BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KEWASKUM AUXILIARY PERSONNEL

and

KEWASKUM SCHOOL DISTRICT

Case #34
No. 68956
MA-14420

Appearances:

Robert Butler, Scott Mikush, and **Ben Richter**, Attorneys, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, WI 53703, appearing on behalf of the Board of Education.

Michael D. Phillips and **Stephen Pieroni**, Attorneys, Wisconsin Education Association Council, Post Office Box 8003, Madison, WI 53708, appearing on behalf of the Franklin Education Association.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the Kewaskum School District (hereinafter referred to as either the District or the Employer) and the Kewaskum Auxiliary Personnel (hereinafter referred to as either the Association or KAP) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the District's decision to use non-bargaining unit personnel for certain maintenance work. The undersigned was so designated. Hearings were held on November 10, 2009 and June 15, 2010 at the District's offices, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A stenographic record was made of the hearings, and a transcript was provided. The parties submitted briefs and reply briefs, the last of which were exchanged through the arbitrator on September 3, 2010, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Award.

ISSUES

The parties could not agree on a statement of the issue and stipulated that the arbitrator should frame the issue in his Award. The issue may be fairly stated as follows:

> Did the District violate the collective bargaining agreement when it reallocated three part-time custodians from the Elementary Schools to the High School at the outset of the 2008-2009 school year, without posting the work at the High School?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE III - MANAGEMENT RIGHTS

The Board on its own behalf and on behalf of the district, hereby retains and reserves unto itself all rights of possession, care, control and management vested in it by law, and retains the right to exercise these functions during the term of the collective bargaining agreement except to the precise extent such functions and rights are restricted by the terms of this Agreement. These rights include, but are not limited by enumeration to, the following rights:

a. To direct all operations of the District;
b. To establish reasonable work loads, work rules and schedules of work;
c. To hire, promote, transfer, schedule and assign employees in positions with the school system;
d. To lay off employees from their duties for sound business reasons;
e. To maintain efficiency of school system 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 select employees, establish job criteria and evaluate employee performance;
i. To determine the methods, means and personnel by which school system operations are to be conducted;
j. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.
k. To contract out for goods and services provided that no employee is laid off or reduced in hours.

. . .

ARTICLE XI - SENIORITY AND LAYOFF

. . .

8. Recall Procedure:

All laid off employees shall have their names placed on a recall list. In the event a vacancy occurs or a new position is created while employees are on layoff, the District shall first attempt to fill the position utilizing the vacancy and transfer language contained in this Agreement. In the event a bargaining unit member is not selected for the position after the completion of the vacancy and transfer procedures the last employee laid off shall be the first employee recalled, provided that he or she is able to perform the duties of the position to which he or she is recalled.

. . .

11. No person from outside the bargaining unit may be hired for a permanent position while there are employees who have been laid off who are willing, available, and immediately qualified to fill the vacancy.

. . .

ARTICLE XII - VACANCIES

1. When a vacancy occurs or a new position is created within the bargaining unit, employees on layoff (if any) shall be eligible for recall to the position, in accordance with the requirements of the Seniority, Layoff and Recall provisions.

Prior to the filling of any vacancy for which an employee on layoff is eligible, the job will be posted internally to give a current employee an opportunity to transfer.

2. If the vacancy or new position is not filled through recall as provided in sections seven (7) through ten (10) of Article XI Seniority and Layoff, the District shall post a notice of the opening adjacent to a time clock on designated employee building boards within all schools in the District for all employees for at least five (5) working days prior to advertising the position outside the bargaining unit. Employees interested in such position shall make application to the administration. A copy of the posting will also be sent to all bargaining unit employees. The President of the Association will also receive an electronic mail copy of all job postings.

The posting may include the approximate date for the filling of the position.

3. Unit employees will be given consideration for a vacancy or new position by seniority. Nothing in this section precludes the District from advertising for candidates outside the bargaining unit, nor from selecting the best qualified candidate as reasonably determined by the Board.

4. When an employee moves from one position or classification to another, he or she must serve a trial period of 30 days. During such trial period, he or she will be paid at his or her previous rate of pay or the hiring pay rate for the new position, whichever is higher. Upon completion of the trial period, the employee will be placed on the pay scale at the amount he or she was making in his or her previous position, or at the next higher rate on the new scale if the previously earned rate falls between two rates on the scale for the new position.

5. When an employee moves to a different classification or position and proves unsuccessful during the trial period, he or she may return to his or her previous position without serving a probationary period.

6. Any employee who fills a position temporarily vacated as a result of a medical leave shall, upon the return of the permanent employee from medical leave, return to their previous position.

. . .

BACKGROUND

The District provides public educational services to the people of Kewaskum, Wisconsin. At all relevant times, Michael Krumm was the District Administrator and Paul Reichert was the District's Business Manager. The Association is the exclusive bargaining representative of the District's support personnel, including custodial and maintenance workers, secretaries and paraprofessional employees.

This grievance concerns a series of personnel transactions at the end of the 2007-2008 school year, and at the beginning of the 2008-2009 school year. At the close of the 2007-2008 school year, the District sent notices of layoff to two paraprofessionals, Tracy McCarthy and Lisa Parker. Two months later, in August, Richard Thull, a full-time year-round custodian at the Kewaskum High School retired. At roughly the same time, the District completed a remodeling project on the High School. The remodeling created a large fitness center at the High School, and that in turn generated a need for additional cleaning services. Krumm assessed its custodial needs in light of the new fitness center, a newly opened Career Academy and expanded administrative offices, and he and Reichert proposed to the School Board that three part-time janitors at Wayne Elementary and Farmington Elementary Schools be reassigned to the High School, and that the District hire an outside contractor to replace them on the night janitorial work at the elementary schools. The custodians were transferred as of the start of the school year. Their hours of work and schedules remained the same, but their work location was changed. On September 17, 2008, the District executed a contract with Pro One Janitorial, Inc. to provide night cleaning at the elementary schools.

The Association objected to the hiring of an outside contractor while unit employees were on layoff, and asserted that the new custodial work had to be posted for employees to bid. In reaction to the first of these complaints, the District initially sent notices of recall to Parker and McCarthy for two hour per day custodial jobs on September 2nd. Both declined the positions because they offered too few hours. On October 3, the District sent notices of recall to the two employees for five hour per day custodial positions at the High School, which opened up due to the resignations of two of the transferred janitors. On October 10th, the District notified them of two hour per week paraprofessional positions. Neither of them responded to the recall to the custodial positions, and both turned down the two hour per week paraprofessional positions. The District terminated their employment as of October 20th for failing to respond to the notice of recall.

In response to the Association's objections to not posting positions, the District responded that it has reassigned employees, voluntarily and involuntarily, in the past without posting positions. In response to the question of subcontracting work, the District asserted that there were no employees either reduced in hours or laid off as a result of the subcontract. The matter was not resolved in the lower stages of the grievance procedure and was referred to arbitration.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

A. The Arguments of the Association

The Association takes the position that the District clearly violated the collective bargaining agreement through its contract with Pro One. The unambiguous language of the contract requires that vacancies be posted for bid by current employees, and if not filled through posting, be filled through recalling laid off employees. Article XII, Section 1 could not be clearer:

> 1. When a vacancy occurs or a new position is created within the bargaining unit, employees on layoff (if any) shall be eligible for recall to the position, in accordance with the requirements of the Seniority, Layoff and Recall provisions.
>
> Prior to the filling of any vacancy for which an employee on layoff is eligible, the job will be posted internally to give a current employee an opportunity to transfer.
>
> . . .

This two step process is mirrored in the language of Article XI, governing recalls.

In this case, the District belatedly conceded that it had to recall McCarthy and Parker to the available custodial work created by the retirement of Thull and the completion of the remodeling project. This admits that this work constitutes a vacancy within the meaning of the contract. This admission is reinforced by the District's repeated use of the terms "new" and "vacant" to describe the available custodial work. Indeed, Business Manager Reichert testified that the retirement of Thull created a "vacancy" at the High School. If it is a vacancy, it must be posted. The District is not free to simply skip this step, but that is what it has done.

The Association dismisses the District's claims that a past practice or bargaining history can somehow trump the clear language of the collective bargaining agreement. The contract expressly conditions the exercise of all management rights "to the precise extent such functions and rights are restricted by the terms of this Agreement." The contract precisely prohibits the use of outside workers when employees are on layoff, and precisely requires the use of posting before the use of recall. This specific language governs the general language permitting the District to transfer and assign employees, and it cannot be rendered meaningless by any alleged practice.

Even if the arbitrator believed that the past practices here were relevant, the Association points out that there is no persuasive evidence that custodial positions have ever been filled by involuntary transfers, with the knowledge and agreement of the Association. There is one case in which a custodian was transferred for disciplinary reasons, with the Association's knowledge and agreement. There is another case of disciplinary transfer, where the Association did not know of the transfer or agree to it. Two cases, one of them largely unknown to one of the parties, hardly constitute a past practice, and on this record the arbitrator cannot possible conclude that custodians have been reassigned without posting of positions.

Even if the arbitrator expended his consideration to include non-custodial positions, there is little evidence of any mutually accepted practice. In many of the instances involving paraprofessionals cited by the District, the supposed transfer of an aide was simply the routine movement of an individually assigned special education aide following the child as he or she moves from one grade or one school to another. Other instances involved reassigning special education personnel as students came and left the District. Still others involved moving personnel in order to maintain their hours of employment. These transactions are simply the day to day realities of paraprofessional staffing, and do not indicate that the parties have chosen to disregard the posting provisions of the contract for all classifications and in all circumstances. Indeed, the evidence shows that, despite the District's claim of carte blanche in personnel matters, 88 positions have been posted in the support staff unit in the past five years. Forty-two of these have been paraprofessional positions.

The District did show several instances in which secretaries were moved from job to job, but there is no evidence that the Association knew of these moves or agreed with them. Again, it is mutuality that establishes a binding practice, and an unknown act is proof of

nothing. Even if the arbitrator concluded that there was some sort of staffing practice with respect secretaries or paraprofessionals, those positions are functionally distinct from custodians, and a past practice applicable to those employees cannot and should not be blindly applied to custodial workers. The Association also notes that the District identified three secretaries who were transferred without posting, while in the five years preceding this grievance 13 secretarial jobs were filled through posting.

Turning to the District alleged evidence of bargaining history, the Association again observes that this is merely an aid to interpretation, and it cannot prevail over clear language. The District also ignores the fact that the Association always conditioned its proposals, counter proposals and modifications in bargaining by noting that they were made without precedent or prejudice.

In summary, the Association stands on the clear language of the collective bargaining agreement. The District was obligated to post the vacant work at the High School. It failed to do so, and it thereby violated the collective bargaining agreement. The arbitrator should so conclude and restore the status quo ante. The transferred custodians should be returned to their positions at the elementary schools, the vacancies at the High School should be posted, and Parker and McCarthy should be restored to the recall list and notified of all vacancies.

B. The Arguments of the District

The District takes the position that the grievance is without merit and must be denied. The Association goes on at length about the need to post the "vacancies" created by the retirement of Thull and the remodeling of District buildings, but it is clear that it has utterly failed to carry its burden of proving that any vacancy existed. "Vacancy" is not defined in the contract. Management has retained its full rights, including the right to "determine the methods, means and personnel by which school system operations are to be conducted" save only "to the precise extent such functions and rights are restricted by the terms of this Agreement." This includes the right to determine whether work constitutes a vacancy to be filled, or whether it will be done by existing personnel, or whether it will be done by an outside vendor.

The existence of a vacancy means more than the existence of work, and the District has retained the right to determine when a vacancy exists. The record is filled with examples of the District deciding to fill existing needs by reassigning existing personnel to different work locations, work schedules, and even classifications, voluntarily and involuntarily. These reassignments have involved paraprofessionals, secretaries and custodians. Positions within the District are, by and large, not designated by specific work locations. These are employees of the District, and not of individual schools. An empty slot at an elementary school does not create a vacancy at that location, unless the District elects to fill the job through posting rather than transfer. Indeed, this is consistent with the history of this grievance, in that the District

responded to Association objections to the use of a subcontractor while employees – Parker and McCarthy – were on layoff, by attempting to recall the two to a variety of available positions. Those positions were both paraprofessional and custodial. None of them were posted before the recall effort was made. If the mere existence of work created a vacancy, as claimed by the Association, these work opportunities should have been posted before being offered to laid off employees.

The District dismisses the Association's peculiar view that "clear" contract language requires posting vacancies for one set of employees – custodians – while not applying to others. There is a single contract here, and if "vacancies" must be posted under the terms of that contract, it follows that all of the secretarial and paraprofessional vacancies should have been posted. They were not, and it strains credulity to claim that all of these vacancies and transfers were somehow unknown to the Association. These reassignments were not grieved because they did not involve vacancies and did not violate any express term of the contract.

The history of bargaining supports the District's view of management rights. In 1995-97 negotiations, the Association sought to require the use of volunteers and assignment by inverse seniority for shift changes, for the stated purpose of giving employees some degree of choice in their work careers. This language was not accepted and was dropped. In the 2006-2008 negotiations, the Association proposed to delete the only provision in the contract which mandated a declaration of a vacancy: "If an existing position is expanded in hours resulting in a new level of benefits, the position will be declared vacant. The incumbent holding the position would be given equal consideration for the new expanded position, provided the district administrator reserves the right to select the most qualified applicant." The District agreed to this deletion. Finally, in the 2008-10 negotiations, the Association made two proposals that are relevant. First, it proposed to eliminate the enumeration of management rights from the contract. That proposal was rejected, and eventually dropped. The Association also proposed to require posting of summer employment opportunities. The parties ultimately agreed to a side letter, preserving the District's right to determine number, duties, schedules and duration of employment for summer workers, but requiring the posting of these work opportunities. Taken as a whole, the Associations proposals in bargaining evince a clear understanding that management has retained its discretion in declaring and filling vacancies, subject only to the very narrow areas – principally summer employment - in which specific language has been agreed.

The history of the District – in negotiations and in practice – shows that there is no requirement to use the posting process before reassigning personnel. Moreover, the specific language of the agreement does not require the posting of open positions, and reading any such requirement into the agreement significantly reduces the District's management rights. The Association seeks a ruling that would require the District to post all open positions, leading to the potential for multiple postings flowing from a single opening, before it could exercise its right to subcontract work, even though the subcontracting would not lead to layoffs or reductions in hours – the only express limits on the right to subcontract. This significantly

adds to the limitations that were negotiated when the subcontracting language was put into the contract. There is simply no basis in the contract for such an interpretation. Had the parties intended this result, they could have bargained for it. They did not, and the arbitrator should not impose it under the guise of interpretation.

DISCUSSION

The District transferred three part-time custodians from the Elementary Schools to the High School, to perform new work created by remodeling and to cover other work formerly done by a full-time custodian who retired. It then subcontracted the night cleaning work at the Elementary Schools. The issue in this case is whether the District's decision to reassign custodians from the Elementary Schools to the High School, rather than using the posting process to fill the available work there, violated the collective bargaining agreement. The Association expressly disavows any contractual challenge to the subcontracting of work at the Elementary School, although it does ask as part of the remedy that the custodians formerly at the Elementary School be returned to those jobs, and presumably this would displace or disrupt the subcontractor, at least for a time.

The District asserts that the term "vacancy" is not defined in the collective bargaining agreement, creating an ambiguity which must be given meaning through the principles of interpretation. The Association contends that the term has a well established meaning in the field of labor relations, and that evidence of past practice and other interpretive aids is impermissible. However, an appeal to a term's technical meaning is, itself, the use of an interpretive aid, and while there may be a majority view within the labor relations field of what constitutes a "vacancy", it is not correct to say that there is a single view. Parties have the freedom to define the terms of their contracts as they see fit, unless they have expressed themselves so clearly as to preclude any alternate meaning. The use of the term "vacancies" does not by itself preclude a conclusion that the parties to a given contract intended it to be read more broadly or more narrowly than it might be construed in the majority of contracts.

While there is a good deal of complexity to the issues raised by the parties, two things are clear at the outset. The first is that the retirement of Thull did not create a vacancy in his former position. The District decided to cover the High School cleaning and the additional cleaning at the Career Academy and administrative offices with three part-time employees. There was no full-time position filled, analogous to the one formerly occupied by Thull, nor did the District have any obligation to create a full-time job. The contract does not require that hours be configured in any given way, and the District has reserved the right to determine schedules, assignments and personnel. The District had the clear right to decide to cover these hours with part-time employees. The issue here is whether the District had the right to fill the three part-time positions through transferring personnel who were already working the same shift and hours at a different location, or was obligated to post them as new positions.

The second thing that is clear is that the movement of the three part-time employees from the Elementary Schools did not create vacancies at those schools. While the parties disagree as to what constitutes a vacancy, there is no dispute that a vacancy does not exist where there is no intent to fill a position, or replace an employee with another employee. Here, the District had no intention of using employees to clean the Elementary Schools once the part-time employees were reassigned. Whether that reassignment came as the result of transfers or as the result of the posting process playing itself out, there were no positions to be filled at the Elementary Schools after the start of the 2008-2009 school year.

These two points have great significance for the proper disposition of this grievance. The Association several times cites my Award in Brown County (Library), (Nielsen, 3/7/2001) for the proposition that a vacancy exists whenever an existing position lacks an incumbent but the need still exists for that position. The cited portion of the Award reads: "Where an employee quits or retires, there is no job added to the workforce. The head count remains the same, but there is a vacancy. An existing position lacks an incumbent. If the County determines that it still needs that position at that location, it must post the job…" While I agree that Brown County is instructive, it does not lead to the conclusion urged by the Association.

In Brown County, the Employer remodeled and expanded one of its libraries, creating a need for an additional Library Associate. It filled the position by eliminating a Library Associate position at another library, and transferring the incumbent. The Union grieved, asserting that the positions should have been filled by a posting, under the terms of the contract's Promotions provision: "Whenever any vacancy occurs due to a retirement, resignation, new position or for whatever reason, the job vacancy shall be posted within ten (10) days of vacancy." There, as here, the question was whether a "vacancy" was created that required posting. I concluded that there was no vacancy:

> … A need existed at the Howard, but there was no position. A position existed at the Central Library, but there was no need. Had the County transferred Stuart, then declared a vacancy at the Central Library, this transaction would rather clearly be a sham intended to evade the posting procedures of the contract. That is not what happened.
>
> The County reallocated the position of Library Associate from Second Floor Reference at Central Library to the Howard Branch. Contrary to the Union's conception of the transaction, this was not the elimination of a job and the creation of another job. This was instead a single transaction, which created neither a vacancy in Howard nor a layoff at the Central Library. Certainly, the County could have elected to handle this as two separate transactions, and if it had, the posting language and layoff language would have come into play. However, the contract as written does not require the County to structure a genuine reallocation in that fashion. If Article 23 specified that transfers were to be accomplished by seniority, clearly the County would have been required to post the transfer opportunity at Howard. The contract does not so require.

> Instead, the posting procedure, while very broad, requires a vacancy before seniority comes into play. There was no vacancy, and thus, the language of Article 23 was not triggered.

This is almost precisely the same transaction that took place here. The District had a need for custodial hours at the High School. It filled that need by moving existing positions which were no longer needed at the Elementary School.[1] There was no change in shift and there was no change in hours.[2] The reallocation was not a sham designed to prevent the posting of Thull's position. As noted, the District had the right to reconfigure the High School staffing on Thull's retirement, and there no longer was a full-time year round position to be filled. Nor was there any vacancy created at the Elementary School. No new position was created, and there were no open positions at the close of the transaction. For the same reasons cited in Brown County, I conclude that there were no vacancies created by this reallocation, and thus the District did not violate the posting provisions of the collective bargaining agreement. It follows that the grievance must be denied.

AWARD

The District did not violate the collective bargaining agreement when it reallocated three part-time custodians from the Elementary Schools to the High School at the outset of the 2008-2009 school year, without posting the work at the High School. The grievance is denied.

Dated at Racine, Wisconsin, this 18th day of July, 2011:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

[1] The District asserted at hearing that the decision to subcontract followed after, and separately from, the decision to reassign the part-time custodians at the Elementary Schools. That is not what the record shows. The memo to the School Board clearly states that the subcontracting was a means of absorbing the hours created by Thull's retirement and the remodeling, and that the transfers were part and parcel of that plan.

[2] Two of the reallocated custodians resigned after they were transferred, and this did create a different configuration of hours, but that was not part of the original transaction under review in this grievance.

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