BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CUBA CITY SCHOOL DISTRICT EMPLOYEES' UNION, AFSCME LOCAL 739

and

CUBA CITY SCHOOL DISTRICT

Case 23
No. 64841
MA-13027

(Bette Olson Grievance)

Appearances:

Michael Wilson, Staff Representative, Wisconsin Council 40, AFSCME, appearing on behalf of the Union.

Eileen Brownlee, Attorney, Kramer and Brownlee, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Union and the 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 transcribed, was held on September 23, 2005 in Cuba City, Wisconsin. On November 14, 2005, the Union filed an initial brief. On February 28, 2006, the District filed its brief. On March 22, 2006, the Union filed a reply brief, whereupon the record was closed. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the District violate the collective bargaining agreement when it hired Joyce Donar for the cook position? If so, what is the remedy?

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PERTINENT CONTRACT PROVISIONS

The parties' 2003-2006 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 3 – SENIORITY

3.01 Policy: It shall be the policy of the Employer to recognize seniority.

3.02 Definition. Seniority shall be defined as length of service with the Employer, commencing on the most recent date of hire. . . .

. . .

ARTICLE 4 – VACANCIES AND TRANSFERS

4.01 Job Posting: When a position becomes vacant or a new position is created, notice of such available position shall be posted for ten (10) working days. The Employer retains the right to temporarily fill vacant positions at its discretion during the posting and selection period. Vacancies will be posted on a designated bulletin board in each school building. The notice shall include the date of the posting, a description of the position available, the work hours of the position, the rate of pay for the position, the qualifications required for the position, and shall be signed by the District Administrator. A copy of the posting will be sent to the President of the Union. . . .

4.02 Selection: A bargaining unit employee who applies for a vacant position, prior to the end of the posting period, shall be granted an interview for the position, and, if qualified, may be awarded the position. In the event two or more equally qualified bargaining unit employees shall apply for a position, the most senior applicant shall be selected. The District retains the right to select the most qualified applicant for any position. The District retains the right to determine the qualifications needed for any vacant position.

. . .

ARTCLE 21 – MANAGEMENT RIGHTS

21.01 Management retains the rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the term of the collective bargaining agreement except to the extent such functions and rights are restricted by the terms of this Agreement. The rights include, but are not limited to, the following rights:

. . .

c) To hire, promote, transfer, and schedule and assign employees in positions within the school district;

. . .

i) To select employees, establish quality standards and evaluate employee performance;

. . .

FACTS

The District operates a public school system in Cuba City, Wisconsin. The Union is the exclusive collective bargaining representative for the District's full-time and regular part-time support personnel. Bette Olson is a bargaining unit employee.

This case involves the filling of a part-time cook position.

In March, 2005, the District had a vacancy for a part-time cook. The position was posted both internally and externally, meaning that existing bargaining unit employees, as well as anyone off the street, could apply. Four or five people applied for the position. One of those who applied was Bette Olson. Olson was the only bargaining unit employee who applied for the position. The rest of the applicants were not District employees (meaning they were outside applicants).

Two District officials interviewed four of the applicants. Olson was one of the people interviewed. The interviewers asked the same questions of each applicant. Both interviewers rated applicant Joyce Donar higher than they rated Olson.

Following the interviews, the District concluded that Donar was the most qualified applicant and offered her the position. She subsequently accepted it.

In April, 2005, Olson grieved the District's failure to give her the job which had been given to Donar. If Olson had received the job, her work hours would have increased. The grievance was processed through the contractual grievance procedure and was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union contends that the District violated the collective bargaining agreement when it hired Donar off the street for the assistant cook position. As the Union sees it, the District

was contractually obligated to award the position to Olson, who was the only internal applicant. The Union elaborates as follows.

The Union acknowledges at the outset that the Management Rights clause gives the Employer the general right "to select employees." That said, it is the Union's view that the general right just noted is limited by the following sections in the contract: 3.01, 3.02, 4.01 and 4.02. According to the Union, when those sections are read together, they provide that qualified bargaining unit applicants are entitled to fill a vacant position before the position is filled with someone from the outside, regardless of whether or not the District determines an outside applicant to be the best qualified. The Union submits that the only way the arbitrator can find to the contrary is if he "dons blinders" to the contract language just referenced. The Union addresses that language in the order just listed.

