BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL DISTRICT OF DRUMMOND EMPLOYEE'S ASSOCIATION

and

SCHOOL DISTRICT OF DRUMMOND

Case 48
No. 55765
MA-10087

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn**, appearing on behalf of the District.

ARBITRATION AWARD

School District of Drummond Employee's Association, hereinafter referred to as the Union, and the School District of Drummond, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Drummond, Wisconsin on March 4, 1998. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on May 14, 1998.

BACKGROUND

The basic facts underlying the grievance are not in dispute. The Grievant was employed by the District for 11 years as a Chapter 1 Aide and then for two years as a Special Education Teacher Aide. At the end of the 1994-95 school year, the District laid off all aides including the Grievant. Under Article IX of the agreement, laid off employes have reinstatement rights for one (1) year and three (3) months. The Grievant did not work in the

1995-96 and 1996-97 school years and retained no reinstatement rights. In 1997, the District posted a vacancy for a Special Education Aide starting with the 1997-98 school year. The posting sought candidates with previous experience as a special education aide and/or have the Handicapped Children's Aide (833) certification. On June 25, 1997, the District hired the Grievant to fill the vacancy. The contractual salary schedule provides for two rates, the base of 0 at $9.42 and 1 at $10.12. The Grievant was placed at the base rate, 0, and the Union grieved. The grievance was denied and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

1. Did the District violate the collective bargaining agreement by placing the Grievant, Eileen Gustafson, at the base wage rate when she was hired for a Special Education Aide position at the start of the 1997-98 school year?

2. If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IV – GENERAL PROVISIONS

A. This Agreement may be altered, changed, added to, deleted from, or modified only through the voluntary mutual consent of the parties in written and signed amendment to this Agreement. This Agreement upon ratification supersedes and cancels all prior practices and agreements whether written or oral unless expressly stated to the contrary herein. The Association does not waive its right to bargain impact. After the Board makes a decision which has an impact on wages, hours and/or conditions of employment (which are not specifically covered within this Agreement) the Association has the right to reopen negotiations on such specific topics (the rest of the Agreement stays in tact (sic) for the total duration).

. . .

ARTICLE IX – REDUCTION IN FORCE

If necessary to decrease the number of employees (in whole or in part) in a department (cooks, clerical, bus drivers, custodians, mechanics and aides) the Board may lay off the necessary number, but only in inverse order of the appointment in each department. Such employees shall be reinstated in reverse order of their being laid off when vacancies occur. Such reinstatement shall not result in loss of credit for previous years of service. No new or substitute

appointments may be made while those who were laid off are available to fill vacancies. Laid off employees have reinstatement rights for one (1) year and three (3) months, this time starts the first day the employee is unemployed.

. . .

WAGE SCHEDULE

1997-1998

. . .

	Aides:	
Base:	0	$ 9.42
	1	$10.12

Union's Position

The Union contends that the Grievant should have been placed at Step 1 of the salary schedule for the 1997-98 school year. It argues that Step 0 stands for zero years of experience within the District and Step 1 stands for one or more years of experience with the District. It points out that the contract is silent as to what Steps 0 and 1 are for and how and when an employe moves from Step 0 to Step 1. It takes the position that past practice and bargaining history must be examined to determine how the salary schedule is applied.

As to bargaining history, the Union observes that the first contract was negotiated between the parties in 1978-80 and prior to that agreement the District had established a wage schedule with steps under the heading, "Years of Experience." The Union notes the first year of the contract had a base amount and varying steps based on classification and the second year, 1979-80, the wage schedule had the 0 and 1 steps, the same as the present contract. It asserts that 0 Step was for no experience in the District and Step 1 was for one or more years of experience in the District. It alleges that the steps were not used for experience credit gained outside the District. The Union asserts that neither party proposed any changes to the method of using experience for the salary schedule and the District never communicated to the Union any different interpretation.

As to past practice, the Union asserts that there has been only one previous occasion where an employe left the District and returned, a bus driver, who was reemployed at Step 1. It argues that this case is the same as the instant case and the Grievant who had prior experience with the District should be placed at Step 1. It claims that the District wanted an experienced aide but now does not want to pay for such experience. It concludes that based on bargaining history and past practice, the Grievant should be placed at Step 1 for the 1997-98 school year and made whole.

