BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SENECA COUNCIL OF AUXILIARY PERSONNEL/
SOUTH WEST EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF SENECA

Case 38
No. 58202
MA-10877

(Ica Boylen Pay Grievance)

Appearances:

Mr. Leroy Roberts, Executive Director, South West Education Association, appeared on behalf of the Association.

Mr. Michael Seiser, District Administrator, School District of Seneca, appeared on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and District respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on January 12, 2000, in Seneca, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on March 10, 2000. Based upon the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated the following issue:

When Ica Boylen was transferred to the food service category, did the District comply with the contract and practice of continuing to pay her according to her appropriate position?

PERTINENT CONTRACT PROVISIONS

The parties' 1999-2002 collective bargaining agreement contains the following pertinent provision:

APPENDIX A

WAGES

1999-2000

Class	*Position 1*	*Position 2*
I. Bookkeeper	$10.63	$12.55
II. Custodians	$ 9.23	$10.89
III. Secretaries	$ 9.13	$10.70
IV. Instructional Aides	$ 8.53	$10.04
V. Cooks, Cleaners, Lunch Servers	$ 8.03	$ 9.45
VI. Bus Drivers		

. . .

B. Probationary period employees shall receive 90% of the hourly established wage for position 1 in the appropriate class of employment.

C. Upon completion of the probationary period, the employee will be placed on the hourly wage rate for position 1 in the appropriate class of employment.

D. Upon completion of two (2) calendar years of employment, the employee shall advance to the hourly wage established for position 2 in the appropriate class of employment.

E. An employee transferred from one class to another will not be reduced in position as a result of such transfer.

BACKGROUND

The District operates a K-12 public school system. The Association represents the District's support staff employes. Grievant Ica Boylen is in the support staff bargaining unit.

The parties most recent collective bargaining agreement (hereinafter CBA) contains a provision dealing with movement from one (support staff) classification to another. That language is found in Appendix A, Sec. E, and is involved in the instant dispute. The language in Section E has remained the same since it was negotiated in 1979. It has not changed over the course of 13 CBAs between the parties.

The record indicates that over the years, the District has eliminated several support staff positions. When this happened, the employes who filled the eliminated positions were then involuntarily transferred to other unit positions. Insofar as the record shows, the employes who were transferred from a higher paying position to a lower paying position did not have their pay reduced. Instead, they kept the rate of pay they previously received. This happened to Ica Boylen in 1989 when she was in a teacher aide position and was transferred to a food service position. She kept her teacher aide pay in the food service position. It also happened to Marilyn Trehey in 1991 when she was in a teacher aide position and was transferred to a food service position. She kept her teacher aide pay in the food service position. It also happened to Chris Foley in 1991 when she was in a teacher aide position and was transferred to a cleaner position. She kept her teacher aide pay in the cleaner position. It also happened to Donna Starkey in the mid-1990's when she was in a teacher aide position and was transferred to a cleaner position. She kept her teacher aide pay in the cleaner position. In the four instances just noted, the employe was transferred from a higher paying position to a lower paying position but did not have their pay reduced; they kept the rate of pay they had before the transfer.

FACTS

In the summer of 1999, the District eliminated several support staff positions. The positions which were eliminated are not identified in the record. The employes who filled the eliminated positions were then transferred into other unit positions. An unidentified employe was transferred into the teacher aide position which Boylen filled at the time. This movement, in turn, necessitated Boylen's movement to another position. On August 19, 1999, the District gave Boylen the choice of moving into either a food service worker position or a cleaner position. She opted for the food service worker position.

Boylen started the 1999-2000 school year as a food service worker. When she started in that job, no one from management told her what her rate of pay would be. She thought she would be paid at the teacher aide rate because she had been transferred from a teacher aide to a food service worker once before (1989), and when that happened, she kept the teacher aide pay rate.

That did not happen. About five weeks into the school year, District Administrator Seiser told Boylen that she would be paid at the food service rate for the 1999-2000 school year, not at the teacher aide rate.

Boylen grieved the District's decision to pay her at the food service rate of $9.45 per hour. She contends she should be paid at the rate she was paid previously -- $10.04 per hour. The District denied the grievance. The grievance was then processed through the contractual grievance procedure and was ultimately appealed to arbitration.

District Bookkeeper Carolyn Wokosin testified that prior to the instant case, no employe has ever been reduced in pay after moving from a higher paid position to a lower paid position. Thus, the instant case is the first time an employe has been reduced in pay after moving from a higher paid position to a lower paid position.

