

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case 23
	:	No. 50731 MP-2871
SCHOOL DISTRICT OF FREDERIC,	:	Decision No. 28099-A
	:	
Respondent.	:	
	:	

Appearances:

Mr. Michael J. Burke, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.
Weld, Riley, Prenn & Ricci, Attorneys, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by Ms. Kathryn J. Prenn, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On March 21, 1994, Northwest United Educators filed a complaint with the Wisconsin Employment Relations Commission, alleging that the School District of Frederic was violating Sec. 111.70(3)(a)(5), Wis. Stats., by selecting the less senior Ms. Renee Ericksen over the more senior Ms. Anna Runnels for the position of part-time cook. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Sec. 111.07, Wis. Stats. A hearing was held on August 11, 1994 in Frederic, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on October 19, 1994. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Complainant Northwest United Educators is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has its principal office at 16 West John Street, Rice Lake, Wisconsin, 54868.
2. Frederic School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal office at 318 355th Avenue, Frederic, Wisconsin, 54837.
3. At all times material to this proceeding, Complainant has been the exclusive collective bargaining representative of all regular full-time and regular part-time non-certified employes of the Frederic School District, excluding confidential, temporary, casual, supervisory and managerial employes.
4. Complainant and Respondent are parties to a collective bargaining agreement commencing on July 1, 1992 and extending through June 30, 1994, which collective bargaining agreement does not contain a grievance procedure.
5. The parties' 1992-94 collective bargaining agreement provides the following:

ARTICLE VI - JOB POSTING

When the District determines that a vacancy should be filled or a new position created within the bargaining unit, the District agrees to post the notice of such vacancy. The vacancy will not be filled until the notice has been posted for at least five (5) working days. The selection of any applicant to fill a job vacancy shall be made on the basis of relative ability, experience and other qualifications as substantiated by an employee's personnel record including his/her performance appraisals.

. . .

ARTICLE IX - BOARD RIGHTS

A. Management retains all rights of possession, care, control and management and retains the right to exercise these functions during the term of the collective bargaining agreement except to the extent that 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:

1. To direct all operations of the school system.
2. To establish and require observance of reasonable work rules.
3. To hire, promote, transfer, schedule and assign employees in positions with the school system.
4. To suspend, discharge and take other disciplinary action toward employees.
5. To relieve employees from their duties because of lack of work or any other reason consistent with the other provisions of this agreement.
6. To maintain efficiency of school system operation.
7. To take whatever action is necessary to comply with state or federal law.
8. To introduce new, improved methods or facilities.
9. To select employees, establish quality standards and evaluate employee performance.
10. To determine the methods, means and personnel by which school system operations are to be conducted.
11. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

. . .

6. During February, 1994, the District posted a vacancy for a full-time cook position. Ms. Anna Runnels, an employe of the District with at

least ten years' seniority and prior experience as a part-time cook for the District, applied for this position. The District, however, selected Ms. Renee Ericksen for the vacant cook position in late February or early March, 1994. Ms. Ericksen has less than one year's seniority with the District and no prior regular experience as a cook with the District.

7. The record shows that in determining which candidate to select for the vacant cook position, the District's interview committee interviewed nine applicants, and quickly narrowed the group under consideration to four, including both Anna Runnels and Renee Ericksen. The record further shows that the final two candidates were Ericksen and a candidate who was not an existing employe of the District. The interview committee found Runnels and Ericksen to have had similar food service experience and that both were qualified for the cook position on that basis. The record also shows that the committee gave significant weight to Ms. Ericksen's personality, which it deemed to be friendlier and more open to students than the other finalists.

8. The parties' collective bargaining agreement gives no weight to seniority in determining job bidding, and the record demonstrates that the District's interview committee considered a number of factors in determining to award the disputed position to Renee Ericksen. The record fails to establish that the District's consideration of and emphasis on personality factors in making the final decision was arbitrary, capricious, invidious or in bad faith. The record therefore fails to establish by a clear and satisfactory preponderance of the evidence that the District violated the terms of the collective bargaining agreement in selecting Renee Ericksen over Anna Runnels.

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

CONCLUSION OF LAW

The School District of Frederic did not violate Sec. 111.70(3)(a)(5), Wis. Stats., when it selected Renee Ericksen over Anna Runnels for the vacant cook position, because the collective bargaining agreement reserved rights of selection and assignment to management and the record fails to demonstrate that management exercised these rights in an arbitrary, capricious or invidious manner, or in bad faith.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

ORDER 1/

That the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 16th day of December, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/
Christopher Honeyman, Examiner

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. 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

(Footnote 1/ continued)

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. petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

Frederic School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Background

The complaint alleges that the School District violated Sec. 111.70(3)(a)(5), Wis. Stats., by selecting the less-senior Renee Ericksen

over Anna Runnels for a cook position. The parties' collective bargaining agreement contains no grievance procedure, and this proceeding constitutes the Union's attempt to enforce its interpretation of the collective bargaining agreement.

Discussion

It is clear from the testimony of both Anna Runnels and Renee Ericksen, as well as testimony of members of the District's interview committee, that both employees were considered qualified to perform the work of cook. Both employees had performed food service work for the District, but Runnels has worked in the District's K-5 building for two to three hours a day every school day since about 1986. Ericksen, meanwhile, worked in a similar capacity from 1984 through 1993, but as a substitute food service worker. Ericksen testified that she worked perhaps six times a month in the kitchen. Both Runnels and Ericksen conceded that they had never filled in for the full-time cook's position, though both had fried hamburgers and performed similar food preparation. Runnels testified that she had also worked for the Polk County nutrition program as site manager and cook for four years, 1986 through approximately 1989, in the summers. But on cross-examination, Runnels testified that she may not have fully identified to the interview committee the extent of this work. Runnels testified that the number of clients of the Polk County nutrition program averaged from 16 to 45, and that the School District prepares approximately 400 meals per day.

District Administrator Reginald Gobin testified that upon receiving the mid-December, 1993 notice of retirement from the former cook, he advised the District's Board of the retirement and then posted the vacancy. Gobin also put an advertisement in the paper, and asked then high school principal Bob Berquist to conduct the necessary interviews and selection process. The interview team chosen included Berquist, the other building principal, the head cook, and a support staff employe. Berquist testified that this type of procedure had been used at least six or eight times during Gobin's tenure in the District. Berquist headed the committee and chose the members. He testified that there were 56 applicants and that he first looked to see if they had any experience in public education, in the business world, in restaurants and in catering. He narrowed the listing to ten, and one applicant then backed out. Berquist testified that nine people were therefore interviewed. He asked the other principal to prepare a list of appropriate questions, which he had done before, and the list was submitted in evidence. At approximately 45 minutes apiece, the interviews were conducted over two days, and it is evident from the record that the interview committee immediately agreed to narrow the list to five and then to four people following these interviews. The four included Anna Runnels, Renee Ericksen and two outside applicants, but the final two were Renee Ericksen and a new applicant. Berquist testified that he and Mr. Rich, the other principal, were both in favor of the new applicant because she had significant experience with baking and with kitchen equipment, but that the Committee considered other matters than food service experience; Berquist testified that "a lot of" people in the original group of 56 had substantially more food service experience than Renee Ericksen. Berquist testified that he and Rich differed with the other two members of the interview committee over the final selection, but deferred to the other two members, primarily because the head cook would have to be the immediate supervisor of the selected employe and they felt that her opinion should carry weight. Berquist testified that the ultimate factor which resulted in Ericksen's selection was that "three of the four people on the team discussed their relationship with her on a substitute basis where she really got along well with children, she -- she was a smiley, bubbly person. And all three mentioned one thing. I specifically remember it, because I didn't say it and they did. And they said this: she always was looking for more to do when she finished a task." 2/ Berquist

2/ Transcript, pages 64-65.

testified that it was his understanding of Article VI of the agreement that this language did not require the District to favor an internal applicant over an external applicant.

Complainant contends that a proper application of Article VI would have required the District to hire Anna Runnels for the vacant cook position. Complainant argues that three factors: relative ability; experience; and other qualifications as substantiated by an employe's personnel record, are involved, and that review of the evidence establishes that in each respect the District's decision to hire Ericksen was arbitrary. Complainant argues that the third factor is irrelevant because while Runnels had received verbal praise for her work in the past, she had never been formally evaluated, and neither employe had a formal personnel file. With respect to experience, the Union concedes that there is no doubt that experience is not the same as seniority, but argues that common sense dictates that an employe's seniority is a relevant consideration in determining how much experience is present, especially when the employe's seniority is based upon work in the same classification as the job opening. The Union notes that Runnels had worked as a cook continuously since 1986 for the District, while Ericksen worked as a substitute since 1983, and was not hired on a regular basis until October 27, 1993. Complainant points to testimony by Berquist to the effect that Runnels' record could be interpreted as showing greater experience than Ericksen's. 3/

With respect to relative ability, Complainant argues that the District's sole basis for concluding that Ericksen was more able for this position than Runnels was her "bubbly personality." Complainant contends that reliance on her personality alone in determining the relative ability factor is an arbitrary interpretation of the contract language. Complainant argues that since Runnels has never been faulted for her personality with the students, and has only heard positive words from her supervisor during her years with the District, the District's reliance on Ericksen's bubbly personality is too nebulous to support its hiring decision. Complainant requests that the District be ordered immediately to award the cook position to Anna Runnels, noting that since it does not involve greater earnings for Runnels than the combination of two jobs (including custodial work) she is already performing for the District, there is no retroactive make-whole remedy requested.

Respondent contends that the collective bargaining agreement's language allows it to select "any applicant," which puts internal and external applicants on the same footing. Respondent contends that experience is not synonymous with seniority, and that a Union witness admitted in testimony that the Union had unsuccessfully attempted several times at the bargaining table to add seniority as a factor in Article VI. Respondent contends that the District has retained the right to establish qualifications for positions, and that it therefore has the right to decide, subject only to avoidance of decisions that are arbitrary, capricious, clearly wrong, or made in bad faith. The District contends that it was not wrong when it hired Ericksen in preference to Runnels, arguing that the cook's relationship with children was as important a factor as raw experience, according to testimony by the head cook and not undermined by testimony by any other witness. The District contends that while both Ericksen and Runnels demonstrated that they had the technical ability to do the job, and even though an outside applicant from Webster had greater experience, the District determined to hire Ericksen based on the unanimous recommendation of the interview committee, which in turn was based on approximate equality in technical ability and a clear preference in personality factors. The District requests that the complaint be dismissed.

Because this complaint proceeding is fundamentally a matter of contract interpretation, the customary interpretation of similar collective bargaining

3/ Citing Tr. pages 69 and 79.

agreement language by arbitrators is entitled to considerable weight. Many arbitrators have found that under collective bargaining agreement language similar to that present here, an employer's determination of whom to appoint to a position can only be overturned if it is found to be arbitrary, capricious, invidious or taken in bad faith. I agree with the District that the Complainant has not demonstrated by the necessary clear and satisfactory preponderance of the evidence that any of these conditions is present here.

To begin with, there is no evidence in the record that the decision of the interview committee was preordained or that it was procedurally unfair to Anna Runnels. The committee was similarly constituted to at least six or eight such committees in the past, and it was, if anything, broader in its representation than many employers' interview committees. Runnels, like other applicants, had an opportunity to explore her background and qualifications with the committee, and it is apparent from the evidence that she may not have taken the greatest advantage of that opportunity to stress for the committee her experience with the Polk County nutrition program. Even if that experience had been more highly stressed and in consequence more highly weighed by the committee, however, it is apparent that the committee considered her qualified on the basis of technical ability for the cook position, and there is nothing in the record to demonstrate a clear superiority on her part compared to Ericksen. Meanwhile, it is notable that the District turned down an outside applicant with significantly greater cook experience than either of the named existing employes. This tends to establish that the District was in fact acting in good faith in determining that the personality factors on which it ultimately based the decision should be given weight. Furthermore, there is nothing in the record to suggest that the District inaccurately identified Ericksen as having a warmer and more student-friendly demeanor than Runnels, even though it is evident from the record that no specific fault was to be found with Runnels' performance or demeanor.

Thus the case turns on whether the District inherently acted in an arbitrary and capricious fashion in concluding that a difference in personality should be weighed more highly than greater experience in the kitchen. Numerous arbitrators have found that employers subject only to "arbitrary and capricious" types of language restrictions have to be allowed latitude up to a high degree to weigh competing elements of performance and evidence in making the determinations for which they had contracted. Here, the District clearly has the right to make such determinations, and I find that the District cannot be faulted for taking personality into account in making judgments as to which employe is best fitted for a cook position which involves working closely with students of a school district. Several arbitration decisions cited by the District support this view. In turn, I conclude that the preference given to this personality factor, favoring Ericksen over Runnels' and other applicants' greater experience, was within the District's proper and contracted-for discretion. It implies no slur on Ms. Runnels to conclude that the District was not acting arbitrarily when it made this fairly close call.

Dated at Madison, Wisconsin this 16th day of December, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/
Christopher Honeyman, Examiner

