BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EDUCATIONAL ASSISTANT EMPLOYEES LOCAL 1750, AFSCME, AFL-CIO

and

SHEBOYGAN SCHOOL DISTRICT

Case 114
No. 55641
MA-10063

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Shawn D. Guse**, 605 North Eighth Street, P.O. Box 1287, Sheboygan, Wisconsin 53082-1287, appearing on behalf of the District.

ARBITRATION AWARD

Educational Assistant Employees Local 1750, AFSCME, AFL-CIO, hereafter Union, and Sheboygan School District, hereafter District or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the District concurred, in the appointment of a Wisconsin Employment Relations Commission staff arbitrator to hear and decide the instant dispute. The undersigned was so designated. The hearing was conducted at Sheboygan, Wisconsin, on December 10, 1997. The hearing was not transcribed, and the record was closed on March 5, 1998, upon receipt of post-hearing written argument.

ISSUE

The Union frames the issue as follows:

> Did the Employer violate the contract and/or past practice when it denied Mary Ball the right to bump Stephanie Erdman?
>
> If so, what is the appropriate remedy?

The District frames the issue as follows:

1. Is the Arbitrator without procedural jurisdiction over the dispute because the grievance was not filed within the time period prescribed by the contractual grievance procedure?

2. If the Arbitrator has procedural jurisdiction over the dispute, does either Article V, C of the collective bargaining agreement or past practice confer upon Mary Ball a right to bump a less senior educational assistant to avoid being transferred to another building?

If so, what is the appropriate remedy?

The Arbitrator frames the issue as follows:

1. Does the Arbitrator have jurisdiction to determine the merits of the grievance?

2. Did the District violate the collective bargaining agreement and/or binding past practice when it denied the Grievant's request to bump into the position of Stephanie Erdman, a less senior employe?

RELEVANT CONTRACT LANGUAGE

ARTICLE IV – GRIEVANCE PROCEDURE

A. Purpose

The purpose of this procedure is to secure equitable solutions to the problems which from time to time arise, affecting the welfare or working conditions of Educational Assistants.

B. Definition

A grievance is defined as any alleged violation of a specific provision or provisions of this Agreement between the Union and Board of Education regarding wages, hours or conditions of employment. Aggrieved parties may be the Union or the Board of Education or any of its employees.

C. Procedure

Grievances of Educational Assistants will be considered and processed in the following manner:

Step 1: An Educational Assistant who believes he/she has cause for a grievance shall discuss the matter with his/her Union steward if requested, and department head or supervisor within fifteen (15) work days of the time the alleged grievance occurred with the objective of resolving the matter informally at the lowest possible administrative level. If there is a failure to resolve the matter orally, the aggrieved Educational Assistant may present within ten (10) work days his/her grievance in writing to his/her Principal or responsible supervisor. The Principal or responsible supervisor shall give his/her written answer within ten (10) working days.

Step 2: If the grievance has not been satisfactorily resolved as per Step 1, the grievance shall be submitted in writing to the Director of Personnel Services within five (5) work days after receipt of the Step 1 response. After receipt of the appeal, a meeting shall be held to discuss the grievance with the Director of Personnel Services and other management member(s) of the Employer, the aggrieved employee and/or the Union representative and steward.

The Director of Personnel Services shall give written response to the grievance within five (5) work days after such meeting.

Step 3. If the grievance has not been satisfactorily resolved as per Step 2, the grievance shall be submitted in writing to the Grievance Committee of the Board of Education within five (5) work days of receipt of the response of the Director of Personnel Services. Within five (5) work days after receipt of the appeal, a meeting shall be held to discuss the grievance with the Grievance Committee of the Board of Education and management members involved in Step 2, the aggrieved employee and/or the Union representative and steward. The Grievance Committee of the Board of Education shall, within five (5) work days after such meeting, respond in writing to the grievance.

Step 4. Arbitration: If a satisfactory settlement of a proper grievance is not reached in the Steps outlined, the Union may submit the matter to arbitration in the following manner:

Within twenty (20) calendar days of the Step 3 response, the Union shall notify the Director of Personnel Services in writing that they intend to process the grievance to arbitration.

The notification to the district must be followed with the filing of a written request to initiate grievance arbitration with the Wisconsin Employment Relations Commission within ten (10) days of the notification to the district referenced above. Requests to initiate grievance arbitration must be filed with the Commission separately.

During the ten (10) day period referenced above, the parties shall use their best efforts to select a mutually agreeable arbitrator from the staff of the WERC who will serve as impartial arbitrator in the case. When agreement cannot be reached, the arbitrator shall be appointed by the WERC, from the WERC staff.

The arbitrator shall have no authority to modify, add to, subtract from or change any of the terms or conditions of this Agreement or any amendments or supplements hereto.

The arbitrator shall hold a hearing as promptly as possible and shall render his/her decision in writing, and the decision shall be final and binding on both parties.

The fees and expenses of the arbitrator shall be divided equally between the Board and the Union.

D. Time Limitations – the time limits may be extended by mutual agreement between the parties. Saturdays, Sundays, days off, holidays, sick leave, vacations, and other approved absences from work are not to be counted as part of the time limitations.

ARTICLE V – SENIORITY

A. Definition

Seniority is the length of continuous service as an Educational Assistant with the Sheboygan Area School District from an employee's last date of hire.

B. Accumulation

The seniority rights of an employee shall continue to accumulate during periods of layoff and leaves of absences.

C. Layoff – Recall

When a reduction in personnel is necessary, the last person hired shall be the first person laid off and the last person laid off shall be the first person rehired provided said person has the ability to perform the work available.

D. Job Posting

Notice of new positions or vacancies shall be posted on bulletin boards for five (5) work days and in the staff bulletin when and if published, stating the area of work and qualifications. Employees interested in the position shall apply in writing to the Director of Personnel Services. Employees in the system will be interviewed for any vacancies for which they apply. Time spent in an interview within the system shall not be deducted from the pay of the employee. The position shall be awarded to the most senior applicant, provided the employee has the ability to perform the work.

. . .

H. Trial Period

An employee awarded a different position pursuant to Section D. Job Posting above shall serve a forty-five (45) work-day trial period. Should the employee fail during the trial period, the Board may return the employee to his/her former position or like position, providing one is available.

An employee who desires to return to his/her former position may do so by making his/her request in writing to the Director of Personnel Services within the first ten (10) work days in the new position.

BACKGROUND

Mary Ball, hereafter the Grievant, is an Educational Assistant who has been employed by the District since January 28, 1985. During the 1996-1997 school year, the Grievant worked at Jackson Elementary School as a CDB EA (Cognitively Disabled-Borderline Educational Assistant).

In the fall of 1996, District Director of Personnel Services, Joe Sheehan, determined that there were too few CDB students at Jackson Elementary School to fund the Grievant's CDB position. Following this determination, Principal Kolzow advised the Grievant that her CDB position could not be funded because there were insufficient special education students to

meet DPI funding standards and that the Grievant would be moved to Cooper Elementary School, where special education student numbers were higher. The Grievant told Kolzow and Sheehan that she objected to this move because she was not the least senior, but did not ask that she be permitted to bump a less senior employe.

Thereafter, the Board of Education agreed to fund a one-year EA position at Jackson. This decision was based upon the Board's desire to avoid disrupting students after the start of the school year.

In November of 1996, the Grievant was told that she could either move as a CDB aide to Cooper or have the one-year EA position at Jackson. The Grievant chose the one-year EA position at Jackson. At the time that she chose the EA position, she understood that she would perform the same functions that she would have performed as a CDB aide and that the position would terminate at the end of the 1996-1997 school year.

In March, 1997, Sheehan sent a memo to the Grievant reminding her that her position at Jackson would be eliminated at the end of the school year and that she should look at postings. On May 27, 1997, the Grievant sent the following to Sheehan:

> I have been consulting with my union representative, Barb Felde, and the Union Contract Negotiator, Helen Isferding. They have informed me that when an Educational Assistant loses her position, she may assume the position of another Educational Assistant with a lower seniority, as long as both of them are in the same classification.
>
> Therefore, I would like to exercise this option and assume the position currently held by Stephanie Erdman who has the lowest seniority at Jackson School.