District's Position

The District contends that the clear and unambiguous language of the contract supports its position. It submits that Article IX provides that if an employe is reinstated during the recall period, there will be no loss of credit for previous years of service. It follows, according to the District, that if an employe is not reinstated during the recall period, credit for previous years of service will be lost. It points out that the Grievant was not reinstated during the recall period and thus lost credit for the prior years of service. It submits that the Grievant applied for the position as an external applicant and went through the same process as other external applicants and was hired as a new employe. It observes that the Union admitted that for seniority purposes, the Grievant was a new hire but was not a new employe for wage schedule placement. The District takes the position that when the Grievant's recall rights expired, she lost all credit for seniority and wage schedule placement.

The District contends that if the contract language is ambiguous, it must be construed against the drafter and it was the Union that prepared and typed the initial contract. The District points out that the present wage schedule differs little from that in the initial contract and there is no reference to "years of experience," merely a base rate of "0" and a "1".

The District argues that there is nothing in the contract that supports the Union's assertion that the 0 and 1 were intended to indicate years of experience in the District in that job category. It points out that the contract refers to a base rate and the testimony established that no new hire was hired above the base rate, even those with experience in other Districts. It states that there is no reference to "years of experience," much less "years of experience in the District" in the wage schedule. According to the District, even assuming there was a mistake in drafting the initial contract, it would have to be a mutual mistake to affect the clear language of the agreement. It takes the position that there was no mistake.

The District claims that the reliance by the Union on the return of a bus driver is misplaced. In that case, the District maintains that the bus driver was forced to leave his job at the end of the 1976-77 school year due to a state imposed mandatory retirement age for bus drivers and after the law was changed as a result of federal legislation, the bus driver was returned to his job in the 1978-79 school year. It submits that this was not a new hire as the bus driver did not have to apply or be interviewed for the job, so his return at Step 1 is readily distinguishable from the Grievant's case. Furthermore, according to the District, this one instance in nearly 20 years under significantly different facts does not establish a binding past practice.

The District insists that the arbitrator has no authority to grant the relief sought because granting the relief would add a provision to the contract which Article IV, Step 4 proscribes. It notes that addition of language to the wage schedule would also add a modifier to Article IX, making it apply only to seniority. The District believes that the Union should obtain such language at the bargaining table and not in arbitration. It seeks dismissal of the grievance in its entirety.

Union's Reply

The Union contends that the District misstated Principal Knight's testimony that he doubted he would have considered the Grievant for the position if she had met the experience requirement as he testified to the exact opposite. It points out that the evidence established that the District credited the Grievant's previous experience. It observes that the District argues that Article IX requires it not to credit previous years of service in any way but it alleges that obviously the District did not follow this interpretation in crediting her experience.

The Union contends that the District's arguments are based on two sentences in Article IX for the position that if an employe is not recalled in the recall period, the employe loses credit for seniority and wages. It claims the District's logic is faulty. It asserts that Article IX does not state what happens to an employe's years of service after the recall period expires nor does it state what happens if an employe leaves and then is rehired and it doesn't say that after the recall period, an employe will be placed at the zero experience level.

The Union reiterates there was only one employe prior to this case that left and was rehired and that employe was placed at Step 1. The Union insists that the two instances are the same, the District severed employment, two years passed and then reemployment. It claims that the prior employe was rehired during the term of the first collective bargaining agreement when the parties had a fresh recollection of the parties' intent and as the language has not changed, the intent remains the same today. It maintains that the Grievant should be treated the same as the prior employe because the 0 step was for new hires with no experience with the District and Step 1 for those who had prior experience with the District.

The Union disputes the District's argument that the Union drafted the contract language as the record fails to establish which party proposed or drafted it.

It also takes issue with the alleged testimony with respect to "years of experience" in the salary schedule and alleges that the testimony was that neither party proposed doing away with "years of experience" within the salary schedule. It further disputes the District's assertion that the issue of salary steps never came up in negotiations when in fact just the opposite occurred. It claims that it was discussed in the negotiations for the initial contract and has not come up in subsequent negotiations.

As for the District's arguments on mistake, the Union insists that the parties agreed that the steps would reflect years of experience within the job category which was discussed in a side-bar and gone over in bargaining and the mere absence of language in the contract does not take away the clear intent of the parties as both overlooked the fact that the contract did not contain the words, "years of experience."

As for the District's arguments that the remedy sought is beyond the scope of the arbitrator's authority, the Union insists that it is not asking for any addition to the contract but

merely asking that the contract be interpreted in the light of bargaining history and past practice and then applying it to the Grievant in the instant case.

District's Reply

The District notes that the Union refers to Step 0 and Step 1 but these designations are not set forth in the agreement. It states that in order to bolster its arguments, the Union misstates and misrepresents the testimony of Paul Jenkins. It points out that the Union's Statement 5 as to the placement of new employes on the salary schedule from 1973 to the first collective bargaining agreement is erroneous as Jenkins testified he had no knowledge of the District's conduct with respect to placement of new hires. As to Statement 6, it asserts Jenkins testified he could not recall using the schedules at the bargaining table. It also observes that Jenkins had no explanation as to why "years of experience" does not appear in the wage schedule and he admitted that he was not aware of the issue of placement of new hires ever coming up before.

The District argues that the Union attempts to read a lot of language into the contract which is simply not there and to ignore the language stated in the contract. It maintains that there are too many pieces of contract language missing in order for the Union's argument to hang together. It concludes that the parties simply did not address the level of detail and this is the first time the issue has come up.

As to the arguments about the prior employe and the Grievant's situation being the same, the District refers to its prior argument and further asserts that his layoff predated the collective bargaining agreement and his return likely pre-dated execution of the initial contract. It also refers to Article IV which cancels all prior practices both written and oral unless expressly stated to the contrary in the contract. The District challenges the Union's statement that it does not want to pay for experience because according to the Union's argument, new hires with prior experience would be treated differently than employes with experience outside the District and such distinction lacks any support as the record clearly establishes that all new hires have started at the base rate regardless of their prior experience. It requests that the grievance be dismissed.

DISCUSSION

The collective bargaining agreement is silent as to the wage schedule placement for an employe who is rehired. Article IX provides that employes who are laid off have reinstatement rights for one (1) year and three (3) months. They have the right to fill vacancies during this period and do not lose credit for previous years of services. The record indicates that the Grievant was not rehired until about two years after her layoff so she had no reinstatement rights and she returned with no seniority or credit for previous years of service. The Union has asserted that the base rate of 0 is for new hires with no experience and the 1 is for employes with 1 or more years of experience with the District. Even if this is correct, the Grievant retained no credit for her previous years of experience and was rehired at the base

rate. The Union argues that the wage schedule should be interpreted without reference to Article IX and anyone rehired with prior experience in a job category would be given credit for prior experience if rehired in that job category. The evidence failed to establish this interpretation. Furthermore, under this interpretation, an employe who was laid off in 1982 after working two years as an aide and rehired in 1998 as an aide would be placed at Step 1 on the wage schedule even if the employe did not work at all from 1982 to 1998, whereas an aide with 20 years of continuous employment at another district from 1977 to 1998 and hired as an aide would start at the base rate. This is such an unusual result that if it was intended, the parties would have spelled it out in the contract. The fact they did not indicates that this is not how the wage schedule is applied. The evidence on bargaining history was not sufficient to establish that this was the intent of the parties. As to the past practice, the evidence established that a bus driver who was forced to retire in 1977 due to reaching the mandatory retirement age which requirement was later abolished by law, was reinstated in 1979. It would appear that this was a case of age discrimination that the District deemed prudent to rectify. It really is not comparable to the instant case where there was a layoff without any discriminatory factors present and a later rehire where the District was free to choose whomever it felt best qualified for the position. Thus, past practice does not aid in interpreting the wage schedule.

Generally, an agreement must be read as a whole and when the wage schedule is read in light of Article IX, it is concluded that the Grievant had lost credit for prior years of service and was a new hire with no seniority and no basis for making any claim to a higher rate than the base rate set out in the contract.

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

AWARD

The District did not violate the collective bargaining agreement by placing the Grievant, Eileen Gustafson, at the base wage rate when she was hired for a Special Education Aide position at the start of the 1997-98 school year, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 6th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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