

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WASHBURN SCHOOL DISTRICT

and

CHEQUAMEGON UNITED TEACHERS

Case 58
No. 63897
MA-12741

(Nemec Grievance)

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, 15614 Windrose Lane, #301A, P.O. Box 988, Hayward, Wisconsin, appearing on behalf of Chequamegon United Teachers.

Mr. Christopher R. Bloom, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of Washburn School District.

ARBITRATION AWARD

Chequamegon United Teachers, hereinafter "Union," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Washburn School District, hereinafter "District," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the Undersigned on November 22, 2004, in Washburn, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on January 3, 2005, at which time the record was closed. Based upon the evidence and arguments of the parties, the Undersigned makes and issues the following Award.

ISSUES

The parties agreed at hearing that there were no procedural issues in dispute and framed the substantive issues as follows:

Did the District violate the collective bargaining agreement when Walter Nemec performed some duties during the Summer of 2004? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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MANAGEMENT AND ASSOCIATION RIGHTS

...

1. To direct all operations of the School District.

...

6. To change existing methods or facilities.

...

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

2003-04 SALARY SCHEDULE

	Start	After 3 Years Of Service	After 6 Years Of Service
*** Custodians	12.69	14.33	14.80
Cleaner	9.29	10.38	11.47

...

*** Custodians hired prior to July 1, 2000, will not be reclassified or transferred to a cleaner position unless a custodian applies for such a position.

When an employee is assigned to fill in for another bargaining unit employee whose position is paid at a higher wage rate and such assignment continues for at least five (5) consecutive work days, the employee shall be paid at the lowest step of the wage rates for the higher paying position which generates a wage rate increase retroactive to the first day of the assignment, with the exception that the cleaners shall be paid the start rate for the custodian position when substituting for a custodian regardless of the number of days of substitution.

BACKGROUND AND FACTS

The Grievant, Walter Nemec, is employed by the District in a full-time Custodian/Cleaner Person (hereinafter referred to as “Cleaner”) position. The Grievant has held this position for four and one-half years. The Grievant’s summer work hours are from 6:00 a.m. to 2:30 p.m. The Grievant’s supervisor is Brad Dryer, Director of Buildings and Grounds. In addition to the Grievant, the District’s custodial/maintenance/cleaning department includes three Custodians, Michael Moore, Lonny Gustofson, Senior, and another Cleaner, Lori Grande.

The District’s custodial/maintenance/cleaning staff perform a thorough cleaning of all District facilities during the summer months. This includes removing teacher and student desks, filing cabinets, tables, chairs, bookcases, and any other movable object from all classrooms; and cleaning the floor, walls, windows, boards and lights. The District hires college students to assist with this cleaning project.

The job description, in relevant part, for the Custodian/Cleaner Person reads as follows:

. . .

JOB GOAL: To provide students with a safe, attractive, comfortable, clean and efficient place in which to learn, socialize and develop.

PERFORMANCE RESPONSIBILITIES:

1. Is a person in charge of the custodial services for his/her assigned portion of the building.
2. Keeps assigned portion of building neat and clean at all times.
3. Sweeps, vacuums or mops assigned classrooms daily. Dusts furniture and tops of lockers daily.
4. Sweep corridors after school each day and damp mop daily.
5. Scrubs, hoses down and disinfects restroom floors and cleans all sanitary fixtures and drinking fountains daily.

6. Wash all windows on both the inside and outside at least once each year and more frequently if necessary.
7. Keeps all floors in a clean and attractive condition.
8. Empty all waste baskets daily and periodically clean waste baskets as needed. Complies with local laws and procedures for the storage and disposal of trash, rubbish and waste.
9. Keep custodial closets and storage areas neat and clean.
10. Assumes responsibility for the closing of building each night and for determining, before leaving, that all doors and windows are secured and all lights, except those left on for safety reasons, are turned off.
11. Remains on the school premises during work hours and during non-school hours when the use of the building has been authorized and his/her attendance required by the principal.
12. Reports major repairs needed promptly to head maintenance person.
13. Reports immediately to the principal any damage to school property.
14. Performs other duties as assigned by the building principal.

...

The job description, in relevant part, for the Custodian position is as follows:

...

