BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MERRILL EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION

and

MERRILL AREA SCHOOL DISTRICT

Case 29
No. 50571
MA-8302

Appearances:

Mr. Thomas S. Ivey, Executive Director, Central Wisconsin UniServ Council, P.O. Box 1606, Wausau, Wisconsin 54402-1606, for the Association.

Godfrey & Kahn, S.C., 333 Main Street, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, by Mr. Robert W. Burns, for the District.

ARBITRATION AWARD

Merrill Educational Support Personnel Association (the Association) and Merrill Area School District (the District), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on June 20, 1994, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was scheduled for Monday, August 22, 1994 in Merrill, Wisconsin at which time the parties attempted to settle the matter voluntarily. Those settlement efforts were unsuccessful and hearing was held on November 9, 1994. A transcript was taken and received on December 6, 1994. The parties filed briefs, and reply briefs, the last of which was received February 20. 1995. Based on the evidence and the arguments of the parties, the Arbitrator issues the following

ARBITRATION AWARD

ISSUE

The parties stipulated to the following statement of the issue:

> Did the District violate the collective bargaining agreement in the manner the positions which are the subjects of the grievances were filled?
>
> If so, what is the appropriate remedy?

BACKGROUND

During the summer of 1993 the District had three vacancies in positions represented by the Merrill Educational Support Personnel Association. Three bargaining unit members applied for the positions: Kathy Ollhoff, a cook at the high school applied for two positions, one a position at the high school consisting of half-day study hall and half-day in-school suspension supervisor, and a teacher's aide position at the elementary school. Charlene Anderson, a food server at Franklin School applied for a teacher's aide position at the junior high school. Cyndy Lowery applied for a position with the District's Head Start program. None of the applicants was considered. The Association grieved on their behalf. The District denied the grievance, asserting that the grievants did not have transfer rights because they were not employed in the departments where the vacancies occurred. Ms. Lowery left the employment of the District at the end of the 1993-94 school year. The dispute remained unresolved and is the subject of this award.

THE POSITIONS OF THE PARTIES

The Association

The Association argues that the clear language of the contract supports its position. It points out that the exercise of seniority to transfer into a vacancy is limited only by reference to seniority and qualification. It points out that in other parts of the contract, such as in ARTICLE 5, SECTION 3 and 5, the parties clearly specified departmental limitations on given rights. According to the District, the Association clearly communicated its intent at the bargaining table and the District's negotiator showed an understanding of the intent. Because the language in this contract parallels the language in the custodial language and the District did not notify the Association it intended the language to have a different effect, that language should have the same effect here as in the custodial unit. It believes a conversation between Ms. Ollhoff and the elementary school principal supports its position, and it denies the alleged conversation shortly after ratification between Greg Kautza and Joy Meyer. The Association emphasizes that the District is protected from unqualified employes by the 60-day trial period. The District's failure to interview the grievants showed a lack of good faith. And finally, the Association believes the Arbitrator does have authority to fashion a remedy that includes the grievant who has taken a position with another employer.

In its reply brief, the Association takes issue with the District's interpretation of events at the bargaining table. It traces the development of contract language in support of its position that the parties intended to have both departmental and district-wide seniority, each applicable for different situations. It asserts the parties did not share an understanding that the entire article was modified by the reference to departments in ARTICLE 5, SECTION 3, and it denies its interpretation of the contract would interfere with the efficient operation of the District.

The District

The District maintains that the parties' bargaining history and the language of the contract do not provide for the exercise of seniority rights for transfers between the four departments included in this bargaining unit. It contends that the enumeration of departments in ARTICLE 5, SECTION 3, indicates that the parties intended to limit the exercise of seniority to within a single department. To conclude otherwise would render the reference to departments a superfluity, thereby violating a standard principle of contract interpretation. The District asserts that in bargaining it communicated to the Association its position as to transfers across department lines as well as the constraints on hiring for the head start position as a result of federal regulations. The District points out that during bargaining for an initial contract, the parties patterned the contract for this unit on the language of the custodians' collective bargaining agreement, but with the deliberate difference of an added delineation of departments in this unit. This difference therefore highlights the significance of the departments in this unit. The rejection of the Association's earlier proposals that expressly provided for the transfer sought in this grievance indicates that such was right was not mutually accepted by the parties.

The District asserts it has on past occasions posted vacancies and hired from outside the unit without regard to bids from unit members in other departments. It submits that this history of the Association's acquiescence confirms its position.

Finally, it argues that even if a contract violation were found, no remedy is available to Cyndy Lowery who is no longer an employe of the District.

In its reply brief, the District asserts the Association's view of the contract language would render the departmental delineation meaningless. It insists the rejection of the Association language at the bargaining table and the District's objection to district-wide seniority supports its position. It finds the Association reference to the lack of restriction on transfers irrelevant since there are no separate departments in the custodial unit. It argues the existence of a sixty-day trial period does not affect the extent of seniority rights regarding transfers and denies it had any obligation to interview bargaining unit applicants and reasserts its position regarding Ms. Lowery.

COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE 5 -- SENIORITY

> SECTION 1: It shall be the policy of the Employer to recognize seniority in laying off or re-hiring, provided however, that the application of seniority shall not materially affect the efficient operation of the Merrill Area Public Schools.

SECTION 2: Seniority shall be based upon the actual length of continuous service commencing with the actual last date of hiring the employee. Continuous service shall be inclusive of all paid absences and authorized leave.

SECTION 3: For the purpose of this contract departments are 1) Secretarial, 2) Audiovisual Technitian (sic), 3) Teacher Aides, 4) Food Service personnel.

When laying off employees, the oldest in point of service in the department shall be retained, if qualified, to perform the available work. If the least senior employee in the department has more seniority than another employee in a department where the employee was previously employed and is qualified, the employee who is least senior in the department being reduced may bump back to the department where the employee was previously employed. The re-hiring of employees that have been laid off shall be in reverse order to that of laying off, assuming that they are qualified.

SECTION 4: When it becomes necessary to fill a vacancy or a new position in the school system, the Board of Education shall, through the Superintendent of Schools, provide the Union with a written notice of vacancy or new position. Any employee interested in applying for the vacancy or new position shall apply in writing to the Superintendent's office within ten (10) days. The most senior employee applying who can qualify for the position, shall be given a sixty (60) work day trial period in said position. In the event the employee does not desire the position within the sixty (60) work day period, or the Employer determines the employee is not qualified, the employee shall be returned to the position previously held. When the Employer determines the employee is not qualified, the employee may appeal through the grievance procedure.

SECTION 5: Part-time employees who become regular full-time employees within their respective departments shall be credited with one-half year of service for each full year of employment as a regular part-time employee. Such credit shall entitle the employee to be placed in proper salary range, seniority list, and receive all fringe benefits based upon the equivalent years of service.

ADDITIONAL FACTS AND DISCUSSION

A. Standing of Cyndy Lowery

The District maintains Grievant Cyndy Lowery no longer has standing in this grievance because she has left the District's employment. The District acknowledges that arbitrators generally have jurisdiction to decide the grievances of former employes who have been discharged, but notes that in the instant case the former employe voluntarily left the District.

Although there are some arbitrators who will refuse to hear grievances of former employes as in the case cited by the District, 1/ the undersigned believes the better practice is followed by those arbitrators who find arbitrable the grievances of former employes who are no longer employes at the time of the hearing, but whose grievances arose during their employment. This principle avoids prejudicing former employes, such as Ms. Lowery, who would be otherwise harmed by a delay prior to hearing, a delay that might be caused, in part, by the parties' good faith efforts to settle the grievance voluntarily.

On the other hand, in a transfer grievance, the remedy cannot reach beyond the date when the grievant voluntarily terminated her employment, for the employer should not be liable after the employe has, by her own action, removed the possibility of a transfer. 2/

B. The Merits

This dispute centers on the proper application of ARTICLE 5 - SENIORITY, SECTION 4, which provides for certain employe rights to transfer into vacancies if the employe is qualified. The parties disagree on whether seniority transfer rights are available to bargaining unit members in departments other than where the vacancy occurred.

Addressing the filling of vacancies, the contract provides that "Any employee interested in applying for the vacancy or new position shall apply in writing to the Superintendent's office within ten (10) days. The most senior employee applying who can qualify for the position shall be given a sixty work day trial period in said position." (underlining added.) The use of the word "any" means that it does not matter which of the members of the bargaining unit chooses to apply; all are eligible, regardless of department. There is no limitation of this right.

1/ U.S. Steel Corporation, 34 LA 306 (1960).

2/ It should be noted that this is not a case in which the labor organization asserts the employer's violation caused a constructive discharge.

The District argues that the language carries an implication that this pool is restricted to employes who are members of the department in which the vacancy occurs. It supports that conclusion by pointing to the first paragraph of SECTION 3 which provides: "For the purpose of this contract departments are 1) Secretarial, 2) Audiovisual Technician, 3) Teacher Aides, 4) Food Service personnel.

SECTION 3 clearly defines the departments into which employes in the bargaining unit are classified, and as a definition, it has effect each and every time the contract refers to "department" or "departments." One provision that refers to "department" is the remainder of SECTION 3 which defines the order of layoff and the bumping rights that may be exercised by laid off employes. The existence of that definition, however, cannot be a basis for reading into another contract provision a departmental limitation that is not stated in the contract. Nowhere does SECTION 4, which deals with vacancies, use the word "department." Similarly, SECTION 4 does not have any ambiguity or inconsistencies that can only be resolved by inferring that the rights it provides are limited by departmental status.

The undersigned, therefore, has concluded that any member of the bargaining unit, not merely those in the department in which the vacancy occurs, has transfer rights if the employe possess the requisite qualifications.

The parties presented considerable evidence of the bargaining history for their first contract and the negotiations which produced the disputed language. The undersigned concludes that a review of the bargaining table events does not disturb her conclusion regarding the correct interpretation of ARTICLE 5.

The parties agree that during the bargaining that lasted the better part of the 1989-90 academic year, the District vehemently opposed giving transfer rights to senior bargaining unit members across department lines. The District's Chief negotiator, Business Manager Gregory Kautza asked: "Does that mean that from now on we're only hiring cooks?"

