

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN COUNCIL 40, LOCAL 1749-B,
PLYMOUTH SCHOOL DISTRICT SUPPORT STAFF EMPLOYEES,
AFSCME, AFL-CIO**

and

PLYMOUTH SCHOOL DISTRICT

Case 63
No. 66517
MA-13551

Appearances:

Mr. Thomas Wishman, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Box 2236, Fond du Lac, Wisconsin 54936, appearing on behalf of the Union.

Davis & Kuelthau, S.C., 605 North Eighth Street, Suite 610, Sheboygan, Wisconsin 53081, by **Mr. Paul C. Hemmer**, appearing on behalf of the Employer.

ARBITRATION AWARD

Plymouth School District, hereafter District or Employer, and Wisconsin Council 40, Local 1749-B, Plymouth School District Support Staff Employees, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to provide a panel of staff members, from which panel the parties selected Coleen A. Burns as Arbitrator. A hearing was held in Plymouth, Wisconsin on April 17, 2007. The hearing was not transcribed. The parties filed post-hearing written argument and the record was closed on July 9, 2007.

ISSUE

The Union frames the issues as follows:

Did the Employer violate Article 23 of the collective bargaining agreement when, during the 2006-2007 school year, it elected not to fill a benefited position and then re-assigned the work to part-time positions without benefits?

If so, what is the proper remedy?

The District frames the issues as follows:

Did the Employer violate Article 23(I) of the collective bargaining agreement when, during the 2006-2007 school year, the employer elected not to fill a benefited position and assigned the work to new positions without benefits?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE THREE – MANAGEMENT RIGHTS RESERVED

The Board of Education retains and reserves all rights, power, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin and the United States of America.

The exercise of the foregoing powers, rights, authority, duties and responsibilities of management shall be limited only by specific and expressed terms of this agreement.

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ARTICLE TWENTY-THREE – VACANCY NOTICES

- A. A notice of a new or vacant position, when the job continues to exist in the school district, will be posted on the principal's bulletin board in the various schools for a period of seven (7) calendar days of which five (5) will be working days. A notice will also be given to designated union representatives.
- B. The notice shall indicate the position description, position requirements, and necessary qualifications, and shall provide sufficient space for interested parties to sign.
- C. An employee may refuse up to three times per calendar year, a position offered under Article 23. Following the third refusal, the employer will not accept further application for that calendar year.

- D. When vacancies are filled, qualified employees, who shall be deemed qualified by the use of the following criteria: experience, ability to do the job, human relations skills, relevant work history, and relevant education, shall be given first preference according to individual seniority.
- E. Group II employees will be notified during the summer months as follows:
 - 1. The notice of vacancy or new position will be mailed to the latest address on file with the District Office.
 - 2. The Board assumes no obligation other than sending the above notice. Therefore, no claim can be filed against the Board for failure to receive a proper notice.
 - 3. Interested parties must return the notice within seven (7) calendar days of the notice date.
- F. Employees moved to different classifications will have a probationary period of 60 calendar days commencing the first day of work in the classification. If within the probationary period, it is determined by the supervisor or the employee that the classification change was not appropriate; the employee shall return to his/her previous position and shall retain all seniority as if there were no interruption in the classification. Such return shall not prejudice the employee in future applications for vacancies. At any time within the 60 calendar days, both parties may agree to end the probationary period. A probationary period may be extended by mutual agreement of the parties.
- G. All positions that change from a non-benefit to a benefit position will be posted. Posting will not occur after a probationary period from a previous posting. Posting will not reoccur after an unsuccessful 60 day trial period.
- H. **QUALIFICATION DISPUTES:** If there is any difference of opinion as to the qualifications of an employee, the matter may be adjusted through the grievance procedure.
- I. Any benefit position as of June 30, 1994, will continue to be a benefit position. This means that a vacated benefit position, when filled, will again be posted as a benefit position.

- J. Present employees will keep the number of hours they have as of June 30, 1994. If the hours of the above employees are not needed, the employees shall have the option to pick up missing hours at another school or in another classification if available. If no hours are available, no new hires will be made until the above employee is either offered or has the hours replaced.

ARTICLE TWENTY-FOUR – GRIEVANCE PROCEDURE

- A. Definition of a Grievance

A grievance is a dispute concerning interpretation or application of the provisions under this contract or compliance therewith.

- B. Steps and Procedure Timelines

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3. **STEP THREE:** If a satisfactory settlement is not reached as outlined in Step Two, either party may request that the matter be submitted to arbitration. The Union Committee and/or the Union Representative shall submit the grievance at Step Three within fifteen (15) working days after the date it was answered at the previous step. The parties shall request the Wisconsin Employment Relations Commission to name the arbitrator. The arbitrator shall make a decision on the grievance, which shall be final and binding on both parties. The arbitrator's authority is limited to the application and interpretation of this contract.

RELEVANT BACKGROUND

During the 2005-2006 school year, the bargaining unit employees employed in the District's Food Service Program consisted of six (6) full-time employees who were eligible to earn benefits under the parties' collective bargaining agreement and two (2) part-time employees who were not eligible to earn benefits. All of the benefit employees were Assistant Cooks, except for one Head Cook. One part-time employee was a Server and one was an Assistant Cook.

Prior to the start of the 2006-2007 school year, one of these full-time employees, Assistant Cook Florence Hanson, and one of these part-time employees, Assistant Cook Maxine Schneider, retired. The District did not post a vacancy in any Assistant Cook position. On or about July 19, 2006, the District posted vacancies in two (2) part-time Food Server

positions and three (3) part-time Server/Cook positions. These posted positions, which were subsequently filled, were not benefit positions.

The Assistant Cook job description is as follows:

ASSISTANT COOK POSITION
High School

Position Description: The Assistant Cook/Food Server will work under the supervision of the Head Cook and Food Service Supervisor in accordance with the policies established by the Board of Education.

Position Requirements:

- Assist the Head Cook in food preparation
- Apportion food for various schools as needed
- Clean kitchen and equipment
- Check food supplies and deliveries
- Assist in keeping records and reports
- Operate equipment necessary to perform effectively and efficiently
- Such other duties as may be assigned

Position Qualifications:

- Knowledge of food service
- Ability to understand and follow oral and written instructions
- Knowledge of kitchen operations and equipment
- Ability to keep accurate records and make reports when necessary
- Have physical ability to do necessary lifting, etc.
- Work effectively with school personnel and students
- A High School diploma or equivalent. Also some experience in quantity food production.
- Food service or related experience

The July 19, 2006 job postings were as follows:

3 SERVER/COOK POSITIONS
High School

Position Description: The Server/Cook will work under the supervision of the Head Cook to prepare and manage food services in accordance with state and school board

Position Requirements: (may vary by site)

- Assistant to the Head Cook
- Operate equipment necessary
- Apportion food for various schools as needed
- Clean facilities and equipment as directed
- Report problems to head cook
- Assist in keeping records and reports

Position Qualifications: (Successful candidate must be able to:)

- Able to follow oral and written instructions
- Time management skills
- Excellent communication and interpersonal social skills
- Able to work effectively with school personnel and students
- Knowledge of food service
- Knowledge of kitchen operations and equipment
- Physical ability to do necessary lifting
- Able to problem solve and think independently
- Able to keep accurate records and reports if necessary
- High School Diploma

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2 FOOD SERVER POSITIONS

High School

Position Description: The employee will work under the supervision of the Supervisor of Food Service in accordance with policies established by the Board of Education.

Position Requirements: (may vary by site)

- Assist in serving lunches to students and adults.
- Assist in preparations necessary for serving.
- Clean facilities and equipment as directed.
- Check food delivered for quantity and quality.
- Clean and sanitize tables before and after service.
- Cashier duties as may be directed.
- Operate dishwashing equipment.
- Any other duties as determined by the Supervisor of Food Service to maintain a quality program.

Position Qualifications:

Knowledge of foods and nutrition.
Ability to understand and follow oral and written instructions.
Ability to maintain good relationships with students and other personnel.
Ability to keep accurate records and reports as necessary.
Ability to use a computer and understand basic computation.

On or about August 1, 2006, the Union filed a grievance alleging that the District violated Article 23(I) and any other provision that may apply “When a vacancy occurred in a food service position (with benefits), the District did not fill it but instead on July 19, 2006 posted part-time positions with no benefits.” The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union¹

Article 23(I) of the parties’ collective bargaining agreement requires the District to maintain positions that earn benefits. This contract language clearly and unambiguously requires the District to fill vacated benefit positions.

