

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 RICE LAKE AREA SCHOOL DISTRICT :
 EMPLOYEES LOCAL 3286, AFSCME, AFL-CIO :
 : Case 47
 and : No. 43438
 : MA-5972
 RICE LAKE SCHOOL DISTRICT :
 :

Appearances:

Ms. Margaret McCloskey, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Rice Lake Area School District Employees Local 3286, AFSCME, AFL-CIO.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Stephen L. Weld, on behalf of the Rice Lake School District.

ARBITRATION AWARD

Rice Lake Area School District Employees Local 3286, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Rice Lake School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned was designated to arbitrate in the dispute. A hearing was held before the undersigned on March 13, 1990 in Rice Lake, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by May 15, 1990. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE:

The issue to be decided may be stated as follows 1/:

Did the District violate Article 7, Section 7.04 of the parties' Collective Bargaining Agreement when it did not award the Chapter I Secretarial position to bargaining unit member Karen Anderson?

If so, what is the appropriate remedy?

CONTRACT PROVISIONS:

The following provisions of the parties' 1987-1989 Agreement are cited:

ARTICLE 2 - MANAGEMENT RIGHTS

Section 2.01: It is recognized that the Board has and will continue to retain the rights and responsibilities to operate and manage the school system of the District, and its programs, facilities and properties and the activities of its employees during working hours.

Section 2.02: Without limiting the generality of the foregoing Section 1.01, it is expressly recognized that the Board's operational and managerial responsibilities include:

. . . .

G) The direction and arrangement of all working forces in the system, including the right to hire, suspend, discharge or discipline employees;

. . . .

I) The determination of the size of the working force, the allocation of assignments of work to employees, the determination of policies affecting the selection of employees and the establishment of quality standards and judgment of employee performance;

. . . .

1/ The parties are basically in agreement on the statement of the issue.

ARTICLE 7 - JOB POSTINGS AND PROMOTIONS

. . .

Section 7.04: The selection of the person to fill the vacancy shall be on the basis of relative skill, ability and seniority.

. . .

BACKGROUND:

The District and the Union are parties to a collective bargaining agreement establishing the wages, hours and conditions of employment of the District's clerical employees and teacher aides. The Grievant, Karen Anderson, has been a part-time Teacher Aide for the District since August of 1986.

On August 4, 1989 the District posted a part-time Chapter I Secretary position with a job description attached which listed the following qualifications, job goal and responsibilities:

QUALIFICATIONS

- 1.Ability to provide superior clerical and stenographic skills.
- 2.Demonstrated competence in use of office machines, Macintosh computer, word processing, and office procedures.
- 3.Highly motivated, self-directed individual with ability to work independently with minimum of direction.
- 4.Such alternatives to the above qualifications as the Board of Education may find appropriate and acceptable.

. . .

JOB GOAL

This position involves serving as secretary to the Chapter I Coordinator, and all Chapter I personnel in the District. It is the secretary's responsibility to provide secretarial skills and assistance to the entire department.

PERFORMANCE RESPONSIBILITIES

- 1.Type reports, tables, requisitions, correspondence, lists, letters, and other materials requiring speed, accuracy, and neatness.
- 2.Do filing and pulling of files.
- 3.Do receptionist work and give general and non-technical information in response to telephone or personal inquiries.
- 4.Operate a variety of office machines.
- 5.Maintain a schedule of appointments and make arrangements for conferences and interviews.
- 6.Keep accurate records of individual budgets for the entire department.
- 7.Type all purchase orders for the entire department.
- 8.Send and record all forms sent to parents in compliance with state and federal law and District policy.
- 9.Work with Chapter I Director to compile and type information for budget.
- 10.Perform other secretarial duties as assigned.

The Grievant and a number of outside applicants were interviewed for the job by the Chapter I Coordinator, Marie Anderson, and the District's Business Manager, Ronald Novotny. Those applicants, including the Grievant, were required to take a timed typing test on an electric typewriter in the Administration Building. On August 29, 1989, Anderson and Novotny selected Peggy Sorenson for the position. Sorenson was not an employee of the District at the time.

The Grievant's score on the typing test was 43 NWPM (GWPM 53-10 errors) 2/ and Sorenson's score was 48 NWPM (GWPM 52-4 errors). The Grievant had also applied for a receptionist position with the District the previous summer and had taken two typing tests for that position, scoring 44 NWPM (GWPM 60-16 errors) the first time and 41 NWPM (GWPM 62-21 errors) the second time.

