Opperwall #6

AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION

In the matter of the arbitration between:

Union

-and-

Employer

Grievant: Employee 1

Issue: Assignment of additional work hours

Arbitrator: Kathleen R. Opperwall

ARBITRATION OPINION AND AWARD

An arbitration hearing was held on August 17, 2006, in City A, Michigan.

The record was closed on October 4, 2006, after receipt of the parties' post-hearing briefs.

ISSUE

Did the Employer violate the parties' collective bargaining agreement by involuntarily assigning Employee 1 to start an hour earlier each morning, at 7:25 AM, after the handicapped student she assisted decided to participate in band during the "zero hour?"

ARBITRATION HEARING RECORD

The Union ("the Union") represents the full-time and regular part-time aides, paraprofessionals, hall monitors, and office/clerical employees of the Employer ("the Employer"). The Grievant, Employee 1, has been employed as a paraprofessional with the Employer for 16 years. During the 2005-2006 school year she held the position of Upper Elementary Mandated Special Education Aide.

Since the fall, of 2003, Employee 1 has been assigned to assist a severely handicapped girl who attends regular classes. At the beginning of the 2005-2006 school year, all the fifth grade students, including Employee 1's assigned student, were given an opportunity to sign up for band. Band is an optional activity, taught by the Employer's band teacher, and scheduled for the "zero hour" in the morning, before the regular classes begin. Employee 1's assigned student decided she did want to participate in band. The Employer was obligated to accommodate her interest in participating in band.

Principal is the Principal of the School A, which covers grades 4, 5 and 6. In late September, when it became known that the student wanted to participate in band, Principal asked Employee 1 if she would willing to come in an hour earlier every morning. Employee 1 said, no, that it would be a problem because of her family responsibilities.

On October 6, 2005, the Employer posted an opening for an Upper Elementary Mandated Special Education Aide, to work the 7:25 to 8:25 AM time period. The posting indicates that it was an "Internal/External Posting," No one applied in response to this posting. Employee 1 did not bid on it. On October 20, 2005, Superintendent 1 gave Employee 1 a memo advising her of the following:

> Effective Monday, October 31, your new start time as a health care aide will be 7:25 a.m., Monday — Friday. This change is a direct result of a change in a student's IEPC.

> Please meet with Principal, Principal of Oakridge Upper Elementary, for details. The ending time will be the same as you are currently working.

The following week, on October 27, 2005, Employee 1 filed a grievance protesting this change in her work schedule. The grievance stated the following:

> Violation of contract on Articles VII, Hours of work, adjusting original work schedule. Article 1X, Vacancies and Transfers – Job wasn't bid on from within, now needs to be posted outside as contract calls for. Just Cause — forcing me to take a job I didn't want or bid on. I feel like this is a disciplinary punishment. This 1 hour job is an extra activity. It is not part of the normal school day.

The relief requested by Employee 1 was to be returned to her original work schedule of 6.75 hours per day, to be paid time and one-half for the extra hour per day, and to have the position posted externally.

On November 2, 2005, Superintendent 1 gave a written response, denying the grievance. The response stated that Employee 1 had been given adequate notice of the schedule change per Article VII; that Article IX was not relevant because this was a change of schedule rather than the creation of a new position; and that this was not a disciplinary action but an extension of Employee 1's responsibilities to her assigned student.

The grievance was appealed to arbitration on or about December 19, 2005. On January 9, 2006, the Employer filed a Motion to Dismiss the arbitration, on the grounds of procedural and substantive arbitrability. However, in its post-hearing brief the Employer indicated that it was not pursuing its arbitrability objections.

The testimony presented at the arbitration hearing indicated that the student has multiple impairments. She uses a power wheel chair, and needs close supervision because she is not always in full control of her wheel chair, due to spasticity. She needs assistance with personal care, including eating and toileting. She uses a computer to communicate and do her school

work. Employee 1 acknowledged that it took some time to learn how to work with the wheel chair and computer equipment. Employee 1 has participated in monthly training sessions which include using the wheel chair and computer equipment.

The Employer acknowledged that Employee 1 was not the only employee who was qualified to work with this student. A substitute had temporarily filled the one-hour spot while the position was being posted. Other paraprofessionals have also worked with this student on days when Employee 1 has been absent. Principal testified that Employee 1 had rapport with the student, and the trust of her parents, "which is huge." Supervisor 1, the Special Education Supervisor, testified that Employee 1 was the best person to work with this student.

Co-President, the Union Co-President, testified that it was the practice of the Employer to seek external applicants if no internal applicants applied for a position. An example was when the Employer posted for a 20 minute time slot when a Monitor was needed at the Another Institution. No internal applicants bid on that, and the Employer hired a parent for that time slot.

CONTRACT PROVISIONS

Article VII, entitled Hours of Work, includes the following sections which are pertinent to this grievance:

> A. Work Schedules. All employees will be assigned to a regular work schedule at the commencement of the school year. Any changes by the Employer in an employee's starting and ending time will be made upon five (5) work days' advance written notice to the employee. The Employer reserves the right to make temporary adjustments in work hours as to the days of the week, the daily start and quit times and the amount of hours in any work day or work week if an emergency requires such temporary change.

* * *

D. Overtime. Time and one-half the employee's regular rate of pay will be paid for all hours worked in excess of forty (40) hours in a work week or eight (8) hours per day except for parent teacher conferences in which the employee will receive compensatory time at straight time rate as per calendar.

* * *

Article IX, which is entitled Vacancies and Transfers, includes the following provisions:

A. Vacancy

1. A vacancy shall be defined as a newly created bargaining unit position or a present bargaining unit position that is not filled and is intended to be filled on a permanent basis and has not been eliminated by Board action within forty-five (45) days.
2. All job vacancies shall be posted for a period of five (5) workdays. The posting shall include the qualifications and background needed. Job vacancies shall be posted fifteen (15) workdays during non-school days (Christmas Break, Summer Break, Spring Break). During the summer months, postings will be mailed to ail Employees.
3. Any person interested in the position may apply for the vacancy by delivering to the Personnel Office a written application by the end of the posting period.
4. All applicants will be considered for the vacancy and the vacancy shall he awarded to the most senior qualified applicant as determined by the Employer and in the event that no applicant is qualified then the position may be filled from non-employee applicants.

* *

Article III, entitled Association and Employee Rights, includes this subsection concerning just-cause:

H. No bargaining unit member shall be disciplined without just cause. Discipline shall mean any time action is taken in which a record is made and placed in the employee's file.

Article II, entitled Management Rights, includes the following provisions which are pertinent to this grievance:

B. Except as expressly restricted by the Agreement, the Employer retains the right to manage the academic and business affairs of the Employer and to direct the working

forces of the Employer, including, but not limited to, the right:

1. To determine methods and schedules of work, including technological alterations, the transfer or subcontracting of work, locations of work, the procedure and processes to be used.

* *

4. To generally direct the work of the employees, subject to the terms and conditions of this Agreement, including the right to hire, discharge, suspend or otherwise discipline employees, assign employees or transfer them to particular jobs, duties or locations either on a temporary or permanent basis; determine the amount of work needed and job content; lay employees off for lack of work or for other proper or legitimate reason; and to determine work standards and the quality and quantity of work to be assigned; and to make such studies as it shall require in connection therewith.

The exercise of the foregoing power, rights, authority, duties, and responsibilities of the Employer, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express ferms of the Agreement and then only to the extent such specific and express terms hereof arc in conformance with Constitution and laws of the State of Michigan and the Constitution and laws of the United States,

POSITIONS OF THE PARTIES

It was the Union's position that the Employer did not have the right to simply assign Employee 1 to work additional hours which fell outside the normal school day. The Union argued that it had been the consistent practice to fill positions with external candidates if no internal candidates bid on a position. The Union emphasized that Employee 1 was not the only paraprofessional who was qualified to work with this student. The Union also argued that the Employer did not try very hard to find an external applicant, and that this was in effect a form of discipline against Employee 1. The Union requested that the Employer be required to fill positions externally when no internal applicants bid on a position, and that Employee 1 receive time and one-half for the extra hours she had been required to work.

It was the Employer's position that the parties' collective bargaining agreement permitted it to assign Employee 1 the additional hour of work each morning. The Employer emphasized that it was legally required to accommodate the student's desire to participate in band. The Employer argued that it had tried to find someone else to take the additional hours, but had not been successful. The Employer also argued that the added hours were not a new position, but were an adjustment in Employee 1's schedule. It was also the Employer's position that it would violate the collective bargaining agreement to award Employee 1 time and one-half when she did not work more than 8 hours per day.

DISCUSSION AND DECISION

The grievance asserted that three provisions of the parties' collective bargaining agreement had been violated. The first provision cited was Article VII, Hours of Work. The most pertinent portion of this provision is the first paragraph of Section A, entitled Work Schedules, which reads as follows:

> All employees will be assigned to a regular work schedule at the commencement of the school year. Any changes by the Employer in an employee's starting and ending time will be made upon five (5) days' advance written notice to the employee. The Employer reserves the right to make temporary adjustments in work hours as to the days of the week, the daily start and quit times and the amount of hours in any work day or work week if an emergency requires such temporary change.

First, it is my conclusion that the change here was not a "temporary adjustment," but was a change in schedule. This differs, therefore, from temporary adjustments such as several which were testified to by Person 1. The second sentence of this provision requires the Employer to give five days written notice before changing an employee's starting time or ending time. In this case, it was undisputed that the Employer did give Employee 1 the required five days notice that her starting time was being changed.

The parties' contract does not specifically state what the starting times or ending times are

for the school day. The Union presented evidence of the normal school hours at the various school buildings for the 2005-2006 school year. These hours varied from building to building, as follows:

high school 7:50 AM – 2:40 PM
middle school 7:50 AM – 2:40 PM
upper elementary 8:35 AM 3:25 PM
lower elementary 8:25 PM – 3:15 PM
kindergarten 8:30 AM – 11:35 PM 12:10 PM — 3:20 PM

Employee 1 was a classroom paraprofessional at the upper elementary school, where the regular school day started at 8:35 AM. Evidence was presented that the classroom paraprofessionals normally started work 10 to 20 minutes before classes started. The classroom paraprofessionals at the kindergarten and lower elementary buildings generally started at 8:15 AM, and those at the middle school started at 7:30 AM. Several bargaining unit members had earlier starting times - the suspension person at the middle school started at 7:15 AM, and the copy center person at the high school started at 7:00 AM. This shows that the starting times of the paraprofessionals were not strictly limited to the regular school class hours, and that Employee 1's new starting time of 7:25 AM was not outside of the range of starting times for other paraprofessionals. It is also my conclusion that band was part of the school program at the upper elementary school, even though it was an optional activity. It was taught by the Employer's band teacher, and was scheduled for fifth graders for the "zero hour," before regular classes began.

Article VII does not prohibit the Employer from changing employees' schedules. This is consistent with Article II, Management Rights, quoted above, which includes among the rights retained by the Employer the right "...to determine … schedules of work..." and the right "... to assign employees or transfer them to particular jobs, duties or locations..." It is my conclusion that particularly in view of this language in the Management Rights clause, it was not a violation

of Article VII for the Employer to change Employee 1's starting time to 7:25 AM after giving her the required five days written notice.

The grievance also cited Article IX as having been violated. This provision, quoted above at page 5, sets forth the procedure for filling vacancies. It defines a vacancy as a "newly created bargaining unit position" or an existing position which the Employer intends to fill. The Employer did post the 7:25 AM to 8:25 AM opening in an "Internal/External Posting." The testimony indicated that no internal or external candidates applied. The Union argued that by posting this opening as a position the Employer had conceded that it was a separate position. The Employer argued that it had posted the extra hour in an effort to accommodate Employee 1, but that it was not truly a separate position. On this issue, it is my conclusion that posting the extra hour did not mean that the Employer conceded that this was a separate position. It was reasonable to post the opening in an effort to fill this time spot. Nonetheless, it is my conclusion that this one hour per day would not normally be considered a separate bargaining unit position.

The Union argued that based on Article IX and the parties' past practice the Employer should have found an outside applicant instead of requiring Employee 1 to work the extra hour. Section A. 4 of Article IX includes the following:

> All applicants will be considered for the vacancy and the vacancy shall be awarded to the most senior qualified applicant as determined by the Employer and in the event that no applicant is qualified then the position may be filled from non-employee applicants. (emphasis added)

It is significant that the word used here is "may," not "shall." It is my conclusion that this language in Article IX does not require the Employer to find an outside applicant in this circumstance. The Union presented testimony that it was nonetheless the Employer's practice to find an external applicant if existing employees were not interested in filling a time spot. An

example was presented where the Employer had posted a 20 minute per day opening, from 3:20 PM to 3:40 PM for a Monitor at the Another Institution, to monitor students from the time they exited the building until they boarded the bus. That opening was filled by a parent, not an existing employee. The Union acknowledged that that 20 minute time spot had been classified as a "casual" position, not a bargaining unit position. That monitor job was a job which could be performed by a parent without any particular training. In contrast, the one hour opening at issue here required considerably more skills and training. The posting stated that the qualifications included "... Highly Qualified status as required by No Child Left Behind – Associate's Degree or passing score on the Work Keys assessment." The job description included assisting the student with physical needs including feeding, toileting, personal hygiene, and orthopedic equipment.

It is my conclusion that the evidence presented by the Union did not establish a binding past practice which would apply to this situation. The Union presented one example, but did not present evidence that it was a mutually accepted, consistent, and long-standing practice. Nor did the Union show that the practice was extended to situations such as the one involved here, where specialized skills and training were needed. In summary, it is my conclusion that neither Article IX nor past practice required the Employer to fill the opening with an outside applicant when no existing employees applied.

The grievance also cited the Just Cause provision in the parties' contract. This provision, found at Article III, Section H, provides that, "No bargaining unit member shall be disciplined without just cause." The Union argued that Employee 1 was forced to work the extra hour basically as a form of discipline. Employee 1 has been active in the Union, including serving on the bargaining team for the current contract, and having served as the Union treasurer, co-

president, and building representative.

Based on all the evidence presented, it is my conclusion that assigning Employee 1 to the extra morning hour was not a disciplinary action. Employee 1 was the person who worked with this student during the rest of the school day. She had the most experience with this student, and was the most knowledgeable about this student's needs. She had received special logical, and therefore should not be considered a disciplinary action.

In summary, it is my conclusion that the Employer did not violate the parties' collective bargaining agreement by assigning Employee 1 to the additional hour. The grievance is denied.

Dated: November 1, 2006