it, the existing contract language simply does not allow food service workers to work less than 6½ hours a day. The Association maintains that the District's assertion that the hours listed in the Work Day and Work Week provision for food service workers apply only to full-time employees lacks a contractual basis.

Third, the Association contends that its interpretation of the Work Day and Work Week provision does not conflict with either the Seniority/Layoff/Recall provision or the Definitions provision. With regard to the former (i.e. the Seniority/Layoff/Recall provision), the Association acknowledges that that section allows the District to completely or partially layoff employees, such that a food service worker could be reduced to the point where the employee could work less than 6½ hours a day. Be that as it may, the Association asserts that the current hours of the food service workers (who all currently work less than 6½ hours per day), is not the result of a layoff. Additionally, the Association argues that the aforementioned language does not allow the District to partially lay off three food service workers at once; instead, the worker with the least seniority would be completely laid off and the worker with the second least seniority would have her hours reduced. The Association submits that if this layoff procedure was followed, there would only be one food service worker who worked less than 6½ hours per day. With regard to the latter section (i.e. the Definitions provision), the Association repeats the point just made that through a partial layoff, a full-time food service worker's hours could be reduced to the point where they would be working less than 6½ hours

per day, and thus would become a part-time employee. Additionally, the Association notes that the District employs a number of support staff employees whose classifications are not listed in the Work Day/Work Week section (i.e. cleaners, tutors, a coordinator, a secretary and a head cook). According to the Association, the District has the discretion to employ those employees as either full-time or part-time.

Fourth, building on the premise that the contract language is clear and unambiguous, the Association believes the arbitrator need not look at the parties' past practice to decide this case. As the Association sees it, the contract language just referenced should carry the day – not the past practice. In support thereof, the Association relies on the arbitral principle that a past practice should not trump clear and unambiguous contract language. It cites numerous arbitrators who have so held and asks this arbitrator to do likewise. In sum then, it is the Association's position that the Work Day and Work Week provision is clear and unambiguous, so the arbitrator is constrained to give effect to that language exactly as it is written without resorting to the parties' past practice.

As a remedy, the Association asks that the District be directed to henceforth employ all food service workers for 6½ hours per day, and that each food service worker receive retroactive wages as if they had worked 6½ hours per day from 15 days prior to the grievance being filed with the District until the District assigns them 6½ hours work per day.

The Association makes the following arguments concerning the second issue herein (i.e. prorating years of service for purposes of advancement on the salary schedule).

The Association contends that the question to be answered here is what the phrase "Years of Service" means when the salary schedule refers to the categories of "After 3 Years of Service" and "After 6 Years of Service". The Association asks rhetorically if the phrase "Years of Service" allows for prorating for part-time employees. The Association answers that rhetorical question in the negative.

The Association notes at the outset that the phrase "Years of Service" is not defined anywhere in the collective bargaining agreement.

Next, the Association avers that a year of seniority is not the same as a year of service. According to the Association, those phrases are not interchangeable. The Association argues that if the parties had intended that those phrases were to be used interchangeably, they would have stated such in the collective bargaining agreement, or better yet, they would not have used the term "years of service" in the salary schedule but would have instead used "years of seniority" or "years of credit" as the headings for the columns in the salary schedule.

Building on the premise that the phrase "Years of Service" is not contractually defined and does not mean the same as a year of seniority, the Association contends that the parties must have intended to use a common definition or common use of the term "years of service" since the parties were capable of providing their own definition. The Association cites Elkouri for the proposition that the party whose understanding is in accord with the ordinary meaning of the language is entitled to prevail.

The Association argues that the ordinary meaning of a "Year of Service" is a year in which any service is provided to the District. As the Association sees it, the term "service" does not require a certain number of hours of work per day. Thus, the Association maintains that any year that an employee provides any service to the District is a "Year of Service" for the purpose of salary schedule advancement. Applying that interpretation here, the Association submits that a part-time employee should get their first increment wage raise after 3 years (not 6 years as the District claims), and should get their second increment wage raise after 6 years (not 12 years as the District claims). To support that interpretation, the Association calls attention to the fact that after part-time employee Monique Mattson completed 5 years of employment with the District, the District gave her a 5 year service pin. The Association points out that in that situation, the District applied the commonly-accepted meaning of a year of service. According to the Association, that is also the meaning that should be applied by the arbitrator here.

