

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RICHLAND SCHOOL DISTRICT EMPLOYEES, LOCAL 2085-B, AFSCME, AFL-CIO

and

BOARD OF EDUCATION OF THE RICHLAND SCHOOL DISTRICT

Case 39
No. 54916
MA-9824

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for Richland School District Employees, Local 2085-B, AFSCME, AFL-CIO, referred to below as the Union.

Lathrop & Clark, by **Attorney Kirk D. Strang**, 740 Regent Street, Suite 400, P. O. Box 1507, Madison, Wisconsin 53701-1507, for the Board of Education of the Richland School District, referred to below as the Board, the District or the Employer.

ARBITRATION AWARD

The Union and the Board are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Lori Shaw, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on May 6, 1997, in Richland Center, Wisconsin. The hearing was not transcribed. After the hearing, the parties unsuccessfully attempted to settle the matter informally, and ultimately filed briefs and reply briefs by April 3, 1998.

ISSUES

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issues:

Did the Board violate the collective bargaining agreement when it denied the Grievant the kindergarten aide position at Doudna School?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II - MANAGEMENT RIGHTS

Section 1. The Board of Education possesses and retains without limitation, the sole and exclusive right to operate the school system and all management rights, subject to the provisions of this contract and applicable laws. These rights include, but are not limited to, the following:

. . .

J) To determine the level of performance of employees, and to pass upon the efficiency and capabilities of employees;

. . .

It is agreed that the Employer shall exercise its rights in a fair and reasonable manner and that such rights and powers shall not be used in conflict with . . . any provisions of this Agreement. . . .

ARTICLE VI - SENIORITY

Section 1. Seniority is herein defined for the purposes of being a measure of an employee's right to a particular job or to employment in relation to other employees by layoff classification. It shall be the policy of the Employer to recognize seniority in case of . . . promotions, transfers . . . as herein provided.

. . .

Section 4. Job vacancies, due to retirement, quits, new positions, or transfers, shall be posted on the bulletin board at each school building for seven (7) working days. Employees desiring to fill such vacancies shall sign the notice. Only those applicants who meet the prerequisites for the position will be considered.

The qualified applicant with the longest service shall be given the first opportunity to qualify for the vacancy. The Employer shall have the right to temporarily fill a job vacancy that is posted until it is determined whether there are applicants for the job from among the employees covered by this Agreement. If there are no applicants from those employees covered by this Agreement, nothing contained herein shall prevent the District from offering the job to any other District employee, or hiring a new employee for the job.

. . .

BACKGROUND

The grievance challenges the Board's denial of a Kindergarten Aide position at Doudna School to the Grievant, and asks that the Grievant be put into the position and be made "whole for lost wages."

The posting for the disputed position reads thus:

. . .

ELEMENTARY

- Kindergarten Aide (Doudna)
- Level III
- 6.75 hours/day (8:15 - 3:30)
- Term position

Requirements:

- High School diploma
- Ability to communicate positively and effectively with children, parents, building personnel
- Ability to maintain high level ethical behavior and confidentiality of information relative to students and student problems/behaviors
- Previous experience in directing specific learning activities with young children
- Previous experience in preparing teaching materials accurately and promptly
- Previous experience in supervising groups of students
- Nurturing, caring personality

. . .

The posting was signed by Iris Peterson, Kelly Worthington, Cindy Olson, Ruth Humphrey, Tina Wipprecht Davis, Julie Ringlestetter and the Grievant. Peterson was the most senior of these applicants, but withdrew her name from consideration, thus leaving the Grievant as the most senior applicant and Olson as the next most senior.

The decision to place Olson in the position was made by Elda Fry, the Board's Elementary Supervisor. Fry is responsible for overseeing the Board's programs from Early Childhood through Grade 6. Fry oversees five buildings, including Doudna. She is the immediate supervisor for teachers and aides in four of those buildings, not including Doudna.

After the posting period for the Kindergarten Aide position had expired, Fry met with Rachel Schultz, the Board's Business Manager. Because each of the employees who signed the posting works a varying schedule of hours, Schultz calculated each employee's seniority. Schultz and Fry then reviewed each applicant's qualifications in light of the position description. One applicant was rejected at this point. The remaining applicants were considered initially by seniority. After Peterson had withdrawn her name from consideration, the Grievant and Olson were the only applicants Fry considered. At the time of the posting, the Grievant was classified as a Cook and Olson was an Aide at Lincoln Elementary School.

Fry then reviewed the Grievant's qualifications in light of the posting. Because she was unaware of what, if any, experience the Grievant had in the areas highlighted in the posting, Fry reviewed the Grievant's personnel file and resume. Neither of those documents stated any experience Fry considered relevant, and she decided to phone the Grievant at home. Fry made this call on July 24, 1996. She asked the Grievant three questions. She made notes of those questions and the Grievant's responses. Those notes read thus:

1. Have you had previous experience in directing special learning activities with young children -- kgn. age?

Has done baby sitting in her home. Has not directed special learning activities except with her own children and reading to children she baby sat.

2. Have you had experience with preparing teaching materials?

"No, not really. I did plan some activities for Hot Lunch Week but couldn't carry them out due to a leave."

3. Have you had experience supervising groups of kgn. age children?

Helped w/ Sunday School when she was 17. Didn't have the responsibility of teaching the class, however.

She did not explain her questions to the Grievant, but simply asked them and listened to the Grievant's unprompted responses. She did ask the Grievant if there was anything else to add before she ended the conversation. Fry was aware that the Grievant made posters and ran a coloring contest to promote the hot lunch program. Prior to making this call, Fry believed the Grievant did not have sufficient experience to qualify for the position and viewed the conversation to confirm this belief.

Fry served as Olson's evaluator prior to the posting at issue here. Fry did not interview Olson or review her personnel file before offering her the position sometime after the July 24 phone conversation.

The job description for "Teacher Aide" states the following "Qualifications" for the position:

1. High School Diploma
2. Demonstrated ability to relate well with young people preferred.
3. Previous experience working with young people preferred.
4. Proven ability to perform responsibly.
5. Ability to maintain confidences relative to students, student behavior.
6. Such alternatives to the above qualifications as the Board may find appropriate and acceptable.
7. Ability to perform all the work required in the job.

The balance of the background will be set forth as an overview of witness testimony.

Elda Fry

Fry testified that she felt the three areas highlighted by the posting concerning previous experience were critical to the Kindergarten Aide position. She acknowledged that past postings for Aide positions sometimes included a requirement for previous experience and sometimes did not. She felt, however, that past hiring decisions reflected the "hit or miss" aspect of not requiring experience of Aide applicants. A teacher should not, Fry stated, be expected to have to train an Aide. Olson did not have prior school district experience as an Aide when she was hired into the position of Elementary Aide. Olson's prior experience is in the District's early childhood program. In the school year preceding the posting at issue here, Olson served as a one-on-one tutor.

Olson informed Fry of her interest in a Kindergarten Aide position several times before and after the position at issue here was posted. Olson initiated these conversations. The Grievant did not supply Fry with material beyond her signature on the posting. Fry never sought such materials, nor consulted with the Grievant's immediate supervisor before concluding she did not have the necessary experience to qualify for the Kindergarten Aide position.

The decision to hire Olson was solely Fry's. She felt that the requirement of previous experience would assure that the applicant selected for the position would be able to immediately perform all the student assessment and supervision as well as educational support activities required of an Aide.

Fry noted the posting for the Kindergarten Aide position is not a boilerplate form, but was created for that position. She has required previous experience in some, but not all, prior postings for other Aide positions. This is the first grievance challenging the requirement of previous experience as a prerequisite for an Aide position.

The Grievant

The Grievant has been employed as a Cook since 1988. She started at the District's High School, but has worked at Doudna for roughly six years. As Cook, she has been involved in a number of promotional activities including classroom presentations. Promotional activities have required the Grievant to prepare posters and other display materials in addition to classroom appearances. She has three children. In the summer months, she takes care of three children in addition to her own. The children she cares for range from under two years old to eight years old. Her summer child care duties require her to read to the children and to create and supervise learning activities. She must also supervise their play.

When in High School, the Grievant worked at a number of Bible Schools. In the summer, she would attend, as a pupil or a helper, perhaps three such schools lasting from one to two weeks each. She performed essentially as an aide to the Bible School teacher. The students in these classes ranged from the first through third grade. When she applied to the District to become a cook, she did not list her child care experience, because it did not seem relevant to the position she was applying for. She did not offer any material beyond the job posting because she was unaware any material was either required or desired.

Fry called her without prior notice on July 24, when the Grievant was busy caring for six children. She estimated the conversation lasted ten to fifteen minutes, and she affirmed the accuracy of Fry's summary of that conversation. She noted she was confused by what Fry meant by "special learning activities," and thought Fry might be inquiring about experience in special education. She thought Fry's question about "teaching materials" might refer to office equipment.

She did not regard the July 24 conversation as an interview, and it did not occur to her that her personal experience handling children might be the sort of experience Fry was looking for. She did not ask Fry what the purpose of the call was, or to clarify any of Fry's questions.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidence, the Union contends that the interpretive issue posed under Article VI, Section 4, is "whether the Grievant was 'qualified' for the position."

The Board's determination that the Grievant was not qualified rests on Fry's conclusion that she lacked "(p)revious experience" regarding "directing specific learning activities with young children;" "preparing teaching materials accurately and promptly;" and "supervising groups of students." That conclusion is, the Union contends, flawed since it presumes "previous experience" has a significance beyond being one of many considerations relevant to determining qualifications and since the Grievant does have relevant experience.

The Union contends that Fry failed to impartially seek the Grievant's qualifications. Rather, the manner in which Fry questioned the Grievant "suggest(s) strongly that Ms. Fry was not particularly interested in finding out what Ms. Shaw's qualifications were, and that she was rather more interested in confirming the conclusion she had previously reached that Ms. Shaw was not qualified." That prior job postings "did not normally contain 'previous experience' requirements" underscores that "Fry may have tailored the job posting to favor Ms. Olson." That Olson and Fry discussed job requirements prior to the job posting further underscores the underlying impropriety.

The Union concludes that under the "'sufficient ability' standard for awarding vacancies," the Grievant "was contractually entitled to the position." It follows, the Union contends, that "the Arbitrator (should) order that grievant be awarded the position and be made whole for all lost wages, benefits, and rights she has suffered as a result of this violation of the labor agreement."

The Board's Reply Brief

The Board contends that its decision to award the position to Olson "is entitled to great deference under the collective bargaining agreement." General arbitral precedent establishes this assertion and that precedent is "directly applicable to this case, given the language of the collective bargaining agreement." More specifically, the Board argues "that a reasonable synthesis of Articles II and VI" demands that its determination of job prerequisites or employee qualifications should not be overturned unless the underlying decision "was unreasonable under the facts, or capricious, arbitrary, or discriminatory." Whether "the arbitrator might reach a different conclusion if he were in the role of the supervisor" is not relevant to the application of this standard.

Contending that its right to establish job prerequisites is undisputed, the Board argues that "an applicant must meet the prerequisites for the position before seniority is at issue." Beyond this, the Board posits that "the prerequisites established . . . in this case were reasonable." With this as background, the Board contends that it acted reasonably in determining that the Grievant did not meet job prerequisites. Fry's expertise in making this determination is apparent, and entitles her conclusion to deference as a matter of contract and of fact. Although the Grievant was the senior applicant, she failed to supply written information establishing that she met the requirements of the job. Thus, Fry reasonably decided to telephone the Grievant to determine if she did have the necessary previous experience. Her determination "was made in real time" and "has to be reviewed that way." Viewed from that perspective, her conclusion that the Grievant's responses failed to establish the necessary experience cannot be faulted.

The Board contends that a review of the evidence establishes that the Union has failed to meet its burden of establishing a contract violation. That Fry never informed the Grievant of the prerequisites of the job cannot be held against Fry and has no bearing on the determination whether the Grievant met the job prerequisites. That Fry did not ask the Grievant about her abilities establishes nothing of relevance to the grievance, since Fry was obligated only to determine whether the Grievant had relevant past experience. Nor is the intimation of a conspiracy of any demonstrated assistance in addressing the issues. Each testifying witness was credible and honest. That Fry had previously evaluated Olson as an employee establishes a "non-conspiratorial" basis for evaluating her responses to the two applicants. The intimation that Fry was biased for Olson or against the Grievant has no evidentiary basis.

The Board asserts that the Union fails to recognize the contractual significance of its right to establish previous experience as a job prerequisite. Beyond this, the Union's assertion that the Grievant had the necessary experience or its equivalent is not well founded in the evidence. After an extensive analysis of these points, the Board states its position thus:

It is natural to sympathize with the Grievant's desire to be appointed to the position, as well as her belief that her family activities have prepared her to do the job. But that sympathy cannot and must not result in evisceration of the District's right under this collective bargaining agreement to seek previous experience and require it as a prerequisite of job applicants.

A review of the evidence as a whole demands, the Board concludes, "that the arbitrator find no violation of the Collective Bargaining Agreement and dismiss this Grievance."

The Union's Reply Brief

The Union contends that the Board's use of precedent to establish a standard of review, on closer examination, establishes a series of standards, some of which are considerably broader than that stated by the Board. A review of relevant contract language establishes that the language at issue here is a "sufficient ability" clause. The sole issue posed by that clause is "whether the grievant can do the job or not." The burden to establish a lack of qualifications falls on the Board, and "the evidence demonstrates that the grievant is more than minimally qualified for the job."

That Fry's conclusion should be afforded deference can be accepted, but cannot obscure that "the supervisor had obtained very little objective evidence before she disqualified the grievant from further consideration." It is not necessary to doubt Fry's credentials in the field of elementary education to note that she never seriously attempted to probe whether the Grievant had previous experience meeting the requirements of the job. More specifically, the Union notes that Fry did no more than consult an outdated job application then make an unannounced phone call to the Grievant during which she posed "three jargon-laden questions in the areas that the supervisor felt the grievant was lacking." This did no more than confirm a pre-existing bias for Olson. That Fry made her decision "in real time" cannot obscure this fundamental failure "to fairly determine the abilities of the Grievant."

The Board's emphasis that the contract establishes a two-step evaluation procedure should not be accepted. The establishment of job prerequisites cannot be meaningfully distinguished from an assessment of employee qualifications. Nor does requiring a single, and even handed evaluation of qualifications "eviscerate" the Board's authority:

The Employer's interest is in having competent employees performing available jobs. How employees come by that competency is not particularly an employer interest.

Nor can characterizing the Union's contentions as a "conspiracy theory" establish anything beyond "name-calling." To say Fry "had a pre-conceived notion of the grievant's abilities," says little more than that she had a human failing. Nevertheless, the Union argues that "the fact remains that she did a very poor job of evaluating the qualifications of the grievant."

The Union concludes that the grievance must be sustained, and that an appropriate make whole remedy must be ordered.

DISCUSSION

I have adopted the Union's statement of the issues as that appropriate to this record. The parties agree that the issue on the merits poses the relationship of Articles II and VI. The parties differ, however, on which specific portions of those articles control the outcome of the grievance.

The Union's arguments pose the interpretive issue as a direct conflict between Article II, Section 1(J), the second sentence of Article VI, Section 1 and the first sentence of the second paragraph of Article VI, Section 4. Put more succinctly, the Union contends the issue on the merits is whether the Grievant is qualified for the job. If she is, Olson's claim for the position rests on manufactured facts which cannot obscure a tenuous contractual claim. Fry's preference for Olson should not, under this view, be permitted to gut the preference for seniority stated in Sections 1 and 4 of Article VI.

Viewed in isolation, this aspect of the interpretive issue favors the Union's view. The Board's authority to assess qualifications under Article II, Section 1(J) is limited by the provisions noted above. Olson's arguably superior qualifications for the position cannot obscure that if the Grievant is qualified to do the work, she is entitled, under the first sentence of the second paragraph of Article VI, Section 4, to "the first opportunity to qualify for the vacancy."

The difficulty with the Union's argument is that it cannot be viewed in isolation, and other contract terms govern this dispute. More specifically, the final sentence of the first paragraph of Article VI, Section 4 states that: "Only those applicants who meet the prerequisites for the position will be considered." The Grievant lacks at least two of three "Previous experience" requirements noted in the job posting. The fundamental flaw in the Union's interpretation is that the Grievant can be considered to meet the "prerequisites" of the position only if the District's attempt to set prior school experience as a prerequisite can be considered contractually infirm. Because it cannot be so considered on these facts, the grievance has been denied.