The Grievant's resume' listed her education and work experience as follows:

EDUCATION: RICE LAKE HIGH SCHOOL, Rice Lake, WI 54868
1959 - 1963

U. W. SUPERIOR, Superior, WI
1963 - 1964

BARRON COUNTY TEACHERS COLLEGE, Rice Lake, WI
1964 - 1965; 1966 - 1967
Graduation 1967
Wisconsin Elementary Teaching Certificate

SCIENCE MUSEUM OF MINNESOTA, St. Paul, MN 55101
Macintosh Intro Part 1 & 2, June, 1988
Microsoft Work Intro & Intermediate, July 1988

. . .

EMPLOYMENT:

ANDERSON ROOFING

Larry E. Anderson, Owner (Husband)

August, 1975, to present
Secretarial duties consisting of quarterly reports, state
w/h, federal w/h, payroll, and answering
the phone.

RICE LAKE AREA SCHOOL DISTRICT

August, 1986, to Present
Teacher's aide in the Extended Kindergarten Program.

RICE LAKE WEIGHING SYSTEMS

November, 1986, to Present
Secretarial duties including: answering multi-line
computerized telephone system, up-dating
customer mailing lists, computer work (IBM
Systems 36, PC, Macintosh), and
proofreading

HILLTOP DAY CARE CENTER

June, 1985, to August, 1986
Assistant Director
Various secretarial duties in addition to supervising staff

BAKERY ON MAIN

May, 1985, to July, 1985
Part-time Clerk

FARM & FLEET

August, 1977, to December, 1979
Responsible for ordering, inventory, and stocking in areas of
housewares, outdoor cooking equipment, and
candy; also various clerk duties

DAYTON'S DEPARTMENT STORE

September, 1971, to April, 1973
Clerk

WISCONSIN BELL TELEPHONE COMPANY

January, 1963, to August, 1963
June, 1964, to August, 1968
Long Distance Operator

2/ Gross Words Per Minute (GWPM) - Errors = Net Words Per Minute (NWPM).

Sorenson's resume' listed the following education and work experience:

EDUCATION

Aug/87 - WORD PROCESSOR SPECIALIST Diploma GPA 4.0
May/88
Wisconsin Indianhead Technical College (WITC)
Rice Lake, WI 54868

Hardware: IBM Personal Computer, CPT 8500 Word Processor,
Transcriber

Software: WordPerfect, Wordstar, PFS:File

Skills: Typing (55 wpm), Machine Transcription, Ten-Key
Calculator

Program Includes:

- *WP Concepts and Applications
- *Microcomputer Applications
- *Typing
- *Business English
- *Communications I & II
- *Business Math
- *Office Procedures
- *Records Control

Organizations: Office Education Association (OEA) active
member

Participant in State OEA Competition

Aug/79 - University of Wisconsin Barron County Campus
Dec/80 Rice Lake, WI 54868
General Education Courses

Aug/75- Rice Lake Senior High School, Rice Lake, WI
May/79 54868

EXPERIENCE

Aug/88- Kelly Temporary Services, Wausau, WI 54401
Oct/88 Responsibilities included: receiving and
directing calls on a 14 incoming line
phone system, typing letters and forms on
a word processor using Display Write.

Jan/87- Schmitz's Super Value, Rice Lake, WI 54868
June/88
Provide friendly customer service as cashier. Handle cash
responsibly. Cited by manager for being a
dependable, efficient employee.

May/82- Citizens State Bank, Birchwood, WI 54817
Mar/84
Teller responsibilities included: deposits, withdrawals,
filing, preparing statements, balance
statements, daily drawer and vault
balance, operate proof machine, answer
phone calls.

The award of the position to Sorenson was grieved and the grievance was ultimately denied at the Board level. The parties proceeded to arbitration of the dispute before the undersigned.

POSITIONS OF THE PARTIES

Union:

The Union takes the position that the Grievant's skills and ability were at least equal, if not superior, to those of Sorenson and that her seniority provided her with the additional criterion Sorenson did not possess. Therefore, the Grievant should have been awarded the position. The Union notes that the Grievant has been employed by the District for approximately four years and has had excellent evaluations. The Union cites the Grievant's present secretarial experience at Rice Lake Weighing, the bookkeeping she has done for her husband's business and her past experience at the day care center as being at least equal to Sorenson's classroom training in word processing and as superior to Sorenson's experience. The Union also notes that neither the Grievant, nor Sorenson achieved the level of typing skill that the Business Education teacher indicated was considered acceptable by area businesses for entry level keyboarding. Further, they were tested on a typewriter rather than the computer that would be used. The Union asserts that despite being made

aware of the Grievant's education, training and experience, Anderson and Novotny ignored that experience and her training on the Macintosh Computer, the computer used in the Ch. I Secretary position. Also, Novotny testified that none of the references listed by the Grievant on her resume' were contacted. As to the importance of typing speed in the position, the Union cites the testimony of a previous incumbent in the position that it was not a major prerequisite and the Grievant's testimony that secretarial skills were barely discussed in the interview for the position. The Union also asserts that the persons listed as references by the Grievant from Rice Lake Weighing have indicated their high regard for the Grievant's skills and abilities. Similarly, the teacher the Grievant has worked for as an aide testified as to the Grievant's ability to get things done without being told and to meet a high standard of quality. According to the Union, Sorenson's resume' indicates that her experience has been in entry-level positions as opposed to the increasingly responsible positions the Grievant has held.

The Union concludes that the Grievant possesses all of the requisite skills listed for the position and has, unlike Sorenson, worked within the system for four years and is familiar with its policies, procedures, etc. Given the above and the Grievant's seniority, the Union questions the District's selecting Sorenson on the basis of a greater net typing speed of five words per minute. The Union requests that the grievance be sustained and that the Grievant be made whole for any losses suffered and that she be awarded the Ch. I Secretary position.

District:

The District takes the position that its determination that Sorenson was the better qualified applicant was within its authority under the Agreement and was reasonable. In support of its position the District first asserts that it possessed the inherent authority to determine the Grievant's qualifications for the position and that it has been recognized that the employer's determination cannot be disturbed unless the employer has exercised its authority in an arbitrary or capricious manner. Further, Section 7.04 of the Agreement grants the District the right to use relative skill, ability and seniority in filling vacancies. That provision does not make seniority the sole criterion, nor the tie breaker if skills and abilities are relatively equal, nor does it prohibit the District from hiring an outside applicant with a higher level of skills and abilities than bargaining unit applicants. The District cites arbitral authority for the proposition that the language of Section 7.04 gives the District the authority to consider and determine all three criterion. The District further cites Article 2 - Management Rights, Section 2.02, G and I, of the Agreement as giving it the authority to determine applicants' qualifications. Unless its determination has been shown to be arbitrary or capricious, the District's determination must stand.

Next, the District contends that it used a "fair, methodical process" in selecting Sorenson for the position and that its decision was not arbitrary or capricious. The District summarizes its decision in selecting Sorenson as "it simply chose the most qualified candidate for that particular job." Anderson was aware of what skills were needed for the position and she and Novotny paid special attention to these clerical skills, including typing accuracy, in reviewing the applicants. Both especially noted Sorenson's clerical experience and familiarity with office computers and her graduation with honors from the word processor specialist program at the Technical College. Conversely, they noted that the Grievant's formal training was in elementary education with no formal post-high school training in clerical skills, other than two half-day seminars on the Macintosh computer, which the Grievant had conceded in her interview gave her only "limited" knowledge of its usage. Since typing constitutes a large part of the duties of the position, a typing test was given and all applicants took the test on the same machine under similar conditions.

The results of the test showed Sorenson to have tested with a "significantly higher level of accuracy" than the Grievant, and accuracy was an essential skill for the position. Due to the need for accuracy, Anderson felt the typing test was critical to the evaluation process and Sorenson clearly showed "superior" typing abilities. The District notes that both the Grievant and Sorenson submitted references who recommended that they be hired for the position. While the teacher for whom the Grievant worked praised the Grievant's performance as an aide, the bottomline is that the Ch. I Secretary position requires different skills and abilities than the teachers aide position. Both the Grievant and Sorenson are hardworking, motivated individuals and both come with good references, but Sorenson is trained as a clerical/word processor and the Grievant is trained as a teacher. In the District's judgment Sorenson was clearly better qualified for the position. According to the District, it used an "orderly, reasonable procedure" in selecting Sorenson. It reviewed applications and resumes', conducted interviews and administered a job-related skills test, and there is no evidence that its failure to select the Grievant was arbitrary or capricious.

Lastly, the District asserts that its determination as to the Grievant's qualifications and abilities must be given deference. It is contended that the authority to determine qualifications is a basic right of an employer and, in addition, the Agreement gives the District the right to determine which

applicant best meets those qualifications. The District cites a number of awards as holding that management's determination may only be challenged on the basis that it was arbitrary, capricious, discriminatory or made in bad faith. The District reiterates its assertion that its determination was not arbitrary or capricious, it simply selected the person more qualified. Therefore, the determination must stand and the Arbitrator may not substitute his judgment for that of the District. Hence, the District asserts the grievance must be denied.

DISCUSSION

The District asserts that the determination that Sorenson was the better qualified applicant was not arbitrary or capricious and, therefore, must stand. It is noted that the District does not claim the Grievant is not qualified to do the work.

Section 7.04 of the parties' Agreement provides:

Section 7.04: The selection of the person to fill the vacancy shall be on the basis of relative skill, ability and seniority.

That type of clause has been considered a "hybrid" of what is generally referred to as a type of "modified" seniority provision, and its application has been discussed in Elkouri and Elkouri, How Arbitration Works:

(3) The third basic type of modified seniority provision, which may be called a "hybrid" clause, requires consideration and comparison in the first instance of both seniority and relative ability. The "hybrid" clause ordinarily is worded in such general terms as "seniority and qualifications shall govern," or "due consideration shall be given to length of service, aptitude, and ability," and the like, without indicating the relative weight to be accorded these factors. Arbitrators however, require that fair and reasonable consideration be given to both seniority and relative ability, although the weight that may be accorded to each varies from case to case.

It seems clear that under "hybrid" clauses the relative claims of seniority and of ability must be determined by comparing and weighing against each other the relative difference in seniority of competing employees and the relative difference in their abilities. Thus, in comparing two or more qualified employees, both seniority and ability must be considered, and where the difference in length of service is relatively insignificant and there is a relatively significant difference in ability, then the ability factor should be given greater weight; but where there is a relatively substantial difference in seniority and relatively little difference in abilities, then length of service should be given greater weight. . . . 3/

Thus, the comparison to be made is in the degree of the differences in skill, ability and seniority of the Grievant and Sorenson. Skill and ability relate to their qualifications and their ability to do the job of Ch. I Secretary and, as the District asserts, in the absence of a contractual provision to the contrary, management retains the right to make the initial determination in that regard. 4/

The District cites a number of awards in support of its argument that it is not the Arbitrator's role to second guess its determination, and the undersigned agrees with that position to the extent noted by Arbitrator Dworkin in his award in Erie Mining Co.:

. . . so long as the company appraises the qualification in an objective manner, and its judgment is supported by the evidence, is fair and reasonable and free from bias or discrimination, its judgment may not be disturbed. 5/

The District asserts that Sorenson was selected as the more qualified applicant for the Ch. I Secretary position by Anderson and Novotny upon their having

3/ 3rd ed., pp. 570-571, (footnotes deleted).

4/ Ibid, pp. 571-572.

5/ 49 LA 390, at 394.

reviewed the requirements of the job and considered the formal training, experience, references and the test results of the Grievant and Sorenson. A review of those areas indicates the following: Sorenson's formal training was in the area of skills required for the position, as opposed to the Grievant's higher level of education in a less applicable area. Sorenson's test score of 48 NWPM was only somewhat higher than the Grievant's score of 43 NWPM and both are apparently below the level considered acceptable by the Business Teacher for an entry-level keyboarder. Both the Grievant and Sorenson had excellent references. On the other hand, the Grievant's three years of experience in a clerical position with Rice Lake Weighing and her years of experience doing the bookkeeping and reports for her husband's business significantly outweigh Sorenson's three months of experience with Kelly, with regard to prior clerical experience. Based on the evidence and considering those various areas together, the District could have reasonably concluded that Sorenson was more qualified for the position than was the Grievant. It still remains, however, to consider the seniority factor. Beyond Anderson's and Novotny's testimony that they considered the Grievant's seniority, there is no evidence as to what weight, if any, they gave that factor. Rather, their testimony indicates that Sorenson was selected on the basis that she was more qualified than the Grievant, and there is no mention of weighing their difference in seniority against their difference on skills and ability. In this case there is a great difference in the area of seniority, i.e., the Grievant's four years as opposed to Sorenson being an outside applicant.

As noted previously, under such language as is contained in Section 7.04, the comparison to be made is in the degree of differences between the applicants in each of the criterion. While it has been concluded that the District could reasonably have determined that Sorenson was more qualified for the Ch. I. Secretary position, the degree of difference in that area between Sorenson and the Grievant is nowhere near as great as the difference in their seniority. On that basis, seniority should have been given greater weight than the skill and ability criteria. Had the Grievant's seniority been given its proper weight in this case, it would have outweighed the difference in skill and ability between her and Sorenson. Therefore, it is concluded that the District violated Section 7.04 of the parties' Agreement when it awarded the Ch. I Secretary position to Sorenson instead of the Grievant.

Based on the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The District is directed to immediately place the Grievant in the Ch. I Secretary position and to make her whole for any difference in the wages and benefits she would have received under the parties' Agreement had it not been for the District's failure to award her the position.

Dated at Madison, Wisconsin this 30th day of July, 1990.

By _____
David E. Shaw, Arbitrator