

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ASHLAND SCHOOL DISTRICT

and

**LOCAL #216-C, AFSCME, AFL-CIO
(CUSTODIANS)**

Case 101
No. 66476
MA-13537

(Posting Grievance)

Appearances:

James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864

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ARBITRATION AWARD

Ashland School District, hereinafter District or Employer, and Local #216-C, AFSCME, AFL-CIO (Custodians), hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. On November 16, 2006, the parties jointly requested that the Wisconsin Employment Relations Commission appoint staff member Coleen A. Burns as arbitrator. Following this appointment, a hearing was held on January 11, 2007 in Ashland, Wisconsin. The hearing was not transcribed. The record was closed on March 20, 2007, following receipt of all post-hearing written arguments.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties were unable to stipulate to a statement of the issue(s). At hearing, the Union framed the issue as:

Did the Employer violate the terms of the parties' collective bargaining agreement and the long standing past practice when it changed an employee's job duties without posting the job?

And if so; the appropriate remedy is for the Employer to post the job with hours and location noted.

At hearing, the Employer framed the issues as:

Did the District violate the collective bargaining agreement when it changed Jerry Paitl's work duties without reposting his position?

If so, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE 2 – MANAGEMENT RIGHTS

1. Except as otherwise specifically provided in this Agreement, the District retains all the rights and functions of management that it has by law.
2. Without limiting the generality of the foregoing, this includes the right:
 - a. To direct all operations of the District.
 - b. To hire, promote, transfer, schedule, and assign employees in positions within the District.
 - c. To suspend, demote, discharge, and take other disciplinary action against employees for just cause.
 - d. To relieve employees from their duties.
 - e. To maintain efficiency of District operation.
 - f. To take whatever action is necessary to comply with state and federal law.
 - g. To introduce new or improved methods or facilities.
 - h. To change existing methods or facilities.
 - i. To determine the kinds and amounts of services to be performed as pertains to District operation and the number and kind of classification to perform such services.
 - j. To create, combine and eliminate positions.
 - k. To determine the methods, means, and personnel by which District operations are to be conducted.
 - l. To take whatever action is necessary to carry out the functions of the district in situations of emergency.
 - m. To establish reasonable work rules.
 - n. To establish maintenance and disciplinary control in use and operation of district property.

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ARTICLE 6 – PROMOTIONS

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3. **Job Posting:** In the event a vacancy or new position occurs, a notice of said position shall be posted on the bulletin board five (5) working days prior to filling said vacancy or new position. Said notice shall contain the qualifications for the job. All interested employees may sign the posted notice. The senior employee who signed the notice will be given first consideration for the job, providing he/she is qualified.
4. The employer may temporarily fill job vacancies or new positions while the posting period is being carried out.
5. The employer agrees that all employees will be employed by job classification within the bargaining unit. All vacancies for permanent or new permanent positions will be posted and filled according to the terms of this agreement.

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ARTICLE 13 – WORKING RULES

1. Should a dispute arise in which the issue is not specifically covered by the agreement, the parties shall negotiate on the basis of the cooperative spirit of this agreement.
2. The Union and the Board consider themselves mutually responsible to improve the public service through the creation of improved employee morale and efficiency. In this connection the parties shall encourage employees to conduct themselves on the job in a workmanlike manner.

BACKGROUND

At all times material hereto, Jerry Paitl has been an employee of the District and a member of the collective bargaining unit represented by the Union. On May 13, 1997, the District posted the following:

SCHOOL DISTRICT OF ASHLAND
Job Vacancy

May 13, 1997

POSITION: Custodian I/Substitute/Floater

LOCATION: All buildings and grounds

HOURS: 40 hours per week – hours to be determined by Dir. Of Building/Grounds [initial shift will be 4:00 P.M. until 8:00 P.M. at LSE, cleaning of District Office, and subbing]

SALARY: Based on salary schedule

QUALIFICATIONS:

1. High school graduate preferred
2. Must accept responsibility of building
3. Good physical condition (exam will be required)
4. Ability to communicate with people & to create a good public image
5. Ability to follow oral and written instructions
6. Knowledge of, care & maintenance of heating and ventilation systems (air handling units, boilers, thermostats, steam traps, etc.)
7. Knowledge of floor care and building custodial maintenance
8. Ability to make repairs to building electrical systems
9. Ability to make repairs to building mechanical equipment
10. Ability to supervise and assign work details
11. Responsible for grounds and fields
11. Ability to perform heavy manual tasks
12. Other duties as assigned

DEADLINE FOR APPLYING: May 19, 1997

Sign:

The School District of Ashland is an equal opportunity employer and does not discriminate on the basis of race, sex, age, handicap or national origin.

ASSIGNMENT CHANGES WILL BE MADE AFTER ALL POSITIONS IN QUESTIONS ARE SETTLED.

Paitl posted for and received this position.

On or about September 11, 2006, the Union filed a grievance alleging that management changed Paitl's work duties from one school to two schools without posting job and that, by this conduct, the District had violated Article 6, Section 3; Article 13, Section 1, and any other applicable contract provision. The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

Seniority rights are a fundamental element of this labor agreement. The posting of jobs whether due to being a vacant position or a reconfigured position with markedly different job duties or a job where the hours of work have been changed; all underscore employee seniority rights.

Union witnesses have established that the Union has been vigilant in its monitoring of postings to ensure that seniority rights are protected. Even non-union jobs have been posted.

When job openings occur, they are posted. When job duties change, they are posted. When job hours change, they are posted. Exceptions to the posting requirement have been based upon unique circumstances. This posting process affords employees the opportunity to change jobs based upon the employees' seniority; allows the employee to change jobs to suit individual needs; eliminates preferential treatment and bolsters employee morale.

In the past, posting positions had not created a "musical chairs" problem or otherwise disrupted the work place. In the present case, Paitl's job could have been posted prior to September, with the result that all possible employee movements would have occurred prior to the start of school. Given the Union's right to enforce the collective bargaining agreement, it is irrelevant whether or not Paitl ever agreed to the change in his position.

The District reassigned 50% of Paitl's duties from floating to various schools on as needed basis to a permanent assignment at a specific school. Paitl's work location, hours of work and specific duties have been changed.

Notwithstanding the District's assertion to the contrary, there has been a substantial change in the job duties assigned to Paitl. Paitl's position is a new position. As such, it must be posted; consistent with Article 6 and the long-standing past practices of the parties.

The eight employees who are senior to Paitl may have an interest in working his new position at the two schools. The District's arbitrary and unilateral action has deprived these senior employees of the opportunity to bid into Paitl's position.

The Union is not seeking to add language to the contract or to obtain that which it has not obtained at the bargaining table. The grievance should be sustained. The District should be directed to post this position and to cease and desist from changing job duties without first posting said positions.

Employer

The language of Article 6 does not require a posting if there is a change in a position's duties, hours or location. A posting is only required if there is a vacancy or a new position.

In the instant case, there was a resignation that affected Paitl's assignments as "Custodian 1/Substitute/Floater." The Union seems to presume that because a Custodian resigned the previous year, that then there was a vacancy.

Under the "Management Rights" provision, the District, and not the Union, retains the right to determine the existence of a vacancy. The Agreement is silent concerning any limitations on this right. The job posting language comes into play only after the District has chosen to fill a vacant position. In the present case, there was no vacancy or new position to be posted.

The "Management Rights" provision specifically reserves to the District the right to transfer, schedule and assign employees in positions in the District and to determine the methods, means and personnel by which the District operations are to be conducted. These rights were exercised in good faith by the District when it notified Paitl that his assigned duties would also include four hours at the Middle School when he was not working as a substitute Custodian. Paitl acknowledged to Stegmann that it was part of his job to change locations.

Numerous arbitral awards have upheld management's right to not post positions due to changes in a position's duties, hours, assignments, schedules or locations, unless management is specifically required to post per the parties' collective bargaining agreement. (cites omitted) Inasmuch as it is the District's right to assign the employees' duties, schedules and locations, the District has not violated the collective bargaining agreement by changing Paitl's location in the fall of 2006.

The contract requires that qualifications be listed on a posting, but does not require the listing of hours, locations or duties. Paitl's posting made it very clear that the purpose of this position was to vary the duties, hours and locations. The posted duty of cleaning the District Office was eliminated without grievance from the Union. Paitl continues to be the primary substitute custodian. Changes were made consistent with the original job posting and the contract language.

The District agrees that seniority rights are important. However, seniority rights do not restrict the District's right to change the duties in dispute. The Union is objecting to the nature of Paitl's posted position. Such objection is not timely.

In order to be binding, a practice must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. The evidence fails to establish the existence of such a practice.

The only instance in which the District posted a position due to a change in work schedules occurred on a non-precedential basis in August of 2005 at the Union's request. The Union did not offer any other example of the District posting a position due to a change in the position's schedules or duties.

There is no contract violation. Nor is there any past practice requirement that the District post Paitl's position. The Union had the opportunity during the most recent contract negotiations to bargain language requiring the District to post Paitl's position, but did not do so. The grievance should be dismissed in its entirety.

DISCUSSION

Issue

The undersigned is persuaded that the issues are most appropriately framed as follows:

Did the District violate the terms of the parties' collective bargaining agreement, or any binding past practice, when it made changes to Paitl's job without reposting his position?

If so, what is the appropriate remedy?

Merits

In 1997, Paitl posted into the position of "Custodian I/Substitute/Floater." As the District argues, this position, as posted, provides the District with discretion to change the hours of the position and to assign the occupant of this position to all buildings and grounds. Given that the position was posted as a "Custodian I/Substitute/Floater," all duties of a Custodian I, Floater, and/or Substitute are within the parameters of this position. As the District further argues, the time for challenging this posting is long past.

Paitl's position, as posted, states: "[initial shift will be 4:00 P.M. until 8:00 P.M. at LSE, cleaning of District Office, and subbing]." The use of term "initial" implies that the shift and duties are subject to change; which implication is consistent with the posting language that provides the District with the discretion to determine hours and assign the occupant of the position to all buildings and grounds.

It is evident that cleaning the District Office was never a part of Paitl's regularly assigned duties. According to Union President Nemecek, from the time that Paitl was awarded the "Custodian I/Substitute/Floater" position until the 2006 changes that are the subject of this dispute, Paitl regularly worked four hours at LSE (Lake Superior Elementary) and that Paitl also substituted for Custodians who were out on leave. While the testimony on this point is somewhat confusing, it appears that, when Paitl was not working as a substitute, he worked at LSE.

The District asserts that, in the fall of 2006, Grosjean told Paitl that, in the morning he would continue to work four hours at LSE, but when he was not subbing throughout the District, he would be scheduled at the Ashland Middle School (AMS) for the remaining four hours of his shift. Neither Paitl, nor his direct supervisor Grosjean, testified at hearing.

In her grievance response of September 20, 2006, District Business Manager Stegmann stated as follows:

Mr. Grosjean has indicated to me that Mr. Paitl will continue his four hour shift at LSE. He will also continue to be used as the primary substitute for the custodial staff. He indicated that the only change will be that when he is not subbing throughout the District he will be scheduled at Ashland Middle School for the remaining four hours of his shift.

This posting has also been discussed with Mr. Paitl to gain his understanding. Mr. Paitl indicated that it was his understanding that he would have a regular four hour schedule at LSE but would be the primary substitute throughout the District. He also indicated that it was his understanding that he could be assigned at any location throughout the District. He was asked if had any issues regarding this change and he indicated that he thought that was the intent of the initial posting. (Jt Ex #5)

At hearing, Stegmann, who is the direct supervisor of Grosjean, reiterated that Paitl continues to be the primary substitute for Custodians.

The Union argues that Paitl was no longer available to work as a substitute because he was directed to work four hours at AMS from 3 p.m. to 7 p.m. This argument is inconsistent with Stegmann's testimony, as well as District Ex #1; which exhibit confirms occasions between September 25, 2006 and December 11, 2006, on which Paitl worked at buildings other than AMS between the hours of 3 p.m. and 7 p.m. The most reasonable conclusion to be drawn from the record evidence is that, at the start of the 2006 school year, Paitl's job was changed such that he regularly worked at LSE and AMS, but that he continued to substitute for Custodians.

Article 2, Management Rights, relied upon by the District, expressly recognizes that the District's management rights, including those enumerated in Subsection 2, are subject to other provisions of the contract. One such provision is Article 6 (3), which, as both parties recognize, addresses job posting.

Specifically, Article 6 (3) requires a posting "in the event a vacancy or new position occurs." The requirement to post "vacancies" and "new positions" is affirmed in the language of Article 6 (4) and (5).

Apparently, Paitl's regular assignment to AMS was triggered by the resignation of Curt Ellson, who had worked as Custodian at AMS during the 2005-06 school year. The record, however, does not establish that Paitl's changed job is the same position that had been held by Ellson. Rather, the record indicates that, in addition to AMS work (presumably work that had been performed by Ellson), Paitl continues to perform duties that he had performed since 1997, *i.e.*, custodial work at LSE as well as substitute custodian duties.

Under Article 2, Management Rights, the District has reserved the right to eliminate or combine positions. The Union has not cited any contract language that limits this right of the District.

According to Nemeč, prior to the change to Paitl's job, the District never provided a substitute for Paitl unless he was absent during his four hours at LSE; but that after the change, the District provided a substitute for Paitl whenever he was absent from work. This change in the use of a substitute is consistent with the conclusion that Paitl now has a regular assignment at AMS, as well as at LSE. It does not, however, have any bearing on the issue of whether or not Paitl's changed job is required to be posted.

The Union characterizes Paitl's position as a "floater" position. However, neither the position as posted, nor Paitl's previous work assignments, warrants such a conclusion. Rather, the record reasonably demonstrates that "floating" is but one aspect of Paitl's position.

As discussed above, Paitl's position, as posted, does not restrict Paitl to any specific work hours or building location. It is not evident that, following the change to his job, Paitl performed any work duty that is not normally performed by a "Custodian I/Substitute/Floater."

In summary, the changes to Paitl's job are within the parameters of the position for which he posted in 1997. Thus, the changes to Paitl's job have not created either a "vacancy" or a "new position." Accordingly, the District does not have a contractual requirement to post Paitl's changed job.

The Union argues that the evidence of past practice establishes that employees in the bargaining unit have a seniority right to post into the position currently held by Paitl. The Union points to the fact that the District has posted "Non-Union Custodial/Maintenance Co-ordinator" positions. If a position is a "non-union" position, then it is not a position over which the District has a duty to bargain with the Union. Accordingly, the posting of such positions is not generally considered to be evidence that is relevant to the determination of the Union's bargaining unit members' seniority rights, posting rights, or any other unit rights.

Custodian Dan Pocernich recalls that the District proposed; the Union agreed; and then the "Non-Union Custodial/Maintenance Co-ordinator" positions were posted. The record does not clearly establish what the Union agreed to.

Assuming *arguendo*, that this agreement confirmed Union posting rights, rather than that the positions were non-union, the posting of the “Non-Union Custodial/Maintenance Co-ordinator” positions would not reasonably establish that the parties mutually intended Paitl’s changed job to be posted. The reason for such a conclusion is that, according to Pocernich, the “Non-Union Custodial/Maintenance Co-ordinator” positions had added responsibilities which warranted additional pay. This testimony reasonably indicates that these positions, unlike Paitl’s changed position, were “new positions.”

In 2005, Union bargaining unit members Guy Roberts and Pocernich approached the Union regarding Roberts and Pocernich trading hours. Thereafter, the Union decided that these jobs should be reposted; the Union requested the District to repost these jobs; and the District provided a written response to this request that included the statement: “In an effort of cooperation with Local 216-C, the district will post the custodial positions at Ashland High School due to the change in work schedules on a non-precedential basis.” (U #1) Given the District’s clarification that this agreement was non-precedential, the undersigned cannot reasonably rely upon this factual situation to conclude that the parties’ had reached any mutual understanding regarding posting requirements.

Nemec recalls that, in a disciplinary situation, the District moved one employee from one shift to another at the High School and a second employee from one shift to another, as well as from one building to another. In each instance, the disciplined employees were placed into the positions without posting the positions. The positions that were vacated by the disciplined employees were posted.

Nemec further recalls that the Union did not challenge the District’s conduct in placing employees in positions that had not been posted. Nor is it evident that the Union made any response to this conduct of the District.

The Union views this disciplinary movement to represent a “unique exception” to its asserted “seniority right” to have a posting whenever there are changes in duties, hours, or work location. The record, however, provides no reasonable basis to conclude that the District agreed with this view. Nor is it evident that, when Mike Hagene and Jim Kollauf moved to different buildings without the benefit of a posting, the District agreed that these were exceptions to a Union “seniority right” to have a posting whenever there are changes in the positions duties, hours, or work location.

Included in the Union’s “past practice” evidence is testimony along the lines of “any time there has been a change in duties, hour, or location, this has created a job posting.” Inasmuch as such testimony is not linked to specific postings and changes, it is too ambiguous to establish the existence of any relevant past practice. Additionally, it is inconsistent with the “past practice” evidence, discussed above, in which a number of employees experienced a change in hours and/or work locations without a posting of the changed job.

Conclusion

As the Union argues, Paitl's job was reconfigured. This reconfiguration is consistent with his position, as originally posted. Paitl's changed job is not a "vacancy" nor is it a "new position." Under the plain language of Article 6, the District does not have a contractual obligation to post Paitl's changed job.

Contrary to the argument of the Union, the evidence of "past practice" does not establish a Union seniority right to have the position occupied by Paitl posted. Nor does the evidence of "past practice" establish that the parties intended the Union to have any posting rights other than those reflected in the plain language of Article 6.

Based on the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The District did not violate the terms of the parties' collective bargaining agreement, or any binding past practice, when it made changes to Paitl's job without reposting his position.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 13th day of July, 2007.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

