

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PESHTIGO EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

PESHTIGO SCHOOL DISTRICT

Case 51
No. 68366
MA-14211

(Summer 2008 lawn maintenance subcontracting grievance)

Appearances:

Ms. Kim Plaunt, UniServ Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin, 54303, appearing on behalf of the Association.

Mr. Kim Eparvier, Superintendent, 341 North Emery Avenue, Peshtigo, Wisconsin 54157, appearing on behalf of the District.

SUMMARY OF BENCH AWARD

The Association (also referred to as PESPA) and the District, above, agreed to submit for final and binding arbitration a dispute arising under their July 1, 2006 - June 30, 2008 collective bargaining agreement (Agreement). At their joint request, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz of its staff as the Arbitrator. At the Arbitrator's request, the parties agreed that the case would be arbitrated on an expedited basis with a bench award followed by issuance of a short written summary of the award.

Following the conclusion of the parties' presentation of evidence and oral closing arguments at a hearing on December 15, 2008, the Arbitrator rendered a bench award. This is a written summary of that bench award.

ISSUES

The parties agreed that the ISSUES for determination this matter are as follows:

1. Is the grievance timely?

2. Did the District violate the parties collective bargaining agreement, Secs. 4.01.10 and/or 11.08, when it contracted out lawn maintenance in the summer of 2008?
3. If so, what is the appropriate remedy?

PORTIONS OF THE AGREEMENT

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ARTICLE I Recognition

Section 1.01 The . . . Board recognizes the . . . Association [PESPA] as the exclusive collective bargaining representative . . . [of] all regular full-time and regular part-time aides, custodians, food service, and secretarial employees employed by the . . . District.

...

ARTICLE II Definitions

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Section 2.04 A "regular employee" is hereby defined as a person hired to fill a "permanent position" as determined by the Board of Education. It does not include seasonal, temporary or student help.

Section 2.05 "Regular full-time employees" in each PESPA employee job department are those employees hired to work at least thirty-five (35) hours per week.

Section 2.06 "Regular part-time employees" in each PESPA employee job department are those employees hired to work less than thirty-five (35) hours per week.

Section 2.07 "Yearly employees" in any PESPA employee job department are those employees hired to work for the school year and for all periods when school is not in session.

...

Section 2.09 "School year employees" in any PESPA employee job department are those employees hired to work only for the school year.

Section 2.010 The term "Job department" shall be defined as including the following categories of employment: Aides, Custodian, Food Service and Secretaries.

...

ARTICLE IV
Management Rights

Section 4.01 Management retains all rights of possession, care control and management that it has by law, and retains the right to exercise these functions, except to the precise extent such functions and rights are restricted by the express terms of this Agreement. These rights include, but are not limited by enumeration to the following rights:

...

4.01.10 To contract out for goods and services provided that no employee will be reduced in hours or laid off as a result of subcontracting;

...

ARTICLE VII
Grievance Procedure

...

Section 7.02 . . . Should the grievant/Association fail to process the grievance within any prescribed time limits the grievance shall be considered resolved in accordance with the previous disposition .

...

Section 7.03 Procedure

Step 1- The grievant/Association shall submit the grievance in writing directly to the immediate supervisor within ten (10) working days after the occurrence giving rise to the grievance. . . .

...

ARTICLE IX
Layoff/Recall Procedure

Section 9.01 In the event that the District determines to lay off employees within a job department, the following procedure shall be used:

9.01.4 In the event of a reduction in work force, the Employer shall identify the specific position(s) to be eliminated or reduced, and shall notify those employees in those positions. . . .

Section 9.07 Seasonal and student help may be maintained during periods when bargaining unit employees are on layoff.

ARTICLE X

Job Posting/Vacancies and Transfers

. . .

Section 10.03 Notice - The job posting shall set forth the job title, pay range, work location, number of hours, a basic description of the job and the name of the person to whom application is to be returned.

. . .

ARTICLE XI

Hours of Work and Overtime

. . .

Section 11.03 . . . With prior approval, all hours actually worked over forty (40) hours per week shall be paid at time and one-half (1-1/2) of the employee's regular wages.

. . .

Section 11.08 The Employer reserves the right to use unit and non-unit substitutes to perform regular unit work in the absence of a unit employee. However, any department employee who works less than full-time within his/her department shall be asked to fill those hours, excluding hours which will create an overtime situation for the given employee, prior to calling in other unit and non-unit substitutes.

