BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL #2398, AFT, WFT, AFL-CIO, STAFF AND CLERICAL FEDERATION, CHIPPEWA VALLEY TECHNICAL COLLEGE	Case 183 No. 46811 MA-7074
and	
CHIPPEWA VALLEY TECHNICAL INSTITUTE	

Appearances:

Mr. Steve Kowalsky, Representative, Wisconsin Federation of Teachers, AFL-CIO, 2021 Atwood Avenue, Madison, Wisconsin 53704, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by Mr. Stevens L. Riley, appearing on behalf of the District.

ARBITRATION AWARD

Local #2398, AFT, WFT, AFL-CIO, Staff and Clerical Federation, Chippewa Valley Technical College, hereafter the Union, and Chippewa Valley Technical Institute, hereafter the District or the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a staff member as single, impartial arbitrator. On January 29, 1992, the Commission designated Coleen A. Burns, a member of its staff, as impartial arbitrator. Hearing was held on May 13, 1992, in Eau Claire, Wisconsin. The hearing was not transcribed and the record was closed on September 10, 1992, upon receipt of written argument.

RELEVANT CONTRACT LANGUAGE

ARTICLE VI - TRANSFER PROCEDURES

A. When a vacancy occurs, or a new position is created in the bargaining unit, a notice thereof shall be posted, with three copies sent to the president of the Federation and copies made available to bargaining unit members via the internal mail system; provided, however, that it is not the responsibility of the employer to see that each bargaining unit member receives one.

B. Requests for transfer or appointment to a new position shall be made in writing to the director or his/her designee and shall also, where applicable, show preference of school department and classification.

C. The Board shall make transfers to open positions and shall fill new jobs on the basis of the following criteria, in the order listed:

1. Training, experience, and ability of the employee in relation to the position to be filled; and

2. Seniority in the district; provided, however, that in cases of tied seniority, the immediate supervisor of the position to be filled shall make the appointment.

D. Involuntary transfers made for cause shall be based on seniority, i.e., the employee with the least seniority within the classification being changed shall be the first transferred; provided, however, that the employees remaining carry on the operations to be performed.

E. Employees transferred involuntarily shall have the right to return to their original position in the reverse order in which they were transferred, provided they make such requests in writing and an opening is available. Employees who pass up an opening to return to their original position shall be deemed to have waived this right.

POSITIONS OF THE PARTIES

Union

The language of Article VI, Section C., of the collective bargaining agreement is clear and unambiguous. When transferring employes, the Board must first determine whether the employe has the training, experience and ability to do the job as required by Section C.1. If so, then the Section C.2. criteria is applied, i.e., does the employe have greater seniority than other employes who have applied for transfer and met the criteria of Section C.1. If so, the senior employe should be transferred into the open position.

The District asserts that it has the right to add an additional criteria test prior to the seniority test. Specifically, the District argues that it has the right to judge the applicants training, experience and ability to determine which applicant is "best" or "most" qualified for the position. According to the District, if it judges one applicant to be the "best" or "most" qualified, then it need not consider Section C.2. The terms "best qualified" or "most qualified" do not appear in the language. The District's position is not supported by the contract language.

The transfer standard expressed is one of "sufficient ability." Thus, an employe with more seniority is to be given preference if the employe has the necessary or sufficient ability to do the job. The contract provision reads as a "sufficient ability" clause because the training, experience, and ability components are in relation to the position to be filled and not to other employes.

The three transfers relied upon by the District occurred some eight years prior to the grievance which gave rise to the instant dispute. The Union did not have knowledge of these three transfers. The transfers cannot be considered to be a binding past practice.

Evidence of bargaining history should not be considered because the language is clear and unambiguous. If the Arbitrator construes the language to be ambiguous, the evidence of bargaining history should be found to be

incomplete and not persuasive. If the Board had desired a "relative ability" clause as stated by District Director Norbert Wurtzel, it is not likely that the Board would have settled for a clause that strongly suggests a standard of "sufficient ability."

The Arbitrator should find that the transfer clause is one that requires the standard of sufficient ability of an employe to perform the job. A comparison of qualifications between employes, i.e. relative ability, is not appropriate under the existing language of the labor agreement.

District

Section C. of Article VI requires the Employer to apply certain criteria, in the order listed, in making transfers to new positions. First, the District must consider the training, experience and ability of the applicants involved, i.e., their "qualifications." Second, and only in the event the applicants' respective qualifications are no longer in issue, the Employer must consider seniority. Use of the words "in the order listed" are significant, allowing the Employer to select an applicant solely on the basis of the first criterion, without reference to the second, if following the application of the first criterion, only one applicant remains.

