

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHERN EDUCATIONAL SUPPORT TEAM

and

TOMAHAWK SCHOOL DISTRICT

Case 53
No. 58213
MA-10883

(Jolene Myers Grievance)

Appearances:

Mr. Gene Degner, Director, Northern Tier UniServ – Central, appearing on behalf of the Association.

O'Brien, Anderson, Burgy, Garbowicz & Brown, Attorneys at Law, by **Mr. Steven Garbowicz**, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the District or Employer, respectively, were signatories to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was transcribed, was held on February 10, 2000, in Tomahawk, Wisconsin. Afterwards, the parties filed briefs which were received by May 2, 2000. The record in the matter was closed on May 16, 2000 when the undersigned was notified that the parties would not be filing reply briefs. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Association framed the issue as follows:

Did the District violate Article 16, paragraph A, when it did not hire Jolene Myers for the Fiscal Assistant position in the District? If so, what is the appropriate remedy?

The District framed the issue as follows:

Did the District violate Article 16 by hiring a more qualified non-bargaining unit member over a current bargaining unit member for a new position?

Having reviewed the record and arguments in this case, the undersigned finds the following issue appropriate for purposes of deciding this dispute:

Did the District violate Article 16, A of the collective bargaining agreement when it did not select Jolene Myers for the new Fiscal Assistant position? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1998-2000 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 4 MANAGEMENT RIGHTS

A. The Union recognizes that the management of the School District of Tomahawk and the direction of the working forces are vested exclusively with the Employer. The Employer retains the sole right to hire, discipline, discharge, layoff, assign, promote, demote or transfer Employees, to determine the amount of work needed and the methods for performing that work, to determine the starting and quitting time and the number of hours to be worked, including overtime, to assign work in all situations, to determine the methods of work, to determine the sequence of work processes, to establish new or improved methods or facilities or change existing methods or facilities, to maintain the efficiency of District operations and to take whatever action is necessary to carry out the functions of the District in times of emergency as long as the aforementioned items are not inconsistent with this Agreement.

. . .

ARTICLE 16
VACANCIES, REASSIGNMENTS, AND TRANSFERS

A. All vacant or new positions, along with their descriptions and qualifications, as determined by the district, shall be posted in each of the three (3) buildings, in a conspicuous place for at least five (5) days. Currently employed Bargaining Unit Employees shall be offered an interview, and if qualified, shall be awarded the position.

. . .

D. An Employee who is promoted or given a new position shall be given a training and qualifying period of thirty (30) days for the purpose of determining whether or not the Employee can meet the job requirements. If, at the end of this period, the Employee is not qualified to perform the job, or the Employee does not want the job, such Employee may return to his/her former job without the loss of seniority or benefits. Anytime an Employee is returned to his/her former position, the District shall retain the right to transfer or reassign all Employees to their former positions that were transferred or reassigned as a result of this thirty (30) day qualifying period. Upon the completion of said qualifying period, the Employee shall be paid the job rate.

FACTS

In August, 1999, the District created a new position entitled Fiscal Assistant. The District intended that the person who filled this position would work at the District's central office and assist the Business Office Manager and the Personnel Specialist in accounting and payroll functions. As part of this process, District administrators created a formal job description for the new position. The job description specified that the qualifications for the job were as follows:

1. Associate degree or higher in Accounting or equivalent experience.
2. Knowledge of WESSAS school accounting system and school district financial reporting requirements highly preferred.
3. Knowledge and experience with Skyward (SASI) school accounting software, or comparable, highly preferred.

The job description further provided that the Fiscal Assistant would work with the Business Office Manager on the following job duties:

- a. Receipts and banking cash transfers
- b. Accounts payable
- c. Bank reconciliation
- d. Purchase order processing
- e. Hot lunch revenues
- f. Required district and state financial reports
- g. Aid in all facets of district budget work
- h. Preparation and aid in annual district audit
- i. Fixed asset records
- j. Scholarship accounting
- k. Preparation and handling of Worker Compensation claims

The job description further provided that the Fiscal Assistant would work with the Personnel Specialist on the following job duties:

- a. New employee data entry
- b. Current employee data revisions
- c. Aid in production of district payroll
- d. Development of required state and federal tax and other reports
- e. Development of reports to vendors of benefits
- f. W-2 processing
- g. "Time-off" postings and reports
- h. Preparation for, and help with, audit reports

The new Fiscal Assistant position was posted after it was approved by the School Board. The posting notice specified in pertinent part:

Successful candidate for this position must have the following:

- 1. Associate degree or higher in Accounting or equivalent experience.
- 2. Knowledge of WESSAS school accounting system and school district financial reporting requirements highly preferred.
- 3. Knowledge and experience with Skyward (SASI) school accounting software, or comparable, highly preferred.

This language mirrors the qualifications listed in the job description. District Administrator John Sarnow testified that in his view, the phrase "equivalent experience" contained in the first criteria means two or more years of experience in accounting. Sarnow further testified that he envisioned that the Fiscal Assistant would use WESSAS and Skyward daily for about half the work day.

There were two applicants for the position: Jolene Myers and Linda Pashek. At the time they applied, Myers was a secretary in the District's elementary school office and Pashek was a temporary employe in the District's central office where she essentially was the District's bookkeeper. Both were interviewed for the vacancy by District Administrator Sarnow. Their interviews were conducted one-on-one.

Pertinent factual information about the two applicants follows. Myers is addressed first.

Myers has an Associate Degree of Business in Court and Conference Reporting from Gogebic Community College. In her opinion, she has knowledge of, and familiarity with, WESSAS and Skyward. The record indicates that her work experience with the WESSAS school accounting system is this: she has entered purchase orders for the elementary school. The record indicates that Myers' work experience with the Skyward accounting software is this: she has maintained student records (specifically attendance records) for the elementary school. Myers' work experience with WESSAS and Skyward has primarily been with its elementary school applications.

When Myers applied for the position, her letter of application provided thus:

Recently there was a posting for a fiscal assistant position in your office. I would ask that you please consider me as an applicant for that position. My application and resume are both on file with the District Office.

I have obtained an Associate Degree in Court and Conference Reporting; along with Medical and Legal Secretary. The School District of Tomahawk has employed me for approximately seven years. It is through my prior position as a fiscal clerk with the Lincoln County Treasurer's Office and the knowledge and experiences I have gained through my current position in the School District that I would meet the qualifications as stated.

Myers did not supply a current resume and application with her letter of application. The "application and resume" referenced in the first paragraph quoted above refers to Myers' 1992 application for employment with the District.

Pashek has a Bachelor of Science degree in Business Administration with an Accounting minor from the University of Wisconsin-Platteville. She also has an Associate Degree in Accounting from Nicolet Technical College. The record indicates that her work experience with the WESSAS school accounting system is this: she has worked with WESSAS and all of its applications in the District's office for three years. The record indicates that Pashek's work experience with the Skyward accounting software is this: she has worked with

Skyward and all of its applications in the District's office for three years. Pashek's work experience with WESSAS and Skyward has been with its District-wide applications. Pashek did not have any experience with WESSAS and Skyward before she began working for the District as a temporary employee. Thus, her knowledge and experience with WESSAS and Skyward is the result of her on-the-job training in the Tomahawk School District.

After interviewing these two applicants, Sarnow determined that Pashek was qualified for the position, while Myers was not. The Fiscal Assistant position was subsequently given to Pashek.

Myers grieved her non-selection for the Fiscal Assistant position. The grievance was processed through the contractual grievance procedure and ultimately appealed to arbitration.

At the arbitration hearing, Myers submitted numerous documents detailing her work experience and knowledge. These documents did not exist at the time she was interviewed by Sarnow. They were created for the arbitration hearing.

Some additional facts are included in the DISCUSSION section.

POSITIONS OF THE PARTIES

Association

The Association's position is that the District violated the collective bargaining agreement when it did not give Myers the Fiscal Assistant job for which she had applied. According to the Association, that job should have been awarded to Myers rather than to Pashek.

This contention is based on the premise that Myers was the only qualified unit employee who applied for the position. The Association contends that Myers satisfied all three criteria which the District set as qualifications for the position. With regard to the first criteria (i.e. "Associate degree or higher in Accounting or equivalent experience"), the Association notes that Myers has an Associate Degree, has work experience as a fiscal clerk from when she worked in the Lincoln County Treasurer's office, and has worked for the District's central office as a substitute bookkeeper on two occasions. In the Association's view, the foregoing should satisfy the first criteria. With regard to the second criteria (i.e. "knowledge of WESSAS"), the Association relies on Myers' testimony that she has an understanding of WESSAS and has worked with it in her present job at the elementary school. With regard to the third criteria (i.e. "knowledge. . .with Skyward"), the Association again relies on Myers' testimony that she has an understanding of Skyward, has been trained on it, and has worked with it in her present job. As the Association sees it, the foregoing establishes that Myers has

the requisite education, work experience and knowledge of WESSAS and Skyward which the District set for the job of Fiscal Assistant. The Association therefore maintains she was qualified for the job.

Next, building on the premise that Myers was qualified for the job, the Association contends that Myers should have been given the 30-day qualifying and training period referenced in Article 16, D. According to the Association, a 30-day training and qualifying period would have allowed her to learn those parts of the job she did not understand.

Finally, the Association argues that the District's selection of Pashek should be overturned for the following reasons. First, the Association asserts that Pashek had an inside track for the job because she had been working as a temporary employee in the District's office for three years. Second, the Association contends that Myers was not provided with a fair interview. To support this premise, the Association calls attention to the fact that Sarnow did not interview Myers and Pashek with an interview committee, but rather interviewed them himself. Third, the Association avers that what happened here is that when the District made its selection decision, it compared Myers and Pashek against each other to determine who was the more qualified candidate. The Association submits that this adds language to Article 16, A that does not currently exist. The Association asks the arbitrator to reject this attempt to insert language into the labor agreement.

In order to remedy this contractual breach, the Association asks that the arbitrator award the Fiscal Assistant position to Myers and make her whole for lost wages.

District

The District's position is that it did not violate the collective bargaining agreement when it selected Pashek for the Fiscal Assistant position. According to the District, it selected Pashek for the position because she was qualified for same. The District avers that the reason Myers was not awarded the position was because she was not qualified for it. The District elaborates on these points as follows.

First, the District notes that the posting provision (Article 16, A) indicates that unit employees will be awarded vacant positions, if qualified. It further notes that the contract language does not indicate how determinations of qualifications are to be made. That being so, the District contends it has full authority to establish job qualifications for vacant positions and to determine which applicants meet said qualifications. With regard to the position involved here, the District asserts that the education, experience and knowledge criteria which it established as qualifications for the Fiscal Assistant position were reasonably related to the actual duties and responsibilities of that position, so the arbitrator should not reject those job requirements.

Second, the District argues it applied the term “qualified” as any normal definition would have. According to the District, it looked to see if Myers met the three criteria which it set for the job. With regard to the first criteria (i.e. “Associate degree or higher in Accounting”), it simply notes that Myers did not have an Associate degree in Accounting. With regard to the other two criteria (“Knowledge of WESSAS” and “Knowledge. . . with Skyward”) it contends that even if Myers had “some” knowledge of some of the duties of a Fiscal Assistant, “she did not have sufficient knowledge of the District-wide applications of those budget and accounting systems.” Relying on the foregoing, the District asserts that Myers was not qualified for the position. The District maintains that the Association has to show that the District erred in deciding that Myers was not qualified and that it has failed to meet this burden.

Third, the District asserts that in contrast to Myers’ lack of qualifications, Pashek met all the requisite qualifications. With regard to the first criteria, it notes that she has a Bachelor of Science degree in Business Administration with an Accounting minor. With regard to the other two criteria, the District notes that Pashek has worked extensively with WESSAS and Skyward and all of its applications District-wide for three years. In the District’s view, the foregoing establish that Pashek was qualified for the position.

