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 100
No. 66475
MA-13536

(Patty Neibauer Grievance)

Appearances:

James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin, appearing on behalf of Local 216-C.

Andrea M. Voelker, Attorney, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Ashland School District.

ARBITRATION AWARD

Local 216-C, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the Ashland School District, hereinafter referred to as the District, are parties to a collective bargaining agreement (agreement or contract) which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign the undersigned as arbitrator to hear and resolve the Union's grievance regarding the change in work hours of Patty Neibauer. The undersigned was appointed as the arbitrator pursuant to the joint request of the parties and held a hearing into the matter in Ashland, Wisconsin, on June 26, 2007 at which time the parties were given the opportunity to present evidence and arguments. The hearing was not transcribed. The parties filed post-hearing briefs by September 3, 2007 at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were unable to stipulate to a statement of the issue to be decided by the Arbitrator.

The Union frames the issue as follows:

Did the Employer violate the terms of the parties' Collective Bargaining Agreement and the long standing past practice when it changed an employee's work hours without posting the job?

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

The Employer frames the issue as follows:

Did the District violate Article 16, Section 4, of the parties' collective bargaining agreement when it changed a custodian's hours of work without re-posting her position?

If so, what is the appropriate remedy?

The Arbitrator believes the issue is most appropriately framed as follows:

Did the District violate the terms of the parties' collective bargaining agreement, or any past practice, when it changed the hours of work of a custodian without re-posting her position?

If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISION

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 operations.
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 service.
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.

. . .

ARTICLE 6 - PROMOTIONS

. . .

3. Job Posting: In the event a vacancy or new position occurs, a notice of said posting 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, provided 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.

. . .

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, Patty Neibauer was an employee of the District and a member of the collective bargaining unit represented by the Union. She was employed in the position of "Custodian I/Substitute/Floater" and her job posting (Jt. Ex. 8) contained the following specific language relating to her work hours:

> **HOURS: 3:00 PM TO 11:00 PM (subject to change at the discretion of the District)**

On or about September 11, 2006, this grievance was filed alleging that the District had changed Ms. Neibauer's work hours from 3:00 PM to 11:00 PM to 4:00 PM to 12:00 PM without posting the position. The grievance alleges that this conduct violated Article 6, Section 3, Article 13, Section 1, and any other applicable provisions of the agreement. The grievance was denied at all internal steps and, thereafter**,** submitted to arbitration in a timely manner.

THE PARTIES' POSITIONS

The Union

Seniority rights have been a critical and vital part of the labor agreement. The Union has a long history of enforcing them. Regarding situations involving changes in work hours, as well as

changes in job duties or openings, these modifications have been posted in the past. The posting process allows employees to change jobs to better suit their personal needs and allows them the opportunity to bid on positions based upon their seniority resulting in a basic sense of fairness and better morale.

Ms. Neibauer expected her new hours to be posted resulting in the possibility that she would have had the opportunity to bid into another position based upon seniority. This would have been fair and just according to the three witnesses called by the Union.

A topic frequently discussed in labor/management meetings in the past was changes in work hours. Employer exhibit #3 details past changes in work hours which were, for the most part, discussed with the Union during labor/management meetings prior to the implementation of the changes.

In two instances the Union by-passed the normal bidding process in order to save two employees jobs in the face of sever discipline and/or discharge. These two instances did not change the Union's approach to the posting of jobs.

In the instant case the posting could have been done before school started and would not have disrupted the operation of the school.

Because the grievance was filed on September 11, 2006, during which time the parties had exchanged preliminary final offers during mediation, and because the final agreement was reached on October 2, 2006, it is clear that the Union is not seeking to achieve through this grievance what it could have/should have bargained for during negotiations. While the Union could have added additional proposals during this time period the truth of the matter was that the Union's "negotiating objectives were elsewhere centered and did not involve clarifying or changing language relating to job posting."

The past practice of the parties is to meet and confer and to discuss and ultimately to reach agreement regarding changes in positions' hours of work. The terms of the agreement have been modified by this past practice. This practice is illustrated by Employer's exhibit #3. In these cases the work hour changes were not posted because the Union leadership agreed to them during labor/management meetings.

The fundamental issue is seniority rights. The District failed to act in good faith by not discussing the change with the Union as it had done so many times in the past.

The Arbitrator should uphold the grievance and direct the District to post this position and to cease and desist from changing the hours of work of a position without first posting said position.

The District

The District has fully complied with the terms and conditions of the agreement. Article 16, Section 4 specifically gives the District the right to change work hours with a 48 hour notice. Section 2(b), (i) and (k) also give it that right and in unilaterally changing the hours of work in this case the District has exercised its management rights and complied with the terms of the agreement.

Under Article 6, Section 3, posting was not necessary because that Article provides for posting only when a vacancy or a new position occurs. In this case, neither occurred, so the contract language does not require a posting.

Many arbitral awards have upheld management's right not to post positions due to changes in work hours (cites omitted) and, in fact, a similar grievance was heard last year by Arbitrator Burns (ASHLAND SCHOOL DISTRICT, Case 101, No. 66476, MA-13537). The pertinent portions of that posting were identical to this grievance in that it provided that the hours and location were "subject to change at the discretion of the District." Arbitrator Burns, stating that the custodian's position, as posted, did not restrict the custodian to any specific work hours or building location and that the changes to the custodian's job were within the parameters of the position for which the custodian originally posted, held that the changes did not create a new position or a vacancy.

There is no binding past practice here. To be binding, a past practice must meet the 3 basic elements of the test: the 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 upon by the parties. (Cites omitted) The Union failed to establish any of these elements. First, there is no evidence that the District has ever posted a change in shift hours. On the contrary, Employer's ex. #3 identifies at least 15 past occasions in which it has changed work hours without posting them. While the District does not dispute that it discussed the changes with the Union during labor/management meetings, this was nothing more than the District advising the Union of its plans. There was never any "agreement" reached and the Union never objected.

Second, the Union filed a grievance on March 23, 2006, that was nearly identical to the present one. It was denied by the Board and the Union failed to advance the matter to arbitration, electing instead to file the present grievance.

Third, most of the posting examples offered by the Union involved the hiring of new custodians. The August 28, 2003 posting occurred because of a vacancy and at the end of the

process a new employee was brought into the unit. The other example dated back to 1985. This is too remote in time and, additionally, the Union's witnesses had no recollection as to the changes in position responsibilities or whether it involved a change in work hours. Regarding the postings which occurred on December 10, 2001, November 15, 2002 and January 31, 2007, these all resulted in additional pay and additional duties outside the scope of the custodian's job description, thus creating a "new" position.

The only instance where a position was posted because of work hour changes occurred on a non-precedential basis and was done at the request of the Union because two custodians wanted to exchange their work hours.

In the ASHLAND case, Arbitrator Burns addressed the past practice issue and rejected it holding that the Union failed to establish that it has a seniority right to have the positions posted or that the Union has any rights other than as clearly set forth in the agreement.

The preceding analysis establishes that the District not only complies with the terms and conditions of the contract but that it also acted in good faith. The District's decision to modify the work hours of the Grievant was made in order to provide 24 hour coverage for the school and still maintain the contractual obligation to reserve Saturdays and Sundays as rest days. The later start time would also benefit the District by insuring that the schools bathrooms would be cleaned for the following day. Also, the District approached the most senior floating custodian and gave him the opportunity to take or reject the new hours. He rejected them and the District then gave the new hours to the less senior of the two. Her position also specifically allows for changes in work hours at the discretion of the District, so, for all of these reasons, there is no bad faith on the part of the District.

If the Union wants the limitations on posting it seeks here, it must obtain them through the bargaining process. If the Arbitrator were to grant the Union's request he would be re-writing the terms of the agreement and he is not authorized to do so.

DISCUSSION

Ms. Neibauer posted into the position of Custodian/Substitute/Floater on or about September 8, 2003. The posting, Joint Exhibit 8, specifically states "HOURS: 3:00 PM to 11:00 PM (subject to change at the discretion of the District)." On or about September 5, 2006, the District changed her hours of work from 3:00 PM to 11:00 PM to 4:00 PM to 12:00 PM.

Article 2, Sections 2b, 2i, and 2k reserve the right of the District to:

2b. To hire, promote, transfer, schedule, and assign employees in positions within the District.

. . .

2i. 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.

. . .

2k. To determine the methods, means, and personnel by which District operations are to be conducted.

Of course, this language may be modified by subsequent contractual language thereby relieving the District of its ability to exercise these rights. The record contains no such reference to language which may, in any way, modify the rights enumerated in Sections 2b, 2i or 2k, nor does the Union seem to argue that it does. On the contrary, the contract bolsters the right of the District to modify the hours of work of Ms. Neibauer under Article 16, Section 4 which specifically addresses this issue. Article 16, Section 4 says: "Shift Changes: Changes in work week or shifts shall be made with a 48 hour notice." The record reflects that the District fully complied with this condition when it changed the work hours of Ms. Neibauer.

The Union takes the position that the changes in work hours should be posted because posting them would be fair and just and because it would allow the employees to post into more favorable positions in order to better suit their individual needs. Posting them would also result in better morale and would recognize the important issue of seniority. The Union argues, commendably, that it has a long history of advancing and enforcing the seniority rights of its unit membership. The problem with this particular grievance is that it is not about seniority; it is about contract interpretation and whether the District breached the terms and conditions of the collective bargaining agreement. The recognition of seniority, and the importance of it, does not create a right of the Union to circumvent the clear and unambiguous terms and conditions of the agreement.

The Union argues that because the hours of work were changed, this creates a "new" position and, as such, must be posted pursuant to Article 6, Section 3 which requires that new or vacant positions be posted. A change in hours of work, absent more, does not create a "new" position nor does it create a "vacancy". The change in Ms. Neibauer's hours of work were anticipated by the District and should have been anticipated by Ms. Neibauer. This change falls squarely within her job posting and complies with the clear language of the contract.

The Union says that the past practice of the parties (i.e. that in the past the parties have discussed changes in shift hours during labor/management meetings and that those changes have been made with the consent of the Union following negotiations) should modify the existing terms of the agreement so as to cause the District to post those changes in the future. In other words, the practice should become binding. The undersigned commends the parties for developing a forum such as labor/management meetings to discuss and hopefully resolve issues which may otherwise evolve into litigation between the parties. At the same time, the undersigned recognizes that the labor/management forum is not a bargaining table. The record evidence does not support the Union's argument that the changes which were made to schedules, outlined in District Exhibit #3, were "negotiated" and "agreed to" by the Union. The more plausible conclusion to be drawn from the evidence is that the District advised the Union of the upcoming changes as a courtesy. This is bolstered by the fact that the record reflects that the only time a change in work hours has been posted in the past (2005), aside from non-union positions which is not relevant to the determination of Union rights in this case, occurred on a non-precedential basis and was done at the request of the Union. See Joint Exhibit #5. Certainly the District would not have found it necessary to clearly state that the posting was non-precedential if it was laboring under the impression that the practice was to bring all such work hour changes to the Union for its consideration and condonation.

The undersigned has consistently followed the "plain meaning" principle of contract interpretation. When considering issues of past practice, the undersigned considers clear and unambiguous contractual terms to be undisputed facts. If terms are unclear or ambiguous or capable of more than one interpretation, evidence of past practice is appropriate to aid the Arbitrator in determining the true intent of the parties. The Arbitrator's function is limited to making a determination of what the parties intended and when the language the parties themselves have negotiated is clear as to their intent the undersigned considers any deviation from that clearly expressed intent to be nothing short of rewriting the terms, the authority for which the undersigned has not been given. This is not to say that the parties are not free to amend the terms and conditions of their agreements. They are, but the conduct relied upon to prove such a modification must be unequivocal and the terms of the modification must be definite, certain and intentional. The record evidence here falls far short of showing that requirement. Here, the language which specifically relates to the issues before the undersigned are clear and unambiguous and the arguments of the Union regarding past practice must be rejected.

Finally, Article 13 - Working Rules, which requires the parties to negotiate disputes which arise which are not specifically covered by the agreement, does not apply here since the agreement specifically covers the dispute here in question.

Based upon 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 past practice, when it changed the hours of work of a custodian without re-posting her position.

2. The grievance is denied and dismissed.

Dated at Wausau, Wisconsin, this 25th day of September, 2007.

Steve Morrison /s/

Steve Morrison, Arbitrator

SM/gjc
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