BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between GENERAL TEAMSTERS UNION LOCAL 662 and NEW RICHMOND SCHOOL DISTRICT	Case 38 No. 54955 MA-9839

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. Frederick C. Miner, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Ms. Kathryn J. Prenn, appearing on behalf of the District.

ARBITRATION AWARD

General Teamsters Union Local 662, hereinafter referred to as the Union, and New Richmond School 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 parties mutually agreed to the undersigned to act as the sole arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. Hearing was held in New Richmond, Wisconsin on June 18, 1997. The hearing was not transcribed and the parties filed post-hearing briefs. The parties reserved the right to file reply briefs. The District filed a reply brief and the Union informed the undersigned it would not be filing a reply brief and the record was closed on August 18, 1997.

Background:

In the fall of 1996, the District created a new position of Maintenance Mechanic with required qualifications such that the position would perform necessary work on the District's air conditioning and refrigeration equipment. The District previously subcontracted this work with outside contractors who had the necessary skill and equipment to perform the work. The subcontracting was expensive and generally included labor and a service charge and, to a lesser degree, parts. 1/ In addition, there were delays before the subcontractor performed the work. The District decided to have someone in-house who would be immediately available to do the work. It also decided to purchase the necessary test equipment and a supply of spare parts to have

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1/ Dist. Exhibit 5.

prompt diagnosis and repairs made with less cost. On October 23, 1996, the District posted the position. 2/ On October 24, 1996, the District advertized the position to the outside. 3/ The advertized position listed a starting pay rate of $14.50 per hour. 4/ This rate was more than $2.00 per hour above the highest rate for any classification specified under the contract. 5/ The grievant, a custodian with nine years maintenance experience, posted for the position but was determined not to be qualified for the position as he did not have an appropriate degree from a technical college or college and did not have the necessary knowledge or experience to work on the air conditioning and refrigeration units. The District hired an outside applicant. The grievant filed a grievance over his non-selection for the position. The grievance was denied and appealed to the instant arbitration.

Issues:

The parties stipulated to the following:

Did the District violate the collective bargaining agreement when it did not award the Maintenance Mechanic position to the grievant?

If so, what is the appropriate remedy?

Pertinent Contractual Provisions:

ARTICLE 5

SENIORITY

Section 6. Job Posting.

2/ Jt. Ex. 7.

3/ Jt. Ex. 8.

4/ Id.

5/ Jt. Ex. 2

(a) Posting. When the Employer determines that a vacancy should be filled, or a new position created within the bargaining unit, the Employer agrees to post the notice of such vacancy. The vacancy will not be filled until the notice has been posted for at least five (5) working days.

(b) The selection of any applicant to fill a job vacancy shall be made on the basis of the most senior qualified employee. If no employee is qualified for the position, the Employer may hire an external applicant for the position. All applicants shall be notified when and to whom the position has been awarded.

(c) Trial Period. An employee who changes positions shall serve a trial period of twenty (20) working days in the new position. If the employee does not complete the trial period satisfactorily, in the Employer's discretion, then he/she shall be returned to their former position at their former rate of pay. Employees may, by their own volition, return to their former position within ten (10) working days.

(d) An employee who is awarded a position through this job posting procedure may not post for another position within six (6) months of his/her first day on duty in the new position.

Union's Position:

The Union contends that the grievant is clearly qualified for the Maintenance Mechanic position. It submits that in his nine years as a Leadman Maintenance employe, he performed virtually every responsibility articulated in the Maintenance Mechanic description. It points out that the grievant filled the Maintenance Mechanic position from the time it was created until it was filled with a permanent employe. It claims that in denying the grievant's bid, the District did not review his background and experience to verify that he was qualified but reviewed his education and work experience to determine whether he would be the most capable conceivable employe. It alleges that the District ignored his seniority. According to the Union, the contract grants the District no authority to award the position on the basis of the relative merits of applicants who are otherwise qualified.

The Union observes that the District relied on two conditions in denying the grievant the position:

1. His lack of experience in servicing air conditioning and refrigeration units; and

2. His lack of a technical degree.

The Union argues that if the District procures the necessary equipment to perform air conditioning and refrigeration servicing duties, it has an obligation to train the grievant under Article 6, Section 3 which contemplates that where new equipment and responsibilities require new skills, training will be provided. It asserts that the District has refused to provide such training. As to the technical degree, the Union claims that such requirement bears no discernable relationship to any of the responsibilities of the position. It states that the District has never explained why a two year technical degree is elevated over years of on-the-job experience.

The Union also contends that the District failed to seek to bargain the terms and conditions of the new position and advertized a rate of $14.50 per hour to start and $15.50 after one year when it never raised the issue with the Union.

The Union insists that the District exceeded its contractual rights when it relied solely on the relative merits of the grievant's background and experience instead of determining whether he was qualified. It claims that it relied on job responsibilities for which it refused to provide training and a technical degree it cannot justify. It asks that the grievance be sustained and the grievant be placed in the Maintenance Mechanic position.

District's Position

The District contends that under Article 31, the Management Rights clause, it had the right to create the new position of Maintenance Mechanic and to establish the qualifications for it. It submits that the key qualifications for the position are an appropriate technical or college degree as well as demonstrated competence in air conditioning and refrigeration trouble-shooting and repair. The District points out that it has been spending thousands of dollars to outside vendors to provide maintenance services prompting the District to hire its own skilled person in-house to immediately perform the required repairs and maintenance. The position, according to the District, is more highly skilled than the present classifications and the proposed pay range ($14.50 - $15.50) is evidence of this. The District recognizes its duty to bargain the wage rate and those negotiations are on-going.

The District argues that the grievant is not qualified for the position. It notes that the grievant admits that he has no degree, has no competence in air conditioning work and no competence in refrigeration work, which is further evidenced by the invoices by outside vendors.

It observes that this paper trail, the supervisor's first hand observations and the grievant's admission that he does not possess all the required qualifications meet the burden of proving the grievant does not have the required qualifications for the position.

Anticipating the Union would argue that the grievant should be given a trial period, the District cites arbitral authority in support of its contention that a trial period is not a training period and an applicant must have the qualifications before getting the benefit of a trial period. It states that the grievant is not entitled to the benefit of a trial period because, by his own admission, he does not possess all of the required qualifications for the position. The District requests dismissal of the grievance in its entirety.

District's Reply

The District points out that despite the grievant's own admissions that he cannot do the air conditioning or the refrigeration work required by the job description, the Union still alleges that the grievant is somehow qualified for the position. It cannot understand how the grievant can admit he is not qualified and then maintain that he is qualified. It notes the Union argued that the grievant exercised virtually every responsibility in the job description; however, the main responsibility which is to overhaul, service and upgrade the air conditioning and refrigeration equipment cannot be performed by the grievant by his own admission. As to the Union's assertion that the District did not review the grievant's background to verify his qualifications, the District noted that the grievant is not qualified because he does not possess the required technical degree and can't perform the air conditioning and refrigeration work. The District observes that the grievant was not offered work as a substitute Maintenance Mechanic as Union Exhibit 9 clearly indicates.

The District responds to the Union's claim that the grievant's seniority was not considered by referring to Article 5, Section 6 which requires an employe to be qualified before seniority comes into play.

The District contends that the Union's reliance on Article 6, Section 3 is misplaced. It points out that the air conditioning and refrigeration units are not new and the Union admitted that repairs on these were subcontracted. The District responds that this is precisely why it wanted an in-house employe to perform this function to save time and money.

The District also alleges that its only obligation is to bargain a new wage rate and there is no provision which requires it to train an unqualified employe for a position where it exists or is newly created. The District disagrees with the Union's assertion that the technical degree requirement is not related to the job but argues that even if it waived this requirement, the grievant by his own admission cannot perform the work.

With respect to the Union's assertion that the District failed to seek to bargain over the

terms and conditions of the position, the District submits that this is not the proper forum for adjudicating that as there is no requirement to bargain prior to implementation and besides the parties have bargained and continue to do so.

The District reiterates its arguments from its original brief and seeks dismissal of the grievance.

Discussion

Article 5, Section 6(a) of the parties' agreement provides that when a new position is created within the bargaining unit, the District will post notice of such vacancy. Implicit in Section 6(a) is the District's right to create a new position and establish a job classification. Thus, it had the right to establish the Maintenance Mechanic position. The Union has not

challenged the District's authority in this regard. It is undisputed that the District posted the position. 6/

Article 5, Section 6(b) provides that the District must select the most senior qualified employe who posts for a vacancy. The grievant was the most senior applicant for the position. The issue in dispute is whether or not he is qualified for the position. The evidence established that he is not. The grievant admitted he could not perform the air conditioning and refrigeration work required for the position. The grievant has been employed by the District for nineteen years, nine of which he was in maintenance, yet he did not perform air conditioning and refrigeration repairs as this work was subcontracted to qualified outside vendors as the numerous invoices show. 7/ Nothing in the grievant's background or experience indicates he was able to perform this work. Contrary to the Union's assertion that the District determined that the grievant wasn't the most capable conceivable employe, the record indicates the grievant did not possess the minimum qualifications and readily admitted so.

The Union has asserted that the grievant should have been trained pursuant to Article 6, Section 3 because the District was acquiring new test equipment. This argument is not persuasive because the air conditioning units and refrigeration equipment was not upgraded and it was this equipment that the grievant required training on. The grievant could be trained on the test equipment yet still couldn't repair or service the old air conditioning and refrigeration equipment. Thus, the reference to Article 6, Section 3 is misplaced.

6/ Jt. Ex. 7.

7/ Dist. Ex. 5.

The Union asserted that the grievant temporarily filled this position, however the position the grievant temporarily filled was a maintenance position. 8/ The Union also raised an issue as to bargaining over the job rate. The undersigned finds nothing in the contract that requires such bargaining before the position is filled nor is this argument related to the grievant's selection or non-selection for the position or his qualifications for the position.

The grievant lacked the necessary qualifications for the job which he freely admitted, so the District's failure to select him did not violate the contract. Pursuant to Article 5, Section 6(b), if no employe is qualified, the District may hire an external applicant for the position.

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

8/ U. Ex. 9.

AWARD

The District did not violate the collective bargaining agreement when it did not award the Maintenance Mechanic position to the grievant, and therefore the grievance is denied.

Dated at Madison, Wisconsin this 12th day of September, 1997.

By _____
Lionel L. Crowley, Arbitrator