

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**OSHKOSH PUBLIC LIBRARY EMPLOYEES UNION,
LOCAL 796A, AFSCME, AFL-CIO**
and
CITY OF OSHKOSH (LIBRARY)

Case 364
No. 67076
MA-13744

(Ethan Wege – Denied Job Vacancy)

Appearances:

William Bracken, Coordinator of Collective Bargaining Services, Davis & Kuelthau, Post Office Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City of Oshkosh.

Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W5670 Macky Drive, Appleton, Wisconsin 54915, appearing on behalf of the Oshkosh Public Library Employees Union, Local 796A.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the City of Oshkosh (hereinafter referred to as either the City or the Employer) and the Oshkosh Public Library Employees Union (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the denial of a vacancy to Ethan Wege. The undersigned was so designated. A hearing was held on September 11, 2007 at the City's offices, at which time the parties submitted such exhibits, testimony and other evidence as was relevant to the dispute. No stenographic record was made. The parties submitted the case on oral arguments at the end of the hearing, and authorized the arbitrator to issue an expedited decision.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Arbitration Award.

ISSUES

The parties could not agree on the exact phrasing of the issue before the arbitrator. However, there was no substantial difference between their formulations, and they agreed that the arbitrator should frame the issue in the Award. The issues before the arbitrator are:

Did the Library violate Article VIII of the Collective Bargaining Agreement when it denied the grievant, Ethan Wege, the ability to post for a Library Page position in the Research and Adult Services Department on the grounds that he had not been in his current position of Library Page in the Circulation Department for at least one year?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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Article VIII - Promotions - Job Posting - Transfer Policy

Section 1. A vacancy shall be defined as a job opening not previously existing in the Table of Organization or a job opening created by the termination, promotion or transfer of existing personnel when the job continues to exist in the Table of Organization.

Section 2. All non-supervisory vacancies not filled through the transfer policy shall be posted on the bulletin board for a period of seven (7) calendar days. Employees interested in such jobs shall sign the posted notices. All applications for such positions must be submitted to the Office of the Director before the end of the posting period. Employees may not sign job postings for jobs within their own classification, unless said posted job is for more or less scheduled hours than the job which the employee is presently performing, or unless the employee has been in his/her current position for at least one (1) year. A copy of each job posting shall be given to the Union. Postings will have salary range attached and an employee moving into a higher classified position shall be paid within the new range at the rate immediately higher than the one he is receiving at the time of promotion. Postings shall list the location and department of the position in addition to the classification.

Section 3. The employee shall be selected on the basis of seniority, work record, and qualifications. In the event an official training program has been conducted for a given position, successful completion of the program shall be the qualifying factor for promotion.

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Section 5. Transfer Policy. Management reserves the right to make transfers within the Library system which in its opinion would expedite and improve the operation of the Library. The Union reserves the right to file a grievance on any transfer that is made for arbitrary or capricious reasons. The Union shall be notified in writing, regarding the reason and effective date of all transfers, through the Change of Status procedure, in accordance with Article VI, Section 2 of this Agreement.

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BACKGROUND

The facts of this case are straightforward. The City provides governmental services to the people of Oshkosh, Wisconsin, including the operation of a public library. The Union is the exclusive bargaining representative of the library's employees, including those in the classification of Library Page. The Grievant, Ethan Wege, is employed as a Library Page.

Page is the entry level position in the Library, and historically there has been a good deal of turnover in the classification. Pages work approximately 11 hours per week, and are assigned to one of three Departments within the Library – Reference, Circulation or Technical Services. The duties of a Page will vary a great deal, depending upon which Department he or she is assigned to, and any new assignment will require a period of training.

In contract negotiations over the 1977 collective bargaining agreement, the City came to the table with a proposal that would limit the ability of employees to post into a new position within their current classification, unless the employee had been in their current position for at least one year, or if the new position represented a change in hours: “Employees may not sign job postings for jobs within their own classification, unless said posted job is for more or less scheduled hours than the job which the employee is presently performing, or unless the employee has been in his/her current position for at least one (1) year.” As explained by the City, the purpose of the proposal was to stop Pages from regularly posting into new positions, thus requiring a new period of training and multiplying the number of openings the Library had to deal with. The Union agreed to the proposal. There was no discussion of whether it made a difference if the employee had moved in the preceding year via posting versus an involuntary transfer.

The Grievant was hired by the Library in 2005 in the Reference Department. In September of 2006, he was one of three employees who were involuntarily transferred to the Circulation Department. Five months later, in early April, 2007, the Library posted two Page openings in the Reference Department, and the Grievant was the only employee who signed the posting. The Library refused to allow him to post for the vacancy, on the grounds that he had not been in his current position for at least one year. Two outside applicants were hired for the openings. The instant grievance was filed, challenging the Library's ability to prevent the Grievant from posting. The matter was not resolved in the lower stages of the grievance procedure, and was referred to arbitration. Prior to the hearing, the parties were able to stipulate to certain facts:

STIPULATIONS BETWEEN
OSHKOSH PUBLIC LIBRARY AND
AFSCME LOCAL 796-A BEFORE
ARBITRATOR DANIEL J. NIELSEN, WERC

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RE: Ethan Wege Grievance

The City of Oshkosh Public Library (hereafter "Library") and the Oshkosh Public Library Employees, Local 796-A, AFSCME, AFL-CIO (hereafter "Union"), hereby stipulate to the following:

1. The grievance dated April 27, 2007, Grievance 2007-03, involving Ethan Wege, is properly before the Arbitrator for his ruling. There are no procedural objections to the grievance being considered by Arbitrator Nielsen.
2. The relevant labor contract that governs this grievance is the 2004-06 Agreement between the Oshkosh Public Library and Oshkosh Public Library Employees Local 796-A, AFSCME, AFL-CIO.
3. The Grievant, Ethan Wege (hereafter "Wege"), was originally hired on August 4, 2005 as a Library Page in the Reference and Adult Services Department. He was scheduled to work approximately 11 hours per week.
4. The Library Page classification is assigned to positions in three different departments: Technical Services, Reference and Adult Services and Circulation. Duties and training of the Library Page position vary between the three departments.

5. On September 18, 2006, the Library transferred Wege from the Reference and Adult Services Department to the Circulation Department. Wege was one of three Library Page positions that transferred from the Reference and Adult Services Department to the Circulation Department for reasons of better efficiency in utilizing staff and improved customer service. Wege was scheduled to work approximately 11 hours per week in the Circulation Department.
6. On April 4, 2007, the Library posted two Library Page positions in the Reference and Adult Services Department. These vacancies were created due to employee resignations. Wege was the only employee to post for one of the two open Library Page positions in the Reference and Adult Services Department. Each position was scheduled to work approximately 11 hours per week.
7. The Library did not consider Wege eligible to sign the posting because of Article VIII, Section 2. The Union grieved this decision and seeks that Wege be placed in the Library Page position in the Reference and Adult Services Department.
8. The Library hired two persons from outside the bargaining unit in filling the two Library Page vacant positions in Reference and Adult Services Department.

In the course of the arbitration hearing, the Union presented testimony from Joann Brewer and Joan Kaeding, both of whom had served on the bargaining team for the 1977-78 round of contract talks. Both testified that the City had described its concerns with the posting provisions as involving Pages using the posting procedure to hop from job to job, which required a great deal of training time and a loss of productivity. The City did not raise the question of how a transfer would affect posting rights. Both noted that, at that time, transfers were a very rare occurrence.

Brewer testified that there was a dispute concerning transfers in 1999, when the Library reorganized, eliminating bookmobile services and closing the Library's South Side branch. Five employees – three Pages, one Bookmobile Operator, and a half-time Library Assistant II - were transferred as a result. The Bookmobile Operator, Sally Dobbins, was transferred to the lower paying position of Library Assistant II. Three grievances were filed, and the parties ultimately reached a settlement, which was described in an exchange of memos between a Union Steward and the then-Library Director:

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September 22, 1999

The union has voted to accept management's offer to resolve grievances 99-4, 99-5 and 99-6 in the following manner. Sally Dobbins will stay at 1999 bookmobile operator top rate until the LA II top rate passes that rate; and she will be made whole. All transferred employees shall retain immediate posting rights. Grievance 99-6 will be dropped without prejudice. This is a non-precedent setting agreement.

Respectfully submitted,

\Christina Sonnleitner Steward, Local 796-A

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To: Local 796-A
From: Richard W. Bowman
Date: September 22, 1999
Subject: Grievances 99-4, 99-5, & 99-6

The Library is in receipt of your letter of September 22, 1999, accepting management's offer of grievance resolution. Sally Dobbins' pay will be retroactively adjusted back to that of Bookmobile Operator, 1999 top step, and she will continue to receive that amount until the L.A. II top step exceeds that amount (should occur in 2001). Both Sally Dobbins and Doris Thomas will be allowed to sign any job postings that may occur.

Brewer observed that the settlement allowed Dobbins and Thomas to sign any postings, and expressed the opinion that this suggests that transfers do not strip someone of their posting rights within the year following the transfer. She agreed that the initial memo stated that the settlement was non-precedential, but felt that that provision was aimed at the red-circled pay rate for Sally Dobbins, rather than the sentence acknowledging their posting rights.

Assistant Library Director Joan Mueller testified that the one year limitation on posting rights was very important to the Library, since it invested a great deal in training Pages, and got no return on that investment if the Page then moved to a new position, requiring yet another training period for that Page as well as training for someone to fill their slot. Mueller agreed, however, that the Grievant would not need a great deal of training if he had returned to Reference, as he had worked there for a year before his transfer, and that the two outside hires had both required training.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that the language of Article VIII, Section 2 was intended to stop job hopping by Pages by effectively limiting them to one posting per year. The parties never discussed applying this limitation to a Page who was involuntarily transferred, and the Union never contemplated the possibility that the Library could strip someone of his posting rights by using their power to transfer under Article VIII, Section 5. The City, which proposed this language, had the obligation to fully explain it, and having failed to do so, it must bear the burden of any ambiguity. The Union also argues that the outcome sought by the City is manifestly unjust, since it allows for a double penalty on an employee in the form of an involuntary transfer, followed by the loss of the only contractual means the employee has to move to a more desirable position. The appropriate outcome of this case is that which the parties reached in the 1999 transfer grievances – the employee should retain his posting rights in the face of any involuntary transfer. Thus the grievance should be granted.

The Position of the City

The City takes the position that the language is absolutely clear and unambiguous in providing that an employee may post into another position within his classification only if he has served for a year in his current position. The language draws no distinction between an employee who came to his current position via posting, transfer or original hire. Nor should the language make any such distinction, since in each case the Library has the same concerns about reducing training costs, avoiding disruptions in its operations, and recouping its investment in training the employee in the current job. There is nothing, the City argues, to even suggest that an employee who has not served for a year in his current job may post into another. In that regard, the City argues that the 1999 grievance settlements were, by their clear terms, non-precedential, and thus irrelevant to this case.

The City notes that an employee who feels the transfer rights have been abused can file a grievance, but that there was no grievance in this case, and no evidence whatsoever that the City is abusing or manipulating its right to transfer employees. Given that, and because the language of Article VIII, Section 2 is absolutely clear, the grievance should be denied.

DISCUSSION

Article VIII, Section 2 of the collective bargaining agreement contains a description of the posting rights of employees, and it forbids employees from posting for positions within their current classification unless (1) the new position involves a change in the number of scheduled hours or (2) the employee has served at least one year in his current position:

Section 2. All non-supervisory vacancies not filled through the transfer policy shall be posted on the bulletin board for a period of seven (7) calendar days. Employees interested in such jobs shall sign the posted notices. All applications for such positions must be submitted to the Office of the Director before the end of the posting period. *Employees may not sign job postings for jobs within their own classification, unless said posted job is for more or less scheduled hours than the job which the employee is presently performing, or unless the employee has been in his/her current position for at least one (1) year. [Emphasis added]*

In this case, the hours were the same for the two positions, and the Grievant had served less than one year in his position at the Circulation Department at the time of the posting. While this language would seem to clearly forbid his use of the posting procedure, the Union argues that it was never intended to apply to situations where the employee had moved involuntarily within the preceding year. The un rebutted testimony of Union negotiators is that posting is the only circumstance discussed in 1977 when the language was bargained, and that transfers were not discussed.

I have no doubt that the parties limited their discussions to posting in 1977, but that does not change the fact that the language they agreed on was more restrictive than that. The contract here does not recognize a general right to post for openings within the current classification, and then exempt those who have already posted within the past year. Instead, it states a general rule that employees may not post for openings within their current classification, and then states two exceptions to that general rule. The second of these exceptions is that “the employee has been in his/her current position for at least one (1) year.” It makes no reference to the circumstances in which he may have come to the job. Moreover, the parties clearly understood that involuntary transfers, while perhaps a rare occurrence in 1977, were a possibility. The language of Article VIII, Section 5 regarding transfers is unchanged between 1975 and the current contract. Moreover, Section 2 itself begins by recognizing that a transfer is a possible means by which an opening may be filled: “*All non-supervisory vacancies not filled through the transfer policy shall be posted...*” Thus I cannot conclude that the parties negotiated the one year provision without being aware that jobs could be filled by means other than voluntary posting.

The Union argues that allowing management to involuntarily transfer an employee and then use that transfer against him in the posting process is a harsh and absurd result. I cannot agree. The limitation on posting is designed to encourage stability in staffing and to allow the Library to recoup some of its investment in training Pages before they shift to other positions. Those concerns are not any different in a case where the Library found it necessary to transfer an employee than they would be where the employee posted for a position. The Page must still be trained, and a move shortly thereafter will create the same issues of cost and instability in the workforce. Thus it is not absurd to accept the Library’s interpretation of the language. As for whether it is harsh, that obviously depends upon

which party is making the analysis. However, even from the employee's point of view, the limitation on posting into a different Page position extends for only one year.¹ That may be unwelcome, but it cannot be said to be harsh to the extent that the parties could not have intended that outcome.

Finally, the Union argues that the 1999 grievance settlements should stand for the proposition that transferred employees retain the right to post at anytime. On the contrary, as I indicated at the hearing, the grievance settlements are clearly non-precedential, and their terms may not be cited as having any binding significance for future disputes.

The language of Article VIII, Section 2 clearly prohibits posting into the current classification, unless (1) the employee will achieve a change in hours or (2) the employee has been in his or her current position for at least one year. Neither exception applies in this case. Accordingly I have concluded that the grievance must be denied.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The Library did not violate Article VIII of the Collective Bargaining Agreement when it denied the grievant, Ethan Wege, the ability to post for a Library Page position in the Research and Adult Services Department on the grounds that he had not been in his current position of Library Page in the Circulation Department for at least one year.
2. The grievance is denied.

Dated at Racine, Wisconsin, this 18th day of September, 2007.

Dan Nielsen /s/

Daniel Nielsen, Arbitrator

¹ I express no opinion on what the outcome would be where there was series of transfers which would deny an employee posting rights for more than one year.