Finally, the District responds to the Association’s argument that Myers’ interview was not conducted properly. It disagrees, and avers that it was. It submits that the reason Sarnow conducted the interview himself was that since this was a hire in his office, he did not feel anyone else needed to be involved. Additionally, the District comments that if Myers were serious about the Fiscal Assistant position, she would have used something other than her 1992 resume and application at the interview.

Overall, the District maintains it did not act in an arbitrary, capricious, or discriminatory manner when it filled the Fiscal Assistant position and concluded Myers was not qualified for same while Pashek was. It therefore requests that the grievance be denied.

DISCUSSION

At issue is whether the District violated the collective bargaining agreement when it did not select Myers for the new Fiscal Assistant position. That position was awarded to Pashek, who at the time was a non-bargaining unit employee. The Association contends Myers should have been awarded the position instead. The District disputes this assertion. According to the District, Myers was not qualified to fill the position while Pashek was.

The parties agree that the contract language applicable here is Article 16, A. It provides thus:

A. All vacant or new positions, along with their descriptions and qualifications, as determined by the district, shall be posted in each of the three (3) buildings, in a conspicuous place for at least five (5) days. Currently employed Bargaining Unit Employees shall be offered an interview, and if qualified, shall be awarded the position.

My analysis of this language begins with the following overview about what it specifically says. This section creates a procedure for filling vacancies. The first sentence provides that “all vacant or new positions”. . . “shall be posted”. Under this language, posting is mandatory. The same sentence goes on to provide that “their descriptions and qualifications” shall also be posted. This same sentence further provides that the [job] descriptions and [job] qualifications will be “determined by the district.” The second sentence says two things. First, it provides that “unit employees shall be offered an interview” (for the vacant position). Second, it provides that “if qualified”, the unit employee “shall be awarded the position.” When the two parts of this sentence are read together, it specifies in plain terms that current bargaining unit members, if qualified, will fill all vacant or new positions. Having just identified what the language specifically says, the focus turns to what it does not say. First, this language does not bar the selection of an outside applicant merely because a member of the bargaining unit seeks the position in question. To the contrary, this language implicitly gives the District the right to hire someone from outside the unit if it is determined that there is no qualified internal applicant. Second, this language does not guarantee that internal applicants will always get the position they apply for or that they are automatically entitled to same. The only thing this language guarantees unit employees is an interview. Third, this language does not say that the internal applicant simply needs to be qualified to learn the job. Conversely though, it does not say that an internal applicant must be the most qualified or more qualified than the outside applicant. Fourth, the word “qualified” is not defined in the agreement and the language does not say how determinations of qualifications are made. Thus, it is silent concerning same.

The focus now turns to the final point made in the preceding paragraph. It is a well-established arbitral principle that when there is no contractual definition of “qualified”, and the collective bargaining agreement is silent concerning how qualifications are determined, an employer has the management right to determine same. The Management Rights clause involved here (Article 4) provides in pertinent part: “the Employer retains the sole right to hire. . .” This language implicitly gives the District the right to determine qualifications and to decide who is qualified for a position and who is not.

The standards which the District set for the Fiscal Assistant job were contained in that position’s posting and job description. Both listed these three job qualifications: 1) “Associate degree or higher in Accounting or equivalent experience”; 2) “Knowledge of WESSAS school

accounting system and school district financial reporting requirements”; and 3) “Knowledge and experience with Skyward (SASI) school accounting software or comparable.” Hereinafter, these criteria will be referred to as criteria 1, 2 and 3. The first criteria set an educational standard for the job, while the latter two set knowledge and experience standards for the job. The District argues these criteria (i.e. education, experience and knowledge) are job-related and the Association does not expressly argue otherwise. While the knowledge criteria will be addressed further below, suffice it to say here that education, experience and knowledge are criteria traditionally used to determine qualifications.

The District decided that Myers did not possess these qualifications. The question here is whether management’s decision concerning same was unreasonable under the facts, arbitrary or capricious. Attention is now turned to making that call.