First, the Union relies on the language contained in Sections 3.01 and 3.02. It notes that Section 3.01 makes a broad policy statement, to wit: "It shall be the policy of the Employer to recognize seniority." It further notes that Section 3.02 then goes on to define seniority as "length of service with the Employer. . ." The Union argues that by not giving the assistant cook position to internal candidate Olson, the District failed to recognize her seniority with the District. The Union maintains that seniority is not a subjective standard; instead, it is a known quantity that can be measured precisely. The Union avers that outside job applicants have no seniority. It is the Union's position that when outside job applicants are awarded bargaining unit positions ahead of bargaining unit employees who are interested in the posting, as happened here, the District is not "recognizing" the seniority of bargaining unit employees, and thus is in violation of those contract provisions.

Second, the Union relies on the language contained in Sections 4.01 and 4.02. Section 4.01 is the Posting provision and Section 4.02 is the Selection provision. The Union notes that the first sentence of Section 4.02 unconditionally grants bargaining unit employees who apply for a posted position an "interview" and goes on to state that they "may" be awarded the position if they are "qualified." It acknowledges that the word "may" implies that they "may not" ultimately receive the position. The Union argues that is only logical because if there is more than one qualified bargaining unit employee who applies for the position, only one of the qualified employee applicants can receive the position. Moving on to sentences two and three, the Union submits that those sentences deal with what the Union calls "the complexity of employee applicant qualifications." The Union reads sentence two to say that seniority governs if there are two or more equally qualified bargaining unit employees. The Union reads the word "applicant" in the third sentence to refer to an "employee applicant" as opposed to anyone who applies for the position. The Union contends that its interpretation, wherein the word "employee" is implied, is a plausible explanation because in hybrid seniority clauses there is a common interpretation known as the "head and shoulders" standard wherein a junior employee can be awarded a posted position if he is significantly better qualified than senior applicants. The Union argues that the District's interpretation of the word "applicant" (i.e. that it refers to anyone who applies and is determined to be the "most qualified applicant") is tortured because it can result in a forfeiture of seniority rights. The Union cites

Elkouri for the proposition that when contract language is susceptible to two constructions, and one of those constructions constitutes a forfeiture and the other does not, arbitrators favor the interpretation that avoids the forfeiture.

The Union therefore requests that the grievance be sustained. As a remedy, the Union asks that the assistant cook position be awarded to Olson along with full backpay.

District

The District contends it did not violate the collective bargaining agreement when it hired Donar for the assistant cook position. As the District sees it, it was not contractually obligated to award the position to Olson, who it acknowledges was the only internal applicant. The District elaborates as follows.

First, the Employer notes at the outset that since this is a contract interpretation case, the Union has the burden of proof in this matter. According to the District, in this case that burden requires that the Union show that the District's (hiring) decision was "discriminatory, arbitrary, unreasonable or capricious."

Second, the District avers that the Management Rights clause gives it the general right "to select employees." Building on that premise, the Employer argues that that general right is not limited or contravened by any other part of the collective bargaining agreement, and particularly by Sections 4.01 and 4.02.

With regard to Section 4.01 (the Job Posting section), the District notes that it posted the assistant cook vacancy both internally and externally. According to the Employer, nothing in Sec. 4.01 precludes it from doing that. Additionally, it notes that the Union did not object to same.

Turning now to Sec. 4.02 (the Selection section), the District argues that nothing in that section gives bargaining unit employees who apply for a vacant position a guarantee that they will be awarded the position before outside applicants, even if they are qualified. To support that premise, it relies on the last part of the first sentence which provides "if qualified, may be awarded the position." The Employer emphasizes that the word "may" is permissive – not mandatory. Next, the Employer calls the arbitrator's attention to the third sentence in Section 4.02 which provides "the District retains the right to select the most qualified applicant for any position." As the Employer sees it, that language clearly entitles it to hire the most qualified applicant for any vacant position. According to the District, the "applicant" that it selects to fill the vacancy can be a bargaining unit employee, but it does not have to be. It contends that what the Union is essentially asking the arbitrator to do is conclude that the word "applicant" is modified by the word "employee", so that employee applicants are given priority for vacant positions. The Employer avers that the problem with this proposed interpretation is that it modifies the collective bargaining agreement by inserting something into the agreement that currently is not there (namely, creating a priority for bargaining unit

employee applicants where none currently exist). The Employer notes that there are collective bargaining agreements that limit applications for employment vacancies to bargaining unit members, or give priority in hiring to bargaining unit members, or limit selection of applicants to bargaining unit members. The Employer emphasizes that here, though, such language does not exist in this collective bargaining agreement. The District submits that if that is what the parties intended, they could have written language that said that. They did not. The District maintains it should not be inferred into the collective bargaining agreement via grievance arbitration.

In sum then, the District believes no contract violation occurred. It therefore asks that the grievance be denied.

DISCUSSION

At issue here is whether the District's hiring of Donar for the assistant cook position violated the collective bargaining agreement. The Union contends that it did while the District disputes that assertion. Based on the following rationale, I answer that question in the negative, meaning that the District's hiring of Donar did not violate the collective bargaining agreement.

. . .

My discussion begins with the following preliminary comments.

First, I am going to address the scope of this decision. In many cases where an employer awards a job to someone and an applicant who did not get the job grieves, the qualifications of the respective applicants are in issue. That is not the case here. This case does not involve Donar's or Olson's qualifications, or the process which the District used to evaluate their qualifications. Since qualifications are not at issue, I will not be using the reviewing standard oftentimes used by arbitrators in qualification cases (i.e. whether the employer's selection decision was discriminatory, arbitrary, unreasonable or capricious). Instead, I will simply be deciding whether bargaining unit employees who post for a vacant position have a contractual right to be awarded the position before outside applicants, assuming they are qualified. This call obviously depends on the contract language.

Second, in this particular contract interpretation case, the outcome is going to be based exclusively on the applicable contract language. Here's why. In some contract interpretation cases, the parties offer evidence external to the agreement to help the arbitrator interpret the applicable contract language. I am referring, of course, to the parties' past practice and bargaining history. That did not happen here. Specifically, no evidence was offered concerning either an alleged past practice or the parties' bargaining history. As a result, all I've got to work with is the language itself and the parties' arguments concerning same. Additionally, there are no factual disputes herein, so this decision is not going to be based on the burden of proof either.

Third, in a contract interpretation case, the arbitrator's task is to determine if the meaning of the applicable contract language is clear and unambiguous, or whether it is ambiguous. Language is usually considered clear and unambiguous when it is susceptible to but one plausible interpretation/meaning. Conversely, language is usually considered ambiguous when it is capable of being understood in two or more different senses, or where plausible arguments can be made for competing interpretations. If the language at issue here is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous, my job is to then interpret it to discern what the parties intended it to mean, and then to apply that meaning to the facts.

In this case, neither side argues that the applicable contract language is ambiguous. Instead, both sides contend that the applicable contract language is clear and unambiguous and supports their position.

Before I address that language though, I am first going to note that a portion of the Management Rights clause is applicable here. I am referring to Sections 21.01(c) and (i) which give the Employer the right, respectively, "to hire. . .employees" and "to select employees". Given that grant of general authority to the Employer to do those things, the obvious question to be answered is whether there are other contract provisions which limit or contravene that authority. The Union contends that there are, and cites Sections 3.01, 3.02, 4.01 and 4.02. Those sections will be reviewed in the order just listed.

My discussion on Sections 3.01 and 3.02 begins by noting what each section explicitly says. Section 3.01 says: "It shall be the policy of the Employer to recognize seniority." This sentence says in plain terms that the Employer's policy is to "recognize seniority." It does not elaborate further. The next section, Section 3.02, goes on to define seniority as the employee's "length of service with the Employer", commencing with their most recent date of hire. This sentence establishes a precise way of measuring an employee's seniority with the Employer. From a labor relations perspective, there is nothing remarkable about either of the provisions just noted. Each is a general provision commonly found in collective bargaining agreements. The Union argues that by not giving the position in question to internal candidate Olson, the District failed to "recognize" her seniority with the District. While the Union essentially invites me to make that decision by just looking at the contract language just noted, I decline to do so. Here's why. There is additional applicable contract language which has yet to be reviewed and considered, namely Sections 4.01 and 4.02. That language has to be reviewed and considered too. The focus now turns to same.

Section 4.01, which is entitled "Job Posting", establishes a procedure that the Employer has to follow when it posts a job vacancy. In the context of this case, the Union does not contend that the District failed to follow any of the steps contained therein (i.e. that the position be posted for the requisite number of days, or posted on the requisite bulletin boards, or list the required information on the posting notice).

While there is no dispute about the Employer's compliance with the posting steps just noted, the Employer calls attention to the absence of certain language from that provision. It is this. In some collective bargaining agreements, the Job Posting provision says that job vacancies will only be posted to internal (bargaining unit employee) applicants. Section 4.01 does not say that. The Employer avers that in reliance thereon, it posted the assistant cook vacancy at issue here both internally and externally. I find that nothing in Section 4.01 precludes the Employer from doing that.