JOB GOAL: To maintain the schools physical facilities in a condition of operating excellence, cleanliness and safety. The buildings maintenance schedule shall be designed to all full use of the school facilities during the school year and as needed during the summer months.

JOB RESPONSIBILITIES:

(Some duties assigned specific personnel vary between buildings.)

The assistant custodian shall:

1. Empty all waste baskets daily and clean as needed.
2. Clean walls and other surfaces as needed.
3. Clean kitchen area daily.
4. Lower flag after dismissal of students in the afternoon.
5. Clean and disinfect all locker rooms daily.
6. Clean toilet floors, sanitary fixtures and drinking fountains daily. They shall be scrubbed and disinfected weekly.

7. Clean corridors after school each day.
8. Sweep/vacuum classrooms daily and dust furniture as needed.
9. Keep all floors clean, attractive and well preserved.
10. Wash and dry towels and other district laundry.
11. Keep custodial closets and storage areas neat and clean.
12. Close the building each night and determine before leaving that all doors and windows are secured and that all lights, except those left on for safety reasons, are turned off.
13. Maintain records as required.
14. Make Minor building repairs.
15. Perform the following tasks on an ongoing basis:
 - a. Report any damage to school property immediately to the head custodian, principal, district administrator.
 - b. Move furniture or equipment within buildings as required for various activities and as directed by the principal. Also, assist with set up and take down for school events.
16. Perform the following tasks on a semi/yearly basis:
 - a. Clean and refinish floors.
 - b. Wash all exit door windows (inside and outside) at least twice each year, and more frequently if necessary.
 - c. Paint as needed.
17. Perform other duties as assigned by the district administrator.

On June 10, 2004, Dryer met with the custodial/maintenance/cleaning department and informed them that Michael Moore would be responsible for coordinating the summer cleaning project. Moore, a custodian with 18 years District experience, had prepared the summer cleaning schedule in the past and was involved in coordinating the summer cleaning project. Dryer informed the staff that any questions or concerns should be directed to Moore. Moore did not receive, review or authorize time sheets.

The Grievant submitted two timesheets for the pay period ending June 25, 2004. In addition to his timesheet for his Cleaner duties, he submitted a timesheet requesting eight hours of Custodian wages for "maintenance" work. Dryer made the decision to pay the Grievant for the eight hours, but also met with the Grievant on or about June 23 to discuss the custodian timesheet. Dryer indicated to the Grievant that moving furniture was a "gray area" in terms of whether it was a Cleaner or Custodian responsibility and that the District needed flexibility.

For the pay period ending July 8, the Grievant submitted two timesheets. He requested Custodian wages for 16 ½ hours. The District did not pay the Grievant for the 16 ½ hours. A grievance was filed and denied by the District on July 22, 2004 where in the District stated that "Mr. Nemecek was specifically informed on June 23, 2004, by Mr. Dryer that he must receive prior permission before performing duties outside his cleaner classification. Mr. Dryer did not approve hours worked outside of the cleaner classification during this time period. Therefore, your grievance is denied." Exhibit 6.

The Grievant again submitted two timesheets for the pay period ending July 23 and requested 25 hours at the Custodian wage rate. The District did not pay the Grievant for the 25 hours and another grievance was filed and denied.

On or about August 9, Dryer verbally told the Grievant that Moore was no longer the lead man, that Moore would no longer assign him work and that the Grievant was to stop performing any custodian/maintenance functions. Dryer documented his conversation with the Grievant by adding the second paragraph (underlined below) to a previously drafted memorandum:

Date: July 16, 2004

To: Walter Nemec

From: Brad Dryer

Subject:

Walter, on June 23, 2004 you were specifically told by me that I needed to be informed of any duties that you were performing that you considered to be outside of your "cleaner" responsibilities. I made it very clear that I needed to be notified so as to have the ability to direct the available employees in a manner that would allow us to avoid any work being preformed [sic] by you as falling into the category of "custodial" responsibilities.

Walter, the above letter confirming the conversation you and I had in reference to your request for additional compensation for work you are performing that you consider to be maintenance. I am once again today (Aug 9, 2004) reiterating the above. This is the third time we have had this conversation. (June 23, July 8, Aug 9-2004).