POSITIONS OF THE PARTIES

Association

The Association contends that the District did not comply with the CBA and the parties' past practice when it changed the grievant's pay rate following her transfer to another position. According to the Association, her pay rate should not have been reduced. It makes the following arguments to support this contention.

The Association begins by addressing the contract language at issue, namely Appendix A, Section E. In the Association's view, that language is not as clear as the District suggests it is. The Association maintains that the word "position" does not simply refer to the non-probationary and two-year pay rates which are identified in the wage schedule, respectively, as "Position 1" and "Position 2". The Association contends that the word "position" in Section E refers to "the job the employe holds or is assigned to perform" (i.e. secretary, teacher aide, cook, etc.). To support this premise, it calls attention to the fact that when the District posts vacancies, it does not call them "classes"; instead, it calls them "positions". The Association believes that when the word "position" is looked at in this context, the straightforward meaning of Section E is that when an employe is transferred from a higher pay rate assignment to a lower pay rate assignment, they get to keep their higher pay rate so that the employe is not reduced in pay by the transfer.

If the arbitrator finds that the contract language is ambiguous, and needs to use an interpretive guide to determine its meaning, the Association maintains that the parties' past practice can supply that guidance. The Association believes it established the existence of a binding past practice. According to the Association, the past practice is that employes who are transferred to a lower paying position get to keep their existing pay and do not have their pay reduced. The Association contends that this practice meets the traditional criteria for establishing a practice (i.e. clear and consistent, of long duration, and mutually accepted by both sides). It elaborates on these points as follows. First, it asserts that on "numerous instances" employes have been transferred from a higher paying position to a lower paying position, and when this happened they were not reduced in pay; rather, they kept their existing (higher) pay rate from the position they transferred from. The Association places particular emphasis on the fact that this very same thing happened to the grievant about ten years ago, and when it did, she was not reduced in pay, whereas she was reduced in pay this time. Conversely, it avers that there are no cases documented in the record where an employe was transferred from a higher to a lower-class position and the employe's pay was reduced. Second, the Association asserts that this practice of not reducing an employe's pay following their transfer has been in existence for 20 years, 13 CBAs and five different administrators. In the Association's view, the practice "has stood the test of time." Third, the Association submits that in each of the instances where the transferred employe's pay was not reduced, this action was approved by the administration. The Association disputes the District's suggestion that there were special circumstances involved in these situations. The Association argues that the record evidence simply does not support that suggestion. Given the foregoing, the Association believes this practice meets the established arbitral criteria for a practice to be considered binding. The Association asks the arbitrator to enforce the practice.

Next, the Association asserts that yet another interpretive guide which the arbitrator can use to help determine the meaning of Section E is the parties' bargaining history. As the Association sees it, the parties' bargaining history supports the Association's interpretation of Section E. To support this premise, it cites the testimony of Association witness Wokosin, who was on the Association bargaining team that negotiated the parties' initial CBA. She testified that when the parties negotiated Section E, they intended it to hold employes harmless as a result of being transferred from a higher paying position to a lower paying position. It was her understanding that under these circumstances, employes would not have their wages reduced (i.e. lose money) as a result of changing positions.

Finally, the Association calls attention to the fact that at the hearing, the District put in no witnesses or evidence to challenge the Association's case.

In sum, the Association believes that the contract language, past practice and bargaining history all support letting the grievant keep her old rate of pay after her transfer to another

position. Since that did not happen here, and her pay was reduced, the Association contends the District violated the CBA. In order to remedy the District's contractual breach, the Association seeks a make-whole award for the grievant.

District

The District contends it did not violate the CBA as claimed by the Association when it reduced the grievant's pay rate following her transfer to a cook position. In the District's view, the grievant is not contractually entitled to be paid at the teacher aide rate because she is no longer in that position. The District therefore asserts that its actions here in reducing the grievant's pay from the Class IV rate to the Class V rate were appropriate. It makes the following arguments to support this contention.

The District notes at the outset that the grievant was transferred from one classification to another, specifically from being a teacher aide in Class IV to a cook in Class V. The District claims that since different pay rates exist for these two classifications, it is apparent that employes are to be paid at the pay rate for the classification they are currently in; not the classification they were formerly in. According to the District, it is only logical that when an employe changes jobs and classifications, the pay rate changes too. The District suggests that the Association's interpretation of Section E (i.e. that employes who transfer to a lower paying class do not have their pay reduced) will eventually result in every employe receiving the same wage rate. Said another way, the District believes that the Association's proposed interpretation will lead to there being just one wage for all the support staff jobs. The District characterizes this outcome as unfair, unreasonable and unrealistic.

The District avers that it complied with the language of Appendix A, Section E following the grievant's transfer. The District notes that that language provides that "an employe transferred from one class to another will not be reduced in position as a result of such transfer." The District reads the term "position" in this sentence to refer only to what the District calls the "measure of time spent in the District." According to the District, the term "position" is clear and has no other meaning. Building on the premise just noted, the District notes that when the grievant was a teacher aide, she was paid at the "Position 2" rate and it emphasizes that she is still being paid at that rate (albeit, now at Class V rather than at Class IV as was previously the case). The District contends that since the grievant is still being paid at a "Position 2" pay rate, she has not been "reduced in position" within the meaning of Section E. The District therefore maintains that no violation of Section E has occurred.

Responding to the Association's past practice contention, the District concedes that in the instances cited by the Association, the transferred employes did not have their pay reduced following their transfers. However, the District suggests that in those instances, "a special arrangement may have been struck." According to the District, those employes may have kept

their old pay intact following their transfer into lower-paying jobs (and not had their pay reduced) because of unknown "special circumstances". That being so, the District claims that no past practice exists.

Given the foregoing, the District believes that no violation occurred when it reduced the grievant's pay rate after it transferred her from a teacher aide to a cook. It therefore asks that the grievance be denied.

DISCUSSION

My discussion begins with a review of the following pertinent facts. Prior to the start of the 1999-2000 school year, the grievant was classified as a teacher aide and was paid at the teacher aide pay rate (i.e. Class IV). At the beginning of the 1999-2000 school year, she was transferred from being a teacher aide to a cook. After this transfer occurred, the District changed her pay from the teacher aide rate to the cook rate (i.e. Class V). This action reduced her pay by 59 cents an hour.

It is noted at the outset that the grievant's transfer is not involved here – just her pay following her transfer. The District contends it committed no contract violation when it changed the grievant's pay from the teacher aide rate to the cook rate. The Association disagrees. It asserts that the grievant should continue to be paid at the teacher aide rate, not at the cook rate.

The contract language applicable to this pay dispute is found in Appendix A. An overview of some of that language follows. The first part of Appendix A lists all the classes (i.e. classifications) which are included in the bargaining unit. It then specifies the wages which are to be paid to the employes in those classifications. The wages are listed in two separate columns which are denominated, respectively, as "Position 1" and "Position 2". While the phrases "Position 1" and "Position 2" are not explicitly defined, the meaning of those phrases can be extrapolated from the sections which follow, specifically Sections B, C and D. The following shows this. Section B provides that probationary employes will be paid 90% of the rate listed in "Position 1". Section C then goes on to provide that when an employe finishes probation, they will be paid the "Position 1" pay rate. The "Position 1" pay rate can therefore be characterized as the non-probationary pay rate. Section D then goes on to provide that when the employe has completed two years of employment, they will be paid the "Position 2" pay rate. The "Position 2" pay rate can therefore be characterized as the two-year pay rate.

As is noted above, the first part of Appendix A lists all the classifications in the bargaining unit along with corresponding wage rates. Under this pay system, an employe's pay rate is tied to their official classification. Since the grievant is now officially classified as a cook, the District sees it as only logical that she would be paid at that rate rather than her former rate (that of a teacher aide).

The District's interpretation has a consistency and straightforwardness about it that is, on its face, logical and appealing. After all, the parties herein did not negotiate one wage rate for all the classifications in the bargaining unit; instead, they negotiated six separate rates. That being the case, the initial presumption of the undersigned is that when an employe moves from one classification to another, they are to be paid at their new (or current) classification rate – not their former classification rate.

However, in this case the Association has successfully rebutted that presumption. It did so by showing that under this CBA, there is language yet to be reviewed which, as interpreted by the parties' practice, trumps the presumption just noted. The following shows this.

Appendix A, Section E provides that "[a]n employee transferred from one class to another will not be reduced in position as a result of the transfer." In the context of this case, the focal point of this sentence is the word "position". The District argues that the word "position" has the same meaning as the phrases "Position 1" and "Position 2" do (i.e. meaning the non-probationary and two-year pay rates). The Association disagrees. It essentially asserts that the term "position" in Section E is more generic than that, and refers "to the job the employe holds or is assigned to perform." In my view, the term "position" can be read either way. On the one hand, the term "position" can be interpreted to have the same meaning as the phrases "Position 1" and "Position 2" do because it is the very same word. Typically, the meaning of a word does not change within a provision unless noted otherwise. On the other hand, the term "position" can also be interpreted to refer to the job an employe holds or is assigned to perform. That particular interpretation is well within the mainstream of labor relations. Either of these interpretations of the term "position" is therefore plausible. Contract language is considered clear and unambiguous when it has only one reasonable meaning. Conversely, contract language is considered ambiguous when it is capable of being understood in two or more different senses. In this case, the word "position" in Section E is capable of being interpreted either way. That being so, it is held that the word "position" in Section E is ambiguous.

When contract language is found to be ambiguous, arbitrators look beyond the contract language itself for guidance in determining its meaning. Oftentimes, they consider the parties' past practice. Past practice is a form of evidence commonly used to clarify and interpret ambiguous contract language. The rationale underlying its use is that a practice can yield reliable evidence of what a particular provision means because it shows what interpretation has

historically been given to the disputed term. Thus, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of its meaning.

The focus now turns to whether the record establishes the existence of a practice. It is generally accepted by arbitrators that in order for a practice to be considered binding, the conduct must be clear and consistent, of long duration and mutually accepted by both sides. Said another way, the practice must be shown to be the understood and accepted way of doing something over an extended period of time.

Based on the rationale which follows, the undersigned is satisfied that such a practice exists here. First, the record shows that on four prior occasions, employes were transferred from a higher-paying position to a lower-paying position. When this happened, they were not reduced in pay; instead, they kept their existing (higher) pay rate from the position they transferred from. While in some cases four instances would not be sufficient to establish a binding practice, it is sufficient here because insofar as the record shows, these are the only occasions when an employe was transferred from a higher to a lower-class position. In all four instances, the employe did not have their pay reduced afterwards. Thus, prior to this instance, the District has never reduced an employe's pay following a transfer to a lower-paying position. In my view, it is particularly noteworthy that one of the four instances involved the grievant about ten years ago. That instance involves facts that are identical to those present herein (i.e. that she was in a teacher aide position, was transferred to a cook position, and afterwards kept her aide pay in the cook position). Second, in each of these four instances, the employe's non-reduction in pay was not something that simply fell through the proverbial cracks; instead, it was approved by the administration. The District's suggestion that there may have been "special circumstances" that permitted the four employes to keep their higher pay rate following their transfer to a lower paying position is not supported by any record evidence. Third, these four instances occurred over an extended period of time (i.e. 10 years) under different administrators. Given the foregoing, a practice has been shown to exist. The practice establishes the way Section E has come to be mutually interpreted, namely that when an employe is transferred from a higher to a lower paying position, they get to keep their existing pay. This practice does not conflict with language contained in Section E.

Application of that practice here means that when the grievant was transferred from being a teacher aide to a cook, she should have kept her existing rate of pay (i.e. $10.04/hour). That did not happen. Instead, her pay was reduced to $9.45/hour. This action violated Section E (as interpreted by the parties themselves via their past practice).

Given that finding, the undersigned believes it is unnecessary to address the Association's claims concerning the parties' bargaining history. Consequently, no comments are made concerning same.

In summary then, it is held that Section E is ambiguous concerning whether the word "position" refers to "the measure of time spent in the District" (as the District contends), or "to the job the employe holds" (as the Association contends); that given that ambiguity, it is appropriate to review the record evidence concerning an applicable past practice; and that the parties' past practice shows that employes who are transferred from a higher paying position to a lower paying position get to keep their existing (higher) pay and do not have their pay reduced. This practice demonstrates the way Section E has come to be interpreted, namely that the word "position" refers "to the job the employe holds." Applying that interpretation here, it is held that the grievant should have kept the aide's pay rate after she was transferred to a cook position. Since that did not happen, the District violated Section E (as it has come to be interpreted via the parties' own practice). In order to remedy this contractual breach, the District is to pay the grievant at the Class IV, Position 2 rate (i.e. $10.04 in the 1999-2000 school year), retroactive to the start of the 1999-2000 school year.

In light of the above, it is my

AWARD

That the grievance is sustained. When Ica Boylen was transferred to the food service category, the District did not comply with the contract and practice of continuing to pay her according to her appropriate position. In order to remedy this contractual breach, the District shall pay her at the Class IV, Position 2 rate retroactive to the start of the 1999-2000 school year.

Dated at Madison, Wisconsin this 27th day of April, 2000.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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