As a remedy, the Association asks that the District be directed to henceforth pay Monique Mattson the wage rate for a food service worker with 6 years of service per the salary schedule contained in the collective bargaining agreement, and pay such wage rate for all hours worked from 15 days prior to the grievance being filed with the District. In addition, the Association asks that the District be directed to provide the number of years of service which would equal the number of years employed to any other employees who may have received half years of service and provide retro wages for all hours worked from 15 days prior to the grievance being filed if recalculated years of service require an increment increase.

**District**

The District's position is that it is not violating the collective bargaining agreement by employing food service workers for less than 6½ hours a day and by prorating years of service for purposes of advancement on the salary schedule.

With regard to the first matter (i.e. employing part-time food service workers), the District makes the following arguments.

First, the District relies on different contract language than the Association does. According to the District, the contract language relevant here is the Definitions section, the

Benefits section and the Seniority/Layoff/Recall section. The District points out that all these provisions contain language relating to part-time employees. Specifically, it notes that the Definition section has a section entitled "Part-Time Employee" wherein it provides that cooks (who are now referred to as food service workers) "who work less than full-time as stated above" (i.e. 6½ hours per day) "shall be considered part-time employees." Next, it notes that the Benefits section has two sections which refer to part-time employees: one section refers to those employees who work 4 to 6 ½ hours per day while another section refers to those employees who are scheduled to work less than half time. Next, the District notes that the Seniority/Layoff/Recall section provides that "seniority for part-time employees shall be prorated as follows: (4 Hours/Day or less = ½ year credit. Over 4 Hours/Day = full year credit)." The District avers that all this language relating to part-time employees is clear and unambiguous.

Second, as the District sees it, the question to be answered for the first issue herein is whether the District has the authority to employ part-time food service workers. Relying on the contract language just referenced, the District answers that question in the affirmative (meaning that the District is empowered to hire/employ part-time food service workers). First, it emphasizes that there is no language in the agreement which clearly prohibits the District from creating part-time food service workers. Second, it maintains that given the three contract provisions already noted which contemplate the existence of part-time employees, the contract should be read as a whole and effect given to all the aforementioned provisions. The District contends that the Association's reliance on the Work Day and Work Week provision is misplaced because that provision does no more than define the normal work schedule for the full-time (and one part-time) positions listed therein. The District submits that if the arbitrator were to accept the Association's interpretation (i.e. that the Work Day and Work Week section precludes the District from employing food service workers for less than 6½ hours per day), this would result in the portions of the Definitions and Benefits sections relating to part-time employees having no effect. The District also argues that if the Association's view that all food service workers must be employed for 6½ hours a day – no more, no less – were adopted by the arbitrator, this would void the layoff provision with respect to the food service workers. What the District is referring to is that the Seniority/Layoff/Recall provision allows for partial layoffs.

Next, if the arbitrator decides that the contract language is ambiguous and unclear and looks outside the contract for guidance in determining the appropriate interpretation of the language, the District believes that the parties' past practice and bargaining history support the District's right to create part-time food service workers.

The District notes that usually in a past practice case, the parties dispute the existence of a past practice. It submits that here, though, that is not the case, because in Stipulation No. 5, it was stipulated that:

> The parties acknowledge a past practice of employing part time Food Service Workers dating back to 1983 and agree that they were aware of that practice from that date forward.

Thus, in this case, the past practice is undisputed. Building on that premise, the District asserts that the practice is binding.

Next, the District addresses the question of whether this past practice is subject to repudiation. The District answers that question in the negative (meaning that the practice is not subject to repudiation) on the grounds that the practice clarifies ambiguous contract language.

The District also argues that the parties' bargaining history supports the District's position regarding the District's authority to hire part-time food service workers. To support that premise, it cites the testimony of Bookkeeper Plizka who testified that when she and another support staff employee negotiated the 1983 Guidelines, the 6.5 hour minimum for full-time employees contained in the Definitions provision was meant to protect the two existing full-time employees; not to prevent the District from hiring part-time employees in the future. The District avers that the Association offered no testimony refuting this testimony.

Finally, the District maintains that if the Association believed that having part-time food service workers violated the agreement, the burden was on the Association to challenge the creation of such positions and/or to negotiate contract language expressly prohibiting the creation of such positions. The District avers the Association did neither.

With regard to the second matter (i.e. prorating years of service for salary schedule advancement), the District makes the following arguments.

First, it acknowledges that the phrase "Years of Service" is not defined in the salary schedule portion of the collective bargaining agreement. That being so, the District looks elsewhere in the contract for a definition. According to the District, a definition/formula is found elsewhere in the agreement, namely in the Seniority/Layoff/Recall provision. The District avers that this provision contains a formula for calculating years of credit, to wit: that employees who work over 4 hours per day shall be granted a full year of credit whereas employees who work 4 hours or less per day shall be granted one-half year of credit. The District believes this formula is clear and unambiguous and that it applies not only to seniority, but also to advancement on the salary schedule.