Although this memorandum was originally dated July 16, the Grievant did not receive it until August 12, 2004, after which he responded as follows:

August 16, 2004

To: Brad Dryer – Supervisor Building and Grounds

From: Walt Nemec – cleaner

RE: Letter from Brad Dryer dated July 16, 2004. Grievances filed for not paying proper wage rate when assigned duties outside of work classification.

- 1.) I received your letter (Brad Dryer) dated July 16, 2004 when you hand delivered it to me on August 12, 2004.
- 2.) Based on the content of this letter I question your veracity.
- 3.) You are well aware of the circumstances regarding my grievances filed. I would be more specific, but because this is going to arbitration it makes no sense to go into detail at this time.
- 4.) On August 09, 2004, you told me that Mark Moore was no longer lead man and that I no longer have to follow his orders. You stated that he was actually no longer lead man as of July 29, 2004. However you informed me of this and told me not to do any more maintenance or custodial duties on August 9, 2004.
- 5.) On August 9 at 10:00 you informed me of this change and by that time I had put in 4 hours maintenance/custodial in [sic]. I stopped doing all duties outside my cleaner position after talking with you shortly after 10:00am.

...

Michael Moore testified that he was assigned lead man responsibilities for the summer cleaning project by Dryer. Moore understood that he was responsible for creating the work plan for two school buildings, assigning work on a daily basis, inspecting the work performed to determine whether it met "standards," responding to worker questions and concerns and informing Dryer weekly as to the status. Moore directed the Grievant to move furniture, replace vents and run the floor extractor. Moore testified that each week he asked Dryer if the Grievant should continue to be assigned these duties and Dryer responded affirmatively until Moore was told otherwise. Moore was informed on August 9, 2004, that he as no longer the lead man. Moore is the Union president.

Lonny Gustafson, Senior, is a 14 ½ year employee with the District currently assigned to a Custodian position. Gustofson testified that Dryer stated at the June 9 meeting that Moore was "in charge." Gustofson stated that in prior years the Building and Grounds Director assigned work during the summer months, but that in 2004 Moore performed this function. The Grievant and Gustofson worked together on uni-vents and ceiling tiles in November and December of 2003 and the Grievant was paid Custodian wages.

Laura Grande has been employed by the District for one year in the capacity of Cleaner. Grande worked from the end of 2003-04 school year through the end of June, 2004, and received her work assignments from Moore. Grande has not cleaned air vents. Grande assists in setting up for school events.

Additional facts, as relevant, will be included in the DISCUSSION section.

POSITIONS OF THE PARTIES

The Union

The Union argues that the Grievant is entitled to Custodian wages for the 87.5 hours that the Grievant performed custodial duties during the Summer months of 2004.

The Grievant was directed to perform the custodial work by Moore. Moore was given the responsibility to direct the regular staff and temporary summer staff and perform lead man responsibilities on June 10, 2004. Witnesses Lonny Gustafson, Laura Grande and the Grievant testified that Moore gave them their daily work assignments. Gustofson testified that he was told by Dryer that Moore was in charge during the summer.

The District never informed the Grievant that he was to refrain from performing custodial/maintenance duties. Dryer spoke to the Grievant on June 23, July 8 and July 22 regarding the Grievant's performance of custodial/maintenance duties, but at no time during any of these conversations was the Grievant told to stop doing custodial/maintenance functions. The Grievant specifically asked Dryer during two of those meetings whether he should stop doing the custodial/maintenance work and on both occasions was told to continue to until directed otherwise. It wasn't until August 12 that the Grievant received a memorandum from Dryer instructing him to no longer do custodial duties.

In anticipation of the District arguing that the work performed by the Grievant was not custodial/maintenance duties, the Union points out that the District job descriptions and the parties' bargaining history support the Union's position. Custodians do maintenance and cleaners do not. The custodial duties that the Grievant performed during the 2004 summer – air duct work, moving furniture out of rooms and putting it back , and operating the carpet extractor – are all maintenance type functions and are completed annually. Four witnesses, Eichman, Dryer, Nemec and Moore, all testified that these job responsibilities are custodial/maintenance functions.

With regard to bargaining history, the Cleaner position was created by the District and added to the unit during the 2000-2002 labor agreement. When the District proposed the position, the Union was told that the Custodial/Cleaner classification duties would be “non maintenance and just normal cleaning” and as a result, the Union sought wages consistent with those functions. Union Br. p. 10. The three functions that the Grievant performed during the Summer of 2004 were not “normal cleaning” and therefore conflict with the District's position at the bargaining table.

The Union and the District have a practice of paying Cleaners for performing maintenance duties. The Grievant received additional compensation during prior summers when he moved furniture, boxes and equipment out of rooms and then back into the rooms. He received custodial wages for work performed in November and December, 2003, and for the pay period June 10 through June 22, 2004. On all of these occasions, the Grievant worked out of his classification as Cleaner and was paid as a Custodian since he was performing custodial duties.

For all of the above reasons, the Union request that the grievance be upheld and that the Grievant received \$186.38 which represents the difference between cleaner wages and custodial wages for the 87.5 hours that the Grievant worked as a custodian.

The District

The management rights clause of the labor agreement provides the District with the authority to determine the “methods, means and personnel by which operations in the District are to be conducted.” The only limitation to this right is that a Cleaner shall be paid at the custodian rate of pay when the clear is “substituting” for the custodian. The parties agree that the Grievant was not substituting for a Custodian during the Summer of 2004 and thus, the District is not contractually obligated to pay the Grievant custodial wages when he performed the alleged custodial duties.

The District challenges the Grievant’s characterization of the work he performed as custodial. First, there is no credible record of what it was that the Grievant actually did since even he was unable to decipher the notations he made on his time sheets and his recollection and testimony were vague. Second, nowhere in the job description is there a prohibition against assigning a cleaner to perform carpet extractor duties, changing of air filters or moving furniture out of classrooms. And since the job description affirmatively allows the building principal to assign other tasks, these tasks are clearly within the purview of the cleaner job description.

The parties’ past practice does not entitle the Grievant to compensation for allegedly performing custodial duties. The District acknowledges that it paid the Grievant custodial wages in November and December of 2003, but in both of these instances the parties agreed in advance that the Grievant would receive custodial wages. The Grievant was told by Dryer on numerous occasions that he needed to have prior approval before he performed the allegedly custodial work in order to receive custodial wages. The Grievant did not obtain this approval and as a result, he was not paid Custodian wages.

The Union has asserted that Moore was the Grievant’s supervisor, that Moore had directed the Grievant to perform the allegedly custodial tasks, and thus the Grievant was acting consistent with instruction. The Union is in error. Moore was the not the Grievant’s

supervisor. As has occurred for a number of years, Moore was given limited authority to act as the “primary contact” for all custodial and maintenance related issues in the absence of the Building and Grounds supervisor. Dryer signed the Grievant’s timesheet and was the Grievant’s supervisor.

Given that the Grievant’s request for additional compensation is contrary to the contract language, the District’s instruction and the parties’ prior course of conduct, the District asserts the grievance should be dismissed.

DISCUSSION

The Union asserts that the Grievant performed three job responsibilities during the Summer of 2004 that are custodial and not cleaner responsibilities. The job descriptions for these positions have not been negotiated, thus is presumed that the management rights clause grants management the authority to assign job duties in the absence of express language limiting otherwise. I find that such limiting language exists. The Salary Schedule of the parties’ labor agreement specifically provides that Cleaners are entitled to the Custodian starting wage rate if they are substituting for a Custodian, regardless of the amount of time that the Cleaner is working in that capacity. As a result, the question to be answered is whether the Grievant was substituting for a Custodian when he performed some or all of the 87 ½ hours in question. To answer this question, it is necessary to determine 1) whether the duties that the Grievant performed were custodial rather than cleaner job responsibilities; and 2) whether the Grievant was substituting.

The three functions that the Grievant performed which are alleged to be custodial include: 1) cleaning uni-vents; 2) operating the floor extractor; and 3) moving furniture. Looking first to cleaning uni-vents, this job responsibility is not identified in either the job description of the Cleaner or of the Custodian. The Grievant and Dryer testified that the Grievant and Custodian Lonnie Gustafson cleaned uni-vents at the elementary school in November and December of 2003 and the Grievant received custodian wages for the time. This was the only time prior to the Summer that the Grievant cleaned uni-vent. Lori Grande, the District’s only other Cleaner, testified that she has never cleaned uni-vents. Given that cleaning of uni-vents has historically been viewed as custodian work and, has been performed by custodians, I am persuaded it is custodian work.

With regard to use of the floor extractor, the Custodian job description specifies that the custodian will “clean and refinish floors” on a semi/yearly basis. There is no such entry in the Cleaner job description. Although the record is somewhat limited in terms of what the Grievant was actually doing when he was running the floor extractor, it appears to be a function that does not occur on a daily or weekly basis and therefore would be encompassed within the job responsibility to “clean and refinish floors.” The Grievant testified, without challenge, that he had operated the floor extractor on one occasion in the past and had received compensatory time for doing so.

As to the moving of furniture, the Custodian job description states that the custodian will “move furniture or equipment within buildings as required for various activities and as directed by the principal. Also, assist with set up and take down for school events.” Exhibit 15. The Cleaner job description does not contain a similar job responsibility and the Grievant testified that in prior years he earned compensatory time when he moved furniture during the summer. Based on the District-created job descriptions and the fact that the District has recognized the moving of furniture as a custodial duty in the past, I conclude that the Grievant was performing custodial duties during the summer of 2004 when he moved furniture and related classroom items.¹

Having found that the three duties are custodial, the next question to address is whether the Grievant was substituting when he performed the three responsibilities. The District maintains that the Grievant was not substituting because he did not have permission and/or authorization to do the custodial duties and as a result, is not entitled to Custodian wages. The District is in error; the Grievant was fulfilling the responsibilities of a Custodian pursuant a validly issued District directive.

The District argues that the Grievant was informed by Dryer on June 23 that he was not to complete any tasks the he believed to be custodial without first consulting with Dryer. I do not find that such a directive was communicated to the Grievant until August 9, 2004. First and foremost, the record is void of any evidence indicating that Dryer informed Moore of the directive. Given that Moore was the individual assigning work to the Grievant, it is inconceivable that he would not have been informed had such a directive been issued. Moreover, Moore testified that he asked Dryer weekly whether he should continue to assign custodial duties to the Grievant and was told to maintain the *status quo*. Although I do not believe that each and every week Moore inquired of Dryer how he should schedule the Grievant, the District did not challenge Moore’s testimony.

Second, in the context of the June 23 conversation, Dryer stated that he and the Grievant discussed the “gray” areas as it related to certain duties. This is not a directive to refrain from doing specific work. Dryer and the Grievant left the June 23 conversation with different understandings. Dryer understood that he would be consulted before the Grievant performed certain work and the Grievant understood that Dryer would be speaking with Eichman to gain permission to pay the Grievant custodial wages. A definitive directive was not issued.

This changed on or about July 22 when District Administrator Eichman responded to the first grievance that was filed. Eichman informed the Grievant’s representative, Barry Delaney of Northern Tier UniServ, that permission was required prior to performing any

¹ When Dryer spoke to the Grievant regarding the moving functions, he indicated that they were a “gray area” and thus it was difficult for the District to determine whether Custodian or Cleaner wages were appropriate. I do not find this to be a gray area. Rather, it would appear that the District has made it a “gray area” by assigning moving responsibilities to Cleaners when it is a Custodian job function.

Custodian job duties. Acknowledging that Delaney needed to receive Eichman's letter and needed time to inform the Grievant of the correspondence, which included the imposition of a pre-requisite to the Grievant's continued performance of custodial duties, there is no question that as of July 28, the Grievant was aware that the District expected him to obtain Dryer's permission before performing any duties outside of his Cleaner position. The Grievant failed to obtain Dryer's permission and as such, all hours worked following that date were without permission or direction from the District and therefore, are not compensable at the Custodian wage rate.

AWARD

1. Yes, the District violated the collective bargaining agreement when Walter Nemec performed some duties during the Summer of 2004.

2. The appropriate remedy is for the District pay the Grievant the difference between the hourly rate of a Custodian/Cleaner Person and a Custodian position for all hours worked prior to July 28, 2004 performing Custodian job duties.

Dated in Rhinelander, Wisconsin, this 28th day of April, 2005.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator