

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RHINELANDER SCHOOL DISTRICT

and

**RHINELANDER EDUCATIONAL SUPPORT PERSONNEL
affiliated with NORTHERN TIER UNISERV, WEAC**

Case 447

No. 57439

MA-10623

(Darlene Lau Grievance)

Appearances:

Quarles & Brady, LLC, by **Attorney Michael Aldana**, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, on behalf of the School District.

Mr. Gene Degner, Executive Director, Northern Tier UniServ-Central, P.O. Box 1400, Rhinelander, Wisconsin 54501, on behalf of the Association.

ARBITRATION AWARD

According to the terms of the 1997-2000 collective bargaining agreement between Rhinelander School District (District) and Rhinelander Educational Support Personnel (Union or Association), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding whether Darlene Lau should have been appointed to the position of Pupil Services/Secretary I. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. The hearing was scheduled and held at Rhinelander, Wisconsin, on August 16, 1999. A stenographic transcript of the proceedings was made and received by August 30, 1999. The parties agreed that they would file their initial briefs by October 1, 1999, and that should they file reply briefs, those would be filed by ten working days after their receipt of the initial brief.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and awards issued by the Commission and its staff, footnote text is found in the body of the this decision.

ISSUE

The parties agreed that the following issue shall be determined by the undersigned in this case:

Did the District violate the collective bargaining agreement, particularly Article 9, by not giving Darlene Lau the Secretary I position for which she applied? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 8 – SENIORITY AND LAYOFFS

A. Seniority: Seniority shall commence upon the last date of hire in the District and shall be based upon the actual length of continuous service for which payment has been received by the employee.

B. Layoffs: If the District decides that a position or positions must be eliminated or that a reduction in the number of employees is necessary, layoffs shall be made in inverse order of seniority among the employees in the affected job categories listed below:

CLERICAL GROUPING

Bookkeeper-Adm

Payroll Clerk

A. Secretary I

B. Secretary II/RHS Bookkeeper

PARAPROFESSIONAL GROUPING

A. Library

B. Handicap

C. Instructional/Chapter I

MAINTENANCE-CUSTODIANS GROUPING

A. Maintenance/Carpenters/Mechanics

B. RHS Assistant Head/Elementary Head

C. General Custodian

D. Matrons

FOOD SERVICE GROUPING

A. Head Cook

B. Cook/Baker

C. Kitchen Helper

D. Server/Dishwasher (Delete July 1, 1998)

A senior employee in a letter job category in the same grouping whose position is eliminated may bump any employee in a lower letter job category in the same grouping with less seniority. An employee may be bypassed for layoff if the employee's skills, ability, and qualifications are necessary to perform the remaining work.

...

ARTICLE 9 – JOB POSTINGS

A. Posting: When a vacancy in a bargaining unit position is to be filled or a new position is created within the bargaining unit, the District agrees to post a notice of such vacancy or new position at each school on a bulletin board reserved for Association notices for five (5) days before posting to the general public. The vacancy will not be filled until the notice has been posted at all work sites for at least five (5) working days. Employees may apply for vacancies to obtain additional hours up to a maximum of eight (8) hours per day or forty (40) hours per week if possible, based upon the employee's current work schedule. Seniority within the bargaining unit shall be the determining factor for all positions applied for within the respective work grouping defined in Article 8. Bargaining unit employees applying for positions outside of their work grouping defined in Article 8 shall be given preference over non-bargaining unit employees unless a non-bargaining unit candidate is substantially better qualified than the bargaining unit candidate. Employees who do not give the District at least two (2) weeks advance notice of intent to quit may have three (3) days pay deducted from their last paycheck.

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BACKGROUND

The parties agreed in the 1997-2000 agreement to change the language contained in Article 8 and Article 9 regarding listed classifications. The language, which appeared in the 1994-1997 agreement, read in relevant parts as follows:

ARTICLE 8 – SENIORITY AND LAYOFFS

A. Seniority: Seniority shall commence upon the last date of hire in the District and shall be based upon the actual length of continuous service for which payment has been received by the employee.

B. Layoffs: If the District decides that a position or positions must be eliminated or that a reduction in the number of employees is necessary, layoffs shall be made in inverse order of seniority among the employees in the affected job categories listed below:

- Bookkeeper-Adm
- Payroll Clerk
- Secretary I
- RHS Bookkeeper/Account Clerk
- Secretary II
- Instructional Paraprofessional
- Library Paraprofessional
- Handicap Paraprofessional
- Chapter I Paraprofessional
- Parking Lot Attendant
- Maintenance/Carpenters/Mechanics/
Heating Controls Technician
- RHS Assistant Head/Elementary
Head Custodian
Custodian/General Services
- Cleaning Persons
- Matrons
- Head Cooks/Junior High Kitchen
Manager
- Cooks/Bakers
- Kitchen Helpers
- Servers/Dishwashers

A senior employee whose position is eliminated may only be transferred to the same job category held by the least senior employee. An employee may be bypassed for layoff if the employee's skills, ability, and qualifications are necessary to perform the remaining work.

...

ARTICLE 9 – JOB POSTINGS

A. Posting: When a vacancy in a bargaining unit position is to be filled or a new position is created within the bargaining unit, the District agrees to post a notice of such vacancy or new position at each school on a bulletin board reserved for Association notices for five (5) days before posting to the general public. The vacancy will not be filled until the notice has been posted at all work sites for at least five (5) working days. Employees may apply for vacancies to obtain additional hours up to a maximum of eight (8) hours per day or forty (40) hours per week if possible, based upon the employee's current work schedule. Seniority within the bargaining unit shall be the determining factor, unless one of the candidates (bargaining unit or non-bargaining unit) is substantially better qualified than the most senior candidate. Employees who do not give the District at least two (2) weeks notice of intent to quit may have three (3) days pay deducted from their last paycheck.

...

It is undisputed that the parties agreed upon the changed language of Article 9 whereby employees in listed classification categories could automatically receive jobs in the same listed category without testing or consideration of their qualifications. The Union representative stated that they entered into this agreement so that employees could automatically have a lateral transfer within their work classification category without having to "qualify" as had been done

from time to time in the past. The District representative testified that the District agreed upon this language so that employees who had held jobs in, for example food service, for a long period of time and then attempted to transfer into a clerical position would not be able to automatically do so. It is also undisputed that no discussion occurred at negotiations for the 1997-2000 contract regarding what would happen if an employee applied for an opening in their job category (essentially seeking an automatic lateral transfer) but did so after the five-day period stated in Article 9.

There was some evidence to indicate that in the past, employees have not been tested who have signed internal job postings. The evidence showed that one employee was transferred from an aide position to a secretary position without being tested; one employee (Andree) was placed in a Secretary II position through arbitration; one Food Service employee (Wilmot) received an aide position after being interviewed but without being tested; and Darlene Lau received her current position without being tested, after having been employed as a Library aide. In none of these cases were external applicants considered by the District.

No evidence was submitted to show that any of these internal applicants signed the relevant postings after the expiration of the five-day period or that they failed to submit application documents in a timely fashion. Furthermore, long-term employee and Union officer Donald Lau stated herein that he was unaware of any prior instance where an employee had been late posting for a position. There is no dispute that the situation which occurred in Darlene Lau's case has never before occurred in the District.

The District submitted a packet of seven internal job postings which were posted between September, 1990, and May, 1997. On each of these postings, the District listed the posting date, the removal date (five days later) and the date by which applications would be accepted (within the five-day posting period).

FACTS

Darlene Lau has been employed by the District since October, 1988. Her position at all times relevant has been Secretary II/Receptionist. Her duties in that position until January 25, 1999, included answering the telephone at the District's Administration Building, processing the mail and tabulating all of the records for the Food Service Program.

In January, 1999, rumors began to circulate that Darlene Lau's position would be changing. On or about January 19, 1999, representatives of the District, including Human Resources Director Laura Millot, as well as Lau's immediate supervisor, Jane Wilkowski (Secretary to the Superintendent) met with Lau to discuss possible changes in her position. At this meeting, Lau was informed that the District was going to install an automated telephone system which would significantly diminish her receptionist duties and that the District was intending to take her Food Service Program duties and transfer them to the Business Office. District representatives indicated that they had no idea exactly what Lau's duties would be in the future and that they could not guarantee that her job would continue to be a full-time job (eight hours per day, calendar year).

On January 25, 1999, the District automated the phone system and on February 19, 1999, the District transferred Lau's Food Service Program duties to the Business Office. Lau has continued to be employed full-time by the District at the Administration Building doing Secretarial/Clerical work. From January 25, 1999, to the date of the instant hearing, Lau's hours were not diminished nor was her pay cut.

On December 22, 1998, the District posted an opening for a Pupil Services/Secretary I at the Administration Building. However, due to an error not relevant here, the internal job posting was removed and replaced by another job posting for the same position with corrected certification/requirements on December 22, 1998. This job posting indicated specifically "all application material must be received in the Human Resources office, Administration Building prior to the removal date and time." 1/

1/ The original job posting also contained this legend.

As the holidays and scheduled vacations were occurring over Christmas, 1998, and because some Secretarial/Clerical employees work less than others, the District decided (on January 6, 1999) to again re-post the opening for the Pupil Services/Secretary I, so that all employees would have the opportunity to view the posting for five full days as stated in Article 9. This posting was put up on January 6, 1999, and removed on January 13, 1999, five days after it was posted. No internal applicants signed the posting. Although Lau had seen the postings in the Administration Building for the Pupil Services/Secretary I position, she did not apply for the position as she was satisfied with her job at that time. However, after January 19, 1999, when Lau met with District representatives regarding the reorganization of her Secretary II position, she decided to apply for the Pupil Services/Secretary I position and submitted the following memo dated January 21, 1999:

. . .

I am writing this to inform you that I would like you to consider me for the position of Pupil Services/Secretary. I realize this is past the posting date for in-house applications. Since I was notified two days ago of my position changing, I would appreciate it if you would consider this as an in-house application.

As there had been no internal applicant for the position who submitted materials on or before January 13, 1999, the District submitted an advertisement to the local newspapers to solicit outside applicants therefor, beginning on January 17th. The ad requested that applications be completed with the District by January 22, 1999.

On February 4, 1999, Human Resources Director Millot wrote to Lau indicating that the District had received her application but that she would have to take keyboarding and clerical abilities tests in order to be considered for the job. Lau took the required tests on

February 15, 1999. The District never shared the results of her testing with Lau and Lau ultimately filed the grievance herein on February 5, 1999, arguing that the District should have automatically transferred her into the Pupil Services/Secretary I position based upon the language of Article 9. The District denied the grievance, indicating that because Lau had missed the five-day deadline for in-house applications, the District had treated Lau as an external applicant.

The District hired another applicant for the disputed position and that person began work on June 28, 1999. The District stated herein that the incumbent was more qualified for the position than Darlene Lau. District representatives also stated that had Lau applied within five days of the posting for the position (between January 6 and January 13, 1999) it would have automatically transferred Lau into the position, pursuant to Article 9. Since Lau did not meet that time target, the District treated Lau as an external applicant and it selected another individual for the job.

POSITIONS OF THE PARTIES

Union

The Union argued that the contract language is clear and explicit regarding the use of seniority for automatic lateral transfers. Here, the Union noted that Article 9 makes seniority “the determining factor” within each respective work grouping when an employee applies for such a transfer. The Union observed that Lau’s position as a Secretary II allowed her a preference for any Secretary I or Secretary II position that she applied for. As the parties negotiated and agreed to give employees automatic rights to jobs in their work groupings in the last collective bargaining negotiations, the Union urged that Lau was entitled to the Secretary I position she applied for.

The Union noted that the contract requires jobs to be posted for five days, but it does not state that internal applicants lose their right to automatic lateral transfers if they do not post within the five-day period. Indeed, in the Union’s view, the only way internal applicants lose their right to lateral transfers is if the District fills the job after the five day posting period has expired and before an internal applicant applies for the position. Here, Lau applied for the job on January 21st, but the job was not filled until June 28, 1999, approximately six months after it was posted.

The Union contended that the evidence overwhelmingly showed that lateral transfers were intended to be automatic if the employee seeking such transfers was within the same job grouping as the job the employee wished to transfer to. In this regard, the Union noted that witnesses Gale Bloom, Don Lau and Judy Wilmot all confirmed this fact. In addition, the Union noted its witnesses testified that in the past the District has transferred employees to positions without requiring that they be tested beforehand.