Second, if the arbitrator decides that the contract language is ambiguous and unclear, and looks outside the contract for guidance in determining the appropriate interpretation of the language, the District believes that the parties' past practice supports the District's position herein.

Third, the District notes that usually in a past practice case, the parties dispute the existence of a past practice. It submits that here, though, that is not the case, because in Stipulation No. 8, it was stipulated that:

> The Union knew or should have known back to 1998 that the District was prorating years of service for part time employees for salary schedule advancement.

Thus, in this case, the past practice is undisputed. Building on that premise, the District asserts that the practice is binding.

Next, the District addresses the question of whether this past practice is subject to repudiation. The District answers that question in the negative (meaning that the practice is not subject to repudiation) on the grounds that the practice clarifies ambiguous contract language.

Finally, as the District sees it, the best evidence of the parties' intent is the parties' long-standing past practice (which is referenced in Stipulation No. 8). According to the District, through that practice, the parties have established a meaning of the term "Years of Service" as that term applies to the salary schedule (namely, that years of service are prorated for part-time employees who work less than 4 hours a day). The District acknowledges that the parties could have agreed to a different meaning or that the term could be interpreted differently. Be that as it may, it is the District's view that what matters here is how these parties have agreed to interpret the term (via their past practice).

In sum, the District believes that the Association has not established any contract violation. It therefore asks that the grievance be denied and dismissed.

## DISCUSSION

In their initial brief, the Association contends that the grievance was timely filed. If the District had raised timeliness as an issue herein, that claim would obviously have to be addressed prior to a consideration of the merits of the grievance. In this case, though, it is unnecessary to address the timeliness of the grievance for the following simple reason: while the District Administrator's answer to the grievance did raise timeliness as one of its defenses, that was the only time that the issue of timeliness was raised by the Employer. Specifically, it did not raise it as an issue at the hearing, or mention it in either of its briefs. I infer from that silence that the issue of timeliness has gone by the wayside, so to speak. Consequently, there is no timeliness claim which needs to be decided herein.

Having so found, the focus now turns to the merits of the grievance. There are two questions to be answered herein. The first is whether the District can contractually employ food service workers for less than 6½ hours per day. I answer that question in the affirmative, meaning that the District can employ food service workers for less than 6½ hours per day. The second question is whether the District can contractually prorate years of service for purposes of advancement on the salary schedule. I also answer that question in the affirmative, meaning that the District can prorate years of service for purposes of advancement on the salary schedule. My rationale follows.

I begin with a description of how this discussion is structured. The format will be the same for both of the issues just identified. Attention will be focused first on the contract language relied on by the parties. If that language does not resolve the matter, attention will be given to evidence external to the agreement. The evidence I am referring to is the parties' past practice.

**The First Issue**

In litigating their respective cases, the parties relied on a total of five different contract provisions. The Association relied on the School Year and Work Day provision and the Work Day and Work Week provision, while the District relied the Definitions section, the Benefits section and the Seniority/Layoff/Recall provision. These provisions will be addressed in the order just listed.

My discussion on the contract language starts with the following introductory comment. My interpretive task concerning all this language is to determine if its meaning is clear and unambiguous, or whether it is ambiguous. Language is considered clear and unambiguous when it is susceptible to but one plausible interpretation/meaning. Conversely, language is considered ambiguous when it is capable of being understood in two or more different senses, or where plausible arguments can be made for competing interpretations. If the language is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous though, my job is to then interpret it to discern what the parties intended it to mean, and then to apply that meaning to the facts. Attention is now turned to making that call.

I begin with the School Year and Work Day provision. That section, which is just one sentence long, says that "the work year and work day for each job classification" is found on page 14 of the Agreement. On its face, this provision simply tells the reader that "the work year and work day for each job classification" is found elsewhere in the Agreement, namely on page 14.

The Work Day and Work Week provision, which is found on page 14 of the Agreement, references over half a dozen job classifications. The classification pertinent here is that of food service worker. Immediately next to that classification is the following phrase: "6½ hours/day, 32½ hours/week." At issue here is what the phrase just quoted means. Specifically, does it require that all food service workers work 6½ hours a day? The Association contends that it does while the District disputes that assertion.

