BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

WESTBY AREA SCHOOL DISTRICT

Case 32
No. 63904
MA-12745

Appearances:

Timothy Hall, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., appearing on behalf of the Union.

Shana Lewis, Attorney, Lathrop & Clark, appearing on behalf of the District.

ARBITRATION AWARD

Teamsters Union Local No. 695 and the Westby Area School District are parties to a collective bargaining agreement which provides 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. Hearing on the matter was held on November 9, 2004 in Westby, Wisconsin, at which time the parties presented such testimony, exhibits and other evidence as was relevant to the grievance. The hearing was transcribed. The parties filed briefs and the District filed a reply brief, whereupon the record was closed on January 26, 2005. Having considered the evidence, the arguments of the parties, the applicable provisions of the contract, and the record as a whole, the Arbitrator makes the following Award.

ISSUE(S)

The parties were unable to stipulate to the issue(s) to be decided in this case. The Union frames the issue as follows:

> Did the School District violate the collective bargaining agreement when it transferred certain extracurricular and non-certified weight room supervisor

work duties from bargaining unit members to members of a different bargaining unit and/or non-staff individuals? If so, what is the remedy?

The District frames the issues as follows:

1. Did the District violate the Support Staff Agreement when it did not hire Deb Easterday for the position of Varsity Wrestling Cheerleading Advisor for the 2003-2004 school year?

    a. Is this grievance substantively arbitrable in that it raises issues unrelated to Ms. Easterday's bargaining unit duties and because grievances are limited to alleged violations of the Support Staff Agreement?

    b. If so, did the Teamsters Union satisfy its burden of proof and, if so, what is the remedy?

2. Did the District violate the Support Staff Agreement when it did not hire Deb Easterday and other support staff employees for the vacant Extracurricular Activities positions for the 2004-2005 school year?

    a. Is this grievance substantively arbitrable in that it raises issues unrelated to Ms. Easterday's bargaining unit duties and because the grievances are limited to alleged violations of the Support Staff Agreement?

    b. If so, did the Teamsters Union satisfy its burden of proof, and, if so, what is the remedy?

3. Did the District violate the Support Staff Agreement when it did not hire Fred Mehlum and other support staff employees to serve in Extra Duty positions during the 2004-2005 school year?

    a. Is this grievance substantively arbitrable in that it raises issues unrelated to Mr. Mehlum's bargaining unit duties and because grievances are limited to alleged violations of the Support Staff Agreement?

    b. If so, did the Teamsters Union satisfy its burden of proof, and, if so, what is the remedy?

4. Did the District violate the Support Staff Agreement when it did not hire Danicka Wehling or another support staff employee to supervise the Weight Room during the 2004-2005 school year?

a. Is this grievance substantively arbitrable in that it raises issues unrelated to any bargaining unit duties and because grievances are limited to alleged violations of the Support Staff Agreement?

b. If so, did the Teamsters Union satisfy its burden of proof, and, if so, what is the remedy?

Since the parties were unable to agree on the issue(s), the undersigned has framed it. Based on a review of the record, the opening statements at hearing and the briefs, the undersigned has framed the issue as follows:

Did the District's actions involved herein violate the support staff collective bargaining agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2003-2006 collective bargaining agreement contains the following pertinent provisions:

ARTICLE II. RECOGNITION

Recognized Bargaining Unit. The Board recognizes the Union as the exclusive and sole negotiation representative for all regular full-time and regular part-time teacher aids, custodians and custodian/light maintenance, maintenance, secretaries, food service employees, bus mechanics, and non-certified weight room supervisor, employed by the Westby Area School District (hereinafter referred to as the "District"), excluding the Assistant Bookkeeper(s), persons hired as substitutes for included positions, seasonal employees, Green Thumb employees, bus drivers, temporary employees, and supervisory, managerial, confidential and professional employees.

ARTICLE III. MANAGEMENT RIGHTS

General. The Board on its own behalf and on behalf of the electors of the District hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the Laws and Constitution of the States of Wisconsin and the United States.

Board Rights. Without limiting the generality of the foregoing, the Board's rights shall include:

1. The management and operation of the District and the direction and arrangement of all the working forces and equipment in the system, including the right to discipline and discharge.

. . .

4. The determination of the management, supervisory or administrative organization of each school or facility in the system and the selection of employees for promotion to supervisor, management, or administrative positions.

. . .

8. The supervision, evaluation, classification, assignment, transfer and allocation of all working force in the system, including the hiring of all employees, determination of their qualifications and the conditions for their continued employment.

9. The creation, combination or modification of any position deemed advisable by the Board.

10. The determination of the size of the working force and the determination of policies affecting the selection of employees, including the right to relieve employees from the duties because of lack of work.

. . .

12. The scheduling and assignment of all work activities and workloads, including overtime.

. . .

The foregoing enumeration of the functions of the Board shall not be considered to exclude other functions of the Board not specifically set forth; the Board retains all functions and rights to act not specifically nullified by this Agreement.

. . .

ARTICLE VII. COMPENSATION AND SALARY PROVISIONS

Overtime. Employees who are required to work more than forty (40) hours per week by their immediate supervisor will be paid for overtime hours at one and one-half (1-1/2) times their regular hourly rate. . .

. . .