If the Arbitrator were to find the language of Article 9 to be ambiguous, the Union urged the Arbitrator to consider the extenuating circumstances in this case and weigh those in favor of Lau's being placed in the Secretary I position. In this regard, the Union noted that the District showed a lack of courtesy to Lau in not telling her sooner that her job was going to be changed/eliminated and it was because the District delayed in speaking to Lau that she was too late to sign the Secretary I posting. Therefore, the Union sought an award placing Lau in the Secretary I position with full back pay and interest retroactive to the date that the District filled that position (June 28, 1999).

District

The District argued that it has a clear past practice regarding how it treats internal applicants who sign postings for job openings at the District. In this regard, the District noted that it has consistently used the language on postings over at least the past ten years to require internal applicants to apply within five days of the initial posting of the opening. The District noted that no discussions at the bargaining table have ever taken place regarding changing the five-day requirement and that the Union has filed no prior grievances over the five-day requirement.

The District noted that Lau knew about the opening in the Secretary I job but did not apply for it. Indeed, the District observed that due to District errors the posting was up much longer than the required five days (from December 22 through January 13). In addition, the District noted that it met with Lau out of courtesy before any final decisions were made regarding the status of her job, to give Lau first-hand information about her job. The District noted that Lau asked to be treated as an in-house applicant when she sought permission to apply for the job after the posting was removed, thus proving that even Lau believed she had no right to an automatic transfer in the circumstances here.

The District argued that if no internal applicants signed the posting within the five-day period stated in Article 9, one must conclude from this that there are no internal applicants and that all people who apply after the posting period must be treated as external applicants. To construe this contract language differently would not give full meaning to all of the language of Article 9. Indeed, the District noted that Union President Bloom admitted that the five-day requirement was the time frame in which internal applicants were required to apply for open positions. Furthermore, the District observed that the Union never sought to change the five-day posting language in the negotiations for the effective labor agreement. In these circumstances, the District argued, accepting the Union's position would give the Union more than it bargained for, lead to harsh and unreasonable results and abrogate a past practice the District has clearly established. The District also noted that if the Arbitrator were to rule in favor of the Union, the District would never be able to fill a position, as internal applicants could apply at anytime during or after the five-day posting period (but before the District filled the job from the outside).

Contrary to the Union, the District argued that no contractual, legal or equitable basis is present in this case to find extenuating circumstances to support Lau's placement in the Secretary I position. The District noted that the Union supplied no evidence herein that the District was motivated by bad faith in speaking to Lau after the job posting for the Secretary I position was removed. The District committed no breach of contract by telling Lau of the potential changes in her Secretary II job. Accepting the Union's extenuating circumstances arguments would create an exception which essentially would swallow up the rule in this case. Therefore, the District urged that the Arbitrator deny and dismiss the grievance in its entirety.

Reply Briefs

Union

The Union contended that the District has transferred people without testing and there has been no proven denial of a job transfer due to posting requirements, as testified to by the Union's witnesses. Thus, the Union argued that there has never been a problem with the District asserting the posting period and no real interpretation has ever been made of the five-day language in Article 9. In addition, the Union noted that the language contained on the postings has changed over time, contrary to the District's claims.

The Union argued that the contract language is clear and specific and that extenuating circumstances, extant here, require the Arbitrator to rule in Lau's favor. In this regard, the Union noted that the District argued that after five days it could rely upon there being no internal applicants if none signed the posting during the five-day period contained in Article 9. The Union disagreed with this assertion and argued that employees applying out of their work groups for jobs would be disadvantaged if such an interpretation were established.

The Union argued that the District should have bargained language stating that employees waived their rights to automatic transfers if they did not sign postings within the five-day period. As the District failed to make any proposals regarding this waiver and no discussion of the five-day requirement occurred at the most recent negotiations between the parties, the Arbitrator must find in favor of the Union. The Union also asserted that the District distorted the record when it asserted that for the last ten years the District has used the five-day period to limit the acceptance of internal applications. The Union contended that no contract provision exists that states that Lau could not be considered for the Secretary I opening. Thus, to find for the District in this case would be a harsh punishment for unit employees, in the Union's view and the Union sought an award in favor of Lau.

District

The District urged that this case cannot be fairly decided by looking only at a portion of Article 9. Rather, the language of the Article must be read as a whole. The District noted that no contract language exists which states that seniority shall apply without limitation and regardless of whether employees have met the five-day application period requirement.

The District urged that the postings which have appeared for openings over the last ten years clearly limit the time intervals in which internal applicants can apply to the five-day period mentioned in Article 9. No grievances have been filed in the past on this point. No issue has been raised in bargaining regarding the five-day requirement. The fact that the parties modified part of Article 9 does not require a conclusion that the five-day application period for internal applicants was effected by the contractual modifications the parties agreed upon. Finally, the District contended, the extenuating circumstances arguments raised by the Union are insufficient to support the grievance where, as here, the District did not act in bad faith.

DISCUSSION

The central issue in this case is whether the language of Article 9 can fairly be interpreted to provide Darlene Lau a lateral transfer based upon her seniority alone. In the circumstances of this case, I find that this language cannot properly be interpreted to provide Lau such a transfer. Initially, I note that Lau failed to sign the posting for the Secretary I opening during the extensive period it was posted (due to District error), from December 22, 1998, through January 13, 1999. Contrary to the contentions of the Union, the contract does not recognize any exceptions to the requirement that employees must sign an internal posting during the five-day period the posting is posted. Thus, whether the District could have or should have spoken to Lau before January 19th regarding potential changes in her job is not relevant under the language of Article 9. 2/

2/ Although Lau suffered detriment because she did not choose to sign the posting for the Secretary I position during the posting period, there was no evidence placed in the record to show that the District had given Lau any assurances regarding the continuation of her Secretary II/Receptionist position. In addition, there was no showing that Lau has been harmed by the District's actions in this case, as the District has continued to employ Lau full-time as it has done in the past.

The Union has argued that employees should be able to apply for Article 9 transfers to open positions within their work groupings at any time after the job is posted, but before the District has filled the position from the outside. I disagree. In my view, such an interpretation is neither expressly contemplated nor provided for in Article 9 and such an interpretation would clearly frustrate and disrupt the District's efforts to fill open positions. This approach would take away the certainty the District has under Article 9, that if no employees sign a posting and submit applications during the five-day posting period, the District can then expend the time and effort to seek external applicants, assured that those efforts will not have been expended in vain when an employee belatedly applies for an Article 9 lateral transfer.

It is significant that the parties failed to discuss the five-day period for posting openings and receipt of internal applications during the negotiations between them. As such, no evidence of bargaining history has been submitted which could affect the outcome of this case. In regard to past practice, I note that the job postings submitted into the record herein, support

the District's arguments, not the Union's. Thus, each posting over the past seven years clearly included a starting and ending date (showing the five-day period) and each contained a legend stating that employe applications had to be completed during the five-day posting.

The Union argued that some employes have been transferred in the past without formal testing. However, I note that no evidence was submitted to show that the District had transferred any employe after they had failed to timely post for a position. Indeed, the evidence submitted herein indicated that the District did not consider any outside applicants for any of the positions into which employes were transferred in the past. These distinctions require a conclusion that the circumstances surrounding past transfers have been different from those in the instant case. As such, the evidence of past transfers was insufficient to support the grievance. Similarly, the fact that no employe has been denied a transfer in the past based on the five-day requirement appears to be evidence that this issue has simply never arisen between the parties, rather than evidence in support of the Union's case.

Based upon the relevant evidence in this case, I find that the clear language of Article 9 requires employes to post and apply for jobs within the five-day posting period. 3/ To find otherwise would abrogate the five-day requirements of Article 9. Because Lau failed to timely sign the posting and complete her application for the Secretary I job, it was within the District's discretion to treat her as an outside applicant. I therefore issue the following

3/ The District posted and re-posted the Secretary I position involved in this case due to an error in the original posting and, later, due to concern that (despite the Holidays) the posting should be available to employes for at least five days. There is no contractual provision which required the District to take these actions.

AWARD

The District did not violate the collective bargaining agreement, particularly Article 9, by not giving Darlene Lau the Secretary I position for which she applied. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 2nd day of December, 1999.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator