

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
MADISON METROPOLITAN SCHOOL DISTRICT :
and : Case 187
MADISON TEACHERS, INC. : No. 42521
: MA-5712
- - - - -

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, by Mr. Lee Cullen, appeared on behalf of the Union.

Ms. Susan A. Hawley, Labor Contract Manager, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin 53703, appeared on behalf of the District.

ARBITRATION AWARD

On July 11, 1989, the Wisconsin Employment Relations Commission received a joint request from the Madison Teachers, Inc. and the Madison Metropolitan School district to appoint an arbitrator to issue an expedited final and binding award on a pending grievance. On July 31, 1989 the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on August 4, 1989 in Madison, Wisconsin. Proceedings were not transcribed. The District submitted written argument at the hearing. The Union made oral argument at the close of the hearing.

This Award addresses the obligation of the District to post a music vacancy that arose at Falk Elementary School.

BACKGROUND AND FACTS

DeAnn Larson was a .6 Music teacher at Falk Elementary School during the 1987-88 school year. On April 4 of that school year, Ms. Larson commenced a maternity leave. She subsequently asked for, and received, a child rearing leave for the first semester of the 1988-89 school year.

During Larson's absence, Ann Dettwiler filled her position as a long term substitute.

On November 23, 1988, Ms. Larson requested to extend her child rearing leave for an additional semester, which continued it through the spring of 1989.

In January of 1989 Dettwiler was erroneously offered, and accepted, a temporary contract to again substitute in the position vacated by Larson. The parties agree that the vacant position should have been filled by a bargaining unit employe under a permanent contract. On May 9, 1989 John Matthews, Executive Director of the Union wrote the following letter:

May 9, 1989

Mr. Phillip Ingwell, Assistant Director
Employee Services
Madison Metropolitan School District
545 West Dayton Street
Madison, WI 53703-1967

Dear Phil:

RE: Falk Elementary/Music

It is our understanding that the teacher assigned to the above-referenced position has been absent in excess of one school year. Will you please

advise us as to why the District is filling the position with a teacher under temporary contract?

We await your response.

Very truly yours,

John A. Matthews
Executive Director

Following a discussion between Matthews and Ingwell the latter man replied with the following:

May 16, 1989

Mr. John Matthews
Executive Director
Madison Teachers, Inc.
821 Williamson Street
Madison, WI 53703

RE: Falk Elementary Music

Dear John,

This is in response to your May 9th letter regarding the above-named issue and our conversation of Tuesday, May 16th.

Due to an oversight, the contract issued on a temporary basis to Ms. Ann Dettwiler should have been a regular contract in as much as the position, at the time of the issuance of contract, was known to have been for more than a year in total time. Therefore, the District will move to adjust Ann Dettwiler's contract from a temporary status to a regular status effective November 23, 1988, the date of issue of the original temporary contract.

Sincerely,

Phillip J. Ingwell
Assistant Director
Employee Services

Matthews countered with the following:

May 19, 1989

Mr. Phillip Ingwell, Assistant Director
Employee Services
Madison Metropolitan School District
545 West Dayton Street
Madison, WI 53703-1967

Dear Phil:

RE: Falk Elementary Music Position

We write relative to the above-referenced position to state that it is MTI's opinion that the position should have been posted for transfer, at such time as the District knew that the vacancy caused by the teacher on leave of absence was to exceed one year.

It is our understanding that this situation could be corrected by Cathy Johnson, currently assigned to Lincoln, being assigned to the position at Falk, provided she can obtain at least an .8 assignment.

If you wish to discuss resolution, please contact me by May 31.

With kind regards, I remain

Very truly yours,

John A. Matthews
Executive Director

May 19, 1989 was a Friday. On the evening of Monday, May 22 the School Board approved a regular teaching contract for Dettwiler. 1/ That contract was confirmed and conveyed to Dettwiler by letter of May 23, 1989. The record is unclear as to whether the District was in actual possession of the May 19 Matthews letter at the time the School Board acted on May 22. A grievance was filed on June 1, 1989.

ISSUES

The District frames the issues as follows:

1. Whether this grievance was filed in a timely manner?
2. Whether the District violated Section IV-F of the Collective Bargaining Agreement when the District did not post the Falk Elementary Music position filled by Ann Dettwiler on November 23, 1988.

The Union believes the issue to be:

1. Did the District violate the provisions of Section IV-F of the Collective Bargaining Agreement by not permitting transfer into the Falk School music vacancy?
2. If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article II B Grievance Procedure

. . .

5. An aggrieved party must submit to the principal the alleged grievances within sixty (6) days after the aggrieved party knew of the act or condition on which the grievance is based, or the grievance will be deemed waived. If the act or condition reoccurs, the time limits will be renewed.
6. The procedural steps for Madison Teachers shall commence at Level 3. Organizational (Class) Grievance: Madison Teachers must submit the alleged grievance within sixty (60) days after Madison Teachers knew of the act or condition on which the grievance is based, or the grievance will be deemed waived. If the act or condition reoccurs the time limit will be renewed.

1/ The contract was effective as of November 23, 1988, the date of issue of the original temporary contract, and was for her present position, .6 at Falk Elementary.

. . .

Article IV B Substitutes, New Hires (Teachers)
and Replacement Teachers

. . .

d. Temporary vacancies of more than one school year.

If the employer determines to fill a vacancy created by an employee temporarily vacating his/her position for a period of more than one school year, it shall, provided that such position remains vacant after the surplus reassignment and recall procedures (Sec. IV-) have been exhausted, do so with a teacher employed under a regular teacher contract.

. . .

F. Voluntary Transfer of Assignment

. . .

1. Voluntary Transfer Where Vacancies Exist

- a. Vacant positions shall whenever practical be filled by the voluntary transfer of "teachers", except involuntary transfers made pursuant to Section IV-E.
- b. Minimum qualifications shall be established by the "Employer" and equally applied to all persons. Posted positions will be filled on the basis of qualifications as determined by the Employer. When same are relatively equal between "teachers", the senior teacher making the transfer request for the position shall be transferred.
- c. A teacher wishing to transfer applies to the principal of the building in which the vacancy exists, or to such other person indicated on the notice. Upon request of said principal or other appropriate individual, such transfer shall be made provided said teacher has greater seniority than the teacher in the surplus pool (IV-0) who is qualified for the same position for which the above mentioned teacher has applied.
- d. The teacher shall also file a statement with the Director of Employee Services requesting such transfer. The Director will, upon receipt of a principal or other appropriate individual request, process the transfer. This will occur so long as the instructional requirements of the school(s) are not disrupted. The Director of Employee Services will notify the teacher of the decision.
- e. If any posted vacancy does not materialize due to a substantial change in the school's population or program, the transfer may not be implemented.
- f. This provision does not apply to temporary contracted teachers.

2. Vacancy Posting

- a. A building principal shall immediately notify the Director of Employee Services upon learning of a potential vacancy.
- b. Whenever a vacancy occurs, either as a result of termination, transfer (voluntary or involuntary), or the creation of a new position, and the employer intends to fill such position, notice of such vacancy shall be posted for five (5) working days prior to the date requests for transfers

are due. However, vacant positions which the employer intends to fill by an involuntary transfer pursuant to Section IV-E need not be posted.

- c. Vacancy notices shall be posted in the office and faculty lounge(s) of each school immediately upon their receipt.

. . .

POSITIONS OF THE PARTIES

As previously noted, the parties set forth argument at the hearing. Each argument made, whether or not specifically referenced in this expedited award, has been reviewed and considered.

DISCUSSION

Timeliness

I believe the grievance was timely. The District argues that the act complained of occurred on November 23, 1988. The Union claims that the exchange of letters in May triggered the timelines for filing a grievance.

Kathy Johnson, a senior teacher interested in transferring into the Falk position testified that she first became aware that the position would not be posted on, or about, April 28, 1989. The parties stipulated that she contacted Matthews on May 3, 1989. The grievance was filed on June 1, which falls within 60 days of either of those dates. Nothing in the record identifies earlier knowledge on the part of either the individual or the Union.

Posting and Voluntary Transfer

I do not believe the District was obligated to post the position. Article IV F, 2, b specifically addresses the circumstances under which posting is required. Leave of absence is not among them. I do not regard Larson's departure as creating a "termination" in the common use of the term. There was no transfer nor was the position a "new position."

Paragraph 2 cannot be read in a vacuum. It is a part of Article IV F, which deals with the voluntary transfer issue. Paragraph 1(a), read above, sets a broader standard against which to measure transfer rights than does paragraph 2(b) which addresses posting. However, I believe paragraph 1(a) has to be read within the context of the entire Article and Section. Section 1(b) refers to the application of qualifications and refers to the "posted position." Ostensibly this is the same vacant position as is referenced in paragraph 1(a). Paragraph 1(c) details the application process and treats "notice" as referring to "vacancy." Paragraph 1(e) specifically refers to "posted vacancy."

Read as a whole I believe that the reference to vacant positions in 1(a) is intended to refer to the same positions noted in 1(b), 1(c), and 1(e). Those are the posted positions as defined in 2(b). Read this way, Section F is internally consistent.

This conclusion is supported by Ingwell's testimony that the District has never posted vacancies created by leaves of absence. To the extent Ingwell testified that the District generally posted vacancies with certain limited exceptions, he also testified that leave of absence was an exception, in that it was not specified in 2(b).

I do not regard Union Exhibit 4 as probative. John Matthews testified that he did not know what transactions created the vacancies that were posted. Ingwell testified that he reviewed the great majority of transactions in that exhibit, and that none of them involved leaves of absence.

The Union's Negotiating Digest, executed contemporaneously with the negotiated language does lend support to the Union's expansive reading of paragraph 1(a). However, I regard the Digest as a summary of the contract. It does not purport to be a comprehensive analysis of the clause. For instance, the parties agree that layoff generated vacancies are not covered by the transfer language and that is not noted in the Digest. The interpretive value of the Digest is compromised by the District's practice of not posting leave of absence generated vacancies. There further exists the rule of contract interpretation which construes ambiguous language against the drafter, which in this case is the Union. On balance I do not regard the history as supporting the Union claim.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 10th day of August, 1989.

By _____
William C. Houlihan, Arbitrator