. . .

ARTICLE XXII
Holidays

Section 22.01 All full-time employees shall receive the following as paid holidays. Part-time employees shall receive the following as paid holidays.

[There follows a table of holidays with separate columns for 12-Month Employees, 10-Month Employees and 9-Month Employees. Each column lists the same eight holidays, but only the 12-Month Employees column lists the 4th of July as a ninth holiday]

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ARTICLE XXIII
Vacation

Section 23.01 - Vacation: Eligibility and Accumulation All regular, full-time and part-time twelve (12) month employees, who have a minimum of one year (1) year of continuous employment with the District, shall be entitled to paid vacation according to the following schedule:

Years of Continuous 12-month Employment	Vacation Earned
One year or more	Five work days

...

23.02.5 Selection of vacation days must have a prior written approval of the immediate supervisor. . . .

...

ARTICLE XXIV
Employee Benefits and Fringes

Section 24.01 - Health and Dental Insurance All regular, full-time and part-time employees shall be eligible for health and dental insurance . . .

The District will pay the following portion of premiums for employees eligible for insurance as determined by the carrier:

1080 - 2080 hours	95%
900 - Less than 1080 hours	75%
Less than 900 hours	Prorated

...

ARTICLE XXVII
Terms of the Agreement

Section 27.01 This Agreement, reached as [a] result of collective bargaining between the parties, constitutes the entire Agreement between the parties, and no verbal statements or past practice shall supersede any of its provision[s]. . .

...

BACKGROUND

The grievance giving rise to this proceeding was signed, dated and filed by Association president Janet Rich on June 23, 2008. It reads as follows:

Local Union Name: PESPA

Employer: Peshtigo School District

Date: June 21, 2008

Grievant's Name: PESPA Union

Grievant's Supervisor: Jim Sutherland

Work Location: Peshtigo Schools

Date Cause of Grievance Occurred: June 13, 2008

Statement of grievance (briefly, what happened): On June 13, 2008, Janet Rich, PESPA President was made aware that Joe Nystrom, a 12 month, 4 hour custodial employee was not working for the summer due to a voluntary or involuntary reduction in hours. On or about the same time, the Peshtigo School District hired an outside firm to cut the grass for the summer recess.

If Mr. Nystrom voluntarily agreed to reduced his hours, then the position of the Association is that his hours should be offered to other part-time employees in the custodial department or other departments prior to the district contracting out for goods and services.

If Mr. Nystrom was laid off by the district, then the Association grieves this matter on his behalf, due to fact that he has had a reduction of hours at the same time that the district subcontracted out for custodial service duties.

Article or section of contract that was violated, if any (what did management do wrong): Article I, Article IV, Article IX.¹

The request for settlement (corrective action desired):

Make whole Mr. Nystrom (if the district laid him off) or a part-time custodial staff member (if Mr. Nystrom voluntarily asked for a reduction of hours) and break the contract with the outside lawn service to return that duty to the custodial department and any other remedy the arbitrator may see fit.

The grievance was denied at each step of the contractual procedure and the instant arbitration eventually resulted. The grievance response of the District's Director of Buildings and Grounds, Jim Sutherland, read as follows:

June 30, 2008

[RE:] PESPA Grievance Concerning Joe Nystrom Position

. . .

Joe Nystrom was hired as a nine month School Year Only employee. On March 12, 2008 I sent an email to Troy Kaempf, Sharen Piatt, and Joe Nystrom notifying them that as School Year Only employees, they would not be working over Spring Break. In addition, the email indicated that their last day of work for the school year would be Tuesday, June 10, 2008. At that time, Joe did not bring up any concerns that would indicate that he did not agree with this. Again, on or around June 19, 2008 in a verbal discussion, Joe indicated his understanding of being a School Year Only employee. I also understand that Joe had left a message for Kim Plaunt on or around Monday, June 23, 2008 confirming that he was a School Year Only employee. Joe was given extra hours of work last summer the same as some other non departmental employees have, not only last year but in previous years as well.

This grievance is denied as the District did not violate any article or section of the contract as stated.

The grievance response of the District's Superintendent, Kim Eparvier, read as follows:

August 20, 2008

Response to PESPA Grievance/Joe Nystrom

¹ The Association acknowledged at the arbitration hearing that the "IX" reference should have been to "XI."

The District ascertains that Joe Nystrom was never hired as a twelve month employee. The following documents support the District's position. Please refer to the attached documents. Therefore, this grievance is denied.

The District inadvertently paid Joe Nystrom some vacation time that he did not qualify for, therefore, the District will deduct his payroll accordingly.

Attached to Eparvier's response were Sutherland's grievance response, above; a November 26, 2005, local newspaper want-ad for "2 Part-Time Custodial Positions" which reads, in part, "The Peshtigo School District is seeking two part-time custodians to work the following shifts during the school year, Mondays through Fridays. Work hours during the summer months may vary. . . . 3:00-7:00 p.m., 3:15-7:15 p.m."; and a March 12, 2008, e-mail message from Sutherland to part-time Custodians Troy Kaempf, Joe Nystrom and Sharon Piatt (showing no copies to the Association or anyone else), which read:

Subject: Spring Break

As a School Year only employee you will not be required to work over Spring Break which is Monday, March 14th through Friday, March 28th. This is the same as for the secretaries, aides, etc.

Your last day of work for this school year will be Tuesday, June 10, 2008. If this changes, I will notify you.

POSITIONS OF THE PARTIES

The Association

The Association argues, among other things, that the grievance was timely filed within 10 working days of the date the Association became aware that District lawn maintenance work was, in fact, being performed by a subcontractor while Nystrom and other bargaining unit employees were not performing summer work that they had performed in the past; that Nystrom is a 12 month employee such that Sec. 4.01.10 was violated when the District, while subcontracting, reduced his employment to 9-month by not employing him during the summer the way it had employed him during the summers of 2006 and 2007; that, while subcontracting for lawn maintenance, the District also reduced the hours of various 9-month bargaining unit employees in violation of Sec. 4.01.10 by failing to offer them any 2008 summer work as it always has in the past; that the District's subcontracting also violated Sec. 11.08 because, during the absences of a full-time custodian for the entire summer and the absence of another for parts of the summer, the District subcontracted (i.e., utilized non-unit substitutes), rather than asking bargaining unit employees in the custodian Department and then in other departments to fill those hours as it has always done in the past; and that the appropriate remedy is to make Nystrom whole for his resultant loss of work throughout the summer of 2008 and for the unwarranted 2006 and 2007 vacation pay deductions noted in the District's

August 20 grievance response, and to make whole the other bargaining unit employees for the remainder of the hours that they lost as a result of the District's improper subcontracting of lawn maintenance work that has historically involved eight hours of bargaining unit work throughout the summer.

The District

The District argues that the grievance should be denied for various reasons including: that it was not timely filed within 10 working days of Sutherland's March 12, 2008, notice to Nystrom, Kaempf and Piatt or of the publicly-accessible May 14, 2008 meeting or of the minutes of that meeting at which the Board approved the lawn maintenance subcontractor's bid; that the District's rights to have work such as lawn maintenance performed by other than bargaining unit employees are recognized in Agreement Secs. 14.01.10 and 9.07; that Nystrom, by the terms of the advertisement for his position and by his own admission at the grievance hearing before the Board and in the context of the District's varying needs for summer work and often-stated interest in controlling its fringe benefit costs, was hired as a 9-month employee; that the District erroneously granted him vacation benefits for which only 12 month employees are eligible, but the District has taken steps to recoup those monies by a series of paycheck deductions; that while Nystrom and some other 9-month employees have historically been offered extra work including work during summers, the District has also subcontracted work that could have been, but was not offered as additional extra work to bargaining unit employees during those summers.

DISCUSSION

Timeliness

The grievance was timely filed. In this case, the Sec. 7.03, Step 1 "occurrence giving rise to the grievance" concerning an alleged violation of Sec. 14.01.10 was the performance of lawn maintenance work by the subcontractor at times when Nystrom or other allegedly-affected bargaining unit employees were not being allowed to work. Similarly, the "occurrence giving rise to the grievance" concerning an alleged violation of Sec. 11.08 was the performance of lawn maintenance work by the subcontractor at times when one or more members of the bargaining unit were absent and when Nystrom or other allegedly affected bargaining unit employees were not being asked to perform summer work. Tuesday, June 10 appears to have been the last day of work before the summer for Nystrom and the other employees to whom Sutherland's March 12 message was sent. The District has therefore failed to show that the June 23 grievance filing date was more than 10 working days after the relevant occurrences described above.

The grievance time limit period did not begin to run until the subcontractor was actually performing work at a time when the affected employees could have been but were not performing that work. For that reason and others, the District's reliance on the non-filing of the grievance within 10 working days of Sutherland's March 12 e-mail to Nystrom, Kaempf

and Piatt or after the Board's May 14 approval of the lawn work subcontract is not a persuasive basis for concluding that the grievance was untimely filed.

Claimed Violation of Agreement Sec. 14.01.10

The Association has persuasively shown that the District violated Sec. 14.01.10 by subcontracting lawn maintenance work during the summer of 2008 while not allowing Nystrom to perform four hours per day of part-time work.

On balance, the record establishes that Nystrom was hired to work part-time both for the school year and for the summer months. While working for the District as a substitute custodian in November of 2005, Nystrom applied for a part-time bargaining unit custodian position in response to an internal posting which is not in evidence. The newspaper advertisement for the position quoted above from the District's August 30, 2008, grievance response, is ambiguous. It could mean that summer work is a normal part of the job but at different times than the shift times specified in the ad. Or, it could mean that summer work is a normal part of the job but in amounts that may vary from the four hours per day specified in the ad. Or, it could mean that summer work is not a normal part of the job, but that it may be offered as extra work over and above the work available during the school year. While Nystrom acknowledges in his arbitration testimony that he had stated during the Board grievance hearing that he thought he was a 9-month employee, he also testified before the Arbitrator that various District paperwork indicates, instead, that he is a 12-month employee. And so it does. The record contains documents showing that: with approvals from Sutherland and the District business office, Grievant was repeatedly approved to take vacation days in 2006-07 and 2007-08 for which only 12 month employees are eligible under Sec. 23.01; with Sutherland's approval, Grievant was also paid for a July 4 holiday in 2006 and 2007 for which only 12 month employees are eligible under Sec. 22.01; and the District business office's costing document exchanged with the Association during bargaining about a 2008-2010 agreement identifies Nystrom as a 12-month employee in a "9 or 12" column and lists his "annual hours" as 1040.00 which is consistent with working the normal four hours per day 12 months of the year that he worked in 2005-06 and 2006-07. The Arbitrator finds those District documents to be a more reliable basis upon which to determine whether Nystrom was hired for a nine or a 12-month per year position, than Nystrom's opinions or the ambiguous want-ad language or the District's varying needs for summer work and often-stated interest in controlling its fringe benefit costs.

Because he was a 12-month employee, four hours of summer work per non-holiday weekday was normally associated with his position, rather than extra work that was over and above the work year normally associated with his position.² Because he was not allowed to perform his normal four hours of work per day during the summer of 2008, Nystrom was an "employee [who was] reduced in hours" within the meaning of Sec. 4.01.10. It follows that

² See, CITY OF RACINE (PARKS), WERC MA-12043 (Nielsen, 3/8/04) (concluding, in a subcontracting context, that "a 'reduction in hours' refers to a reduction in the hours of employment normally associated with the job." ID. at 6).

the District's subcontracting of lawn maintenance during that summer made Nystrom an "employee [who was] reduced in hours . . . as a result of subcontracting" in violation of Sec. 4.01.10.

However, contrary to the Association's contentions, Nystrom was the only employee shown to have been "reduced in hours" within the meaning of Sec. 4.01.10. None of the other employees who were not offered summer work for the first time in 2008 have been shown to have been hired as 12-month employees. As 9-month employees, summer work was extra work over and above the work year normally associated with their jobs. The District was therefore within its rights under Sec. 4.01.10 to decide how much, if any, of that extra work it would offer them even though it was at the same time subcontracting for lawn maintenance, and even though it had always, in previous years, offered them at least some work during the summer. The District's decisions not to have those 9-month employees perform summer work was not a "reduction in hours" for any of them within the meaning of that Section, and therefore did not constitute a violation of that Section.

Alleged Violation of Agreement Sec. 11.08

The Association has also persuasively shown that the District violated Sec. 11.08 by subcontracting lawn maintenance work during the summer of 2008 while not asking Nystrom to fill-in for full-time custodian(s) who were absent during that time, to the extent that Nystrom could do so without exceeding the 40 hour weekly overtime threshold in Sec. 11.03.

While Sec. 11.08 generally reserves to the District "the right to use unit and non-unit substitutes to perform regular unit work in the absence of a unit employee," it expressly limits that right to this extent: "prior to calling in other unit and non-unit substitutes", "any department employee who works less than full-time within his/her department shall be asked to fill those hours."

The record establishes that, with at least one full-time custodian absent throughout the summer of 2008, the District utilized non-unit (subcontracted) personnel to perform lawn maintenance work historically performed by bargaining unit employees without offering that work to Nystrom. As a 12-month part-time employee in the Custodian department, Nystrom would have been a "department employee who works less than full-time within his/her department" but for the District's Sec. 14.01.10 violation noted above that prevented Nystrom from working his normal four hours during the summer. As such, Nystrom would have been entitled under Sec. 11.08 to be asked to fill the absent full-time custodian's hours prior to the District calling in other substitutes (such as those who performed subcontracted lawn maintenance work), but subject to the limitation that his hours could not exceed the 40 hour contractual weekly overtime threshold in Sec. 11.03.

However, contrary to the Association's contentions, Nystrom would have been the only "[Custodian] department employee who works less than full-time within his/her department" during the summer of 2008. No other part-time custodian employee could be said to have been

one "who works" in the Custodian department during the summer of 2008, because they were not working that summer at all.

Also contrary to the Association's contentions, Sec. 11.08 cannot be interpreted as embodying the District's practice of asking bargaining unit employees who work in other departments to fill in for an absent unit employee before using non-unit substitutes. To do so would be to add to the single limitation expressed in the second sentence of that Section, contrary to both Sec. 27.01 (" . . . no verbal statements or past practice shall supersede any [Agreement] provision") and Sec. 4.01 ("Management retains . . . the right to exercise these functions, except to the precise extent such functions and rights are restricted by the express terms of this Agreement. ")

Remedy

The Arbitrator concludes that the appropriate remedy for the violations noted above is to take the actions noted below that are designed to put Nystrom in the position he would have been in had the violations not occurred.

To remedy the Sec. 14.01.10 violation, it is appropriate to require the District to pay Nystrom four hours pay (and to credit him for seniority and any other applicable contractual accrual purposes) for each week day in the summer of 2008, and also to pay him four hours of pay for the July 4 holiday in 2008. Four hours per day is and has been Nystrom's normal work schedule during the school year and during the summers of 2006 and 2007. Because the District improperly retroactively treated Nystrom as a 9-month employee for vacation purposes beginning with its August 20, 2008 response to the instant grievance, it is also appropriate to require the District to pay Nystrom so that he will have received five days pay as regards 2006-07 vacation and five days pay as regards 2007-08 vacation.

To remedy the Sec. 11.08 violation, an award of up to an additional four hours pay per 2008 summer weekday to Nystrom might have been appropriate but for the fact that Nystrom's work for the District is a second job which he works during hours permitted by his work for another employer. It is therefore difficult to determine how many more hours than four per day, if any, Nystrom would have been willing and able to work during the summer of 2008. For that reason, no additional relief is being ordered in this particular case on account of the Sec. 11.08 violation.

No relief for any other employee besides Nystrom is appropriate.

Jurisdiction has been retained for a specified period of time to resolve disputes concerning the meaning and application of the remedy that may arise during that period.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the DECISION AND AWARD of the Arbitrator on the ISSUES noted above, that:

1. The grievance was timely filed.
2. The District violated Agreement Secs. 4.01.10 and 11.08 by its subcontracting of lawn maintenance work in the summer of 2008, but only as regards its impact on Joseph Nystrom.
3. The appropriate remedy for the violations noted above is that the District shall immediately:
 - a. pay Nystrom four hours pay (and credit him with four hours for seniority and any other applicable contractual accruals) for each non-holiday weekday in the summer of 2008;
 - b. pay Nystrom four hours pay for the July 4 holiday in 2008; and
 - c. adjust Nystrom's pay so that he will have received five days pay as regards 2006-07 vacation and five days pay as regards 2007-08 vacation.
4. The Arbitrator reserves jurisdiction for a period of 30 calendar days from the date of this award (or for such additional period as the Arbitrator may order within that period), to resolve, at the request of the Association or the District, any dispute that may arise as to the meaning and application of the remedy ordered in 3., above.
5. The Association's requests for relief besides that set forth in 3, above, are denied.

Dated at Shorewood, Wisconsin, this 22nd day of December, 2008.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator

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