

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
NORTHWEST UNITED EDUCATORS : Case 19
and : No. 42809
: MA-5810
LADYSMITH-HAWKINS SCHOOL DISTRICT :
:
- - - - -

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators,
appearing on behalf of the Northwest United Educators.
Mulcahy & Wherry, S.C., by Mr. Steven L. Weld, appearing on behalf of the
Ladysmith-Hawkins School District.

ARBITRATION AWARD

Pursuant to a request by Northwest United Educators, herein the Union, and the subsequent concurrence by the Ladysmith-Hawkins School District, herein the District, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on October 12, 1989 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on December 6, 1989 at Ladysmith, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on February 7, 1990.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties stipulated to the following issues:

1. Was the grievance timely filed at the first step?
2. Did the Employer violate Article 11 by not granting the grievant the position of Maintenance Engineer?

BACKGROUND:

On June 28, 1989, District representatives interviewed Gene Zillmer, hereinafter the grievant, for the Maintenance Engineer position. On or about June 29, 1989, Mark D. Christianson, the District's Business Manager, told the grievant that he would not be offered the position. By letter dated July 5, 1989, the District informed the grievant that he was not selected for the position.

On July 13, 1989, the grievant filed a written grievance with the District wherein he claimed "the district violated Article 11 by not granting me the position of Maintenance Engineer". For a remedy the grievant requested that he be placed in the disputed position.

The grievant met with William F. Bobbe, District Administrator, on July 14, 1989, to discuss his grievance at Step 1 of the grievance procedure. Bobbe, on behalf of the District, denied said grievance. By letter dated July 17, 1989, the grievant appealed the denial of his grievance to Step 2.

By letter dated July 25, 1989, Bobbe denied the aforesaid grievance at Step 2. Bobbe wrote, in material part, as follows:

You (sic) request to pursue your grievance to step 2 of the grievance procedure was received on July 21, 1989. Your letter is dated July 17, 1989. In either case, the collective bargaining agreement states in Article VI B p. 4 "Step 2", if not settled or Step 1, the grievance may within 5 days be appealed in writing to the Super-intendent." The disposition of Step 1 occurred on July 7, 1989, therefore 10 days elapsed before your letter was initiated and 14 days before it was received. I therefore reject the grievance for two reasons. This untimeliness of the grievance as it is not in accordance with Article VI and the reason forthcoming in the next paragraph.

Bobbe admitted at hearing that the July 7th meeting referred to above actually occurred on July 14th. The District later told the grievant's representative(s) that the timeliness objection noted above was withdrawn.

By letter dated August 3, 1989, the grievant appealed his grievance to the Board level pursuant to Step 3. By letter dated August 22, 1989, the District informed the grievant that the Board denied his grievance. On September 19, 1989, the Union requested arbitration of the aforesaid grievance which the District subsequently agreed to.

The following facts are either stipulated to by the parties or undisputed:

1. The grievant is a bargaining unit employe in the custodian department.
2. The grievant is qualified to work as a Maintenance Engineer.
3. The grievant is the most senior custodian in the bargaining unit to apply for the position of Maintenance Engineer.
4. The position of Maintenance Engineer is new.
5. Representatives of the Union and the District negotiated on the wages for the new position of Maintenance Engineer, and agreed to a hourly wage rate of \$9.38 for the position for the 1989-90 school year. The parties also reached agreement that if any current custodians were hired that they would be eligible to receive the full rate immediately (rather than 90 percent during the first year, the new hire pay rate).
6. The District selected a new employe from outside the bargaining unit (Ronald Srp) to fill the new Maintenance Engineer position.

In the spring of 1989 the District decided to reorganize the custodial services in response to the retirement of one of the custodians and a desire to have one position primarily responsible for the performance of maintenance engineer duties. On May 25, 1989, Bobbe and Christianson met with representatives of the Union to discuss the aforesaid reorganization. At that meeting the District made the following written proposal to the Union:

It is the intention of district administration to reorganize the custodial/maintenance services. The reorganization will create 3 district classifications.

Maintenance will be added as a classification and a distinction will be made between day and night custodians.

The purpose of the reorganization is to maximize the potential of the staff by clarifying duties and responsibilities.

Currently, there are 14 custodians on staff. Our plan is to reduce this to 13 and hire a new maintenance person. The total employees would remain at 14.

