

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CESA #11 HEAD START ASSOCIATE
AND PROFESSIONAL STAFF**

and

**COOPERATIVE EDUCATIONAL SERVICE AGENCY #11
(HEAD START)**

Case 18
No. 56027
MA-10148

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, on behalf of the Association.

Weld, Riley, Prens & Ricci, S.C., by **Mr. Stephen L. Weld**, on behalf of the Agency.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "Agency", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Turtle Lake, Wisconsin, on April 21, 1998. The hearing was not transcribed and both parties subsequently filed briefs that were received by June 5, 1998. Based upon the entire record and arguments of the parties, I issue the following Award.

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

ISSUE

Did the Agency violate Article 13, Section B, and/or Article 17, Section A, of the contract when it denied grievant Jennifer Hewitt's transfer request and, if so, what is the appropriate remedy?

BACKGROUND

Grievant Hewitt was hired to work about 25 hours per week as a part-time Teacher Assistant in 1996 for the Agency's Menomonie, Wisconsin, office which houses Head Start students who attend class about 3 ½ hours each day. Her job description at that time did not require any bilingual skills. Throughout her employment, Hewitt has been assigned to teacher Linda Anderson's classroom. Anderson does not speak Hmong. In addition, Hewitt drives a school bus for about 12 hours a week.

In August, 1997, the Agency posted for a vacant 40-hour a week Teacher Assistant position at its Menomonie facility which, under the heading "Job Responsibilities", stated, *inter alia*: "For bi-lingual classrooms, interpret for children/families." (Emphasis added). Hewitt applied for said position, but was turned down in favor of outside applicant Pang Chang who speaks Hmong. The Agency passed over Hewitt, who does not speak Hmong, because it wanted the Teacher Assistant to speak Hmong to both the children in class and to their parents. Bonita Pach, the teacher assigned to that class, does not speak Hmong.

Hewitt testified at the hearing that she should have been awarded the position because she presently works with four (4) Hmong students in Anderson's class; because some Hmong students in Pach's class could have switched to another class; and because some Hmong students speak English.

By letter dated September 9, 1997, (all dates hereinafter refer to 1997), Head Start Director Barbara Wehman informed NUE Executive Director Alan D. Manson:

...

Our records indicate Jennifer is currently a Teacher Assistant for 25 hours per week in a Head Start classroom in Menomonie. The classroom she is assigned to has only two families/children who do not speak English. The other two classes have ten families/children and eight families/children with little ability to speak and understand in English. We consider these classrooms to be bilingual and the classroom Jennifer is assigned to is not because it has the least need for bilingual skills. We do try to integrate all our classrooms but we could consider placing Hmong speaking children and families in only the four double session units.

We do not have interpreter time available in the classroom other than on an individual basis. The limited interpreter time is assigned to Early Head Start and Social Services function.

Attached is a copy of the Teacher Assistant job description which identifies the interpreter skill. You raise a good question, however, should all three Teacher Assistants at this site have bilingual skills. We have tried to strike a balance with two bilingual aides and one that did not necessarily need that same skill level.

...

By letter dated September 23, Manson filed a grievance over the Agency's failure to transfer Hewitt.

By letter dated October 6, Human Resource Coordinator Cindy Haight informed Manson:

...

In response to your letter dated September 23, 1997, Step 2 grievance. The position Jennifer requested is in a bilingual classroom with over 50 percent Hmong families. The Teacher Assistant job position specifically states for bilingual classrooms you must be able to interpret for children and families. Jennifer does not have this ability.

As I reviewed Jennifer's Performance Appraisal there seems to be several professional development areas that she is working on and not up to meeting the minimal standard. By placing Jennifer in a more demanding classroom situation, it may also make it more difficult for her to concentrate on the needed areas of improvement.

It does not look as though we can come to an agreement on this point on the grievance. Policy Council meets Thursday, October 9, and Thursday, November 13, if you elect to move on to Step 3.

...

After the Association appealed the grievance to Step 2, Wehman by letter dated November 10 informed Manson:

...

The attached letter of October 6, 1997 details management's position on the facts in dispute. The attached job description clarifies the requirement for bilingual skills. The attached federal regulations further supports the agencies position that bilingual skills as identified on the job description are necessary in bilingual classrooms.

...

The grievance subsequently was advanced to arbitration.

The record shows that at the beginning of the 1997-1998 school year, there were 17 students in teacher Pach's a.m. class and 17 students in her p.m. class; that Yer Yang, who speaks Hmong, has been employed since at least 1996 as a full-time interpreter at the Menomonie facility where she performs various duties; that Classroom Aide Chai Kou, who was recently hired in 1998, speaks Hmong; that Teacher Assistant Chee Lee D, who speaks Hmong, has worked in teacher Beth Neverdahl's class since September, 1997; that Pach in 1997-1998 had 17 students in her a.m. class and 17 students in her p.m. class; that there are four Hmong students in teacher Anderson's class; and that there are two Hmong students on Hewitt's bus route.

Head Start Director Wehman testified that the Agency's original figures were in error and that a majority of students in Pach's classroom were not Hmong students in September, 1997; that only 7 out of the 17 students in both her morning and afternoon classes were Hmong; that a bilingual aide is still needed in her classroom during the current school year because more Hmong students might enter her class throughout the school year; and that Hewitt was not given a trial period for the posted Teacher Assistant position in Pach's class because she did not speak Hmong and hence was not then currently qualified.

State Facilitator Rebecca Evan testified that several white children have since dropped out of Pach's class and that close to a majority of students are now Hmong; that a bilingual aide is needed in Pach's class to explain behavioral issues to students and to help them build up a base in their own language; that a Teacher Assistant takes over a classroom when the regular teacher is not there for a limited time, which is why a Teacher Assistant must speak Hmong in Pach's class; and that there are fewer Hmong students in Anderson's class because there is no interpreter.

POSITIONS OF THE PARTIES

The Association asserts that the Agency violated the contract because it mistakenly concluded that a majority of students in Pach's class were Hmong when, in fact, they were not, thereby showing that Hewitt's hire was not barred by federal law as initially claimed by the District. Claiming she "should not have to pay for the Employer's mistake", the Association argues that the Agency has "hired other employees who are bilingual at the Menomonie Center. . ." and that the District can easily satisfy federal law by assigning some of them the duties in issue. The Association also argues that the Agency is not entitled to now claim that it is free to exceed the federal requirements dealing with bilingual assistants because the Agency is "no longer unbiased" in ruling on Hewitt's qualifications. As a remedy, the Association asks that Hewitt be awarded the disputed position and that she be made whole.

The Agency, in turn, asserts that it has the authority to determine job qualifications, that its decision here to require bilingual skills "was not made arbitrarily, whimsically or discriminatorily"; and that it did not violate the contract by refusing to give Hewitt a thirty day trial period.

DISCUSSION

This case mainly turns on Article XIII, Section B, of the contract which provides in pertinent part:

- B. Transfers: Current qualified employees (not including LTE or substitute employees) within the classifications (defined as teacher, home visitor, family resource, bus driver, cook, cook assistant, center assistant, interpreter, teacher assistant, or cleaner) in which the vacancy occurs will be allowed to transfer to the vacant position prior to the employer hiring a new employee (provided that, if there is any employee on layoff, no such transfer shall result in an increase of hours if such an increase directly limits the opportunity for a laid off employee to be fully recalled). If more than one such qualified employee desires the vacancy, seniority shall prevail. Only after all such voluntary intra-classification transfers are made shall the employer consider filling the vacancy with others.

Current employees in the other classifications will be given consideration for any vacancy remaining after the intra-classification voluntary transfers. The selection of any applicant to fill such a job vacancy shall be made on the basis of seniority, relative ability, experience, and other qualifications as substantiated by an employee's personnel record, including his/her performance appraisals. The Agency may concurrently with a posting advertise such positions outside the Agency.

...

The key phrase here is “Current qualified employees. . .”, as it mandates that applicants must be qualified at the time of the posting. Here, Hewitt clearly was not qualified to speak Hmong – which was an essential job duty of the job in question. Since she was not then a “currently qualified” employe, the Agency was not required to give her a thirty-day trial period to learn Hmong under Article XIII, Section C, because the trial period provided for therein only kicks in for employes who are currently qualified.

Absent any clear contractual language to said effect, the Agency similarly was not required to undertake any of the special steps suggested by Hewitt such as transferring duties or students so that she could more easily work in Pach’s classroom. Instead, the Agency had the absolute right to insist that the Teacher Assistant in Pach’s class be bilingual and speak Hmong.

There is only one possible basis for overturning the Agency’s decision – i.e. its earlier mistaken belief - reflected in Wehman’s November 10 letter to Manson described above - that a majority of students in Pach’s class spoke Hmong and that federal law therefore required that a bilingual aide be hired. That error, though, does not go to the question of whether the Agency in the first place had the contractual right to insist upon a bilingual skill in its job posting. Since the Agency could reasonably establish that a requirement even if it had one Hmong student in Pach’s class, it certainly had that right given the fact that there were seven Hmong children in each of Pach’s morning and afternoon classes. For by having a bilingual Teacher Assistant in Pach’s classroom, the Agency has improved communications among Hmong families and their children, as well as build a stronger base in their own language before they master English.

The Association asserts that this result is unfair because the Agency is raising “an additional standard” and that it “is no longer unbiased in the matter of evaluating the overall qualifications of Ms. Hewitt. . .” This claim is without merit because: (1), the Agency in fact is not raising an “additional standard” since the need to speak Hmong was

on the original job posting; and (2), bias has absolutely nothing to do with this case since Hewitt herself testified at the hearing that she does not speak Hmong. That being so, there are no other qualifications to consider.

In light of the above, it is my

AWARD

That the Agency did not violate Article 13, Section B, and/or Article 17, Section A, of the contract when it denied Jennifer Hewitt's request; the grievance is therefore denied.

Dated at the City of Madison, Wisconsin this 31st day of July, 1998.

Amedeo Greco /s/

Amedeo Greco, Arbitrator