On May 28, 1997, the Grievant sent the following to Sheehan:

> Until the situation concerning my position at Jackson has been resolved, I know I must apply for other positions. Therefore, I would like to apply for the CDB opening at Grant School.

The Grievant obtained an EA position at Grant School and worked in this position throughout the 1997-1998 school year.

On May 29, 1997, Sheehan sent the following to the Grievant:

Mary, this letter is in response to your May 27 request to assume the educational assistant position now held by Stephanie Erdman, who has the lowest seniority at Jackson Elem. School. I would like to make the following points:

1. You are not losing your position. Your EEN position was transferred during the fall of 1996. At that time you chose not to move with your position, but to change positions and accept your present General Education Educational Assistant position. At that time it was made clear that this new position was to end at the conclusion of the 1996-97 school year, and that you would have to be placed for the 1997-98 school year. Barb Felde, Carol Kolzow, you and I were at that meeting.

2. As I expressed at our last meeting this spring with yourself, Carol Kolzow and Barb Felde, I believe that the administration acted in good faith with you through this whole process. If you and the Union believe that you have the right to "bump" within the building, you should have pursued this last fall, when you made the choice to change positions. Again, as I stated, if you believe that the "bumping" is the case, then, another Educational Assistant should have been given the choice instead of you. You know that I believe in open, two-way communication, and I now question you and the Union why this "bumping" process was not pursued in the fall so that the appropriate person could have been given the choice. I believe the appropriate person was given the choice and chose to change positions. That person was you.

3. I share the concern that Carol Kolzow expressed regarding the continuity of services to students. Your recommendation to take Stephanie Erdman (sic) position would unnecessarily disrupt services to the students she serves. The reason why your position was transferred was that the number of students that you serve was low and thus your position was moved to where the students are attending school.

4. In checking with the Jackson staff, indeed, two of the Educational Assistant positions are more focused on one-on-one services with two specific students. This also has them performing specific functions which are not asked of all Educational Assistants. Some of these include: going out for all recesses, assisting in the lunch room with eating skills daily, and assist students in the adaptive physical education program.

In conclusion, I believe that Administration has acted fairly and consistently with you. At this time, I am not honoring your request to assume Stephanie Erdman (sic) position. The appeal process is available to you. I am prepared to assist you in providing you with job postings through the summer until you have a 97-98 position.

On June 2, 1997, the Grievant sent the following to Sheehan:

Mr. Sheehan, after receiving your memo of May 29, I feel the need to respond. The entire situation has been poorly handled from the beginning, and I believe your proposed solution is not fair or equitable to all involved. I have been poorly represented by my union and unfairly treated by the Sheboygan Area School District administration.

When you and others met in November to consider staff reductions I was not present. Had I been at that meeting to provide an honest appraisal of the staffing situation at Jackson School, I believe the situation would have been fairly and equitably resolved at that time. Subsequently, you conferred with Barb Felde, AFSCME 1750 President, on this matter, again, without my presence to provide input. Barb left that meeting with the impression that you were changing my status from CDB Educational Assistant, AND that my position, my duties, were also changing. She did not find out until March of this year that she had been misled - that although I was not considered a GE EA, I continued being a full time CDB EA in all of my duties. Nothing changed except the letters after my name in your records. It would seem that the administration was doing a slight of hand trick to make itself look good on paper without actually making any change.

This year there have been four and one-half CDB EA (sic) at Jackson, including myself. If it was determined that the school warranted only three and one-half CDB EA's, then why did not my duties change? Why did the school continue having the same number throughout the entire school year? And, when the decision to reduce the CDB EA staffing at Jackson was made, why did the administration not adhere to the staff reduction rules contained in the union contract? Why was not the least senior CDB EA removed from the program rather than one with much more seniority? Such action, failure to abide by the union contract is grievable.

You are undoubtedly aware, as am I, that a similar case occurred at the Pidgeon River School. In that case, the senior staff retained the position. I would expect that similar cases would be dealt with in a similar fashion, that the same rules would apply in all cases.

In November, when I was informed of the decision to terminate my assignment as a CDB EA, to be reassigned as a GE EA, and that the position would end at Jackson at the end of the 1996-97 school year, I talked with Barb Felde and Warren Wiesfeld on a number of occasions. At that time I wanted to file a grievance, but they both advised against that then. I do not believe they fully understood the situation. Additionally, they failed at the time to advise me of the seniority clause in the union contract.

Your remark, and I quote, "replacing Stephanie Erdman would unnecessarily disrupt services to the students she serves" belittles my role in the CDB program at Jackson School. I believe my leaving will cause more of (sic) disruption. I have been helping with the youngest and those with the most severe special needs. It has been thought (and not by just myself) that one particular student may regress next year in my absence. He and I have a special rapport this year - he trusts me and feels secure where I am there.

And lastly, I need to reply to your statement that some educational assistants have special duties. We all have our "special duties". We are all assigned our work schedules by our supervisors. Not only do I do most of the clerical work in our CD room, I also assist the specialists in Adaptive Art, Adaptive Physical Education, an inclusion music class, two inclusion Physical Ed classes, and two inclusion Art classes. I also had to work intensely with third grade students to learn library skills, research reports, orals living biographies, etc.

I am very sorry that this whole issue has developed as it has due to poor communication between administration, the union representatives and myself. I have served the CD program for thirteen years. I love my job and the rewarding experience my students have given me.

I feel my long-term honorable service to the Sheboygan Area School District should at least give me a fair treatment. I have not received that. Should we not be able to amicably settle the problem, I am fully prepared to file a grievance against the school district based on violation of the union contract.

Thereafter a grievance was filed; denied by the District; and submitted to arbitration.

POSITIONS OF THE PARTIES

Union

The Grievant does not protest the elimination of a position from Jackson Elementary School, but rather, protests the District's denial of the Grievant's right to bump into a position held by a less senior employe. During the 1996-1997 school term, the Grievant continued to do what she had always done. The Grievant hoped that student enrollments would increase such that a position would become available at Jackson. The Grievant was not harmed until her request to bump was denied at the end of the 1996-97 school year.

Personnel Director Sheehan's testimony demonstrates that, if the Grievant had not chosen an open position, then she would have been laid off. The right to bump occurs before a layoff in order to avoid a layoff. The Grievant's request to bump Stephanie Erdman was made on May 27, 1997, and involved a layoff that was to occur in the fall of 1997. It was not until May of 1997, when the Grievant was denied the right to bump a less senior employe, that the Grievant had a grievable matter.

The answer to the grievance, provided at the last step prior to arbitration, contains no allegation that the grievance is untimely. The grievance is timely and the arbitrator has jurisdiction to determine the merits of the grievance.

The District did not transfer the Grievant. Rather, the District eliminated the Grievant's position at Jackson. As a result of this elimination, the Grievant had the option to fill an open position, bump, or go on layoff. Under protest, the Grievant posted into a position at Grant School.

In the past, when a position has been eliminated, most employes have chosen to take an open position. Other employes, however, have chosen to bump a less senior employe. The Grievant is one employe who has been bumped out of a position. The past practice of bumping is unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time. The argument that a bump would cause undue disruption is bogus.

The District's conduct caused the Grievant to lose a position for which she had posted and obtained through seniority. By denying the Grievant the right to bump a less senior employe, the District is denying the Grievant her contractual posting and seniority rights.

Contrary to the argument of the District, the contract does not require that there be a reduction in the total number of employes before the layoff/recall language, with its inherent bumping rights, comes into play. The contract provides employes with the right to bump when their job is eliminated, even if the total number of the work force remains the same.

The Grievant should be allowed to bump into Stephanie Erdman's position at Jackson and be made whole. The make-whole remedy would include pay for the one-fourth hour per day she lost as a result of the denial of the request to bump.

District

Under Article IV, C, a grievance must be filed within fifteen days of the event or occurrence which gives rise to the alleged grievance. When the Grievant accepted the General Education Assistant position in November of 1996, she understood that she would no longer be classified as a CDB Educational Assistant and that she could not remain at Jackson after the 1996-1997 school year. The event that caused the Grievant to leave Jackson at the end of the 1996-1997 school year was her reclassification in November of 1996. Since the grievance was not presented until June of 1997, the grievance was not filed within the time period prescribed by the grievance procedure.

The time period for filing the grievance did not begin on the date the Grievant made a request to bump Stephanie Erdman. The Arbitrator is without procedural jurisdiction over the dispute. The grievance must be dismissed.

The layoff clause does not reference work site. The layoff clause applies to a "reduction in personnel" and to "persons hired and laid off." The agreement covers all Educational Assistants. The argument that the layoff clause applies separately to each building and not to the District as a whole contravenes the plain terms of the layoff clause.

Layoff is a separation from employment, with an ensuing loss of benefits or status. Layoff is not a separation from a building.

The Grievant was shifted to the same job in a different location without any loss of employment status. Inasmuch as the Grievant was transferred and not laid off, Article V, C, does not apply.

The collective bargaining agreement does not confer bumping rights when an Educational Assistant is transferred. Seniority is the controlling factor in awarding open positions, but the Grievant seeks a distinctly different right. The posting language relied upon by the Union allows the most senior qualified applicant to be appointed to a job that has been posted. It does not permit an Educational Assistant to take a position that is not open and that has not been posted.

None of the cases cited by the Union stand for the proposition that a seniority-based collective bargaining agreement confers bumping rights in the absence of any contract language recognizing bumping rights. The claim that bumping would not cause any disruption of educational services is erroneous.

The evidence has not shown an unequivocal, clearly enunciated and acted upon and readily ascertainable practice of bumping that is accepted by both parties. Nor does the contract language provide for bumping. The grievance is without merit and should be dismissed.

DISCUSSION

Jurisdiction

The "cause for the grievance" was the District's decision to eliminate the Grievant's position at Jackson Elementary School at the end of the 1996-97 school year. The Grievant was first notified of this decision in November of 1996.

The Union argues that, at the time of the initial notification, the Grievant had hopes that the student enrollment would increase and, thus, her position would not be eliminated at the end of the 1996-97 school year. Such a "hope," however, was dashed in March of 1997, when the District's Director of Personnel Services confirmed that her position would be eliminated at the end of the 1996-97 school year.

The Grievant did not challenge the elimination of her position at Jackson by asserting that she had a right to bump a less senior employe until May 28, 1997. Since the Grievant did not discuss the matter within fifteen work days of the time that the Grievant knew that her position at Jackson would be eliminated, the grievance was not filed within the time limits set forth in Article IV, C, Step 1.

Article IV, C, does not expressly provide that a failure to adhere to the contractual time limits relieves the arbitrator of jurisdiction. Article IV, D, recognizes that such time limits may be extended by mutual agreement of the parties.

In his denial of the Grievant's request to bump, Director of Personnel Services Sheehan raised an issue with respect to the timeliness of the Grievant's bumping claim. It is not evident, however, that the District raised any timeliness objection when the District provided the Step 1, Step 2, or Step 3 responses to the grievance.

Step 4 of the grievance procedure provides that the Union may submit the matter to arbitration if a satisfactory settlement of a "proper grievance" is not reached in the previous steps of the grievance procedure. Since the District did not raise a timeliness objection in Steps 1 through 3, the undersigned is persuaded that the District implicitly agreed to accept the grievance as filed and, thus, a "proper grievance" has been submitted to arbitration. Contrary to the argument of the District, the undersigned has jurisdiction to determine the merits of the grievance.

Merits

As both parties recognize, the collective bargaining agreement does not expressly provide bumping rights. Article V, D, the job posting language relied upon by the Union applies to new positions and vacancies and awards the posted position to the most senior applicant, if qualified. Neither this language, nor any other language relied upon by the Union, precludes the District from eliminating a position which has been filled pursuant to Article V, D.

As the Union argues, Article V, D, requires that postings state the area of work, as well as qualifications. Article V, C, Layoff-Recall, however, does not refer to "area of work." The absence of such reference leads to the conclusion that "area of work" is irrelevant for the purpose of determining layoff and recall rights.

Under the language of Article V, C, a layoff occurs when there has been a "reduction in personnel." It is reasonable to construe a "reduction in personnel" to be a reduction in the number of employes. It is not reasonable to construe this phrase to mean a reduction in the number of positions assigned to a particular school building.

In the present case, the Grievant's position was eliminated at Jackson and the Grievant was provided with the opportunity to post into a vacant position. The Grievant posted into that position. The fact that the Grievant posted into the position under protest does not alter the fact that the District did not reduce personnel. Since there has not been a reduction in personnel, the seniority rights provided in Article V, C, are not applicable to this dispute.

Neither Article V, nor any other contract provision, expresses or implies that the elimination of the Grievant's position at Jackson entitles the Grievant to bump into a position held by a less senior employe. The District did not violate the collective bargaining agreement when it denied the Grievant's request to bump into the position held by Stephanie Erdman. The undersigned turns to the evidence of past practice.

The evidence of past practice demonstrates that the District frequently eliminates specific EA positions and that, generally, the employes who occupied the eliminated positions post into vacant positions. On a few occasions, an employe in an eliminated position has received another position without posting into that position.

Virginia Neumeister, a retired teacher, testified that, on one occasion in 1982 or 1983, her classroom was dissolved and it was not immediately clear that she would have another position. According to Neumeister, she discussed the matter with Principal Mattox and the

Principal assured her that he would take care of her. Subsequently, the Principal offered Neumeister a position which had been held by a less senior employe and the less senior employe received a position at another school. Neumeister does not know whether or not the less senior employe voluntarily left the position. While it is evident that Neumeister received a position that had been occupied by a less senior employe, it is not evident that the less senior employe had been bumped out of the position

When four of six General Education Aide positions were eliminated at Pidgeon River, the Union and the District discussed the matter and mutually agreed that the two most senior employes would remain at Pidgeon River. According to Barb Felde, who represented the Union during the Pidgeon River discussions, the remaining four employes posted into other positions.

Felde acknowledges that bumping rights were not a subject of discussion when the parties resolved the Pidgeon River matter and that, at the time, Felde did not believe that bargaining unit employes had any bumping rights. Felde confirmed Sheehan's testimony that the resolution of the Pidgeon River matter was "crafted" specifically for the Pidgeon River situation.

Julie See and the Grievant each believe that employes who had positions eliminated at Pidgeon River were permitted to bump into other positions. Their knowledge of these other employes is based upon unsubstantiated hearsay and, thus, is not persuasive.

Julie See recalls that, when her position was eliminated at Pidgeon River, she bumped into a position at Wilson which was held by a less senior employe. The Grievant recalls that a full-time aide, Joy Perna, was permitted to bump into two part-time positions, one of which had been held by the Grievant. Assuming arguendo, that each of these witnesses is correct, the two instances of bumping would not be sufficient to demonstrate a binding past practice.

Neumeister recalls that Union Representative Helen Isferding advised Neumeister that she could bump, but that "no one else" agreed that Neumeister had bumping rights. Felde recalls that, in 1996, Isferding advised Felde that employes had bumping rights. It is not evident, however, that any District representative has agreed with Isferding's assertion that employes have bumping rights.

In summary, the record does not demonstrate that the parties have a well established and mutually accepted past practice of allowing an employe whose position has been eliminated to bump into a position of a less senior employe. Nor does the contract language provide such a bumping right. The grievance is without merit and has been dismissed.

AWARD

1. The Arbitrator has jurisdiction to determine the merits of the grievance.

2. The District did not violate the collective bargaining agreement and/or binding past practice when it denied the Grievant's request to bump into the position of Stephanie Erdman, a less senior employe.

3. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 17th day of August, 1998.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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