The proposal included a number of new job descriptions including one for the proposed new Maintenance Engineer position. The proposal also included a description of various personnel reassignments, duties reassignment, a wage proposal of \$9.38 per hour for the 1989-90 school year for the Maintenance Engineer position, and an organizational chart as follows:

MAINTENANCE ORGANIZATION CHART

BUSINESS MANAGER
:
BLDING. & GROUNDS SUPERVISOR MAINTENANCE
:
MAINTENANCE ENGINEER
:
HES LES LMS LHS

CUSTODIAL ORGANIZATION CHART

BUSINESS MANAGER
:
BLDING. & GROUNDS SUPERVISOR MAINTENANCE
:
 HES LES LMS LHS
:
Day Custodian Day Custodian Day Custodian Day Custodian
:
Night Custodian Night Custodian Night Custodian Night Custodian

During the meeting on May 25, 1989, and at a subsequent meeting on May 30, 1989, representatives of the District and the Union negotiated over matters contained in the aforesaid proposal. As noted above, the parties reached agreement over a wage rate of \$9.38 per hour for the new Maintenance Engineer position and over the fact that if a current member of the bargaining unit was hired into said position he/she would receive the full rate immediately. However, the parties disagree over whether or not an agreement was reached to create a new maintenance department. Bobbe testified that he discussed creating a new separate maintenance department with representatives of the Union at the aforesaid meetings and reached agreement over same. Christianson agreed with Bobbe that the District proposed creating a separate maintenance department, and negotiated its creation with the Union. However, both Bobbe and Christianson admitted that the terms "department" and "classification" were used inter-changeably during the course of said negotiations. The Union's four represent-atives who negotiated on the disputed position - Chief Negotiator Rod Marinucci, Negotiator Bob Matson, Bargaining Union Chief elected official Gene Zillmer, and NUE Executive Director, Alan Manson - all testified that there was no agreement over creation of a new, separate maintenance department. Only Marinucci remembered that the word "department" may have been used in the context of the aforesaid negotiations but not to create a new department.

The aforesaid agreement was not reduced to writing and/or signed by the parties.

The District generated its annual associate staff seniority list on August 1, 1989 and listed Srp in seniority sequence with all the bargaining unit custodians. The August 1, 1989 seniority list divided the bargaining unit employes into five groups with subheadings matching the five existing departments in the collective bargaining agreement: secretaries, aides, cooks, custodians and bus drivers. Srp had the word "(Maintenance)" printed after his name which is found at the bottom of the list of custodians.

PERTINENT CONTRACTUAL PROVISIONS:

- . . .
6. Grievance Procedure
- . . .
- C. Whenever a grievance shall arise, the following procedure shall be followed:
- Step 1
- A. An earnest effort shall first be made to settle the matter informally between the employee and his immediate Supervisor or between the Association and Superintendent.
- B. If the matter is not resolved, the grievance shall be presented in writing by the employee or Association, hereafter called the

grievant, to the immediate Supervisor within 5 days after the facts upon which the grievance is based first occur or first become known. The immediate Supervisor shall give his written answer within 5 days of the time the grievance was presented to him in writing.

Step 2

If not settled in Step 1, the grievance may within 5 days be appealed in writing to the Superintendent. Within 5 days of receiving the grievance, the Superintendent shall meet with the grievant to attempt to resolve the grievance. The Superintendent shall give a written answer to the grievant no later than 10 days after this meeting.

Step 3

If not settled in Step 2, the grievant may, within 15 days, submit the matter in writing to the Board. The Board will hear the grievance at its next regularly scheduled monthly meeting. Following the hearing, the Board shall issue its written decision within 10 days.

. . .

- D. The parties agree to follow each of the foregoing steps in the processing of a grievance. If the employer fails to give a written answer within the time limit set out for any step, the employee may immediately appeal to the next Step. Grievances not processed to the next Step within the prescribed time limits shall be considered dropped.

. . .

11. Assignments, Vacancies, and Transfers

Within each department (secretaries, aides, cooks, custodians, and bus drivers) current employees will be given the opportunity to fill any department vacancies or sign up for any assignments prior to hiring outside the current staff. In the event more than one employee applies for a vacancy or assignment, the senior employee shall be given preference.

Transfers between departments to fill vacancies are at the discretion of the board, but employees requesting such transfers will be considered before outside applications are accepted.

All vacancies and/or additional hours will be posted in the individual schools principals office. Notices will also be sent to the Unit Director, and to any school year employee who signs up before school ends. The Unit Director will be notified of any adjustments in union dues due to the different ratio of employment.

An employee, upon being selected for a position in another classification, shall receive a trial period of thirty (30) working days. An employee may elect to return to his/her former position at his/her former rate of pay within the thirty (30) day trial period. In the event that the Board determines that the employee is not qualified for the new position, the board reserves the right to return the employee to

his/her former position at his/her former rate of pay.

UNION'S POSITION:

The Union initially maintains that the District's procedural objection is without merit. In this regard, the Union argues that the delay caused by the grievant's late filing was so small that it caused no harm to the District. The Union also argues that the District waived its right to raise this defense because it failed to object to the late filing prior to hearing. Finally, the Union claims that the District also failed to process the grievance on a timely basis and failed to supply the required written answer at the first level of the grievance procedure.

As to the merits of the dispute, the Union contends that the terms of the collective bargaining agreement were not amended to create a new department thus allowing the District to go outside the bargaining unit to fill the disputed position. Instead, the Union claims that the grievant as the most senior, qualified applicant was entitled to the position pursuant to Article 11.

For a remedy, the Union requests that the grievance be sustained; and that the grievant be awarded the aforesaid position and be made whole for all wages lost (including interest) as a result of the District's action.

DISTRICT'S POSITION:

The District initially argues that the grievance was not filed within the time limits set forth at Step 1 of the grievance procedure and therefore must be dismissed.

In support thereof, the District maintains that it orally notified the grievant that he did not get the disputed position on or before June 30, 1989. The District adds that the grievant received written confirmation of this fact on July 5, 1989. The grievant notified the District of his grievance by letter dated July 13, 1989. Based on the foregoing, the District argues that the grievant failed to comply with the time limits of Step 1 of the grievance procedure (" . . . the grievance shall be presented in writing . . . to the immediate Supervisor within 5 days after the facts . . . first become known."), and the grievance must be dismissed. The District cites several arbitral decisions in support of this position.

The District also argues that it did not waive its timeliness objection. In this regard the District claims that it first raised the issue of timeliness in its response to the second step grievance contained in a letter dated July 25, 1989. In this letter, District Administrator Bobbe told the grievant that he rejected the grievance due to untimeliness which occurred between Steps 1 and 2 of the grievance procedure. The District now claims that upon review of his calendar Bobbe realized that he had an incorrect date in his July 25th letter, and the untimeliness actually occurred at the first step between the time the grievant knew of the results of the selection process, and the initiation of the grievance, not between the first and second steps of the procedure as originally believed. The District adds that Bobbe explained at the Board hearing that the dates were incorrect in the letter, and the District did not waive the untimeliness issue at the Board hearing.

Finally, the District contends "Even if the untimeliness issue would not have been raised until the arbitration hearing, the issue must still be heard."

With respect to the merits of the dispute, the District maintains that it did not violate Article 11 by not granting the grievant the position of Maintenance Engineer. In this regard the District concedes that the grievant was the most senior candidate for the vacancy. However, because of a negotiated agreement between the Union and the District, the District feels it was creating a new department, not just a new classification of Maintenance Engineer. There-fore, the District feels Article 11, paragraph 1, referring to seniority-based promotions, does not apply. Rather, the District contends the applicable contract provision is paragraph 2 of Article 11 which provides that "Transfers between departments to fill vacancies are at the discretion of the board, but employees requesting such transfers will be considered before outside applications are accepted." The District concludes that the facts of the case show the District did comply with this paragraph.

The District rejects the Union's claim that the District used the word "classification" when discussing the creation of the maintenance position and not the word "department". To the contrary the District contends the parties used both words interchangeably, and that the Union knew the District was proposing the creation of a new department, and agreed to same. The District feels the Union should not be allowed to renege on the agreement now due to its dissatisfaction with the District's selection of a candidate from outside the

unit.

Based on all of the above, the District requests that the grievance be denied and the matter be dismissed.

DISCUSSION:

The District initially raises a procedural defense to the grievance by arguing that it was not filed in a timely manner according to Step 1 of the grievance procedure. However, the District did not raise this issue prior to the hearing. In this regard the record indicates, contrary to the District's assertion, that the District raised a timeliness objection to the processing of the grievance between Steps 1 and 2 of the grievance procedure which it later dropped. It is true that District Administrator Bobbe after reviewing his calendar later realized that he had an incorrect date in his July 25th letter (wherein he first raised the aforesaid objection), and the untimeliness actually occurred at the first step between the time the grievant knew of the results of the selection process and the initiation of the grievance, not between the first and second steps as noted above. However, Bobbe did not come to this realization until at or shortly before the arbitration hearing, and did not raise a timeliness objection that the first step was improper prior to the date of the hearing. 1/ Based on same, and absent any persuasive evidence to the contrary, the arbitrator finds that the District waived its right to raise this objection by its conduct herein. 2/

The arbitrator turns his attention to the second issue stipulated to by the parties.

It is undisputed that if the new Maintenance Engineer position is treated as a position in a new department the District acted properly pursuant to paragraph 2 of Article 11 in selecting the best qualified candidate from outside the unit to fill the disputed position. Conversely, if the aforesaid position is just a new classification, Article 11, paragraph 1, referring to seniority-based promotions applies, and the grievant would get the job. The question before the arbitrator then is whether the parties agreed to create a new Maintenance Engineer classification or a separate maintenance department when they negotiated over same in the spring of 1989. For the reasons listed below, the arbitrator finds that the parties created a new classification.

The District argues that it took its proposal, which called for a separate maintenance department, to the Union for its approval in two bargains on May 25th and May 30th. The District also argues that the Union agreed to the change and despite numerous opportunities to question the District's treatment of the position as a separate department failed to do so prior to the instant grievance. The record, however, does not support a finding regarding same. In this regard the arbitrator points out that all four Union representatives who negotiated on the position of Maintenance Engineer testified that there was no agreement over the creation of a new, separate maintenance department. No one even remembered discussion on the subject. There is no written or signed document reflecting such an agreement.

The District basically argues that when it proposed creation of a new maintenance "classification" it meant "department", and that the two terms were used interchangeably. The Union, however, did not have the same understanding. Nor does the District's written proposal on the subject clearly and specifically reflect such a notion. Finally, it should be pointed out that the terms "class-ification" and "department" ordinarily mean something quite different. For example, The American Heritage Dictionary of the English Language, New College Edition, (10th Ed., 1981), at page 248, defines "classification" as "the act or result of classifying"; and, at page 354, defines "department" as a "distinct division of a large organization" such as a school. The District simply did not offer any persuasive evidence that the aforesaid terms were used differently than their ordinary usage; that the Union understood this and agreed to same. To the contrary, the record contains better evidence in the form of the District's written proposal noted above, the parties' labor agreement, the annual associate staff seniority list dated August 1, 1989 which listed Srp in seniority sequence with all the bargaining unit custodians, and the record testimony that the parties reached agreement over the creation of a new classification. 3/

1/ Uncontroverted testimony of District Administrator Bobbe.

2/ It should also be pointed out that the record indicates the parties did not follow the contractual grievance procedural requirements strictly in processing the instant grievance, nor did the District at anytime material herein give the Union notice that it was going to start strictly observing the timelines provided in the grievance procedure.

3/ Testimony provided by the District indicating the Union was assured that existing employees would be considered for the new position, but that the

As noted above, there really is no dispute over the fact that if the new maintenance position is just a new classification, Article 11, paragraph 1, referring to seniority-based promotions applies, and the grievant would get the job. Therefore, based on all of the above, the arbitrator finds that the answer to the second issue, as stipulated to by the parties is YES, the District violated Article 11 by not granting the grievant the position of Maintenance Engineer.

In light of the foregoing and the record as a whole, it is my

AWARD

That the grievance is sustained, and the District shall offer the position of Maintenance Engineer to the grievant, Gene Zillmer, and make him whole for all wages and benefits lost as a result of the District's action.

Dated at Madison, Wisconsin this 6th day of March, 1990.

By _____
Dennis P. McGilligan, Arbitrator

District also wanted to have outside applicants post for the position so that the best qualified candidate would get the job, absent some other persuasive evidence, is not enough to persuade the Arbitrator to reach a different conclusion.