The focus now turns to Section 4.02 which is entitled "Selection". Broadly speaking, that section deals with the filling of job vacancies. I've decided to begin my analysis of that section with the following overview about what that section specifically says. The first sentence says two things. The first part of that sentence says that a bargaining unit employee who applies for a posted position "shall be granted an interview". The word "shall" is mandatory, so this language means that a bargaining unit employee who applies for a posting automatically gets an interview. Thus, a bargaining unit employee is guaranteed an interview. The second part of that same sentence then goes on to say that the bargaining unit employee "if qualified, may be awarded the position." The word "may" is not mandatory; rather, it is permissive. That being so, all the second part of the sentence says is that a bargaining unit employee who applies for a vacancy "may" get it. Whether the bargaining unit employee who applies for a job gets it (i.e. the job) depends on whether they are deemed to be "qualified". (Note: The question of who makes that determination will be addressed later in this paragraph). The second sentence in Section 4.02 then says that if two or more "equally qualified bargaining unit employees" apply for a job, "the most senior applicant shall be selected." The next two sentences then deal with qualifications (specifically, who gets to make them and who decides which applicant is qualified). The third sentence says that the District retains the right "to select the most qualified applicant for any position." The fourth sentence says that the District also retains the right "to determine the qualifications needed for any vacant position." Taken together, these two sentences establish that the Employer gets to decide what the qualifications are for a position, as well as which applicant is "most qualified" to fill same.

Having just identified what Section 4.02 says, the focus now turns to its application here. I find that in the context of this case, sentences two and four are inapplicable. Here's why. As noted above, the second sentence deals with a factual situation where "two or more . . . bargaining unit employees" apply for a position. Here, though, just one bargaining unit employee applied for the assistant cook position (i.e. Olson), so the factual situation which that sentence contemplated (i.e. two or more bargaining unit employees applying) was not present here. Sentence four is not applicable here because, as noted above, it deals with the qualifications set by the Employer for a job, and here the Union is not challenging the qualifications which the Employer set for the assistant cook position.

As a practical matter, those findings mean that just sentences one and three are applicable here. With regard to the first part of the first sentence, Olson was given an interview, so the Employer complied with that requirement. With regard to the second part of that sentence, it is noted once again that all it says is that bargaining unit employees who apply

"may" be awarded the job. The word "may" is not nearly as strong as the words "will" or "shall". That being so, the second part of that section does not give bargaining unit employees who apply for a job a guarantee that they will or shall be awarded the position ahead of outside applicants, even if they are qualified. Knowing this, the Union essentially hangs its hat, so to speak, on the third sentence. According to the Union, the word "applicant" in that sentence refers to an "employee applicant" as opposed to anyone who applies for the position and is ultimately determined to be the "most qualified". Thus, the Union contends that the word "employee" should be inferred before the word "applicant" in the third sentence, so that it refers to a bargaining unit employee applicant. I decline to make that inference. Here's why. Were I to do that (i.e. infer that the word "applicant" refers to an "employee applicant"), I would be inserting something into the collective bargaining agreement that presently is not there. What I am referring to, of course, is giving priority in filling vacancies to bargaining unit employee applicants over outside applicants. There are certainly collective bargaining agreements that do that (i.e. give priority in filling vacancies to bargaining unit employees over outside applicants, or that limit selection of applicants to bargaining unit employees). However, such language is not found in this collective bargaining agreement. If that is what the parties intended, they could have included language in Section 4.02 or elsewhere that said that qualified bargaining unit employees will fill vacancies ahead of qualified outside applicants, or that qualified internal applicants will be offered the position prior to external candidates, or words to that effect. They did not. Since the parties did not specifically include such language in their agreement, I decline to infer its existence into the agreement. Consequently, I interpret the word "applicant" in the third sentence to refer to all applicants – both internal and external. While bargaining unit employees can certainly be applicants for job vacancies, they are not given priority in filling vacancies over outside applicants under the existing contract language. That means that when the Employer selects "the most qualified applicant" to fill a vacancy, that individual can be either an internal or external applicant.

In this case, the District decided that the "most qualified applicant" for the assistant cook position was outside candidate Donar. The third sentence in Section 4.02 specifically allowed the District to make that decision. As a result, the District did not violate the collective bargaining agreement, and specifically Sections 3.01, 3.02, 4.01 or 4.02, when it did not give the assistant cook job to bargaining unit employee Olson, but instead hired outside applicant Donar for that job.

In light of the above, it is my

AWARD

That the District did not violate the collective bargaining agreement when it hired Joyce Donar for the cook position. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 5th day of June, 2006.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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