The parties' bargaining history supports the Employer's position. District Director Wurtzel testified, without contradiction, that the Employer was strongly opposed to a requirement that positions be awarded to a minimally qualified employe on the basis of seniority if there were more qualified applicants available. As District Director Wurtzel testified, the words "in the order listed" were inserted in the clause, at the insistence of the Employer, specifically to ensure that the factor of seniority would be clearly subordinate to those of applicants' training, experience and ability (i.e., qualifications). District Director Wurtzel's testimony is persuasive.

The Employer's conduct since 1974 has been consistent with its interpretation of Section C. of Article VI. As established by the testimony of Assistant Director Arnold Rongstad, the District has consistently told Union representatives that the District has the right to select the best qualified applicant. Such a statement was made when the parties deleted Paragraph Three from Article VI. Union representative Underwood neither objected to the accuracy of this interpretation of Section C. nor informed the District that the Union did not share the District's view.

In the vast majority of transfer situations, there has either been only one qualified applicant or the applicant's qualifications have been substantially similar, with the result that the senior qualified applicant was awarded the position. However, in three instances since 1974, with the most recent occurring in 1984, a junior, more qualified applicant, has been awarded a position over a senior, less qualified applicant. The fact that these occurrences have been rare emphasizes the relative reasonability of the Employer's interpretation of Section C.

Prior to the grievance which gave rise to the instant dispute, the Union was well aware of the Employer's interpretation of Section C of Article VI and agreed to it. Several successor agreements have been negotiated by the parties, giving the Union ample opportunity to raise the issue, but the Union has not done so. If the Union wishes to require the Employer to appoint a minimally qualified senior applicant to an open position for which a more qualified junior employe has applied, it should bring the matter to the bargaining table and negotiate for the removal of the words "in the order listed."

DISCUSSION

The parties have asked the undersigned to determine their Article VI, C, rights. The District contends that this contract language provides the District with the right to select the most qualified applicant. 1/ The District further contends that the Employer must consider seniority only in the event that the applicants' respective qualifications are no longer in issue. The Union maintains that the language requires the District to select the most senior applicant who has sufficient ability to perform the job.

Article VI, C, provides that the Board is to fill open positions and new jobs on the basis of the "following criteria, in the order listed:". There are two criteria listed. The first criteria listed is "Training, experience and ability of the employee in relation to the position to be filled". The second criteria listed is "Seniority in the district; provided, however, that in cases of tied seniority, the immediate supervisor of the position to be filled shall make the appointment."

By adopting language which requires the Board to apply the two criteria in the order listed, the parties have demonstrated that the second criteria, i.e., seniority, is subordinate to the first criteria, i.e., "training, experience, and ability of the employee in relation to the position to be filled". Construing Article VI, C, in accordance with its plain language, the undersigned is persuaded that if the District has a reasonable basis to conclude that the "training, experience, and ability" of one applicant "in relation to the position to be filled" is superior to the "training, experience, and ability" of another applicant "in relation to the position to be filled", then the District has the right to select the applicant who has the superior "training, experience, and ability". Under such circumstances, the second criteria, i.e., seniority, is not relevant to the selection of the applicant. The second criteria, seniority, becomes relevant only when application of the first criteria does not provide the District with a reasonable basis for distinguishing among the applicants.

The undersigned turns to the question of whether the evidence of negotiations history and conduct of the parties after the disputed language was negotiated demonstrates that the parties have agreed to an interpretation of Article VI, C, which is different than that which is reflected in the plain language. By its terms, the parties' initial collective bargaining agreement was in effect from January 1, 1974 through June 30, 1975. The initial collective bargaining agreement contained the language which is contained in Article VI, C, as well as a Third Paragraph which stated as follows:

> 3. Priority of request, in case of tied seniority; provided, that in the case of appointment of the personal secretaries of the Area Coordinators and the Assistant Directors (with the exception of the Assistant Director for Administrative Services whose personal secretary is not part of the bargaining unit), the individual for whom the secretary is to work shall have the right to appoint whom he chooses.

When District Director Norbert Wurtzel began his employment with the District in 1966, he held the position of Assistant Director of Administrative Services. Wurtzel, who assumed his current position in 1974, was present at the negotiations which lead to the parties' initial agreement. Wurtzel, who testified from memory and did not review any contemporaneous bargaining notes, recalled that Article VI, C, was a major issue in the 1974 contract negotiations. Wurtzel further recalled that the language of Article VI, C, was

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1/ At hearing, District Director Wurtzel stated that the District determines "qualifications" on the basis of the individual applicant's training, experience and ability. The record does not demonstrate otherwise.

developed by both parties after lengthy discussions. According to Wurtzel, the District wanted to be able to select the most qualified applicant and, to that end, proposed the inclusion of the phrase "in order listed", so that Paragraph One was given precedence over Paragraph Two. Wurtzel further recalled that he clearly enunciated the District's intent to select the most qualified applicant when the parties bargained Article VI, C. Wurtzel's testimony on the bargaining history of Article VI, C, is not contradicted. 2/

The fact that Wurtzel was recalling events which occurred approximately twenty years ago does provide the Union with a reasonable basis to question whether Wurtzel has a reliable recollection of the negotiations which lead to the inclusion of the language of Article VI, C, in the parties' collective bargaining agreement. The undersigned, however, is satisfied that the issues addressed by Article VI, C, were of such significance to the District that it is likely that Wurtzel does have an accurate recollection of the District's negotiation position.

Crediting Wurtzel's testimony, the undersigned is persuaded that, when the parties negotiated the language of Article VI, C, the District advised the Union that the language of Article VI, C, permitted the District to select the most qualified applicant. Since neither Wurtzel's testimony, nor any other record evidence, establishes that, at the time that the parties negotiated the language contained in Article VI, C, the Union disagreed with the District's interpretation of the language, the evidence of bargaining history does not demonstrate that the parties intended Article VI, C, to be given any meaning other than that reflected in the plain language of the provision.

The record fails to establish the date on which the parties deleted Paragraph Three from Article VI, C. However, given the involvement of Union President Patricia Underwood, the deletion must have occurred since 1983, when Underwood became a member of the Union's negotiating committee. Neither party argues, and the record does not establish, that the act of deleting Paragraph Three has any substantive effect upon the remaining language. Rather, the District relies upon evidence of a conversation which occurred at the time that the parties were discussing the deletion of Paragraph Three to argue that the Union has been aware of the District's position and has acquiesced to that position.

Assistant Director of Administrative Services Rongstad recalled that, when Paragraph Three was deleted from Article VI, C, he advised Underwood that the remaining language permitted the District to select the most qualified applicant. Rongstad did not recall that Underwood disagreed with his statement. While Underwood did recall that she and Rongstad had engaged in discussions at the time that the parties deleted Paragraph Three, she did not recall the conversation related by Rongstad. Underwood did recall that, on other occasions, District representatives had stated that Article VI, C, permitted the District to select the most qualified applicant. According to Underwood, on these other occasions, she had advised the District representatives that the Union believed that, if the applicant met the posted qualifications, then the applicant was qualified.

The undersigned is persuaded that, after the parties had agreed to the language contained in Article VI, C, the parties did have discussions in which the District advised the Union of its interpretation of Article VI, C, and the Union advised the District of the Union's interpretation of Article VI, C. However, by agreeing to disagree, neither party has waived its right to rely upon the plain language of Article VI, C.

2/ The only Union witness, Patricia Underwood, was not involved in the negotiation of the parties' initial bargaining agreement.

During Rongstad's eighteen years as Assistant Director of Administrative Services, there have been approximately one hundred transfers. The record establishes that Rongstad has consistently advised District managers and supervisors involved in the transfer process that the District has the right to select the most qualified applicant. According to Rongstad, there were only three instances in which a junior applicant was deemed to be more qualified than the senior applicant and that, in each of the three instances, the District chose the junior candidate. The record does not demonstrate otherwise.

It is true that, after the District has made the transfer decision and the District initiates the appropriate payroll change, the Union receives notice that a bargaining unit member has been transferred. However, the posting procedures do not provide the Union with any means of identifying which other bargaining unit employes, if any, have applied for a transfer. Thus, the record does not warrant the conclusion that, prior to the dispute which gave rise to the instant grievance, the Union was aware that the District had ever selected a junior employe over a senior employe. Thus, as the Union argues, the evidence of past practice does not provide a reasonable basis to conclude that the Union acquiesced to the District's interpretation of the disputed contract language. The Union, however, did acquiesce to the language which was incorporated in the collective bargaining agreement and must be bound by that language.

In summary, neither the evidence of the parties' negotiation history, nor the evidence of conduct which occurred after the parties incorporated the language of Article VI, C, into their collective bargaining agreement, demonstrates that the parties mutually agreed to any interpretation of Article VI, C, other than that which is reflected in the plain language of the provision. Contrary to the argument of the Union, the plain language of Article VI, C, does not require the District to select the most senior applicant who has sufficient ability to perform the job.

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

AWARD

If the District has a reasonable basis to conclude that the "training, experience, and ability" of one applicant "in relation to the position to be filled" is superior to the "training, experience, and ability" of another applicant "in relation to the position to be filled", then the District has the right to select the applicant who has the superior "training, experience, and ability". The second criteria, seniority, is relevant only if application of the first criteria does not provide the District with a reasonable basis for distinguishing among the applicants.

Dated at Madison, Wisconsin this 9th day of December, 1992.

By _____
Coleen A. Burns, Arbitrator

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