My initial focus of inquiry is on job criteria 2 and 3 which reference, respectively, “knowledge of WESSAS” and “knowledge. . .with Skyward”. Earlier in this discussion, I found that “knowledge” was a criteria traditionally used to determine qualifications. Notwithstanding that finding, reference to “knowledge” is problematic here because neither criteria 2 nor 3 reference a specific level of knowledge. For example, is an extensive level of knowledge required for the job, or is a rudimentary/limited level of knowledge sufficient? The job description simply does not say. The obvious problem with not specifying a certain or ascertainable level of knowledge is that each candidate gets to supply their own level (i.e. each candidate gets to determine for themselves the level of knowledge they deem appropriate). In other words, each candidate gets to ask themselves the rhetorical question: “Do I have knowledge of WESSAS and Skyward?”, and if they answer in the affirmative, they arguably satisfy criteria 2 and 3 as written. That is what happened here. Myers feels she has knowledge of, and familiarity with, WESSAS and Skyward. The record evidence does not show otherwise. She has in fact worked with WESSAS entering purchase orders for the elementary school. Additionally, she has in fact worked with Skyward by maintaining student records (specifically attendance records) for the elementary school. Given this work experience, her claim of knowledge of, and familiarity with, WESSAS and Skyward has a factual basis. In their brief, the District essentially characterizes Myers’ knowledge of WESSAS and Skyward as limited. Myers does not disagree or claim that her level of knowledge is extensive or complete. The District argues that even if Myers has “some” knowledge of WESSAS and Skyward, what it was looking for was a candidate with extensive knowledge of WESSAS and Skyward. However, neither the job posting nor the job description says that. In point of fact, neither document says that some familiarity or some knowledge of WESSAS and Skyward will not suffice. If the District wants the Fiscal Assistant to have an extensive knowledge of WESSAS and Skyward, it is certainly free to require that. However, it cannot leave that knowledge requirement off those documents and then implicitly add it later when making its selection decision. If the Employer does so, its ultimate selection determination can be successfully

challenged by a candidate who has just “some” knowledge of WESSAS and Skyward because those documents do not specify that “some” knowledge of those matters is insufficient. This rationale also applies to the District’s contention that what it wanted was someone with WESSAS and Skyward experience with District-wide applications – not applications limited to the elementary school office. Myers’ work experience with WESSAS and Skyward is primarily with its elementary school applications. Once again, if the District wants the Fiscal Assistant to have WESSAS and Skyward experience with District-wide applications, it can certainly require it. However, it cannot leave that information off the job posting/job description and essentially add it later, which is what happened here.

Based on the foregoing, I find that since Myers arguably has “knowledge of WESSAS” and “knowledge. . .with Skyward”, she met criteria 2 and 3 as they were written. It follows from this finding that if those two criteria had been the only criteria specified for the Fiscal Assistant position, she would be found “qualified” for same, and awarded the job.

However, the fact of the matter is that there was another criteria for the position, namely the first criteria which set an educational requirement. That criteria specified that the candidate needed an “Associate degree or higher in Accounting or equivalent experience.” Myers had neither. Specifically, she does not have an Associate degree in Accounting. While she does have an Associate degree in another subject area, that does not suffice – the Associate degree has to be in Accounting. Additionally, she does not have “equivalent experience” which the District Administrator identified as being two years of accounting experience. This is because even if her job at Lincoln County as a Fiscal Clerk qualifies as “equivalent experience”, it was not two years in length. That being the case, Myers did not satisfy the first criteria.

Since Myers did not satisfy the first criteria, it does not matter that she satisfied the other two. All three criteria have to be satisfied for a candidate to be found “qualified” under Article 16, A, and Myers did not do so. Specifically, she did not satisfy the educational criteria, so it therefore follows that she was not qualified for the Fiscal Assistant position. Consequently, the District’s finding to that effect has not been shown to be unreasonable, arbitrary or capricious.