It is also undisputed that the Association's initial proposal was different in form and lengthier than the seniority provision that was ultimately accepted by the parties. That initial proposal had three separate articles for seniority, layoff and recall, and promotions and job posting. For several sessions, the parties used this initial proposal as the basis for their bargaining. In January, 1990, the District, in order to condense, or in Mr. Kautza's words, to "congeal" the contract, introduced the custodian's contract as the basis for bargaining. In this draft, the three articles were combined into a single one, entitled, "Seniority." As the parties continued to bargain, they modified the model provided by the custodian's contract by adding some elements from the Association's initial proposal. One of these modifications is apparent in ARTICLE 5, SECTION 3. This provision of the custodian's contract, providing for layoff procedures, is not identical to SECTION 3 of the support staff contract.

SECTION 3 of ARTICLE 5 the support staff contract contains two items not found in the custodians' contract: the definitions of departments and the following sentence:

> If the least senior employee in the department has more seniority than another employee in a department where the employee was previously employed and is qualified, the employee who is least senior in the department being reduced may bump back to the department where the employee was previously employed.

The presence of this section indicates that the parties were aware of the need to tailor the pattern of the custodians' contract to fit the support staff unit, and that they were aware that the variety of departments in the support staff unit created circumstances different from those of the custodians' bargaining unit.

The fact that the final version of the contract was different in form from the Association's initial proposal and that the District did not want to give transfer rights across departmental lines does not, without more, prove that the District, in fact achieved its objective.

The difference between the Association's vacancy and transfer proposal and the provision finally agreed to by the parties is properly attributed to a desire for simplification. In preparing its January proposal, the District borrowed the entire SECTION 4 of ARTICLE 5 from the custodian's contract, thereby reducing the material that was 56 lines in a separate article in the Association's proposal to ten lines in a subsection of the Seniority article. This wholesale substitution for the asserted purpose of shortening is not the same as a counter-proposal of a single item or sentence that modifies a specific right created by the proposal.

In fact, the evidence that changes were made in the model provided by the custodians' contract, noted above, indicates that the parties were aware that changes might be necessitated by the different nature of the bargaining unit. In a similar vein, the District's strong opposition to interdepartmental transfers indicates that it had focussed on the issue, and the final contract which left portions of the model unchanged cannot be attributed to mere inadvertence. In this set of circumstances, the District clearly had opportunity to bargain for the result it wanted. The final contract shows that the District did not achieve language restricting transfer rights to within departments.

In addition to arguments drawn from the bargaining for the first contract, the District argues that its position is supported by the parties' conduct surrounding two vacancies. In February of 1991, an aide position was filled by an applicant from outside the bargaining unit despite the application of a bargaining unit member. Ms. Lowery had applied for the position, but she did not pursue the matter after she learned that it entailed more computer work than she had believed. On another occasion, Ms. Ollhoff discussed an aide vacancy with elementary school principal Gene Bebel who reported to her that the District believed that she did not have automatic

transfer rights. Ms. Ollhoff decided not to apply for the position because she had recently been promoted from a food server position to a cook position and did not want to cause further disruption. The District did not dispute the testimony regarding the Association's reasons for not pursuing the transfer issue at that time.

These two incidents are insufficient to support a conclusion that the parties have established a lengthy, well-known, and mutually accepted practice that would contravene the language of the contract, and insufficient to support a conclusion that the Association concurred with the District's understanding of the contract.

In summary, this Arbitrator concludes that the parties' collective bargaining agreement grants qualified employes interdepartmental transfer rights.

THE REMEDY

Consistent with the conclusions reached above, the District must follow whatever procedures it normally uses to determine if the grievants are qualified for the positions for which they applied. If they are qualified, they must be made whole for all lost wages and benefits, dating from the time the position was filled.

If Grievant Cyndy Lowery is found to be qualified, consistent with the conclusion in the discussion on standing, above, she must be made whole from the time the position was filled until the time when she resigned from the District's employment.

In light of the record and the above discussion, the Arbitrator issues the following

AWARD

1. The District violated the collective bargaining agreement in the manner the positions which are the subjects of the grievances were filled.

2. The District shall use its standard procedures to determine whether the grievants were qualified for the positions for which they applied.

3. If Grievant Kathy Ollhoff is qualified for the position for which she applied, she shall be awarded the position based on her seniority and be made whole for all wages and benefits from the time the District filled that position.

4. If Grievant Charlene Anderson is qualified for the position for which she applied, she shall be awarded the position based on her seniority and be made whole for all wages and benefits from the time the District filled that position.

5. If Cyndy Lowery is qualified for the position for which she applied, she shall be made whole for all wages and benefits from the time the District filled the position until she terminated her employment with the District.

6. All remedies shall be offset by the amounts the grievants actually received during the relevant time period.

7. The Arbitrator will retain jurisdiction for the purpose of resolving issues regarding qualifications and remedies and will relinquish such jurisdiction in sixty days unless the parties notify her those issues are unresolved.

Dated at Madison, Wisconsin this 19th day of June, 1995.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator