BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHWEST UNITED EDUCATORS

and

BARRON AREA SCHOOL DISTRICT

Case 53
No. 65199
MA-13152

(Robbie Jo Ellefson Grievance)

Appearances:

Mr. Tim A. Schultz, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., **by Attorney Richard J. Ricci,** 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the District.

ARBITRATION AWARD

Northwest United Educators (herein the Union) and the Barron Area School District (herein the District) have been parties to a collective bargaining relationship for many years. At the time of the events chronicled herein, the collective bargaining agreement in effect between July 1, 2003 and June 30, 2005 had expired and the parties were negotiating a successor agreement. On October 3, 2005, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the failure of the District to recall bargaining unit member Robbie Jo Ellefson from layoff status to fill a teaching vacancy in the District. The undersigned was selected from a panel of WERC staff members to hear the dispute and a hearing was conducted on January 9, 2006. The proceedings were not transcribed. The parties filed their briefs on February 13, 2006. On May 26, 2006, the parties advised the arbitrator they would not be filing reply briefs, whereupon the record was closed.

ISSUES

The parties stipulated to a statement of the issues, as follows:

Did the Barron Area School District violate Article 8, section B, of the collective bargaining agreement when it did not recall the Grievant to the position of 8th Grade Science Teacher in the Middle School?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article VIII – LAYOFF

A. When the Board deems it necessary to decrease the number of teachers, it may lay off the necessary number of teachers on the basis of certification and seniority; provided, however, that when the difference in seniority is no greater than 3 years, the final determination shall be made on the basis of performance as evaluated by the teacher's immediate supervisor. The Board shall give preliminary notice of layoff by May 1 and final written notice to the teacher(s) by June 1.

B. No teacher may be prevented from securing other employment during the period he/she is laid off under this Article. In the event of a vacancy within 2 school years, such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies. Such reinstatement shall not result in a loss of credit for previous years of service. No new or long-term substitute appointments may be made while there are laid off teachers available who are qualified to fill the vacancies.

BACKGROUND

Robbie Jo Ellefson, the Grievant herein, has been an employee of the Barron Area School District since March of 2000. At that time, she was hired as a long-term substitute in the area of cognitive disabilities. In the Fall of 2000, she was offered a full-time position as a Learning Disabilities Teacher and since that time has also taught Grades 1-3, 5th Grade Math, Special Education and has been the District's Title 1 Teacher. Her teaching certification is for Grades 1 – 8, and also Pre-Kindergarten – 12th Grade Cognitive Disabilities. During the 2003-04 school year Ellefson taught Special Education and was the Title 1 teacher. In April 2004, Ellefson was given notice of layoff for the 2004-05 school year, which did occur.

On June 5, 2005, Ellefson learned that the District would have a vacancy for an 8th Grade Science Teacher for the 2005-2006 school year and waited to see if she would be recalled from layoff status to fill the position. On June 30, 2005, the District posted a vacancy notice for a Grade 8 – Science Focus position and set an application deadline for the position of July 22, 2005. On July 12, District Administrator Monti Hallberg left a message for the Grievant asking her to contact him to indicate whether she was interested in the position.

Hallberg had previously ascertained that the other teacher then on layoff, Julie Blackaller, who had greater seniority than Ellefson, was not interested in the position. Ellefson returned Hallberg's call on July 13, whereupon Hallberg, in effect, interviewed her over the phone for the position. Ellefson expressed interest in the position and confidence in her abilities, despite the fact that she had not previously taught middle school or science. On July 19, Hallberg informed her that he felt she was not qualified for the position and would not be recalled. He told her she could still apply for the position before July 22 and compete for it alongside other applicants, which she did.

On August 8, 2005, Ellefson formally interviewed for the position. The interview panel consisted of Middle School Principal John Gevens, District Human Resources Director and High School Principal Kirk Haugestuen and Middle School Teachers Greg Mikunda and Kathleen Waldvogel. On August 10, Haugestuen notified Ellefson that she was not selected for the position. Subsequently, a grievance was filed by the Union on Ellefson's behalf, contending that the District erred in determining that she was not qualified for the position, as that term is understood and applied in the contract. The grievance was denied and the matter advanced through the contractual procedure to arbitration. Additional facts will be referenced, as necessary, in the discussion section of the award.

POSITIONS OF THE PARTIES

The Union

The Union contends that the term "qualified, as used in Article VIII, Section B, of the contract, is ambiguous and, therefore, requires construction according to generally accepted methods of contract interpretation. In this regard, bargaining history supports the Union's position. The present recall language has been in place since the 1972-73 contract. The District attempted to obtain a change in the language in the 1977-79 contract through interest arbitration, but Arbitrator Krinsky ruled in favor of the Union and held that in most instances changes in layoff language should be bargained, rather tan imposed by an arbitrator. The parties have not been successful in bargaining a change in the language.

Other arbitration awards also support the Union. In LADYSMITH-HAWKINS SCHOOL DISTRICT, WERC Case 30, No. 50487, MA-8270 (McGilligan, 5/20/94), the arbitrator was asked to interpret similar language in a district in the same conference where the bargaining unit was also represented by NUE. Witnesses who had been part of the original bargain testified as to the meaning of the word "qualified," which the arbitrator relied on in upholding the grievance. Here, the same language was bargained by the same Union at about the same time, leading to an inference that it was intended to have the same meaning.

Past practice also supports the Union. At the hearing, witnesses for both sides could recall only one previous layoff/recall situation in this district. In 1992, a Title 1 teacher with similar certification to the Grievant here was laid off and later recalled to teach 7th Grade Language Arts. When the vacancy arose, the teacher was recalled without the necessity of an interview to determine her qualifications.

A denial of the grievance will lead to harsh, absurd and nonsensical results. Common sense dictates that the terms qualified and certified in this context are synonymous. The District has not proposed a definition of "qualified," but merely asserts that it means more than certified. If the District prevails, there will still be no concrete standard and the interpretation of qualification will be left to the whims of each individual administrator. The arbitrator should concur with the Union that DPI certification is the equivalent of qualification.

The Grievant is certified by the DPI to teach grades 1-8, which would include the Grade 8 Science position at issue here. She has received positive evaluations from her past supervisors in the District. Her last Principal, John Gevens, gave her a positive letter of recommendation as a teacher and testified that he stands behind his recommendation. The District's arguments about her lack of qualifications are conjectural, based on opinion rather than fact. Administrator Hallberg testified that he relied, in part, on Ellefson's statement that she was "somewhat qualified," which was improper because he did not advise her as to the District's interpretation of the term or that it was a contractual standard for recall. Further, not being an expert on the meaning of the term, Ellefson's response should have had no weight in the District's decision making process.

The "highly qualified" standard adopted by the No Child Left Behind Act has no relevance here. "Qualified" is a contractual term adopted by the parties and should be given its meaning within this context. Further, according to the DPI, a teacher is "highly qualified" if he or she has a bachelor's degree, is certified in the subject they teach and can demonstrate competence in teaching the subject matter. Ellefson, meets the first two criteria and was not given a chance to demonstrate the third.

In not recalling Ellefson, the District acted in bad faith. It is clear from the sequence of events that the District never intended to consider Blackaller or Ellefson for recall. The contract requires that qualified teachers on lay off be recalled for any vacancies for which they are qualified, yet the notice of vacancy was posted before any contact was made with Ellefson about the position. She was only contacted after the Union President had contacted the District to assert the recall rights of the laid off teachers. In their telephone conversation, Hallberg expressed reservations about Ellefson's ability to do the job and hinted at possible termination if she could not. Further, on July 19 he told her she could interview for the position with other candidates, although he had already determined she was not qualified. There clearly was never a serious intent to consider her. For all the foregoing reasons, the grievance should be sustained.

The District

The District asserts that the terms "qualified" and "certified" are not synonymous and the Union failed to show that the terms were ever intended to be used interchangeably. Qualified means something more than certified. Layoffs occur on the basis of certification and seniority, but recalls occur on the basis of qualification. There is no bargaining history or past practice supporting the Union's position, so case law would support the District's position.

[See: ASHLAND SCHOOL DISTRICT, WERC Case 62, NO. 41226, MA-5327 (Burns); WISCONSIN INDIANHEAD VTAE DISTRICT, WERC Case 36, NO. 39705, MA-4889 (Gratz); LADYSMITH-HAWKINS SCHOOL DISTRICT, WERC Case 30, NO. 50487, MA-8270 (McGilligan)]

Bargaining history, in fact, supports the District. The relevant language in the contract has remained unchanged for many years. Both parties have sought changes in the language and their respective attempts reveal how they variously interpret the provision. In the 2001-03 and 2003-05 negotiations the Union sought to replace the word "qualified" with the word "certified," indicating it does not view them as meaning the same thing. Thus, the Union is now trying to gain through arbitration what it could not through bargaining.

There is no relevant past practice in this area. None of the examples brought up by the Union at hearing was on point. The Waldvogel, Updike and Warnberg cases did not involve recall and in the Trowbridge case the applicant, was, in fact, deemed to be qualified. The arbitrator cannot rely on these situations as precedent. Here, the Grievant was not qualified. She did not have the minimum subject matter knowledge or age-level appropriate skills for the position, as the Union acknowledged in its letter to the Administrator requesting that the Grievant be given the position and provided with additional assistance and mentoring. Her previous principal, John Gevens, acknowledged her skill as an elementary teacher, but stated she did not have the background to be successful teaching 8th Grade Science. Establishing the minimum qualifications for the position is a management prerogative. MILWAUKEE BOARD OF SCHOOL DIRECTORS, WERC DEC. NO. 23208-A. Meeting the technical requirements for a job is part of the qualification process, but not all. Management can properly consider other factors, which it did here.

DISCUSSION

In this case, the Grievant, Robbie Jo Ellison, had been a teacher in the Barron School District for five years, primarily in the area of elementary special education. She was, however, certified to teach any and all subjects, Kindergarten through 8th grade. Her performance evaluations over the years had been very good and she had received a letter of recommendation from her last supervisor, Middle School Principal John Gevens, wherein he recommended the Ms. Ellison "…without hesitation for any position she may apply for." Considering her certification, this would presumably include a position as an 8th Grade science teacher, should she have applied for such. Nevertheless, when an 8th Grade science position became vacant at the Barron School District Ms. Ellison, who was on layoff at the time, was not recalled to it. The question before the Arbitrator, then, is whether the District, in not recalling Ms. Ellison, despite her record described above, violated the collective bargaining agreement.

At the outset, I note that the relevant language of the collective bargaining agreement requires that a teacher on layoff be recalled to any vacant position, "if qualified." The contract, however, does not provide a definition of the term "qualified," nor does it describe a

process by which qualification, either minimal or relative, is to be determined. This, then, becomes the point of controversy between the parties. The Union asserts that Ms. Ellison was qualified for the position on the basis of her certification, buttressed by her good performance while teaching in the District. The District demurs, arguing that certification, alone, is insufficient to establish qualification and citing her minimal academic credentials in science and lack of experience with the subject matter and age group in support of its decision. Further, District Administrator Monti Hallberg testified that in his telephonic interview with Ms. Ellison she appeared less than confident about her abilities, leading him to conclude that her lack of confidence and enthusiasm, coupled with minimal credentials, disqualified her for the position.

Clearly, the term "qualified" as used in the contract is ambiguous. The Union believes that it is synonymous with "certified," and cites in support of its position the arbitration award of Arbitrator Dennis McGilligan in LADYSMITH-HAWKINS SCHOOL DISTRICT, WERC Case 30, NO. 50487, MA-8270 (McGilligan 5/20/94), wherein the arbitrator did, in fact, find the terms to be synonymous based upon the bargaining history of the parties. That case is distinguishable from the one before me. In LADYSMITH-HAWKINS, there was testimony from three witnesses who had participated in the negotiation wherein the relevant provision was added to the contract. Their uncontroverted testimony established that the parties intended the word "qualified" to mean the same as "certified" for purposes of recall from layoff. Arbitrator McGilligan made it clear that this was the key evidence in his determination of the outcome. Here, there is no such evidence. No one who participated in the bargaining of this provision was available to testify. Furthermore, subsequent bargaining history is a mixed bag, at best. Over the years, both parties have made bargaining proposals to modify the language, which have been unsuccessful. Most tellingly, in 2002, the Union proposed to substitute the word "certified" for "qualified" in the recall provision, to no avail. If anything, this suggests that there was at least a difference of opinion on the meaning of the word "qualified," which the Union was seeking to clarify. That the District would not agree to do so suggests that it did not see the terms as being identical. Bargaining history, therefore, does not support the Union's position in this case.

The Union also cites as past practice an occasion in approximately 1996 where a Title I teacher on layoff was recalled to a 7th Grade Language Arts position, even though she was not certified in Language Arts. In fact, that teacher had a general 1-8 certification, similar to Ms. Ellison's, along with a K-12 reading certification. Nevertheless, the record is very sketchy as to the criteria used by the District at the time to determine her qualifications, so it cannot be said that certification alone was the determinant. Further, one incident nearly ten years old is insufficient to establish the existence of a binding past practice of equating certification with qualification for recall purposes. Past practice, therefore, does not support the Union's position.

When the parties have chosen not to define the term "qualified" and there is no instructive bargaining history or past practice, typically it is management's prerogative to apply meaning to the term as and when need arises. As this arbitrator has previously held,

"Typically, where the contract is silent on this point the making of such determinations is presumed to be the prerogative of management, either under its residual management authority or as an extension of its reserved rights to manage the workplace." SAUK COUNTY, WERC Case 156, NO. 64263, MA-12853 (Emery, 11/17/05) Thus, in this situation where the parties have not supplied a definition of the term, it is the District's right to determine in its management discretion what constitutes a "qualified" employee for the purposes of recall from layoff and it is not restricted from looking beyond certification in making that analysis. As further noted in SAUK COUNTY, however, the District's determination process may not be arbitrary, capricious, or unrelated to the listed duties of the position.

Here, the determination that Ms. Ellison was not qualified was made by District Administrator Hallberg. According to Hallberg, he posted the position on June 30 because time was short and if neither of the laid off teachers was qualified he needed to begin the external search process quickly. If one of the teachers was recalled, he planned to pull the posting. On July 11, 2005 he first contacted Julie Blackaller about the position because she was the senior teacher on layoff status. He asked her if she felt qualified for the position and if she was interested in it. Ms. Blackaller stated she did not feel qualified, nor was she interested. Based on that response, Hallberg did not recall her. He then called Ms. Ellison and they spoke on either July 12 or 13. According to his file memo recounting the conversation, he asked her whether she felt qualified, how she felt about teaching 8th Grade students and whether she was interested in the position. He recorded that she felt "somewhat qualified" and that she had taken four science classes in college. Further, she was not comfortable with 8th Graders, science was her weakest area and she had no passion for the subject, but was interested in the position and would give it her best. Ms. Ellison denied that she claimed to have no interest in the subject and further denied having any concerns about teaching 8th Graders. She further testified that Hallberg expressed concern about her chances of success with her minimal qualifications and suggested that if she proved unable to handle the position she could be terminated. For his part, Hallberg denied making any such statement. Hallberg also spoke to Middle School Principal John Gevens about Ms. Ellison because Gevens had been her supervisor and had also taught 8th Grade Science himself, giving him unique insight into both the position and the candidate. Gevens apparently did not feel Ms. Ellison was competent to teach 8th Grade Science, notwithstanding the unqualified recommendation he would subsequently give her. Based on her academic and professional credentials, Gevens' opinion and his own conversation with her, Hallberg determined that Ms. Ellison was not qualified for the position and on July 19 he informed her that she would not be recalled. [1] Hallberg testified that the his decision was based on her experience with the subject matter, her knowledge of the subject, her experience with the age group, her background and expertise.

[1] On August 8, Ms. Ellison was permitted to interview for the Science position along with other applicants. Given, however, that one of the interviewers was Gevens and that the screening committee was aware that Hallberg had already declared her to be unqualified, the interview can only be regarded as pro forma.

I conclude that the District's determination that Ms Ellison was not qualified was not arbitrary, capricious, or based on factors unrelated to the listed duties of the position and, therefore, it did not violate the contract by not recalling her. I do not do so, however, without reservations. I have grave concerns about a process whereby a position is opened for external applications before laid off candidates are considered for recall, because the potential exists for the credentials of external applicants to be used as benchmarks for the relative qualifications of bargaining unit members. Such a practice has potential to seriously undermine the job protections inherent in being part of a union and could make the recall process little better than an expansion of an open posting wherein bargaining unit members only get recalled if their qualifications compare favorably to those of the external applicants. Here, however, the record is silent about whether any applications were received or reviewed before a recall decision was made regarding Ms. Ellison, so I cannot draw any conclusions in that regard. I also take note of the apparent inconsistency between Gevens' testimony that he advised Hallberg that Ms Ellison was not qualified for an 8th Grade Science position and his subsequent unqualified letter recommending her "for any position she may apply for," which, presumably, could include 8th Grade Science. [2] It is difficult to grant equal weight to both statements. Further, I take note of the fact that prior to the hearing there was apparently no explanation given of what, if any, process was used to determine the qualifications of the laid off staff members. The credibility of a decision-making process depends not just on appropriate standards, but also upon the employees involved being clearly informed as to both the process and the basis for the ultimate decision. That was not done here. Nevertheless, Hallberg's stated criteria for his decision are reasonably related to the duties of the position and there is no evidence that they were not, in fact, his true rationale. Educational background, experience with the subject matter and experience with the age group are legitimate considerations in determining qualifications for a teaching position and since the determination of qualifications was within the District's discretion, Hallberg was entitled to apply them in his decision-making process. Whether someone else would have reached the same conclusion is not material, but only whether the process Hallberg used was rational and fair and the result was not unreasonable.

For the reasons stated, and based upon the record as a whole, I hereby enter the following

[2] In fact, after Hallberg refused to recall her, Ms. Ellison did apply for the 8th Grade Science position and Gevens was a member of the interview panel that rejected her.

AWARD

The Barron Area School District did not violate Article 8, section B, of the collective bargaining agreement when it did not recall the Grievant to the position of 8th Grade Science Teacher in the Middle School. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 25th day of August, 2006.

John R. Emery /s/
John R. Emery, Arbitrator

JRE/gjc
7031