

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 NORTHWEST UNITED EDUCATORS :
 :
 and : Case 46
 : No. 43325
 : MA-5951
 RICE LAKE AREA SCHOOL DISTRICT :
 :

Appearances:

Mr. Michael J. Burke, Executive Director, Northwest United Educators,
 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf
 of the Union.
 Mulcahy & Wherry, S.C., Attorneys at Law, 715 South Barstow Street,
 Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by
Mr. Stephen L. Weld, appearing on behalf of the District.

ARBITRATION AWARD

Northwest United Educators, hereinafter referred to as the Union, and Rice
 Lake Area School District, hereinafter referred to as the Employer or the
 District, are subject to a collective bargaining agreement which provides for
 the final and binding arbitration of grievances arising thereunder. 1/ The
 Union, with the concurrence of the District, requested the Wisconsin Employment
 Relations Commission to appoint an arbitrator to hear and decide the instant
 dispute. The Commission appointed Coleen A. Burns, a member of its staff, to
 act as Arbitrator. Hearing in the matter was held on February 22, 1990, in
 Rice Lake, Wisconsin. The hearing was not transcribed and the record was
 closed on June 8, 1990, upon the receipt of post-hearing briefs.

ISSUE:

The parties have stipulated to the following statement of the issue:

Did the District violate Article VIII of the collective
 bargaining agreement when it filled the swimming pool vacancy
 with a non-bargaining unit member?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II - MANAGEMENT RIGHTS

SECTION 2: Without limiting the generality of the foregoing
 Section 1, it is expressly recognized that the Board's
 operational and managerial responsibilities include:

. . .

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

. . .

ARTICLE VIII - SENIORITY

SECTION 6 - PROMOTIONS

All new and vacated positions shall be posted at each school for a
 period of five (5) working days. Such posting shall
 state the job to be filled, the date the job is to be
 filled, qualifications for the job and the rate of pay.
 Interested employees may apply for posted vacancies by
 notifying the business office, in writing, of their
 interest, during the posting periods specified above.

. . .

1/ The Union and the Employer agree that the parties are bound by the terms
 of the 1987-89 contract which had been negotiated with a predecessor
 Union.

SECTION 7 - FILLING OF VACANCIES

1. Vacancies shall be awarded to the most senior full-time employee qualified to perform the work available. The qualifications of employees are matters of fact and include physical fitness, knowledge, skill and efficiency.

. . .

BACKGROUND:

Dan Emerson, hereinafter the Grievant, has been employed as a full-time custodian since September, 1986. Prior to that time, the Grievant was a part-time employe who worked on the mowing crew.

In July of 1989, the Grievant applied for a custodial position at Franklin Elementary School. The Grievant was subsequently interviewed and offered the position. The Grievant began work at Franklin on August 14, 1989. 2/ On September 13, 1989, the Grievant requested that he be returned to his former position of night custodian at the High School. The Grievant's request was granted. The Grievant's return to the night crew was effective Monday, September 18, 1989.

On or about August 23, 1989, the District distributed a notice of vacancy in a custodial position at the Rice Lake Swimming Pool Administrative Building for posting at all District schools. The notice stated, inter alia, that application should be made to the District's Business Manager and that the deadline for applying was five working days from the date of the posting. The notice was dated August 23, 1989.

The District had one internal candidate who filed an application for the position within the five days referred to in the August 23, 1989, posting, i.e., Marcaux. The District rejected Marcaux's application and advertised the position in the local papers on September 17 and September 20, 1989. On October 3, 1989, the Grievant submitted an application for the custodial position at the Rice Lake Swimming Pool Administrative Building to the District's Business Manager, Ronald Novotny.

The District interviewed six external applicants on October 3, October 4, and October 5, 1989. The Grievant was not interviewed. On October 9, 1989, Novotny sent the following memo to the District's Superintendent, Robert J. Foster:

Dennis Wee and I have reviewed approximately 40 applications for the pool/administrative office custodian. We interviewed six of the applicants.

Dennis and I are recommending Dean King for the position. Dean is currently employed at K-Mart. He has an associate degree in architectural (sic) design from WITC. He has job and/or work experience that shows a good background in carpentry, electrical and plumbing. The assistant manager at K-Mart indicates that Dean is a self starter with good thinking skills. Give him a problem and he will figure a way to get the job done. They don't want to see him leave.

In making this recommendation we are passing over two of our present employees who did apply for the position. One we interviewed and one we didn't interview because we received his letter after we had selected those we were going to interview. We may or may not hear from the union on either of these two employees, but I feel we have by far the best candidate (sic) to handle the pool portion of this position.

The District hired one of the external applicants, i.e., Dean King.

On October 16, 1989, the Grievant filed a grievance with the District alleging that the District violated Article VIII, Section 7, of the collective bargaining agreement when it failed to interview the Grievant for the swimming pool position and requesting that the Grievant be awarded the swimming pool position. On October 23, 1989, the Step 4 grievance was presented to the District's Business Manager. On October 25, 1989, the District's Business Manager denied the grievance, indicating that the Grievant had failed to meet the timelines for responding to the job posting. The grievance was advanced to

2/ The Grievant was the only District employe working at Franklin at that time. Teachers reported to work on August 30, 1989. The Principal and secretaries reported to work on August 28, 1989.

the Board on November 27, 1989, where it was again denied. Thereafter, the grievance was submitted to arbitration.

POSITIONS OF THE PARTIES:

Union:

Article VIII, Seniority, of the parties' collective bargaining agreement requires that all vacated positions be posted at each school for a period of five (5) working days. It is uncontested that the job vacancy notice for the position in dispute was never posted at the Franklin Elementary School where the Grievant was employed on August 23, 1989. Given this failure to follow the contractual requirements for job posting, the District's argument that the Grievant waived his rights under the posting/promotion language because he failed to apply for the vacancy within five (5) working days is without merit.

The collective bargaining agreement requires that vacancies be awarded to the most senior full-time employe qualified to perform the available work. Business Manager Novotny relied upon an earlier interview with the Grievant, (unrelated to the pool vacancy) in determining that the non-bargaining unit employe, Dean King, had superior qualifications.

The collective bargaining agreement requires that successful applicants be allowed a reasonable time to qualify for the posted position. Obviously, the District did not consider this provision.

The District has ignored the collective bargaining agreement in filling the pool vacancy. As Pool Supervisor Wee admitted on cross-examination, he did not review the applicable provisions of the collective bargaining agreement during the interview process; he was not aware of the past practice of the District with respect to filling bargaining unit vacancies on the basis of seniority; he did not review the Grievant's personnel/employment file; and he did not discuss the Grievant's qualifications with the Grievant's immediate supervisor at the High School, Mr. Fredrickson.

The Union respectfully requests that the Arbitrator award the pool vacancy to the Grievant consistent with Article VIII of the parties' collective bargaining agreement.

District:

The District's central office distributed the notice of vacancy on August 23, 1989. The Grievant testified that he saw the notice on the table in the employe lounge at Franklin. Thus, while the notice was not placed on the Franklin bulletin board, the Grievant had actual notice of the vacancy within the five-day posting period. The Grievant did not respond to the notice in a timely fashion and, indeed, chose to do nothing about the vacancy for well over a month. The Grievant waited for the District to advertise for applicants in a local newspaper, he waited for the District to screen those applicants, and he waited for the District to interview the six finalists. Only then did the Grievant notify the District of his interest in the position. The District was within its contractual rights in not giving the position to the Grievant because of his untimely application.

Assuming arguendo that the Grievant's application was timely, the District did not violate Article VIII when it filled the swimming pool position with a more qualified non-bargaining unit member. The standard set forth in Article VIII, Section 7, is not a standard seniority-based hiring clause. Instead, it applies criteria in addition to seniority, i.e., physical fitness, knowledge, skill and efficiency. Only after those four criteria are considered does the seniority criterion come into play. In the present case, the Grievant was clearly less qualified than King, the successful applicant, and, therefore, the Grievant's seniority was not determinative.

In order to harmonize Article VIII, Section 7, with the rights reserved to the District under Article II, Section 2, Paragraph 7, one must conclude that the District has the authority to determine applicants' relative qualifications for a position. The Grievant, like Marcaux, had, by his performance in the July interview and on the job, convinced Business Manager Novotny that the Grievant was not nearly as well qualified as was King. Arbitrators have upheld the position that management has the inherent right to determine relative ability and qualifications and that such determinations may be challenged only on the basis that it was arbitrary, capricious, discriminatory, or made in bad faith. (Cites omitted.)

In arguing that the Grievant had more seniority and, therefore, should have automatically received the position, the Union overlooked the second sentence of Article VII, Section 7(1). Seniority is not the sole contractual criterion for filling a vacancy. The District did not violate the collective bargaining agreement and the grievance must, therefore, be denied.

DISCUSSION:

At hearing, District Business Manager Novotny stated that he prepared the posting for the Swimming Pool Administrative Building position and relied upon a secretary in his office to distribute the posting to all of the District's schools. The posting expressly stated that the deadline for applying was five days from the date of the posting. The posting was dated August 23, 1989.

For the deadline set forth in the posting to be effective, the District was required to meet the requirements of Article VIII, Section 6, i.e., the posting was required to be posted at each of the District's schools no later than August 23, 1989 for a period of five working days. The Union's claim arises from the posting, or lack thereof, at Franklin School.

According to the Grievant, at Franklin, notices of position vacancies are posted on a bulletin board in the teachers' lounge. The Grievant stated that, to his knowledge, the August 23, 1989 notice of vacancy was not posted at Franklin. The Grievant recalled that he found a copy of the August 23, 1989 notice while he was cleaning in the Franklin teachers' lounge. At the time that the Grievant found the notice, it was on top of a stack of papers. While the Grievant could not recall the exact date, he believes that he found the notice after the five-day posting period referred to in the notice.

Neither Novotny's testimony nor any other record evidence demonstrates that the August 23, 1989 notice of vacancy was posted at Franklin school on August 23, 1989, or at any other time. Absent evidence that the August 23, 1989

posting was posted at Franklin in accordance with the requirements of Article VIII, Section 6, the application deadline set forth in the posting cannot be given effect at Franklin School. 3/

The application period set forth in Article VIII, Section 6, is defined in terms of, and coterminous with, a posting period of five days. In the present case, there is no posting period from which to determine an application period for employes at Franklin School. However, contrary to the argument of the Union, it is not reasonable to conclude that the Grievant is not subject to any application deadline. 4/

In adopting the language of Article VIII, Section 6, the parties have recognized that an employe, such as the Grievant, has a right to receive notice of position vacancies so that the employe may apply for such vacancies. The parties have further recognized that an employe who wishes to apply for a position does not have an unlimited amount of time in which to make an application. Rather, such application must be made within five working days of the date of the posting. Since the purpose of the posting is to provide notice, the undersigned is persuaded that the intent of Article VIII, Section 6, is to limit the application period to a period of five working days from the date that an employe knew or should have known of the vacancy.

Given the record presented herein, it is not reasonable to conclude that the Grievant knew or should have known of the vacancy in the position in dispute prior to the time that the Grievant saw the notice in the teachers' lounge. While the record fails to establish the exact date upon which the Grievant saw the August 23, 1989 notice and, thus, gained knowledge of the vacancy, it is evident that the Grievant knew of the vacancy no later than September 18, 1989, the date upon which the Grievant returned to the High School. 5/ Inasmuch as the Grievant's application of October 3, 1989 was filed more than five working days after the date upon which the Grievant knew or should have known of the vacancy, the Grievant's application was not timely filed.

As the Union argues, Article VIII, Section 7, does provide that vacancies are to be awarded to the most senior full-time employe qualified to perform the work available. However, Article VIII, Section 7, does not exist in a vacuum and must be construed in a manner which is consistent with the other provisions of Article VIII. To give effect to both Section 6 and Section 7 of Article VIII, it must be concluded that the rights afforded by Section 7 are only available to employes who have made a timely application for a vacancy. For the reasons discussed supra, the Grievant's application for the position in dispute was not timely filed.

The violation of Article VIII alleged by the Union rests upon the assertion that the Grievant should have been awarded the position in dispute. Since the Grievant did not make a timely application for this vacancy, the District did not violate Article VIII of the collective bargaining agreement when it refused to consider the Grievant for the position. Contrary to the argument of the Union, it is not evident that the District violated Article VIII of the collective bargaining agreement when it filled the swimming pool vacancy with a non-bargaining unit member.

Based upon the above and foregoing, as well as the record as a whole, the undersigned issues the following

AWARD

1. The District did not violate Article VIII of the collective bargaining agreement when it filled the swimming pool vacancy with a non-bargaining unit member.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 10th day of August, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

3/ At issue is the Franklin posting. Presumably, therefore, the District posted the notice at the other schools in a manner which gave effect to the application deadline set forth in the notice.

4/ The Union does not claim and the record does not demonstrate that any bargaining unit employe other than the Grievant would have been affected by a Franklin posting.

5/ The notice which was seen by the Grievant was dated August 23, 1989 and expressly stated that the deadline for applying was five working days from the date of the posting. Thus, the Grievant was aware of the application deadline established by the District at the time he first saw the notice.

By _____
Coleen A. Burns, Arbitrator