ARTICLE XV. SENIORITY, LAYOFF AND RECALL

Layoff Clause

A. Layoff.

. . .

3. In the event the Board decides to layoff or reduce in hours a post-probationary employee, the Board shall give a thirty (30) calendar day notice.

B. Recall.

1. Laid off post-probationary employees shall retain seniority rights for a period of sixteen (16) months from the date of layoff.

. . .

C. Classification for purposes of this Contract are: teacher aides, food service employees, custodians and custodian/light maintenance, maintenance, secretaries, bus mechanic, and non-certified weight room supervisor.

ARTICLE XVI. REASSIGNMENT/TRANSFER

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B. Vacancy. When a vacancy(s) occurs, the vacancy shall be posted on a bulletin board in each building as designated by the Building Principal for five (5) work days. Existing positions which are increased from half-time or less to full-time will be considered a vacancy for the purposes of this provision and shall be posted as any other vacancy. The posting of the vacancy shall specify the job classification. A copy of such posting shall also be sent to the Union Stewards and Bargaining Representative. The vacancy(s) shall be first offered to qualified employees within the job classification unless special skills and/or certifications are required. Seniority shall prevail.

C. In the event no employee within the job classification fills the vacancy, of the employees applying who are qualified and able to perform the work, the District shall select the most senior applicant.

. . .

FACTS

The District operates a public school system in Westby, Wisconsin. The District's employees can be categorized into different groups. Three of those groups are relevant to this case: 1) the professional teaching staff; 2) the support staff; and 3) individuals known as non-staff persons who are not employed by the District in any capacity other than in an Extracurricular Activities position or an Extra-Duty assignment. The employees in the first category (i.e. the professional teaching staff) are represented by the Westby Area Education Association which has negotiated a collective bargaining agreement covering wages, hours and conditions of employment on their behalf. The employees in the second category (i.e. the support staff) are represented by Teamsters Local 695 which has negotiated a collective bargaining agreement covering wages, hours and conditions of employment on their behalf. The employees in the third category (i.e. the non-staff persons) are not represented by a labor organization.

Broadly speaking, this case involves the assignment of work. The Teamsters contend that certain work should have been awarded to current or former support staff employees Debra Easterday, Sue Anderson, Fred Mehlum and Danicka Wehling. Easterday and Anderson wanted to be cheerleader advisors, Mehlum wanted to be the scoreboard operator and Wehling wanted to be the weight room supervisor. They were not awarded that work and hence, this case arose. In this section, the facts have been broken down into three categories which have been denominated as Extracurricular Activities, Extra Duty assignments and weight room supervisor. These categories will be addressed in the order just listed.

A. Extracurricular Activities

The District employs individuals in Extracurricular Activities positions, which include both athletic and non-athletic advising positions, such as yearbook advisors, coaches, school play advisors, and cheerleading advisors. All these positions are enumerated in the collective bargaining agreement covering the professional teaching staff. When the District experiences a vacancy in an Extracurricular Activities position, it announces the vacancy by distributing and posting a document entitled "Westby Area School District Notice of Professional Staff Position Vacancy." The posting is sent to a WAEA representative, and put up in the teacher lounges of each building. The District then gives its teachers the opportunity to apply for the position. The teachers who apply complete and submit an application using the District's required form. If there are multiple teacher-applicants, the District conducts an interview process as described in the Coaching Vacancy Plan. The teacher-applicant who demonstrates that he/she has the best qualifications for the position is selected to fill the Extracurricular Activities position.

In the past, when no teachers have applied for a vacant Extracurricular Activities position, the District hired whoever it wanted to fill the position. The record indicates that the District has hired support staff, administrators and non-staff persons to fill Extracurricular

Activities positions. The District would not hire a support staff, administrator or non-staff person to fill an Extracurricular Activities position if a teacher wanted the position though because, as previously noted, teachers get first crack at Extracurricular Activities positions. In the past, when no teachers have applied for a vacant Extracurricular Activities position, and both a support staff employee and a non-staff person applied for the position, the District evaluated the applicants based on their qualifications for the position. In the past, when making such evaluations, the District gave "credit" to support staff employees by noting their good performance for the District and experience working with the students in the District. However, Extracurricular Activities positions were not offered to support staff employees first, nor were they filled on the basis of seniority.

When the District hired support staff employees to fill Extracurricular Activities positions in the past, the District offered them an Employment Contract for the Extracurricular Activities position involved. These Employment Contracts do not incorporate the support staff collective bargaining agreement. When the support staff employees work under these Employment Contracts filling Extracurricular Activities positions, their wages, hours and conditions of employment (relative to the Extracurricular Activities position) are not governed by the support staff collective bargaining agreement; instead, their pay is set pursuant to the rates listed for same in the teachers' collective bargaining agreement and their hours and conditions of employment are governed by School Board policies.

