

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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NORTHLAND PINES EDUCATION ASSOCIATION, :
Complainant, :
vs. : Case 29
NORTHLAND PINES SCHOOL DISTRICT, : No. 42229 MP-2230
Respondent. : Decision No. 26096-B
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Appearances:
Mr. Gene Degner, Executive Director, WEAC UniServ Council #18, P.O. Box 1400, Rhinelander, Wisconsin 54501, for the Association.
Dreager, O'Brien, Anderson, Burgy & Garbowicz, Attorneys at Law, P.O. Box 639, Eagle River, Wisconsin 54521, by Mr. John L. O'Brien for the District.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Northland Pines Education Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on May 22, 1989, in which it alleged the Northland Pines School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5 and 1, Stats. On July 25, 1989, the Commission appointed Sharon Gallagher Dobish, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats., and hearing was set for August 24, 1989. On August 2, 1989, said hearing was cancelled. On August 31, 1989, Jane B. Buffett, a member of the Commission's staff, was substituted as Examiner. On October 18, 1989, hearing was held in Eagle River, Wisconsin. A transcript was prepared and received December 11, 1989. Briefs were received by February 1, 1990. The Association submitted a reply brief which was received January 26, 1990. On February 1, 1990, the District gave notice that it declined to submit a reply brief.

FINDINGS OF FACT

1. Northland Pines Education Association, hereinafter the Association, is a labor organization with offices at 719 West Kemp Street, Rhinelander, Wisconsin 54501.
2. Northland Pines School District, hereinafter the District or Board, is a municipal employer with offices in Eagle River, Wisconsin.
3. The Association and the District are parties to a series of collective bargaining agreements, and the July 1, 1988 to June 30, 1989 agreement contained the following relevant provisions:

SECTION II - RECOGNITION OF THE BARGAINING UNIT

The Board recognizes the Northland Pines Education Association as the legally constituted bargaining agent under the provisions of Section 111.70 of the Wisconsin Statutes for all regularly employed classroom teachers, librarians, and guidance counselors, which shall include teachers hired to replace teachers leaving the Northland Pines system permanently

No. 26096-B

SECTION IX - TRANSFERS AND REASSIGNMENTS

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- B) (1) All vacant grade, subject and/or buildings positions shall be filled by teachers from within the school district provided:
(a) they make application within ten (10) school days of the notice date of the vacancy, and (b) they are qualified for said position.
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SECTION XII - POLICIES RELATING TO SALARIES

. . .

E). . . All applications shall receive full consideration with the final determination of the appointees being made by the Board. WIAA approval would be required for any coach hired from other than the teaching ranks of the school district. If two persons, who are in the Board's opinion equally qualified, apply for the same position, the teaching staff member shall be awarded the position. . . .

APPENDIX B
1988-89 EXTRA-CURRICULAR ASSIGNMENTS

. . .

Building Contact Persons:

St. Germain Elementary	1,145
Conover Elementary	984
Land O' Lakes Elementary	822
Eagle River Elementary	1,471

Additionally, the agreement contains a grievance procedure, but does not contain any provision for the final and binding arbitration of unresolved grievances.

4. The District has four elementary schools; one is at Eagle River, one is at St. Germain, approximately 13 miles from Eagle River, and two others are in locations outside of Eagle River: Conover and Land O' Lakes. Prior to 1976, each elementary school had its own principal. Sometime during the period 1976-1978 the District eliminated the principals at the aforementioned outlying schools, and Principal Gene Olson, situated at the Eagle River School, became responsible for all the elementary schools. At the same time, the position of Building Contact Person was created at each outlying school. The Building Contact Person, who is the representative of the principal at the outlying school, deals with minor problems as they arise, and keeps the principal informed regarding the school. The position description for the Building Contact Person, revised over the years, currently is as follows:

Building Contact Person

Duties

1. Develop, under the district elementary principal's direction, schedules for fire and emergency drills, lunches and playground, lyceum buses, parent-teacher conferences, special classes and traveling teachers in the building(s).
2. Assist teachers, bus drivers, etc., in minor discipline problems when needed.
3. Acquire needed substitutes for classroom teachers, not including special or traveling teachers.
4. Provide and disseminate information to pupils, parents and staff.
5. Attend personnel interviews at the discretion of the district elementary principal.
6. Maintain general public relations.
7. Handle minor public concerns and problems.
8. Cause to have removed from the premises, members of the public who may be a threat to the peace or safety of the school.
9. Handle emergency situations until the district elementary principal can be contacted.
10. Be responsible for seeing to the after hours security and public use of the building.
11. Coordinate the duties of the local non-certified personnel under the direction of the district elementary principal.
12. Be responsible for the picking up of mail, and parcel pick-up and drops during the school year and summer.

13. Work closely with the building secretary, janitors, and maintenance personnel.
14. Assemble the staff periodically to discuss mutual building concerns and problems.
15. Keep the district elementary principal informed of all happenings and events.
16. Person must be a full time employee.

5. Until his resignation in January, 1989, the Building Contact Person at St. Germain School was Tom Rossi, who was also a teacher in that building. During eight-and-a-half years of his tenure, the school secretary was Cathy Clark. Under his direction, Clark executed many of the duties of the Building Contact Person such as picking up and distributing mail. Additionally, Clark has asked non-custodial parents to leave the building or be removed, has handled emergencies, and made arrangements for community use of the building pursuant to Board policy. During this period, Rossi, not Clark, approved teachers' request to leave early, meted out discipline for misconduct on busses, reviewed teachers' letters prior to their being sent to parents, and held staff meetings.

6. After Rossi resigned as Building Contact Person in early 1989, the Board posted the position vacancy. Clark signed the posting. Irene Dean, a teacher at the building, indicated interest in the position. Prior to her signing the posting, she spoke to Olson, asking him about the position. He responded that he thought it would be fair for Clark to have the position since she had already been performing it and was doing so satisfactorily. Dean and Olson had a second, short conversation about the position prior to Dean's formal application.

7. Olson did not conduct interviews with the two applicants, nor were any written questionnaires required of the applicants, nor was there any set of qualifications for the position. Olson considered such interviews unnecessary since he had supervised and evaluated Dean for six years as a teacher, and Clark for eight years as a secretary and playground aide. Olson recommended to District Administrator Jann Peterson that Clark be hired because she had been performing many of the duties of the position, had been doing so in a satisfactory manner, and had never received extra payment for the work. There was no additional delineation of any reasons for recommending Clark.

8. The District's decision to award the position of Building Contact Person was not based on an evaluation of the applicants' comparative qualifications.

9. There was no evidence presented relevant to any allegation that the District interfered, coerced or restrained employees in the exercise of their collective bargaining rights.

Upon the basis of the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Inasmuch as the collective bargaining agreement does not provide for final and binding arbitration of contract disputes, and the parties have no alternative mechanism for resolving such disputes, the Examiner exercises the Commission's jurisdiction to decide the instant matter.

2. The District, by awarding the position of Building Contact Person at St. Germain School to an employee who is not a teaching staff member without evaluating the comparative qualifications of all applicants, violated the collective bargaining agreement, and thereby violated Sec. 111.70(3)(a)5, Stats.

3. The District, has not been shown to have violated Sec. 111.70(3)(a)1, Stats.

On the basis of the above Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order.

IT IS ORDERED that the Northland Pines School District, its officers and agents shall immediately;

1. Cease and desist from violating the collective bargaining agreement by awarding the position of Building Contact Person at St. Germain School to an employe who is not a teaching staff member without evaluating the comparative qualifications of all applicants.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

(a) Conduct an evaluation of applicants Cathy Clark and Irene Dean to determine their comparative qualifications for the position of Building Contact Person at St. Germain School and award the position in compliance with Section XII, Paragraph E of the Collective Bargaining Agreement. If Dean should be awarded the position, the District shall make her whole, with interest 2/ for all wages and fringe benefits lost as a result of the District's violation.

(b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of the Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the portion of the complaint alleging a derivative violation of Sec. 111.70(3)(a)1, Stats., be dismissed.

Dated at Madison, Wisconsin this 4th day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Jane B. Buffett, Examiner

If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was filed with the Commission. See Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83).

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

When the position of Building Contact Person for the St. Germain School became vacant in January, 1989, two employees made application: Irene Dean, a bargaining unit member and teacher at the school, and Cathy Clark, the St. Germain school secretary, who is not a member of the teachers' bargaining unit. After the Board awarded the position to Clark, the Association filed a grievance, objecting that the Board's action violated the collective bargaining agreement. The grievance procedure was exhausted without resolving the dispute. Since the parties' collective bargaining agreement does not provide for final and binding arbitration, the Association filed a complaint of prohibited practices, claiming that the alleged contract violation violated Sec. 111.70(3)(a)5 and 1, Stats. The District does not challenge the jurisdiction of the Wisconsin Employment Relations Commission.

POSITIONS OF THE PARTIES

A. The Association

The Association claims its position is supported by the clear language of the contract in the recognition clause, salary appendixes A and B, Section XII - Policies Relating To Salaries, and Section IX - Transfers and Reassignments. Additionally, the Association points to the changes made during the bargaining which resulted in the 1984-1985 contract. The presence of a non-teacher in the position of Building Contact Person in the Land O' Lakes School does not waive the Association's rights in this dispute. The Association argues the position of Building Contact Person calls for a person to exercise responsibility and make decisions, qualifications possessed by a teacher. Finally, the Association asserts the District laid no foundation for comparing the qualifications of the two candidates, but rather assigned the position to Clark as a reward to her for having performed many of the duties in the past.

B. The District

The District argues the collective bargaining agreement vests hiring discretion in the Board, except in the matter of two applicants "who are in the Board's opinion equally qualified." According to the District, under this language, the Board can be reversed only if it acts arbitrarily and without any reasonable basis. It strenuously rejects the Association's theory that Section IX - Transfers and Reassignments refers to the position of Building Contact Person. Since it finds no evidence that Dean and Clark were equally qualified, the Board acted properly in awarding the position to Clark.

C. The Association's Reply

The Association insists that the contract language referring to equal qualifications of the applicants obligates the Board to prove that the applicants were evaluated. The events surrounding the selection indicate the Board acted arbitrarily. Additionally, the Association disputes the Board's position on the applicability of Section IX - Transfers and Reassignments.

DISCUSSION

A. Applicable Contract Provisions

Both parties agree that Section XII - Policies Relating to Salaries applies to the assignment of Building Contact Person, but the District disputes the Association's contention that Section IX - Transfers and Reassignments also applies to the position of Building Contact Person. If the Association were correct, then the District would, indeed, be obligated to fill the position with a teacher within the district as long as the teacher met the other contractual requirements of applying within ten days of the notice and being qualified.

The Association's contention is not supported, however, by a close reading of Section IX which in pertinent part provides:

A teacher who desires a change in grade and/or assignment, or who desires to transfer to another building, may file a written statement of such desire with the superintendent not later than February 1st of

each year. Such statement shall include the grade and/or subject and/or building to which the teacher desires to be transferred, in order of preference. (Underlining added).

Both the section's title, as well as the words "change" and "transfer" indicate this paragraph is about the substitution of one position for another. The Building Contact Person is a position that would be added to an existing position, not one that would be substituted for a position at a given grade, subject, or school. Therefore, a "building position" in this section means a teaching position at a given school, not the position of Building Contact Person. This interpretation is consistent with Appendix B which, in listing the salary for this disputed position, does not use the term "building position" but instead uses, "Building Contact Person," thereby indicating that the parties used that phrase when they intended their contract to address the position of the Building Contact Person.

The undersigned is not dissuaded from this conclusion by the Association's argument based on bargaining history. The Association points out that prior to the 1984-85 contract, Section IX, Paragraph B, subparagraph 1 provided: "All vacant positions shall be filled by teachers from within the school district" In the 1984-85 contract, the following underlined words were inserted into the provision to create the following sentence: "All vacant grade, subject and/or buildings positions shall be filled by teachers from within the school district" This change, without more evidence does not support the assertion that "building positions" was intended by the parties to mean "Building Contact Person." The Association argues that the Building Contact Person was the only extra-curricular position whose title was close to "building positions." That explanation assumes that Section IX was intended to cover extra-curricular assignments, but there is no reference in Section IX to extra-curricular assignments, and no other evidence that the section was intended to cover extra-curricular assignments. The undisputed fact that there was a change in the 1984-85 contract does not, by itself, prove that the change had the meaning argued by the Association.

In the light of the above analysis, it is clear that the parties did not intend Section IX - Transfers and Reassignments to apply to the selection of the Building Contact Person.

B. Contractual Standard for Awarding Building Contact Person Position

Section XIII - Policies Relating to Salaries, Paragraph E provides in pertinent part:

All applications shall receive full consideration with the final determination of the appointees being made by the Board. . . . (Not reproduced here is a sentence regarding coaching positions.) If two persons, who are in the Board's opinion equally qualified, apply for the same position, the teaching staff member shall be awarded the position.

The key to applying this language is to recognize that the discretion it gives the District is broad, but not absolute. The first sentence which delegates final determination to the Board is modified by the second, more specific, sentence which establishes guidelines for dealing with two applicants whom the Board considers equally qualified. This language vests authority in the Board's conclusion regarding qualifications, but at the same time, this language obligates the Board to make a determination and reach such a conclusion regarding qualifications. Contrary to the Board's assertion, it is not sufficient for it to show that its action was based on reason, and therefore was not arbitrary. To prevail, the District must show that its selection of Clark was founded on an evaluation of the applicants' comparative qualifications.

C. The District's Selection Process

Eagle River Principal Gene Olson recommended to District Administrator Jann Peterson that Clark be appointed the Building Contact Person. Although Peterson testified that he and Olson discussed qualifications for the position, he had no independent recollection of any specific qualifications discussed, and Olson did not testify to the content of those discussions. Consequently, it is Olson's decision-making that must be reviewed to determine whether it complied with the contractual requirements.

The first inquiry addresses whether Olson had a list, written or unwritten, of qualifications required for the Building Contact Person. Although there was a document entitled: "Building Contact Person - Duties," that document was precisely what it purported to be, a list of duties, not qualifications. Nor was there any other written list of qualifications.

It is conceivable that Olson could have had an informal, mental list of qualifications upon which he focussed, but the record does not demonstrate that

this was the case. Olson did, in fact, respond to leading questions by testifying that responsibility and decision-making and being a community businesswoman (and thereby having community contacts) were qualifications for this position, but it is unclear whether Olson had considered these qualifications at the time when he decided to recommend Clark for the position. When examined about his decision-making through open-ended questions that did not suggest the answer, Olson did not state that he considered any qualifications, but rather gave another reason for his decision, to be discussed below.

Having found that there was no list, written or unwritten, of qualifications at the time that applicants were being considered, the undersigned must still determine whether, in fact, a consideration of qualifications was implicit in the selection process. The first thing to be noted about the selection process was that there was no application form or other questionnaire through which the applicants could make written statements about their qualifications. Nor was there any interview that might have explored qualifications. There were two conversations between Dean and Olson regarding the position. In the first, Dean asked Olson about the position and announced she was considering applying. Olson responded by asking about her interest in the position and explaining that he believed Clark should have the position. The content of the second conversation is in dispute, but neither Dean's or Olson's version indicates the conversation was an interview in which Olson evaluated Dean's qualifications. Similarly, there was no application interview with Clark.

When asked how he evaluated the two applicants, Olson responded that he had evaluated both of them for several years. Those earlier evaluations, however, were not explorations of qualifications the applicants had for the position of Building Contact Person, but rather, evaluations of their performance in two other positions: Dean's teaching position, and Clark's secretary/playground aide position. While such past performance evaluations might have been appropriately a part of the selection process, they are not evidence of an evaluation of qualifications for the Building Contact Person position.

In short, there is no evidence Olson focused on qualifications for the disputed position and no evidence he evaluated the two applicants in light of any qualifications.

If not a consideration of the applicants' qualifications, what then was the basis of the selection? Olson gave this testimony regarding the basis of his recommendation to Peterson: "Basically I felt that it would be a real disservice not to give it to someone who had been there all this time, had done the job, a lot of it without being paid, being allowed to as she indicated; and I was satisfied with it, and I guess my feeling is you go with a known entity." 3/ At another point, in his first conversation with Dean regarding her possible application, Olson emphasized the fairness of awarding the position to Clark since she had been performing much of the work. ". . . I told her (Dean) at that point in time that I felt it would only be fair that Cathy have the job from the standpoint she has been doing it and we have all been very happy with it." 4/

In fact, the basis of the decision to award the position to Clark was a sense of fairness that since Clark had performed many of the duties during the eight-and-a-half years that Rossi held the position, she was entitled to the position (and, presumably, remuneration), now that Rossi had resigned from the position. Additionally, Clark's past performance gave Olson the confidence that she could satisfactorily perform the required duties.

The Board's reliance on doing what it deemed fair, however, did not fulfill its contractual duty to evaluate qualifications. Likewise, the Board's reliance on experience did not suffice. The meaning of "qualifications" is not identical to the meaning of "experience." "Qualifications" are those abilities or characteristics that suit a person to a specific task, whereas "experience" is active participation in a specific task. It is possible that a person who lacks experience performing the duties of a given position nevertheless possesses the qualifications for performing those duties. In this instance, Clark was indisputably experienced in many of the duties of the Building Contact Person. Noting her experience, however, is not the same as evaluating her qualifications and comparing them to the qualifications of the other applicant.

In summary, since Section XII - Policies Relating to Salaries requires the Board to base its decision to award the position of Building Contact Person upon an evaluation of the qualifications of the applicants, and the Board's decision in this instance was not based on such an evaluation, that decision violated Sec. 111.70(3)(a)5, Stats.

3/ Tr. 90 & 91.

4/ Tr. 88.

D. REMEDY

To remedy this violation, this Examiner orders the District to rescind its award of the Building Contact Person position to Clark and not make such an award until such time as it has conducted an evaluation of the applicants regarding their comparative qualifications for the position of Building Contact Person. If Dean should have qualifications equal or superior to those of Clark, she must be awarded the position with salary and fringe benefits retroactive to the date when Clark was awarded the position.

E. ALLEGED VIOLATION OF SEC. 111.70(3)(a)1, STATS.

Inasmuch as the Association has presented no evidence or argument relevant to the claim that Sec. 111.70(3)(a)1, Stats., has been violated, the Examiner dismisses that portion of the complaint.

Dated at Madison, Wisconsin this 4th day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Jane B. Buffett, Examiner