In finding Myers unqualified, it is expressly noted that I did not rely on the District’s argument that Myers’ WESSAS and Skyward experience was limited to elementary school applications. My reason for doing so is as follows. First, as has previously been noted, District-wide applications of WESSAS and Skyward are not mentioned as criteria on the job description. If the District wanted it to be, it should have listed it on the job description as a qualification. Second, in my view this argument is intended to persuade me that Pashek is more qualified than Myers because Pashek has WESSAS and Skyward experience with District-wide applications while Myers does not. However, the contractual standard applicable

here is not which candidate is most qualified; it is whether the bargaining unit applicant is qualified. In this case, I have been able to make that decision (i.e. whether Myers is qualified for the Fiscal Assistant job) without relying on the District argument just referenced.

Having so found, the focus now turns to Article 16, D. The first sentence of Section D provides for a 30-day “training and qualifying period” for the “employee who is promoted or given a new position. . .” According to the Association, the District denied Myers her rights under this section when it did not give her the 30-day training and qualifying period for the Fiscal Assistant position. I find otherwise. The training and qualifying period referenced in Section D is not automatic for every unit member who applies. Instead, the training and qualifying period only comes into play after someone has been found qualified for the job. Said another way, the training and qualifying period does not apply to an unqualified applicant. In this case, Myers was not qualified for the Fiscal Assistant position, so it therefore follows that she was not entitled to the training and qualifying period referenced in Article 16, D.

The final portion of my discussion concerns the person who was selected by the District for the job of Fiscal Assistant. As previously noted, Pashek was selected for the job. At the time of her selection, she was a non-bargaining unit temporary employee.

The record evidence establishes that Pashek met all three of the criteria set by the Employer as qualifications for the job. The following shows this. Pashek met the education criteria because she has more than the requisite education. Specifically, she has a Bachelor of Science degree in Business Administration with an Accounting minor. Additionally, she also has an Associate degree in Accounting. Next, Pashek met the second criteria (i.e. “knowledge of WESSAS”) because she has worked with WESSAS and all of its applications in the District’s office for three years. Finally, Pashek met the third criteria (i.e. “Knowledge and experience with Skyward accounting software”) because she has worked with Skyward and all of its applications in the District’s office for three years. The fact that Pashek gained her knowledge and experience with WESSAS and Skyward as a temporary employee in the District’s office does not alter this conclusion. Since Pashek met all three of the criteria set for the job, it follows that she was qualified for same.

Notwithstanding the fact that Pashek is qualified for the job, the Association argues that the District’s selection decision should nevertheless be overturned for several reasons. These reasons are addressed below.

First, the Association asserts that Pashek had an inside track for the job because she had been working as a temporary employee in the District office for three years. She probably did in the sense that Sarnow knew her and was familiar with her work product as a result of her working in the office over that three year period. However, just because Sarnow was familiar

with Pashek personally and her work product as a temporary employee does not prove that the proverbial “fix was in” for Pashek to get the job, or that the Employer’s selection decision was automatically flawed.

Next, the Association contends that Myers was not provided with a fair interview. To support this premise, the Association calls attention to the fact that Sarnow did not interview Myers and Pashek with an interview committee – instead, he interviewed them by himself. In addressing this point, it is noted at the outset that there is no contract language which specifies how the District is to conduct job interviews. That being so, the District has the right, via the Management Rights clause, to conduct job interviews as it wishes. While the record indicates that some employees in the District have been interviewed for positions in the past by an interview committee, as opposed to just one individual (i.e. the District Administrator), that evidence is not sufficient to establish a binding past practice entitled to contractual enforcement that all interviews must be conducted by an interview committee. Other than the matter just noted (i.e. the District’s failure, in this particular instance, to use an interview committee), the Association does not raise any other arguments about Myers’ interview, and the undersigned sees no red flags with it including how Sarnow comported himself during same. That being the case, Myers’ interview has not been shown to be unfair, arbitrary or capricious. It therefore passes muster.

In conclusion then, it is held that Myers was not qualified for the Fiscal Assistant position. Since she was not qualified for that job, the District did not have to award it to her. The person who was given the position (Pashek) was qualified for same. The District’s decision to not give the Fiscal Assistant position to Myers did not violate the collective bargaining agreement.

In light of the above, I issue the following

AWARD

That the District did not violate Article 16, A of the collective bargaining agreement when it did not select Jolene Myers for the new Fiscal Assistant position. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 5th day of July, 2000.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