In the last five years, most of the Extracurricular Activities positions have been filled by teachers, with the balance being filled by support staff, administrators, and non-staff. The following table, which is extrapolated from District Exhibit 13, shows the distribution of employee classifications to Extracurricular Activities positions:

School Year	Number of Extracurricular Activities Positions	Number of Professional Staff in Extracurricular Activities Positions	Number of Support Staff in Extracurricular Activities Positions	Number of Administrative Staff in Extracurricular Activities Positions	Number of Non-Staff in Extracurricular Activities Positions
2000-2001	94	77	4	3	10
2001-2002	101	81	5	3	12
2002-2003	101	83	5	3	10
2003-2004	100	80	4	2	14
2004-2005	94	82	0	2	10

During the 2003-04 school year, FLSA pay questions arose concerning support staff employees who filled Extracurricular Activities positions. The District learned that under the FLSA, when an employee performs two different jobs for the employer, each with different

pay scales, the hours worked must be combined to determine whether the hours worked per

week exceeded 40. If they do, then overtime has to be paid for all hours worked over 40. Once the number of hours worked per week is determined, the employer has to use a blended rate to determine the employee's overtime rate. After learning this, the District's administration began looking for ways to avoid overtime pay while still permitting support staff employees to fill Extracurricular Activities positions. The District's efforts in that regard impacted the following support staff employees.

Debra Easterday

Debra Easterday is a support staff employee who works for the District as a teacher aide for 35 hours per week. In the 2003-2004 school year, she wanted to fill the Extracurricular Activities position of Yearbook Advisor and discussed it with District Administrator Todd Ihrcke. He wanted her to limit the hours she would spend as a Yearbook Advisor to five hours per week, so as to avoid exceeding 40 hours per week and having to pay her overtime for such work. They both concluded that it would not be possible for Easterday to do justice to the position while working in it for only five hours each week. Consequently, Easterday was not given that position.

In late 2003, the District posted a vacancy for an Extracurricular Activities position of Wrestling Cheerleader Advisor. No teachers applied. Easterday applied and was the only internal candidate. On December 11, 2003, District Administrator Ihrcke sent Easterday notice that he was not going to hire her as Wrestling Cheerleader Advisor because of the District's decision to not use support staff employees in Extracurricular Activities positions when doing so would generate overtime under the FLSA. Easterday grieved this denial in January, 2004.

In April, 2004, the District posted a vacancy for an Extracurricular Activities position of Varsity Football Cheerleader Advisor for the 2004-2005 school year. Easterday applied. On April 26, 2004, Ihrcke met with Easterday and informed her that he was not going to hire her as Football Cheerleader Advisor for the 2004-2005 school year because of the District's decision to not use support staff employees in Extracurricular Activities positions when doing so would generate overtime under the FLSA.

Sue Anderson

Sue Anderson was a support staff employee who worked for the District as a food service worker. In the 2003-04 school year, she also served as the Varsity Wrestling Cheerleader advisor. On May 4, 2004, Ihrcke met with Anderson and informed her that he was not going to hire her as Varsity Wrestling Cheerleader Advisor for the 2004-2005 school year because of the District's decision to not use support staff employees in Extracurricular Activities positions when doing so would generate overtime under the FLSA.

Danicka Wehling

Danicka Wehling was a support staff employee who worked for the District in the 2003-2004 school year as the weight room supervisor. In previous school years, she had also been hired by the District to serve as the Assistant Track Coach and other Extracurricular Activities positions. During the 2003-2004 school year, the District attempted to regulate the hours Wehling worked as Assistant Track Coach in order to avoid having to pay her overtime (for her work related to her position as Assistant Track Coach). It did this by reviewing the Track schedule and setting up a calendar of practices and meets that she could attend. This attempt to regulate Wehling's hours was unsuccessful because the District discovered that holding an employee to such a schedule was essentially impossible because of the length of time resulting from meets occurring out of the District.

. . .

The Union subsequently filed grievances on behalf of Easterday, Anderson and Wehling alleging that the District violated the support staff collective bargaining agreement when it refused to hire them for different Extracurricular Activities positions beginning with the 2003-2004 school year. The Union asserts that the District's actions violated the Recognition clause, the Reassignment/Transfer clause and the past practice of the parties.

B. Extra Duty Assignments

The District employs individuals to fill Extra Duty assignments. Some examples of Extra Duty assignments are chaperoning dances, chaperoning school trips, official timer and scorer for athletic events, and selling tickets for same.

The only District collective bargaining agreement which specifically references Extra Duty assignments is the teachers' collective bargaining agreement. It provides as follows:

> PAY FOR EXTRA SCHOOL WORK ACTIVITIES
>
> A fee of $20.00 will be paid for chaperoning an activity which falls outside a teacher's normal duty. A fee of $40.00 will be paid for an all day duty. A fee of $15.00 will be paid for official timer and scorer at athletic events. A fee of $15.00 will be paid to teachers for selling tickets at school activities. Examples of "chaperone": dances, elementary music concerts, night student events requested by the principal.

Since the teachers' collective bargaining agreement is the only District collective bargaining agreement which references Extra Duty assignments, that work (i.e. Extra Duty assignments) belongs to the teachers.

Teachers frequently perform Extra Duty work, but do not do so exclusively. Sometimes, other District employees do that work. The record indicates that over the years, support staff, bus drivers, administrators and even non-staff persons have also performed Extra Duty assignments.

When the District hired support staff employees to fill Extra Duty assignments in the past, the District offered them an Employment Contract for the Extra Duty assignment involved. These Employment Contracts do not incorporate the support staff collective bargaining agreement. When the support staff employees work under these Employment Contracts filling Extra Duty assignments, their wages, hours and conditions of employment (relative to the Extra Duty assignments) are not governed by the support staff collective bargaining agreement; instead, their pay for the Extra Duty assignment is set pursuant to the rates listed for same in the teachers' collective bargaining agreement and their hours and conditions of employment are governed by School Board policies.

In 2004, the District decided to not use support staff employees for Extra Duty assignments for the same reason it decided to not use support staff employees for Extracurricular Activities positions (namely, when performing two jobs would generate overtime for the employee on a regular basis). However, the District has not stopped using support staff employees for all Extra Duty assignments because some support staff employees can do their Extra Duty assignment and their regular support staff job without incurring overtime. The District continues to use support staff employees for Extra Duty assignments when the two jobs do not result in overtime pay.

Fred Mehlum

Fred Mehlum is a support staff employee who works for the District as a custodian. In the past, he has also served as the Scoreboard Operator for a variety of athletic events. This job is considered an Extra Duty assignment. On May 13, 2004, Ihrcke met with Mehlum and informed him that he was not going to be hired as the Athletic Scoreboard Operator for the 2004-2005 school year because he was already working overtime for the District in his capacity as a custodian and he (Ihrcke) did not want to worsen the District's financial condition by having him work as the Scoreboard Operator and receive overtime pay for all hours worked in that capacity.

. . .

The Union subsequently filed a grievance on behalf of Mehlum alleging that the District violated the support staff collective bargaining agreement when it refused to hire him to serve as the Scoreboard Operator for the 2004-2005 school year. The Union asserts that the District's actions violated the Recognition clause, the Reassignment/Transfer clause and the past practice of the parties.

C. Weight Room Supervisor

The District operates a weight room. During the first semester of the 2004-2005 school year, the weight room was open during 6th, 7th, and 8th hours each day, which was from approximately 12:50 p.m. through 3:15 p.m., or 2.5 hours each day. The weight room was not open at all in the second semester of the 2004-2005 school year.

Prior to the 2004-2005 school year, the weight room was open approximately 22 hours each week and was staffed by support staff employee Danicka Wehling who worked as the non-certified weight room supervisor. She supervised the room.

Effective at the end of the 2003-2004 school year, the School Board eliminated the position of weight room supervisor and Wehling was laid off. The Union did not file a grievance concerning the decision to layoff Wehling.

In the first semester of the 2004-2005 school year, the District implemented a weight training, weight lifting and plyometrics program known as Bigger, Faster, Stronger. The goal of the program is improving the health and condition of the District's students. The following facts pertain to the District's decision to implement that program.

At the beginning of the 2004-2005 school year, the District's administration learned that two of the District's teachers, Mark Luebke and Mike Marr, were interested in working with students in the weight room during the school day. Marr, who holds a Master's Degree in Exercise Physiology, is a physical education teacher. Luebke is a teacher and coach. Both teachers felt they had time to supervise students in the weight room during the first semester of the 2004-2005 school year, so they suggested that the District open the weight room with a formalized weight-training program for students. They proposed a specific program: weight lifting on Mondays, Wednesdays and Fridays, and agility and pylometrics on Tuesdays and Thursdays. They envisioned that they would supervise the students in the weight room and require that the students participate in an athletic curriculum when in the weight room. The School Board adopted the teachers' proposal and implemented the Bigger, Faster, Stronger program. This work was offered to teachers Luebke and Marr; it was not offered to Danicka Wehling (who, as noted above, had been the weight room supervisor until being laid off at the end of the 2003-04 school year).

Luebke and Marr supervise the students in the weight room as part of their teaching contract. They are not paid anything other than their regular teaching salaries for the time in which they supervise the students in the weight room. Specifically, they do not receive Extra Duty pay, nor do they receive Extracurricular Activities pay.

. . .

The Union subsequently filed a grievance on behalf of Wehling alleging that the District

violated the support staff collective bargaining agreement when it refused to recall her

from layoff status or to hire another support staff employee to serve as the weight room supervisor for the 2004-2005 school year. The Union asserts that the District's actions violated the Recognition clause, the Reassignment/Transfer clause and the past practice of the parties.

All of the grievances referenced above were consolidated for the purpose of hearing.

POSITIONS OF THE PARTIES

Union

The Union contends that the District's actions herein violated the collective bargaining agreement. The Union sees this case as a transfer of work case. According to the Union, what the District did was transfer certain work historically performed by bargaining unit members to non-staff persons and members of a different bargaining unit (i.e. the teachers). Said another way, the District assigned bargaining unit work outside the bargaining unit. The Union avers this transfer of work resulted in the elimination of a significant number of work hours for four support staff employees which, in turn, diminished their job security. It elaborates as follows.

The Union's case is premised on the notion that all the work involved herein (i.e. cheerleader advisor, scoreboard operator and weight room supervisor) is bargaining unit work. The Union makes different arguments for the different types of work.

With regard to the cheerleader advisor and scoreboard operator work, the Union does not cite any specific contract language to support its contention that that work is bargaining unit work. Instead, it asserts that the parties have a practice that when that work is not filled by teachers, then it is considered support staff work and assigned to support staff employees. To support that assertion, the Union notes that the District did not present any evidence that it had ever denied support staff employees the opportunity to bid on that work when teachers did not fill it. The Union contends that the District discontinued that practice when it failed to award that work to the support staff employees and instead assigned it to employees outside the bargaining unit.

With regard to the weight room supervisor work, the Union does cite and rely on specific contract language. Specifically, it cites and relies on the Recognition clause wherein it identifies the "non-certified weight room supervisor" as being in the bargaining unit and also the salary schedule wherein it contains a wage rate for "teacher aide and weight room." According to the Union, these contractual references to a weight room supervisor establish that the parties intended for the weight room supervisor work to be performed by members of the support staff. It cites an arbitration award wherein the arbitrator found that the listing of a job in the labor agreement made that work bargaining unit work which could not be assigned to non-bargaining unit personnel. The Union asserts that when the District decided to reopen the

weight room in the fall of 2004 (after closing it at the end of the preceding school year),

Wehling should have been recalled from layoff to staff it. As the Union sees it, she was qualified to do it (i.e. supervise the weight room) because that is the work she performed prior to being laid off. Even if the District imposed new duties and qualifications on the job, the Union submits that the District could have trained Wehling to do that work.

Next, the Union acknowledges that the parties' collective bargaining agreement does not contain an explicit work preservation clause or language addressing subcontracting or transfer of work outside the unit. Be that as it may, the Union avers that the absence of language regarding such transfers of work does not give the District the right to eliminate bargaining unit work as it did here (by assigning it to other employees). To support that contention, the Union cites several arbitration awards wherein the arbitrators found that the employer's transfer of bargaining unit work violated the recognition clause, wage clause, and seniority clause because removing bargaining unit work was implicit. The Union asks this arbitrator to reach the same conclusion.

Finally, anticipating that the District will rely on the management rights clause to justify its actions, the Union argues that that clause does not authorize the District's actions here either (i.e. assigning bargaining unit work to non-bargaining unit employees). As the Union sees it, the District's management rights do not trump the Union's (implicit) right to that work.

The Union therefore asks that the grievance be sustained and the District ordered to cease and desist from transferring bargaining unit work to non-bargaining unit employees. As a remedy, the Union asks that the disputed work (i.e. the cheerleader advisor, scoreboard operator and weight room supervisor work) be returned to the support staff bargaining unit and that the four affected employees be made whole for their losses.

District

The District contends that it did not violate the support staff collective bargaining agreement when it refused to place various support staff employees in certain Extracurricular Activities positions, Extra Duty assignments and as weight room supervisor. It addresses these matters in the order just listed.

The District begins its discussion on the Extracurricular Activities positions grievance by averring that that grievance is not substantively arbitrable because that work (i.e. Extracurricular Activities positions) is not support staff bargaining unit work (as claimed by the Union). According to the District, there is no contract language in the support staff collective bargaining agreement that applies to or covers Extracurricular Activities positions such as yearbook advisors, coaches, school play advisors and cheerleader advisors. The District asserts that there is a simple reason for this, namely that all Extracurricular Activities work has been given to the teachers by the teachers' collective bargaining agreement. The District maintains that pursuant to that collective bargaining agreement, teachers get first crack at those Extracurricular Activities positions and the District only hires non-teachers for those

positions when no teachers have expressed an interest in the Extracurricular Activities positions. The District notes in this regard that in the past five years, out of 490 Extracurricular Activities positions, just 18 were staffed by support staff employees. Thus, it is the teachers who usually fill Extracurricular Activities positions. Putting all the foregoing together, the District contends this grievance should be dismissed on the grounds it is not substantially arbitrable.

The District argues in the alternative that even if the support staff collective bargaining agreement does apply, the grievance should still be denied on the merits for the following reasons. First, it avers that nothing in the support staff collective bargaining agreement obligates the District to place Easterday and other support staff employees in the Extracurricular Activities positions. Building on that premise, the District relies on the Management Rights clause for the proposition that it retained the right to make decisions concerning the staffing of Extracurricular Activities positions. Second, the District contends that the Wage, Recognition and Reassignment/Transfer clauses do not limit the District's right to make decisions regarding the staffing of Extracurricular Activities positions. As the District sees it, there is nothing in those contractual provisions that obligated the District to place Easterday and other support staff employees in Extracurricular Activities positions after the 2003-04 school year. Third, the District claims there is no binding past practice that entitles support staff employees to Extracurricular Activities positions. The District cites the standard arbitral principles for establishing a past practice, and asserts they were not met here.

The District begins its discussion on the Extra Duty assignments grievance, like the discussion on the Extracurricular Activities positions grievance, by averring that that grievance is not substantively arbitrable because that work (i.e. Extra Duty assignments) is not support staff bargaining unit work (as claimed by the Union). According to the District, there is no contract language in the support staff collective bargaining agreement that applies to or covers Extra Duty assignments such as scoreboard operators. Instead, just like Extracurricular Activities positions, Extra Duty assignments have been given to the teachers by the teachers' collective bargaining agreement. Once again, the District maintains that pursuant to that collective bargaining agreement, teachers get first crack at those Extra Duty assignments and the District only hires non-teachers for those positions when no teachers have expressed an interest in the Extra Duty assignments. The District notes in this regard that over the years, most Extra Duty assignments have been filled by teachers, not support staff employees. Putting all the foregoing together, the District contends this grievance should be dismissed on the grounds it is not substantively arbitrable.

The District argues in the alternative that even if the support staff collective bargaining agreement does apply, the grievance should still be denied on the merits for the following reasons. First, it avers that nothing in the support staff collective bargaining agreement obligates the District to place Mehlum and other support staff employees in the Extra Duty assignments. Building on that premise, the District relies on the Management Rights clause for the proposition that it retained the right to make decisions concerning the staffing of Extra Duty assignments. Second, the District contends that the Wage, Recognition, and

Reassignment/Transfer clauses do not limit the District's right to make decisions regarding the staffing of Extra Duty assignments. As the District sees it, there is nothing in those contract provisions that obligated the District to place Mehlum and other support staff employees in Extra Duty assignments in addition to their existing support staff positions. Third, the District claims there is no binding past practice that entitles support staff employees to Extra Duty assignments. The District cites the standard arbitral principles for establishing a past practice, and asserts they were not met here.

The District begins its discussion on the weight room supervisor grievance, like the discussion on the Extracurricular Activities positions and Extra Duty assignments grievances, by averring that that grievance (i.e. the weight room supervisor grievance) is not substantively arbitrable. According to the District, the work performed by Luebke and Marr in the weight room during the first semester of the 2004-2005 school year is not bargaining unit work for support staff employees. The District notes in this regard that the support staff collective bargaining agreement describes the bargaining unit as including a non-certified weight room supervisor position. According to the District, Luebke and Marr did not perform non-certified weight room supervisor duties when they supervised students in the weight room during the 2004-2005 school year; instead, they performed certified weight room duties (i.e. professional duties) as part of the District's new Bigger, Faster, Stronger program. It is the District's position that since certified teachers now supervise the students in the weight room and require that they participate in an athletic curriculum when in the weight room, there is a difference in what is happening in the weight room now, as compared to what was happening during the 2003-2004 school year when Wehling, a non-certified support staff employee, simply supervised the room. Putting all the foregoing together, the District contends this grievance should be dismissed on the grounds it is not substantively arbitrable.

The District argues in the alternative that even if the grievance is arbitrable, it should still be denied on the merits for the following reasons. First, it avers that a support staff vacancy did not result from the District's decision to open the weight room for three hours each day during the fall semester of the 2004-2005 school year. In other words, no vacancy was created. Building on that premise, the District relies on the Management Rights clause for the proposition that it had the right to decide whether a vacancy exists because no contract provision limits the District's right to fill vacancies. The District maintains that it exercised that (management) right when it decided that no vacancy was created by its decision to open the weight room for three hours each day in the fall of 2004. Second, the District contends that the support staff collective bargaining agreement does not contain language which precludes the District from assigning teachers to supervise the weight room. That being so, it is the District's position that it had the right to assign Luebke and Marr to supervise the weight room during the 2004-2005 school year.

Based on the foregoing, the District contends that all the grievances should be denied.

DISCUSSION

My discussion begins with the following overview. The Union sees this case as a transfer of work case. According to the Union, what the District did here was transfer certain work historically performed by support staff employees to non-staff persons and teachers (i.e. outside the support staff bargaining unit). The Union's case is obviously premised on the notion that all the work at issue herein is support staff work. Based on the rationale which follows, I find that premise lacks both a factual and contractual basis. That being so, I find no contract violation occurred.

This discussion is structured as follows. Attention will be focused first on the Extracurricular Activities positions and the Extra Duty assignments. Thus, they will be addressed jointly. I will then address the weight room work.

One more preliminary comment will be made. In its brief, the District argued that each grievance was not substantively arbitrable. I have decided to base my decision on grounds other than substantive arbitrability. Accordingly, for the purpose of discussion herein, it is assumed that all the grievances are substantively arbitrable. That said, the District's arguments pertaining to substantive arbitrability are subsumed into the discussion which follows.

The Extracurricular Activities Positions and Extra Duty Assignments

Oftentimes in a contract interpretation case like this involving the alleged transfer of work, a union relies on contract language which identifies certain work as bargaining unit work, or preserves certain work for the bargaining unit, or prohibits the subcontracting or transfer of that work. The Union does not rely on any of that type of language here. The reason is simple: it does not exist in the support staff collective bargaining agreement.

Next, since the alleged transfer of work involves work known to the parties as Extracurricular Activities positions and Extra Duty assignments, one would expect the Union to rely on contract language dealing with same. It does not. Once again, the reason is simple: it does not exist in this collective bargaining agreement. Specifically, there is no contract language in the support staff collective bargaining agreement that applies to or covers Extracurricular Activities positions (such as yearbook advisors, coaches, school play advisors and cheerleader advisors) or Extra Duty assignments (such as scoreboard operator, dance chaperone and ticket taker). That said, there is such language in the teachers' collective bargaining agreement. Since such language is found in the teachers' collective bargaining agreement, this means that the Extracurricular Activities positions and Extra Duty assignments have officially been given to the teachers. Thus, that work belongs to the teachers.

Knowing that it lacks specific language giving that work to the support staff, the Union takes a different approach herein. Specifically, it relies on an alleged past practice to claim the Extracurricular Activities work and Extra Duty assignments in question. According to the Union, the practice is this: when Extracurricular Activities positions and Extra Duty

assignments are not filled by teachers, then that work is assigned to support staff employees (and thus becomes support staff work). Building on that premise, the Union argues that the District failed to follow that practice when it did not give the Extracurricular Activities positions and Extra Duty assignments involved herein to the support staff employees who wanted them.

The record indicates that when no teacher expressed an interest in an Extracurricular Activities position or Extra Duty assignment, the District has historically filled it with whoever was interested in doing it. Sometimes, the person who the District selected to fill the position or assignment was a support staff employee.

The question in this case is whether the fact just noted (namely, that support staff employees have filled Extracurricular Activities positions and Extra Duty assignments) is sufficient to establish a binding past practice which is entitled to contractual enforcement. I find it is not. Here's why. The District's use of support staff employees to fill Extracurricular Activities positions has historically been the exception, rather than the rule. District Exhibit 13 shows that in school years 2000 through 2004, there were about 100 Extracurricular Activities positions filled per year, and support staff employees filled just four or five of them per year. Those numbers are insufficient to establish a past practice whereby the District has to place support staff employees in Extracurricular Activities positions when they (the support staff employees) want to fill them.

Aside from that, the Union's underlying theory that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a binding past practice, particularly when the pattern of conduct arises from the exercise of a management right. That is precisely the case here. What happened previously concerning the filling of Extracurricular Activities positions and Extra Duty assignments was not the result of bargaining with the Union, but rather was the District's unilateral act. The District had previously decided that when no teacher wanted a vacant Extracurricular Activities position or Extra Duty assignment, it would be filled by whoever the District could find to fill it, including support staff employees. That was the District's right. The District had the right to make that decision because it reserved to itself, via the Management Rights clause, the right to make decisions about the staffing of Extracurricular Activities positions and Extra Duty assignments in those situations where no teacher wanted that work. As previously noted, there is nothing in the support staff collective bargaining agreement that explicitly obligates the District to place support staff employees in Extracurricular Activities positions and Extra Duty assignments (when no teacher wants that work), or restricts the District's right to make decisions concerning the filling of Extracurricular Activities positions and Extra Duty assignments (when no teacher wants that work). This means that previous decisions concerning who filled Extracurricular Activities positions and Extra Duty assignments (when no teacher wanted that work) were the product of management prerogatives. Said another way, they arose from the exercise of a management right.

Since the previous instances of support staff employees filling Extracurricular Activities positions and Extra Duty assignments (when no teacher wanted that work) resulted from the District exercising its management right to assign work as it saw fit, the Union had the burden of showing that the District knowingly waived its management right to fill Extracurricular Activities positions and Extra Duty assignments (when no teacher wanted that work) as it saw fit and agreed to assign that work only to support staff employees. The Union did not prove that. As a result, the District has not waived its management right to assign Extracurricular Activities positions and Extra Duty assignments (when no teacher wants that work) as it sees fit.

The focus now turns to the Union's contention that several contract provisions implicitly preclude the District from doing what it did here (i.e. not giving the Extracurricular Activities positions and Extra Duty assignments to the support staff employees). The contract provisions which the Union relies on are the Wage, Recognition and Reassignment/Transfer clauses. Those provisions will be addressed in the order just listed.

The Wage clause identifies what wage is to be paid to employees in the various support staff classifications. On its face, that clause does not specify what wage is to be paid to them when they fill an Extracurricular Activities position or an Extra Duty assignment. Given that contractual silence, it would be one thing if the record established that when support staff employees previously filled Extracurricular Activities positions and Extra Duty assignments, they were paid at their existing support staff pay rate for that additional work. However, that is not what the record shows. What the record establishes is that when support staff employees previously filled Extracurricular Activities positions and Extra Duty assignments, they were paid a stipend for that work which was set by the teachers' collective bargaining agreement, and communicated to each support staff employee through an individual Employment Contract. That being so, it is held that the Wage clause does not implicitly preclude the District from doing what it did here (i.e. not giving the Extracurricular Activities positions and Extra Duty assignments to the support staff employees).

The Recognition clause identifies the Union as the exclusive bargaining representative for the positions included in the support staff bargaining unit. The positions which are included in the unit are "teacher aides, food service employees, custodians and custodian/light maintenance, secretaries, bus mechanic, and non-certified weight room supervisor." As has already been noted, the support staff employees sometimes fill Extracurricular Activities positions (such as yearbook advisors, coaches, school play advisors, and cheerleading advisors) and Extra Duty assignments (such as scoreboard operator, dance chaperone and ticket taker). However, just because they have done that work on the side, so to speak, that does not make that work support staff work or mean that that work is incorporated into any of the support staff positions just referenced. It would be one thing if that work was not referenced in any District collective bargaining agreement and had been exclusively performed by support staff employees. However, that is not what the record shows. As previously noted, that work officially belongs to the teachers and historically, most Extracurricular Activities positions have been filled by teachers. That being so, it is held that the Recognition

clause does not implicitly preclude the District from doing what it did here (i.e. not giving the Extracurricular Activities positions and Extra Duty assignments to the support staff employees).

The Reassignment/Transfer clause addresses, as it says, reassignments and transfers. The transfers referenced therein are lateral transfers. A "lateral transfer" is defined therein as "job movement within a job classification." The previous hiring of support staff employees for Extracurricular Activities positions and Extra Duty assignments, in addition to their support staff positions, was not job movement within a job classification, so therefore cannot be considered a lateral transfer. As a result, the District's refusal to hire Easterday, Anderson and Wehling for Extracurricular Activities positions, and Mehlum for an Extra Duty assignment, in addition to their support staff positions, did not violate that provision. Moreover, the Extracurricular Activities positions which Easterday, Anderson and Wehling wanted to fill, and the Extra Duty assignment that Mehlum wanted to fill, were not vacancies covered by the support staff collective bargaining agreement. As a result, the District's refusal to hire Easterday, Anderson and Wehling for Extracurricular Activities positions, and Mehlum for an Extra Duty assignment, did not violate that provision either.

Based on the foregoing, it is held that none of the contract provisions just referenced implicitly preclude the District from doing what it did here (i.e. not giving the Extracurricular Activities positions and Extra Duty assignments to the support staff employees). In so finding, I am well aware that the District's decision caused a financial loss for the affected employees because it reduced their overall work hours. Be that as it may, the employment opportunities which they sought (namely, the Extracurricular Activities positions and Extra Duty assignments), are outside the support staff bargaining unit, and management's to control (when no teacher wants to fill them). Accordingly, no contract violation has been found relative to the Extracurricular Activities positions grievance and the Extra Duty assignments grievance.

The Weight Room Work

The weight room work cannot fairly be characterized as either an Extracurricular Activities position or an Extra Duty assignment, so it will be dealt with separately.

The following factual context is relevant to the discussion which follows. Wehling was the non-certified weight room supervisor until she was laid off at the end of the 2003-04 school year. When the next school year started, teachers Luebke and Marr expressed interest in working with students in the weight room for several hours each day. Specifically, they proposed a formal weight training program for students. The Board ultimately implemented a program known as Bigger, Faster, Stronger which is a weight training and lifting program intended to improve the health of the District's students. This teaching work was assigned to teachers Luebke and Marr who did it 2.5 hours each day in the fall semester of 2004.

The Union contends that after the Board decided to have someone staff the weight room in the fall of 2004, the person who should have staffed it was Wehling. This contention (i.e.

that Wehling should have been recalled from layoff to work in the weight room) is obviously based on the premise that when the District opened the weight room in the fall of 2004 for 2.5 hours each day, this created a vacancy which should have been filled by a support staff employee. I find that premise lacks a contractual basis. Here's why. Under the support staff collective bargaining agreement, there is no requirement that the District maintain a certain number of support staff positions, nor is there a requirement that the District maintain a certain number of positions in each of the support staff classifications. Additionally, there is no requirement that the District has to post a vacancy each time an employee resigns or is laid off. Absent such restricting language, the District has retained the right, via the Management Rights clause, to determine whether a vacancy exists. In this instance, the District decided that no support staff vacancy existed as a result of its decision to open the weight room in the fall of 2004. The vacancy provision (Article XVI, Sec. B) does not require the District to declare a vacancy in all circumstances. Instead, that language simply states that "when a vacancy occurs", it must be posted. All this language requires is that the District post a vacancy after it (i.e. the District) determines that a vacancy exists. As was just noted, this collective bargaining agreement does not contain language which requires the District to find that a vacancy exists every time an employee departs the workforce. That being so, the fact that the District opened the weight room in the fall of 2004 does not establish that a vacancy existed which had to be filled by a support staff employee.

The next part of my discussion addresses the question of whether the work that the two teachers did in the weight room in the fall of 2004 was support staff bargaining unit work. I find it was not for the following reasons. First, just because the support staff collective bargaining agreement references a "non-certified weight room supervisor" and provides a wage rate for that position does not establish that all work performed in the weight room is support staff work. Instead, it simply establishes that if the District chooses to fill a "non-certified weight room supervisor" position, that position is included in the support staff bargaining unit. Nothing more. Second, the duties that Wehling performed as "non-certified weight room supervisor" were different from the duties performed by the two teachers in the fall of 2004. The following shows this. When Wehling worked as the non-certified weight room supervisor, she supervised the room. She did not perform any teaching duties. However, the two teachers who worked in the weight room in the fall of 2004 performed teaching duties with the students as part of the District's Bigger, Faster, Stronger program. The work they performed was different from the work Wehling performed in that they (i.e. the teachers) taught students while Wehling did not. Even if their actual teaching time was minimal, and they spent most of their time supervising students, their status as certified teachers meant they were "certified" weight room supervisors as opposed to "non-certified" weight room supervisors. This distinction between "certified" and "non-certified" weight room supervisors is important because the support staff collective bargaining agreement does not cover "certified" weight room supervisors. Third, the support staff collective bargaining agreement does not contain language which precludes the District from assigning teachers to supervise the weight room. Given the absence of such a contractual limitation in the support staff collective bargaining agreement, the District had the right, under the Management Rights clause, to do what it did and assign two teachers to work in the weight room in the fall of

2004. It is therefore concluded that the Union has not proven that the work performed in the weight room was support staff work which had to be performed by a support staff employee. Accordingly, no contract violation has been found relative to the weight room supervisor grievance.

In light of the above, it is my

AWARD

That the District's actions involved herein did not violate the support staff collective bargaining agreement. Therefore, the grievances are denied.

Dated at Madison, Wisconsin, this 14th day of June, 2005.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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