The final paragraph of Article II establishes the limits to the Board's ability to set "prerequisites" of a position. More specifically, that provision demands that job prerequisites be set in a "fair and reasonable manner," and that they "shall not . . . conflict with" other "provisions of this Agreement." It is arguable that prior school experience is not a necessary prerequisite for a Kindergarten Aide position. This does not, however, establish a basis upon which to label such a requirement "unfair" or "unreasonable." Fry's conclusion that setting the experience prerequisite would avoid past "trial and error" experiences with filling positions and would assure that a teacher would not have to train the Aide cannot be dismissed as unreasonable.

Nor can Fry's conclusion be said to conflict with other agreement provisions. Olson was the senior applicant who met the prerequisites set by the posting. Thus, there is no apparent conflict with the seniority references of Article VI, Section 1. It can be noted that the experience requirement is not stated as specifically in the job description as in the posting, but the issue posed here is contractual interpretation and the governing portion of Article VI, Section 4 is addressed to the posting process.

In sum, the Board's preference for Olson can be considered contractually infirm only if its requirement of previous school experience for this position can be considered to conflict with other agreement provisions or can be characterized as unfair or unreasonable. In my opinion, no conflict within agreement provisions exists. The prerequisite, whether or not I would agree with it as a matter of educational or employment policy, cannot be characterized as unfair or unreasonable. Because the Grievant lacks the experience required in the job posting, the Board's refusal to consider her a qualified applicant cannot be faulted.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. It should be stressed that the conclusion stated above is no reflection on the Grievant's potential as an Aide. The evidence would indicate she meets the first, second and seventh requirement stated by the job posting. There is no evidentiary basis to indicate she could not meet the third requirement. The Union's argument that her life experience meets the fourth requirement is sound. Thus, the conclusion stated above rests only on her lack of prior school experience. My conclusion that the final sentence of the first paragraph of Article VI, Section 4 grants the Board the authority to hold this experience as a prerequisite dictates the denial of the grievance, not any deficiency in the Grievant's testimony.

The parties dispute the appropriate "type" of seniority clause posed here and the appropriate standard of review under arbitral precedent. Whether it is helpful to generally "type" a contractual clause to interpret it is debatable. More significantly here, it is necessary, under Article II, to give meaning to all of the disputed contract terms. However the seniority clause is typed, meaning must be given to the final sentence of the first paragraph of Article VI, Section 4. Similarly, whether arbitrators find an "arbitrary and capricious" or a "reasonableness" standard appropriate is less significant than the terms of the final paragraph of Article II, which demand that the Board's management rights be exercised in a "fair and reasonable manner."

The degree of deference appropriate to Fry's conclusions is a potentially vexing issue. Here the contract addresses the point. Her conclusion that prior school experience can be considered a prerequisite to the Kindergarten Aide position cannot be dismissed as unreasonable. This is the case, in my opinion, whatever her credentials as an educator.

The Union forcefully argues that the process was rigged in Olson's favor. That Olson benefited from a requirement which could have precluded her original hire cannot be lightly dismissed. As the Union points out, it is not necessary to determine Fry acted in bad faith to conclude that her bias for Olson tainted the process. The difficulty with the Union's position is that a contractual violation defines the taint to the process. Unless the requirement of prior school experience can be dismissed as unreasonable, the process has no contractual taint. "Superior" qualifications did not win Olson the position. She had the experience the Grievant lacked. Any predisposition on Fry's part has no bearing on this point. That the Grievant is a sympathetic applicant complicates the picture. Contractually speaking, however, it cannot change the picture. The prerequisite asserted here can also serve to filter out unsympathetic applicants.

Similar considerations apply to the Union's concerns with the July 24 phone call. Those arguments persuasively question how objectively Fry assessed the Grievant as an applicant. The problem with the arguments is that the phone conversation was not an interview relevant to a weighing process, but an attempt to determine whether the Grievant met the job prerequisites.

That the Board has not uniformly required past school experience does undercut its assertion that such experience must be considered a prerequisite here. Neither party asserts this prior experience can establish a binding practice. More to the point, Fry's contention that this prior experience highlights the inadequacy of earlier hiring efforts stands un rebutted.

AWARD

The Board did not violate the collective bargaining agreement when it denied the Grievant the kindergarten aide position at Doudna School.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 18th day of May, 1998.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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