

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 WISCONSIN INDIANHEAD TECHNICAL :
 COLLEGE EDUCATION SUPPORT STAFF :
 ASSOCIATION, LOCAL 4019, :
 WFT, AFT, AFL-CIO :
 :
 : Case 43
 : No. 44196
 and : MA-6207
 :
 WISCONSIN INDIANHEAD VOCATIONAL, :
 TECHNICAL AND ADULT EDUCATION DISTRICT :
 :

Appearances:

Mr. William Kalin, Staff Representative, Wisconsin Federation of Teachers, appearing on behalf of the Union.
 Mulcahy & Wherry, S.C. Attorneys at Law, by Mr. Stephen L. Weld and Mr. William G. Thiel, appearing on behalf of the District.

ARBITRATION AWARD

Wisconsin Indianhead Technical College Education Support Staff Association, Local 4019, WFT, AFT, AFL-CIO, hereinafter referred to as the Union, and Wisconsin Indianhead Vocational, Technical and Adult Education District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Superior, Wisconsin on September 19, 1990. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on November 15, 1990.

BACKGROUND

The basic facts underlying the grievance are not in dispute. On March 15, 1990, the District posted a vacancy in the position of Financial Aid Clerk at its Superior campus. 1/ The grievant was one of the applicants for this position. The grievant is a Clerk/Typist in the Student Services office at the Superior campus, a position she has held for about six years, and prior to that, she was employed at the Superior campus as a part-time LRC attendant. 2/ The District reviewed all applications and interviewed seven candidates, including the grievant. 3/ The grievant was not selected and the position was awarded to an outside applicant. The District determined that the grievant was qualified for the position but the applicant selected was more qualified. 4/ The Union submitted a grievance on April 9, 1990 alleging that the grievant should have been selected for the position. 5/ The grievance was denied and processed through the grievance procedure to the instant arbitration. 6/

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- 1/ Ex-12.
 - 2/ Ex-2, 18.
 - 3/ Ex-13.
 - 4/ Exs. 14, 15.
 - 5/ Ex-3.
 - 6/ Exs - 4, 5, 6, 7, 8, 9, 10 and 11.

ISSUE

The parties stipulated to the following:

Did the Employer violate the parties' collective bargaining agreement, Article IX, when it did not grant the position of Financial Aid Clerk to the grievant, DeLorr Mattson?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II - Management Rights

A. Recognition of Board Rights: The Federation recognizes the right of the Board or representative to operate and manage the affairs of the Wisconsin Indianhead VTAE District in accordance with its responsibilities under law. The Board and the Director shall have all powers, rights, authority, duties and responsibilities conferred upon them and invested in them by the laws and the Constitution of the State of Wisconsin.

B. Board Functions: The Board possesses the sole right and responsibility to operate the school system and all management rights repose in it, subject to the express provisions of this Agreement. These rights include, but are not limited to, the following:

. . .

10. The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards and judgment of employee performance.

. . .

C. Exercise of Management Rights: The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board; and the adoption of policies, rules, regulations and practices in furtherance thereof; and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement.

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ARTICLE IX - Employment Opportunities

A. This procedure shall apply for bargaining unit positions when vacancies occur or new positions are created:

1. A notice of opening shall be posted at each work site.
2. Bargaining unit employees shall make application within the time limits as specified.
3. The Board selection process shall be based upon:
 - a. Training, experience and abilities of applicant
 - b. Required qualifications of position
 - c. Knowledge of district operations and procedures
 - d. Seniority will be considered as a selection criteria when more than one candidate is ranked equal, according to the selection criteria of the Board
 - e. Meeting the needs of the position

and district

B. General Provisions

1. Voluntary transfer or promotion between district locations shall be based upon qualifications as per position posting and classification, and the selection criteria as established by the district.
2. Employees who are promoted shall serve a twelve (12) month probationary period within his/her new position. During this time the employer may exercise the right to return the employee to the original position and salary step if the employee cannot satisfactorily perform in this new position.
3. Employees who are identified by management for voluntary transfer or promotion and who complete the twelve (12) month probationary period satisfactorily shall retain their original date of employment for seniority purposes.
4. Involuntary transfer shall not be made between the district locations of Ashland, New Richmond, Rice Lake, Superior, and Shell Lake.
5. Involuntary transfer within and between classifications by location shall be based upon inverse seniority with no reduction in pay, with salary of employee frozen if necessary until appropriate schedule encompasses said salary.
6. Employees transferred involuntarily shall have the right to return to original position in the inverse order in which they were transferred. This right shall be available to the employee for two (2) years from date of original transfer, after which the employee forfeits this option.

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ARTICLE XVIII - Duration

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B. Contract Terms

1. The articles in this Agreement supersede and override any individual agreement, contract or policy of the Board that pertains to wages, hours and working conditions. Any individual agreement, contract or policy of the Board not in conflict or not covered by this Agreement shall apply.

UNION'S POSITION

The Union contends that Article IX is clear and requires the District to transfer or promote bargaining unit employees to District campus vacancies if the employees are qualified for the position. It points to the testimony of Beverly Jenson, Administrative Assistant for the District, and Bruce Miller, Student Services Administrator, that the grievant was qualified for the position of Financial Aid Clerk. The Union submits that there are two procedures for transfer or promotion contained in Article IX. It claims that Section A provides a selection process which restricts the District to transferring or promoting qualified bargaining unit members within one District location or campus. It maintains that Section B provides the selection process for transfer or promotion between District locations and Section B allows the District greater latitude in determining selection criteria. The Union alleges that during the Arbitration hearing in this matter, it for the first time became aware of the District's Guidelines for Selection of Staff which was dated May, 1982 and revised February, 1990. It submits that this document was written after the first collective bargaining agreement between the parties, was developed without the Union's knowledge, and thereafter, the Union was never informed of it. The Union, referring to the Management Rights clause and

the Duration clause, Articles II and XVIII respectively, point out that the District cannot establish rules and regulations or policy which conflicts with the agreement. The Union insists that the District's Guidelines for Selection violate the express terms of the Agreement, namely Article IX. It contends that the Guidelines are not related to the "Selection process" contained in Article IX, Section A. It maintains that when the parties agreed to the initial contract, it was agreed that employment opportunities for bargaining unit employes within one campus location would be governed by Article IX, Section A, and in the instant case, the District did not use Section A to fill the Financial Aid Clerk position but used their Guidelines which conflict with Section A. It submits that had the District applied the selection process contained in Article IX, Section A, the grievant would have been selected for the position. It asks that the District be directed to employ the grievant in the position of Financial Aid Clerk and to make her whole for all the losses she incurred.

DISTRICT'S POSITION

The District contends that Article IX must be read in conjunction with Article II which reserves to the District the right to determine policies affecting the selection of employes. It submits that Article IX, Section A provides in subsection 3.d. that seniority will be a selection criteria only if two candidates are ranked equally and nothing else in Article IX contains any language which establishes the right of a bargaining unit employe to be selected over an outsider. The District points out that although Article IX requires that notice be given to allow bargaining unit employes to make application, the selection is based on five factors, four of which apply to all situations and the fifth, seniority, only applies in a special situation. It maintains that Article IX must be interpreted as allowing District discretion in the development of selection criteria and the review of applicants. It refers to Section 3.B as buttressing its right to establish "selection criteria". The District submits that the first factor listed under Article IX, 3.A. is that of the qualification of the employe to assume the position and it notes that there is no limitation set forth in the agreement which restricts the District's review of qualifications. It asserts that if the District were limited to selecting a qualified bargaining unit employe, then the application of factors at A.3.b. and e. would be rendered superfluous. The District cites arbitral authorities supporting its position that an outsider may be hired over a qualified employe on staff, absent express language restricting its hiring capabilities, otherwise it might be prevented from hiring the most qualified person. It takes the position that Article IX, 3. A. spells out five criteria: one, seniority, only applies under unique circumstances and therefore the others must have greater impact, and without any express limitation on the District discretion, it has the right to select someone without reference to seniority. It reiterates that to hire based solely on seniority and minimum qualifications would disregard the remaining language of Section A. 3 and render it mere surplusage.

The District asserts that the guidelines adopted for selection of staff are consistent with and fully implement Article IX, Section A. 3. It submits that the guidelines provide an objective and uniform application of procedures on development of an applicant pool, ranking of applicants and identification of those to be interviewed. It submits the guidelines set out a program for interviewing applicants with a full and complete analysis of the factors set out in Article IX, A.3. by using a systems approach to ranking applicants. The District alleges that the evidence establishes that it did not exceed its authority under the contract in selecting someone other than the grievant. It notes that there was unanimity by the interviewers in the selection of the successful candidate and the supervisor of the position testified that the questions asked were appropriate to the position and met the criteria of Article IX, A. 3.

The District argues that it was not required to consider seniority because the agreement requires such consideration where more than one candidate is ranked equal. It points out that there was no tie here as the grievant had a composite score of 68 1/2 while the successful candidate had a score of 81 1/2. It submits that requiring the application of seniority when one candidate is an outsider and the other a bargaining unit member is contrary to the language of the agreement and would grant to the Union that which it failed to negotiate into the agreement.

The District submits that it has discretion to determine employes' qualifications and its determination must not be set aside unless it acts arbitrarily or capriciously. It relies on arbitral authorities in support of this position as well as establishing that the burden of proving arbitrary or capricious conduct is on the Union. It states that the evidence failed to prove that it acted in an arbitrary, discriminatory or capricious manner. It contends that it hired the most qualified person for the position and the grievance must be denied.

DISCUSSION

The issue presented in this case is whether the District violated Article IX of the agreement by hiring a candidate from the "outside" over a

qualified "inside" bargaining unit employe because the outside candidate was determined better qualified by the District. Generally, where the agreement does not explicitly provide or strongly infer a limitation on the right of an employer to hire a new employe over a qualified bargaining unit employe, arbitrators have refused to read such a restriction into the parties' agreement. 7/ A review of Article IX indicates that there is no express language that requires the District to hire qualified bargaining unit employes before it hires an applicant from the outside. Article IX does not even contain any express language indicating a preference will be given to the consideration of bargaining unit employes. In West Mifflin Area School District, 74 LA 627 (Hays, 1980) and School District of Superior, 72 LA 719 (Pieroni, 1979), the collective bargaining agreement contained express language indicating a preference for bargaining unit employes, but this language was not construed to prohibit the school districts from hiring an outside employe who had better qualifications than a present employe. Here, there is no express language that prohibits the District from selecting a more qualified outside candidate over a qualified bargaining unit employe. Is there an inference expressed in Article IX that such a prohibition exists? Article IX, Section 3 lists five basis for selection of an applicant to fill a position. Subsection 3. d. provides that seniority will be considered when two or more candidates are ranked equal according to the other selection criteria. This clearly infers that the other criteria will be used and if the result of that criteria is an equal ranking, then and only then does seniority come into play. Thus, where the ranking is not equal and one candidate is deemed more qualified, seniority is not considered, so the inference is that a bargaining unit employe is given preference only when the bargaining unit employe is equally qualified. Article IX must be construed so as to reflect the intention of the parties as reflected by the entire provision. Inasmuch as seniority may not even be considered, the overall intention appears that the most qualified candidate, either a bargaining unit employe or a new employe would be selected and the District is not prohibited from selecting a more qualified outside applicant over a qualified bargaining unit employe.

Article IX, Section A. 2 states that bargaining unit employes shall make application within the time limits. Arguably, it might be inferred that Article IX is applicable only to bargaining unit employes; however, this interpretation is strained and it seems more logical that this language merely sets the time for bargaining unit members to make application rather than limiting the provision only to bargaining unit applicants. Had the parties intended to limit the provision to bargaining unit employes only, they could have easily done so in clear and unambiguous terms. Therefore, it is concluded that neither the express or implied terms of the agreement prohibit the District from selecting a more qualified applicant from the outside over a qualified bargaining unit employe.

The Union has asserted that the District's use of its Guidelines for the Recruitment and Selection of Staff 8/ violates Article IX because the Guidelines conflict with Article IX and the use of the Guidelines did not properly assess the applicants for the Financial Aid Clerk's position as they did not relate to the criteria in Article IX, Section A. Generally, an employer has a great deal of discretion in determining the qualifications for a position so long as it does not act in an arbitrary or capricious, discriminatory or unreasonable manner. 9/ A review of the Guidelines fails to establish that it conflicts with Article IX of the agreement. In fact, the Guidelines spell out in detail the procedures to be followed so that there is a uniform and objective process for the implementation of Article IX. The Guidelines provide procedures for who will do the selecting, how interviews will be conducted and how candidates will be ranked. 10/ None of these factors are set forth in Article IX and these fall within the discretion of the District to determine the qualifications of the candidate. In short, the Guidelines deal with those areas of District discretion which are not controlled by the parties' collective bargaining agreement. Therefore, the evidence presented fails to establish that the Guidelines in any way violate the provisions of Article IX.

Additionally, the evidence fails to demonstrate that the District acted in an unreasonable or arbitrary or capricious manner in the selection process.

The questions asked of the candidates appear to relate to the factors in Article IX, Section 3. 11/ The make up of the interviewers as it relates to

7/ Elkouri & Elkouri, How Arbitration Works (4th Ed., 1985) at 508.

8/ Ex-21.

9/ Barbers Point Federal Credit Union, 84 LA 956 (Brown, 1984); Leach Manufacturing Co., Inc., 82 LA 235 (Harrison, 1984); E-Systems, Inc., 84 LA 194 (Steele, 1985); Southern California Gas Company, 91 LA 100 (Collins, 1988); Equitable Bag Company, Inc., 83 LA 317 (Modjeska, 1984).

10/ Ex-21.

11/ Ex-13.

this position and the grading of candidates shows no unreasonable action on the part of the District. The evidence establishes that, at most, the District made a judgment call that the Union disagrees with but this is not a sufficient basis to find a violation of the agreement. The Union has the burden of proving that the District erred in determining qualifications or that the District acted in an arbitrary or capricious manner. 12/ The Union has failed to demonstrate this. Therefore, it must be concluded that the District appropriately determined that an outside applicant was more qualified than the grievant and seniority did not apply. Therefore the District's selection of the most qualified candidate, an outside candidate, did not violate the parties' agreement.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes and issues the following

12/ GTE Products Corp., 91 LA 44 (Dworkin, 1988); Barbers Point Federal Credit Union, 84 LA 956 (Brown, 1984); E-Systems, Inc., 84 LA 194 (Steele, 1985).

AWARD

The District did not violate Article IX of the parties' collective bargaining agreement when it did not grant the position of Financial Aid Clerk to the grievant, and therefore, the grievance is denied.

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

By _____
Lionel L. Crowley, Arbitrator