In support of its interpretation, the Association correctly notes that the job classification of custodial/maintenance has two work schedules listed; one for full-time employees and another for part-time employees. In contrast, the job classification of food service worker just has one work schedule listed. Thus, it does not specify one work schedule for full-time employees and another for part-time employees. Obviously, the parties could have included language referencing part-time employees in the food service worker classification if they had wanted to, just as they did for the custodial/maintenance classification. However, they did not. The Association submits that since the language referencing food service workers does not specify one work schedule for full-time employees and another for part-time employees, the parties intended that all food service workers were to work the same number of hours, namely 6½ hours a day.

I find that the Association's proposed interpretation of the Work Day and Work Week provision is certainly plausible because no exceptions are listed in the line dealing with the food service worker classification. Had the parties wanted to list a different work schedule for part-time food service workers (i.e. something other than 6½ hours a day), they certainly could have done so. They did not.

This finding does not end the discussion of the contract language, though. As has already been noted, there is other contract language that still has to be reviewed (namely, the language the District relies on). The focus now turns to that language.

All three of the contract provisions cited by the District – the Definitions section, the Benefits section and the Seniority/Layoff/Recall section - contemplate the existence of part-time employees in the District because all three contain language relating to part-time employees. The following shows this. The Definitions section has a section entitled "Part-Time Employee" wherein it provides that "all non-certified employees", one of which is cooks (which are now referred to as food service workers) "who work less than full-time as stated above" (wherein full-time is described as a minimum of 6½ hours a day) "shall be considered part-time employees." The Benefits section has two sections which refer to part-time employees: one section refers to those who work 4 to 6½ hours per day, while another section refers to those employees who are scheduled to work less than half-time. Finally, the Seniority/Layoff/Recall section provides that "seniority for part-time employees shall be prorated as follows: (4 Hours/Day or less = ½ year credit. Over 4 Hours/Day = full year credit."

In situations like this where there are multiple contract provisions involved, it is a standard principle of contract interpretation that the Agreement is to be read as a whole, and the contract provisions harmonized, if possible.

In this case, the contract provisions just referenced cannot be harmonized. Here's why. The three contract provisions just cited all specifically contemplate the existence of part-time employees while the Work Day and Work Week provision, at least on its face, does not contemplate the existence of part-time food service workers. If I apply the Work Day and Work Week section herein exactly as written and hold that the District is precluded from employing part-time food service workers, this finding would result in the portions of the Definitions and Benefits sections relating to part-time employees having no effect. Additionally, were I to hold that all food service workers could only be employed for 6½ hours a day and not any less than that, this finding would conflict with the part of the Seniority/Layoff/Recall provision that specifically allows for partial layoffs (of food service workers).

Given the foregoing, my predicament as an arbitrator is this: which of the aforementioned contract provision, or provisions, is controlling herein? It would be one thing if any of the contract provisions said that it took precedent over the others. If it did, I would hang my hat on it, so to speak, and find that provision(s) controlling herein instead of the other(s). However, I cannot do that because there is no such language in the Agreement.

In my view, the foregoing analysis shows that when the contract language is considered as a whole, it is open to more than one interpretation concerning whether the District can have part-time food service workers. Once again, if you just look at the Work Day and Work Week provision, the answer to that question is in the negative, while if you just look at the Definitions section, the Benefits section and the Seniority/Layoff Recall section, the answer to that question is in the affirmative. Given that conflict between those provisions, I find that the Agreement is ambiguous on that point.

Having found that the Agreement cannot be termed clear and unambiguous on whether it precludes the District from employing part-time food service workers, it is necessary for the undersigned to look beyond the Agreement itself to determine what the parties intended concerning part-time food service workers.

In litigating their case, the District relied on past practice and bargaining history to buttress their position that the Agreement gives it the right to employ part-time food service workers. Past practice and bargaining history are forms of evidence which are commonly used to help interpret ambiguous contract language. The rationale underlying their use is that they can yield reliable evidence of what ambiguous language means. Thus, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of its meaning.

The focus now turns to the parties' past practice. It is generally accepted by arbitrators that for a practice to be considered indicative of the parties' mutual intent and be binding, the conduct must be clear and consistent, of long duration and accepted by both sides. The District asserts that the record evidence meets all of these criteria and, thus, is entitled to be given effect herein.

Usually in a past practice case, one side disputes the existence of a practice. However, that is not the case here. In this case, the parties stipulated that:

> The parties acknowledge a past practice of employing part-time Food Service Workers dating back to 1983 and agree that they were aware of that practice from that date forward.

Obviously, based on that stipulation, the existence of a practice here is undisputed.

Given the existence of this practice of the District employing part-time food service workers, the next question is whether this practice conflicts with the Agreement. I find it does not, because there is no language in the Agreement which prohibits or precludes the District from employing part-time food service workers.

This practice is dispositive of the outcome herein because it establishes how the Agreement has come to be interpreted by the parties themselves. The practice clarifies that the parties intended their Agreement to mean that the District can employ part-time food service workers. Application of that practice here means that the District's employment of part-time food service workers does not violate the Agreement.

In light of that finding, it is unnecessary to address the parties' bargaining history on this point. As a result, no comments are made concerning same.

**The Second Issue**

The parties agree that the contract language applicable to the second issue is found in the salary schedule. That schedule contains three columns: a "Start" rate, an "After 3 Years of Service" rate, and an "After 6 Years of Service" rate. When an employee moves from one column to another, they get a salary bump. The phrase "Years of Service" is not defined anywhere in the Agreement. At issue here is whether that phrase allows for prorating for part-time employees. The Association asserts it does not while the District asserts that it does.

The Association argues that since the phrase "Years of Service" is not contractually defined, the parties must have intended the common meaning to apply, since the parties were capable of providing their own definition but did not do so. According to the Association, the ordinary meaning of a year of service is a year in which any service is provided to the District.

That interpretation is certainly plausible, since it is the meaning the District itself applied when it gave the grievant in this case, part-time employee Monique Mattson, a 5-year service pin after she worked for the District, part-time, for 5 years. If that interpretation were applied here, any year that an employee provides any service whatsoever to the District would be a "year of service" for purposes of salary advancement. Under that interpretation, the District could not prorate years of service for salary schedule advancement for part-time employees.

However, that interpretation is not the only plausible interpretation of the phrase. It is also possible that the parties did not mutually intend that any service whatsoever qualifies as a "year of service" for purposes of salary schedule advancement. Instead, the service that qualified as a"year of service" would be based on the employee's work status (i.e. whether they were full-time or part-time). Under this interpretation, years of service would be prorated for part-time employees.

In my view, the foregoing discussion establishes that the phrase "years of service" which is found on the salary schedule is open to more than one interpretation. On the one hand, it could mean that there is no prorating for part-time employees. On the other hand, it could mean that there is prorating for part-time employees. That being so, it is held that the language is ambiguous on that point.

Having just found that the Agreement cannot be termed clear and unambiguous on whether the phrase "years of service" allows for prorating for part-time employees, it is necessary for the undersigned to look beyond the Agreement itself to determine what the parties intended that phrase to mean.

In litigating their case, the District relied on past practice to buttress their position that the Agreement gives it the right to prorate years of service for purposes of salary schedule advancement. The focus now turns to an examination of the parties' practice.

Usually in a past practice case, one side disputes the existence of a practice. Here, though, that is not the case. In this case, the parties stipulated that:

> The Union knew or should have known back to 1998 that the District was prorating years of service for part-time employees for salary schedule advancement.

Obviously, based on that stipulation, the existence of a practice here is undisputed.

Given the existence of this practice of prorating years of service for part-time employees for salary schedule advancement, the next question is whether this practice conflicts

with the Agreement. I find it does not for the following reasons. First, there is no language in the Agreement which prohibits or precludes the District from prorating years of service for part-time employees for salary schedule advancement. Second, another section of the contract contains a formula for calculating years of (seniority) credit. This formula, which is found in the Seniority/Layoff/Recall provision, provides that employees who work over 4 hours per day get a full year of credit, whereas employees who work 4 hours or less per day get a half year of credit. Under this formula, seniority is prorated for part-time employees. While this section only applies on its face to seniority, it is logical that since the parties decided to prorate seniority for part-time employees, they must also have intended to prorate years of service for salary schedule advancement for part-time employees.

This practice is dispositive of the outcome herein because it establishes how the Agreement has come to be interpreted by the parties themselves. The practice clarifies that the parties intended their Agreement to mean that the District prorates "Years of Service" for salary schedule advancement for part-time employees who work less than 4 hours a day. Application of that practice here means that the District's prorating of years of service for purposes of advancement on the salary schedule for part-time employees who work less than 4 hours a day does not violate the Agreement.

In light of the above, it is my

## AWARD

1. That the District has not violated the collective bargaining agreement by employing part-time food service workers (i.e. food service workers who are scheduled to work less than 6½ hours per day); and

2. That the District has not violated the collective bargaining agreement by prorating years of service for purposes of advancement on the wage schedule. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 2nd day of September, 2004.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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