The contract language does not require the District to maintain a full-time position. Under the contract, a benefited position is one in which the employee works twenty-hours per week.

In the present case, the District did not fill the vacated benefit position. Rather, the District re-assigned the duties of the benefited position to non-benefited positions.

The total number of hours of work performed by food service increased. This increase indicates that the volume of work is as great, if not greater, than in the past and that there were sufficient hours to maintain at least one of the “new” positions as a benefit position.

Article 3, Management Rights, is subject to the limitations and requirements of the Article 23(I) language. The District may not ignore the requirements of Article 23(I) because it is convenient for the District to do so.

Testimony from both Union and management witnesses support the Union’s assertion that a substantial portion, if not all of, the duties which had been performed by Assistant Cook

¹ Given the reference to contract language, it is clear that the Union is relying upon Article 23(I), rather than Article 23(J).

Hanson were reassigned to several part-time positions that are not eligible for benefits. The District asserts that the vacated Assistant Cook position still exists and may be filled at some

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point, but the vacated position of Assistant Cook is not listed on the “Plymouth High School Food Service Staff Distribution.” (Er. Ex. #3)

Testimony from the Union officers indicates that the language that was bargained in Article 23(I) was designed and intended to address a situation exactly like the one in this case. They further indicated that prior to the inclusion of this contract language, the District had engaged in the practice of replacing positions with benefits with those not eligible for benefits and that, after the inclusion of this language, this practice stopped. Additionally, after the inclusion of this language, the District agreed to fill the benefited position, rather than, replace or restructure it.

The District asserts that the positions created are not the positions that were vacated. Although the new positions have different titles and may perform some duties which are different than the positions vacated, the duties are of a common type.

The District has violated Article 23(I) of the contract by failing to fill or replace a vacancy in a benefited position with another employee in that position or another benefit position. The Union asks the District to re-post a non-benefit position with a benefit position and that the current occupant of the position which is re-posted be afforded benefits retroactive to the date and to the extent that they would have otherwise been eligible for such benefits had the position been posted as such originally.

District

The clear language of Article 23(I) reflects a specific mutual agreement between the parties. The District agreed to continue “benefit positions” in effect as of June 30, 1994 and the Union, in turn, acknowledged the authority of the District to determine whether or not to fill such a position should it become vacant. This section, as well as Sections A and D, clearly recognize the District’s right to determine whether or not to fill a vacated position.

The overall volume of work performed during the 2006-2007 school year is at least as great as in prior years. While the number of hours may have been sufficient to maintain at least one benefit positions, this is not what the collective bargaining agreement requires. Article 23(I) does not require the District to create new benefit positions to replace those existing on June 30, 1994.

The District has not elected to fill the Assistant Cook position vacated by Ms. Hanson. Until a decision is made to fill this Assistant Cook position, Article 23(I) does not apply.

Union President Dick Seefeldt acknowledged that Article 23(I) does not restrict the District from reassigning work from one position to another; from establishing start and ending times of work shifts; determining the number of employees to be hired; or impose any further

limitation upon the management rights of the District. Union Officer Shirley Gilliam testified that the interpretation and application of Article 23(I) had been the subject of discussion

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between the District and the Union; identified three (3) positions in which “benefited positions” were eliminated even though some of the work of the positions still existed and was reassigned to other employees; and that the Union has recognized that management has the right to take work from existing positions and redistribute the work among other positions. There is no evidence that, whenever a question or discussion between the parties arose with respect to filling a benefited position, the District agreed to fill a benefit position rather than replace or restructure it.

The District appropriately exercised its authority when it decided to not fill the vacated Assistant Cook position and reassigned residual dishwashing work to other employees. Dishwashing had also been performed by Maxine Schneider, who had worked three hours each day.

The hiring decision was not based on intent to avoid filling a benefit position. Rather, the decision was driven by the need to create positions that would accomplish the work of the reorganized school lunch program; which program required a reduction in the time necessary for students to move through the serving and cashier lines and the provision of additional menu choices. The District has the authority to structure positions in order to more effectively manage the school lunch program, to better serve students, and to assure financial solvency.

The reorganized school lunch program is now operating on a break-even financial basis. If the trend continues, the school lunch program will “remain in the black.”

Over a period of years, the food program has changed such that there is little, if any, cooking from “scratch.” At the time of her retirement, Ms. Hanson was not performing the duties of an Assistant Cook. The range and scope of responsibility of Assistant Cook Koenig duties reflects the District’s expectation of Assistant Cooks.

The new part-time Food Server and Server/Cook positions satisfy the District’s reorganization requirements, *i.e.*, substantial varied work in a concentrated part of the school day requiring multiple overlapping work shifts. The vacant Assistant Cook position did not. If and when the District requires the Assistant Cook position, it will be posted as a benefit position.

Suzie Ziegler and Tandi Kovacs have not assumed the position vacated by Ms. Hanson. Rather, each of these employees occupy new positions, having different and more diverse duties than the position held by Ms. Hanson at the time of her retirement.

Under Article 3, Management Rights Reserved, the District’s right to manage the affairs of the District is limited only by specific and expressed terms of the contract. There is no specific and expressed provision of the agreement that requires the District to fill any position. Arbitral precedent confirms that, in the absence of a specific contract limitation, the

District retains the authority to determine whether or not positions should be created or filled; subject to a duty to act in good faith.

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The District elected to not fill the vacated Assistant Cook position for a number of legitimate business reasons and, thus, has acted in good faith. The grievance is without merit and must be dismissed.

DISCUSSION

Issue

Contrary to the recollection of the District's attorney, the parties did not stipulate to a statement of the issue. However, the parties have framed similar issues. Upon consideration of the grievance that was filed and processed through the parties' contractual grievance procedure, the District's statement of the issue is more appropriate than the Union's statement of the issue. Accordingly, the undersigned has adopted the following statement of the issue:

Did the Employer violate Article 23(I) of the collective bargaining agreement when, during the 2006-2007 school year, the employer elected not to fill a benefited position and assigned the work to new positions without benefits?

If so, what is the appropriate remedy?

Merits

Article 23(I) states as follows:

- I. Any benefit position as of June 30, 1994, will continue to be a benefit position. This means that a vacated benefit position, when filled, will again be posted as a benefit position.

The language of Article 23(I) provides a "specific and expressed" limitation upon the rights reserved to management under Article 3 of the parties' collective bargaining agreement.

It is undisputed that, as of June 30, 1994 and at the time of her retirement, Florence Hanson occupied a full-time benefit Assistant Cook position. It is also undisputed that, following her retirement at the end of the 2005-2006 school year, the District did not post and fill a vacancy in a benefit Assistant Cook position; but rather, posted and filled vacancies in two (2) new Food Server Positions and three (3) new Server/Cook Positions; none of which are benefit positions.

The Union argues that, following Assistant Cook Hanson's retirement, the District reassigned Assistant Cook Hanson's duties to the newly hired non-benefit positions and, therefore, the District has violated Article 23(I) of the parties' collective bargaining agreement. The District responds that, for good faith reasons, it made a decision to reorganize the Food

Service program in such a way that it no longer required the full-time Assistant Cook position occupied by Hanson. According to the District, there has been no violation of Article 23(I)

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because the District has the contractual right to not fill the benefit position vacated by Assistant Cook Hanson.

The evidence of bargaining history was presented by two Union witnesses. Union President Dick Seefeldt, who states that he was on the Union bargaining committee when the parties agreed to the language of Article 23(I), recalls that this language was negotiated in response to the District's conduct in replacing a benefit position, *i.e.*, one that works twenty (20) hours or more per week, with a non-benefit position, *i.e.*, one that works nineteen and three-quarter (19 $\frac{3}{4}$) hours per week. According to Mr. Seefeldt, not all of the replaced benefit positions were full-time.

Union President Seefeldt recalls that he went to the then Superintendent; that he said that this District conduct was not the way to retain employees; that he said that both the Union and the District benefited by having benefit employees; that the Superintendent agreed; and that, after this discussion, Article 23(I) went into the contract. Shirley Gilliam recalls that she was on the Union bargaining team at the time that Article 23(I) was negotiated and that the Union wanted to protect benefit positions.

Mr. Seefeldt states that, after Article 23(I) went into effect; there was no instance in which the District attempted to fill a vacated benefit position with a non-benefit position. Ms. Gilliam recalls that, since Article 23(I) was negotiated, the Union and management have had discussions regarding Article 23(I). According to Ms. Gilliam, these discussions involved three vacated positions; that none of the three positions were in Food Service; that no new employees were hired to replace employees who held the vacated positions; and that the work of the vacated positions did not continue and/or was reassigned to existing employees. Ms. Gilliam's testimony further indicates that the Union ultimately agreed that, under these circumstances, the vacated benefit position need not be posted. Ms. Gilliam could not recall any other instances involving the application of Article 23(I).

In summary, the evidence of bargaining history reasonably establishes that the language of Article 23(I) was mutually intended to restrict the District's right to convert a benefit position that existed as of June 30, 1994 into one or more non-benefit positions. The existence of such a mutual intent is supported by the evidence of past practice; which evidence indicates that, after the adoption of Article 23(I), no vacated benefit position was replaced with a non-benefit position.

As the District argues, the Union recognizes that the District has a right to reassign duties. Indeed, such a right was recognized when, as discussed above, the District reassigned the duties of vacated positions to existing employees. However, to give effect to the mutual intent of the parties, as reflected in the plain language of Article 23(I), the evidence of bargaining history and past practice, it must be concluded that the right to reassign does not include the right to convert a vacated benefit position that existed as of June 30, 1994 into one

or more non-benefit positions.

As the District argues, Article 23(I) recognizes that the District has the right to not fill the benefit position vacated by Assistant Cook Hanson. A District right to not fill a vacancy is also implicit in the language of Article 23(A); which provides for posting vacant positions “when the job continues to exist in the school district.” However, whether or not “the job continues to exist in the school district” is not determined by the District’s conduct in posting or not posting a vacancy. If the work of the vacated benefit position continues and is performed by employees in the new Server and/or Server/Cook positions, then it is reasonable to conclude that “the job continues to exist in the school district.” It is also reasonable to conclude that there has been a *de facto* filling of the vacancy and that, under the plain language of Article 23(I), the District has a duty to post a benefit position.

Food Service Director Carmella Schmidt, who has been with the District since the 2005-2006 school year, recalls that Assistant Cook Hanson made salads, cleaned trays and her area, ordered the food she required, kept records, washed dishes, filled the line that was closed while other employees were on lunch or when asked to help other employees and, at the start of the year, made subs. Employer Exhibit #3, which compares 2005-2006 staff to 2006-2007 staff, indicates that Assistant Cook Hanson made “Salads and Subs” from 7:00 a.m. to 12:00 p.m. and then did “Dishes.”

Assistant Cook Donna Koenigs, who has been with the District for twenty-one years, recalls that Assistant Cook Hanson worked from 7:00 a.m. to 10:30 a.m. preparing salads and sandwiches and, from 11:00 a.m. until 3:30 p.m., almost exclusively washed dishes. Assistant Cook Koenigs recalls that Assistant Cook Hanson would also assist others if they needed help and, like the other Assistant Cooks, ordered the food that she needed.

Article 23(I) refers to “benefit positions” and not to “benefit employees.” The “benefit position” in dispute is that of Assistant Cook. Notwithstanding any District argument to the contrary, the “benefit position” vacated by Assistant Cook Hanson is not defined solely on the basis of the duties performed by Assistant Hanson at the time of her retirement, but rather, is defined by the duties of the position description and the practice of the parties with respect to the assignment of duties to the Assistant Cook position.

A review of the Assistant Cook position description establishes that it is the Assistant Cook’s responsibility to assist the Head Cook in “food preparation.” (ER. Ex. #2) Indeed, during the 2005-2006 school year, the majority of employees in the Assistant Cook position were involved in “food preparation” duties. (ER. Ex. #3). To be sure, not all of the Assistant Cooks had the same “food preparation” duties. However, neither the Assistant Cook position description, nor any other record evidence, provides a reasonable basis to conclude that one type of “food preparation” duty is an Assistant Cook duty, while another type of “food preparation” duty is not. Nor does the record provide any reasonable basis to conclude that Assistant Cook positions are defined by the type of food prepared.

The Assistant Cook position description does not reference “dishwashing.”

Nonetheless, at the time of Assistant Cook Hanson's retirement, dishwashing was also performed by Assistant Cook's Michelle P., Donna Koenigs, and Maxine Schneider, as well as

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by Server Vicki. (ER. Ex. #3) Dishwashing may not have been the exclusive work of an Assistant Cook. The record reasonably establishes, however, that dishwashing was a duty of an Assistant Cook.

Assistant Cook Koenigs' testimony establishes that, in addition to food preparation and dishwashing, she fills, serves, cleans tables, sweeps floors, preps for the next day, orders produce, and assists others as needed. Employer Exhibit #3 indicates that, in addition to food preparation and dishwashing, Assistant Cooks stock beverages, clean, clean up, cashier, fill, set-up, and pack ahead. Assistant Cook Koenigs' description of her duties, as well as Employer Exhibit #3, are consistent with the Assistant Cook position description which describes the position as "Assistant Cook/Food Server" and, in addition to assisting the Head Cook with food preparation, includes such duties as apportioning food, cleaning kitchen and equipment, checking food supplies and deliveries, assisting in keeping records and reports, and operating necessary equipment.

It may be, as the Food Service Director believes, that it is not efficient to have Assistant Cooks perform dishwashing duties and that Assistant Cook Hanson did not perform at the same level of responsibility as the other Assistant Cooks. The record, however, does not support the District's assertion that, at the time of her retirement, Assistant Cook Hanson was not performing the duties of an Assistant Cook.

Suzie Z. assumed one of the new Server/Cook positions. Employer Exhibit #3 shows that Suzie Z. works 3.5 hours per day, starting at 7:30 a.m., and that her responsibilities are "Grab and Go Prep"/Fill/Clean-up, Dishes." Food Service Director Schmidt states that Suzie Z.'s hours have been temporarily changed due to the fact that Assistant Cook Michelle is on leave. Assistant Cook Koenigs states that Suzie Z. works from 7:30 p.m. to 1:00 p.m. and that her duties include making salads and sandwiches, serving on the line, and washing dishes. Food Service Director Schmidt states that Suzie Z. was originally hired to make salads like Assistant Cook Hanson did and that Suzie Z. also prepares the "Grab and Go line; which preparation includes making sandwiches and yogurt parfaits, and that Suzie Z. also performs miscellaneous duties, *e.g.*, filling a cooler and washing.

Employer Ex. #3 shows that Server Tandi works 3.5 hours, beginning at 11:00 a.m., and that her responsibilities are "Dishes/Washer/Laundry." Assistant Cook Koenigs states that Tandi no longer works for the District, but that before she left her employment, her primary duty was dishwashing.

Food Service Director Schmidt and Union President Seefeldt confirm that Tandi did laundry. Union President Seefeldt states that laundry duties had not previously been performed by Food Service employees. According to Union President Seefeldt, Server Tandi reported to work at the time that Server/Cook Suzie Z. left work and that, together, the two have essentially the same work hours and perform the same work as Assistant Cook Hanson.

In addition to Suzie Z. and Tandi, the new Food Service staff includes Server/Cook Patty, Paula and Gayle and Server Renata. (U. Ex. #2) Employer Exhibit #3 identifies the following work hours: Server/Cook Patty – 8:30 a.m. to 1:00 p.m. (3.5 hrs); Server/Cook Paula – 10:00 a.m. to 2:00 p.m. (3.5 hrs); Server/Cook Gayle - 10:00 a.m. to 2:00 p.m. (3.5 hrs); and Server Renata - 12:00 p.m. to 3:30 p.m. (3.5 hrs). U. Ex. #2 identifies the following work hours: Server/Cook Patty - 9 a.m. to 12 p.m.; Server/Cook Paula - 9:30 a.m. to 1:30 p.m.; Server/Cook Gayle - 9:30 a.m. to 1:30 p.m., and Server Renata - 12:00 p.m. to 3:30 p.m. According to Assistant Cook Koenigs, U. Ex. #2 reflects the hours at the beginning of the school year; which hours were subsequently changed due to the fact that Assistant Cook Michelle went on leave and Server Tandi left District employment.

Employer Exhibit #3 shows that Server/Cook Patty has the following responsibilities: “Assist Classic Production, “Build a Bar” Prep.” Assistant Cook Koenigs describes Server/Cook Patty’s duties as making hot and cold sandwiches, soup – “whatever is on the line.”

Employer Exhibit #3 shows that Server/Cook Paula has the following responsibilities: “Set-up/Bake/Fill “Mama Mia”/Server/Dishes”/Clean up.” Assistant Cook Koenig recalls that Server/Cook Paula’s duties are baking bread sticks and pretzels, working on the computer and helping others as needed. Food Service Director Schmidt agrees that the pretzels and bread sticks are made, rather than prepackaged. Employer Exhibit #3 indicates that Assistant Cook Judy prepares the other food items for the “Mama Mia” line; which items include pizza and hot Italian sandwiches.

Employer Exhibit #3 shows that Server/Cook Gayle has the following responsibilities: “Set-up/Fill/Clean-up “Build a Bar”/Server/Cashier/Dishes.” As discussed above, Server/Cook Patty does the food preparation for the “Build a Bar.” Assistant Cook Koenigs states that Server/Cook Gayle helps Patty a lot, as well as others, and also works at the computer.

Employer Exhibit #3 shows that Server Renata has the following responsibilities: “Dishes/Washer/Laundry.” Union President Seefeldt states that Server Renata’s primary responsibilities are the dishwasher and laundry.

Food Service Director Schmidt credibly testified that the reorganization of the Food Service program that went into effect at the beginning of the 2006-2007 school year was motivated by legitimate business reasons, *e.g.*, complying with federal and state regulations, maximizing income and minimizing expenditures, providing healthy choices that appeal to the student body, and decreasing the amount of time necessary for students to obtain and pay for their lunch. The record reasonably establishes, however, that, following this reorganization, work of the Assistant Cook position continued to be performed by new Server and Server/Cook positions. The continued performance of these duties reasonably establishes that

Conclusion

The District has assigned the work of the Assistant Cook benefit position vacated by Assistant Cook Hanson to the new Server and Server/Cook positions. This conduct of the District is a *de facto* filling of the position vacated by Assistant Cook Hanson. Under Article 23(I), the District is required to post a benefit position of Assistant Cook. Given the difference in underlying facts and contract language, the arbitration cases cited by the District do not require a contrary conclusion.

The Union asserts that Article 23(I) does not require that a vacated full-time benefit position be filled as a full-time benefit position. The undersigned agrees that there may be instances in which there is insufficient work to warrant a full-time benefit position. The instant record, however, does not establish such circumstances. In reaching this conclusion, the undersigned has considered the following: the 2006-2007 staffing provides for ten more hours of staffing per day than the 2005-2006 staffing; assuming *arguendo*, that the 3.5 hours of dishwashing previously performed by retired Assistant Cook Schneider may be appropriately reassigned to Server and/or Server/Cook positions, there is more than enough hours to staff a full-time Assistant Cook position; and the record fails to establish that the Assistant Cook work being performed by the new Server and Server/Cook positions cannot be reassigned in such a manner as to provide full-time employment to an Assistant Cook position. Notwithstanding the District’s assertion to the contrary, the undersigned has not created a new benefit position, but rather, has maintained the benefit position required by Article 23(I).

To have Assistant Cook work performed by a full-time Assistant Cook benefit position may require greater District expenditures. Such a fact, however, does not relieve the District of its Article 23(I) obligations.

Based upon the above and foregoing, and the record as a whole, the undersigned sustains the grievance and issues the following:

AWARD

1. The Employer violated Article 23(I) of the collective bargaining agreement when, during the 2006-2007 school year, the employer elected not to fill a benefited position and assigned the work to new positions without benefits.

2. Unless the parties agree otherwise, the remedy for the violation noted in Paragraph 1, above, shall be as follows:

a. the District shall promptly, in accordance with Article 23 of the parties’ collective bargaining agreement, post and fill a full-time vacancy in the Assistant Cook position and make whole the recipient of this position for all wages and benefits lost as

a result of the District's failure to post a vacancy in a full-time Assistant Cook position on July 19, 2006.

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b. in implementing this remedy, the District shall have the right to eliminate and/or re-post the Server and/or Server/Cook positions that were posted on July 19, 2006 in order to accommodate work adjustments necessitated by the posting and filling of a vacancy in the full-time Assistant Cook position.

Dated at Madison, Wisconsin, this 26th day of October, 2007.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc

