BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE GRIEVANT (M__ T__)

and

SCHOOL DISTRICT OF FRANKLIN

Case 86
No. 67106
MA-13756

(Grievance concerning non-selection for position)

Appearances:

Alan C. Olson and **Jennifer J. Allen**, Alan C. Olson & Associates, S.C., 2880 South Moorland Road, New Berlin, Wisconsin 53151-3744, appearing on behalf of the Grievant.

Mark L. Olson and **Daniel J. Chanen**, Davis & Kuelthau, S.C., Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the District.

Ted Craig, Executive Director, Council #10, 13805 West Burleigh Road, Brookfield, Wisconsin 53005, appearing on behalf of the Franklin Education Association.

SUMMARY GRIEVANCE AWARD

The Grievant and District above, agreed to submit a dispute for final and binding grievance arbitration and at their joint request, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz of its staff as the Arbitrator. The dispute arose under the 2005-07 collective bargaining agreement (Agreement) between the District and the Franklin Education Association covering the District's professional educator personnel. Association representatives attended the hearing. Their role was limited to stating the Association's positions with regard to certain limited aspects of the case. Except in the quoted portions of the Agreement, references to "the parties" herein are to Grievant and the District, only. References to "the drafters" are to the Franklin Education Association and the District, only.

The parties agreed that the Arbitrator should issue the award on an expedited basis in a summary form, and they authorized the Arbitrator to frame the issues for determination on the basis of their respective proposals and the record as a whole. The Arbitrator conducted a

hearing in the matter on July 13 and August 30, 2007, at the District office in Franklin, and additional evidence was submitted by stipulation on September 5, 2007. Following their respective receipt of the transcript, the parties summed up their positions by means of written briefs, the last of which was received by the Arbitrator on September 25, 2007.[1]

ISSUES

The Arbitrator frames the **ISSUES** as they were proposed by the Grievant, to wit:

1. Did the District violate Agreement Art. VI Sec. 1 when it failed to place the Grievant in a first grade position in the Robinwood Elementary School for the 2006-07 school year?

2. If so, what shall the remedy be?

The District's proposed statement of the issues -- which the Arbitrator has not adopted -- would have substituted the words "hired the best qualified applicant for" in place of "failed to place the Grievant in," in ISSUE 1, above.

PORTIONS OF THE AGREEMENT

ARTICLE I - AGREEMENT AND PREAMBLE

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SECTION 7: "ZIPPER" CLAUSE

> The parties agree that all negotiable items have been discussed during the negotiations leading to this agreement, that this agreement--as the result of these negotiations--is binding on both parties, that no additional negotiations on or changes of any provision pertaining to teachers' wages, hours or conditions of employment shall be undertaken except by mutual consent.

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[1] The Grievant's brief was submitted to the Arbitrator on September 12. The District's brief was submitted to the Arbitrator on September 25. The briefs were then simultaneously exchanged by the Arbitrator by e-mail on September 25. The briefs were due "[one] week after the [parties'] respective receipt of the . . . electronic copy of the transcript." (tr.II, 292-3). However, the District and the Arbitrator inexplicably did not receive their copies of the electronic transcript until well after the Grievant's receipt of same on September 5 -- the Arbitrator on September 12 and the District (from the Arbitrator) on September 17. Following an exchange of e-mail on the subject, the Arbitrator, on September 17: denied the Grievant's request to strike any District brief submitted after September 12, denied the District's request for an extension until October 1, and granted both parties an opportunity to submit written arguments until the end of business on September 25.

. . .

ARTICLE II - SCHOOL BOARD FUNCTIONS

The operation of the school system and the determination and direction of the teaching staff, including the right to . . . schedule classes and assign work loads; . . . [and] to select . . . teachers . . . , are the functions of the School Board.

The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth, the Board retaining all functions not otherwise specifically nullified by this policy statement.

The Franklin Education Association has the right to challenge the Board in the exercise of any of the functions set out in this Article and such challenge shall be made through the grievance procedure.

Functions of the Board which have a direct and intimate effect upon salaries, hours and working conditions are subject to collective negotiations.

. . .

ARTICLE VI - SENIORITY AND LAYOFF PROCEDURE

SECTION 1: NEW POSITIONS

When new positions open up within the District, qualified personnel from within the District will be given first consideration.

. . .

SECTION 9: RECALL PROCEDURE

A. If the District has a teaching position available, they will recall the most senior layoffee who is certified for the vacancy. . . .

. . .

ARTICLE VIII - PROFESSIONAL COMPENSATION

SECTION 2: CO-CURRICULAR ASSIGNMENTS

A. The Administration retains the right to select the person or

persons to fill co-curricular positions within the District. The

> Administration shall continue the current practice of solicitation of applicants for extra-duty vacancies through the posting of notices of such vacancies . . .
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> . . .
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> C. In the event no bargaining unit member, whom the Administration feels to be qualified for the position in question, applies for an extra-duty vacancy within the . . . posting period, the District may fill the position with personnel from outside the bargaining unit.
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> . . .

BACKGROUND

The Grievant has been employed by the District as a professional educator since fall of 1984.

During the summer of 2006, the District selected an outside candidate to fill the first grade position at Robinwood Elementary School that had been held by another member of the bargaining unit in 2005-06. There were three first grade positions at Robinwood in both 2005-06 and 2006-07.

The District considered outside applicants and selected one of them for the Robinwood position despite its receipt of Grievant's timely expressions of interest in the Robinwood and other early elementary grade regular education positions. The selection was made on a consensus basis by the District's five elementary principals acting as a group following interviews of Grievant and various outside applicants. From among applications submitted by 217 outside applicants, the principals invited to interviews the 9 they thought most likely to be the best qualified of the applicants, based on the information supplied on their on-line applications. They invited Grievant to interview because she was already a District employee and had expressed an interest in the position.

After Grievant learned that the District had selected one of the outside applicants for the position rather than herself, a grievance was initiated by the Association asserting that the District thereby violated Art. VI Sec. 1. The grievance was ultimately submitted to arbitration. The Grievant was represented by her own attorney in the arbitration with Association representatives present but limited to objecting to proposed remedies or proposed grievance settlement terms.

POSITIONS OF THE PARTIES

The Grievant

The Grievant asserts that, under Agreement Art. VI Sec. 1 as originally agreed upon and as historically applied, a "new position" means any position that is open, or vacant[2]; that the Robinwood position was therefore an instance "when a new position . . . open[ed] up within the District;" that the requirement that "qualified personnel from within the District will be given first consideration" precluded the District from considering and from hiring an outside applicant if there was an applicant from within the District who was qualified for the position; that the Grievant was "qualified" for the position; that the District therefore violated Art. VI Sec. 1 by requiring Grievant to compete with outside applicants and by selecting an outside applicant for the Robinwood position; and that the District should therefore be ordered to immediately award the Grievant the Robinwood position for which the outside applicant was selected or a comparable regular education position in grades 1-3 that is or becomes available in the District, preferably at Robinwood or Country Dale.[3]

The District

The District asserts that the Agreement reserves to it the right it exercised in this case, to follow its written School Board policy of selecting the best qualified applicant when filling bargaining unit vacancies; that Art. VI Sec. 1, by its terms and as historically applied, applies only to positions newly created by the School Board[4]; that the Robinwood position was therefore not a "new position" both because it was not a position for which a job description was newly created by the Board and because first grade positions have always existed in the District; that the Robinwood position was a vacancy in a position that, contrary to Grievant's testimony, was held at Robinwood throughout 2005-06 school year by another member of the bargaining unit; that even if the Robinwood position was a "new position" within the meaning of Art. VI Sec. 1, Grievant was not "qualified" for that position so as to be entitled to "first consideration" under that Section; that, in any event, Grievant was, in fact, accorded "first consideration" within the meaning of that section[5]; and that the Arbitrator should therefore

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[2] Grievant's Brief at 2, et seq., citing, FARM CREDIT SERVICES OF NORTH CENTRAL WISCONSIN, ACA v. WYSOCKI, 2001 WI 51 ¶23, 243 Wis.2d 305, 314 (2001)(". . . the primary goal in contract interpretation is to determine and give effect to the parties' intention at the time the contract was made.")

[3] Grievant requests in her brief that the District also be ordered to pay Grievant's attorneys fees and costs and that the District be required to continue to employ Grievant in a regular education position for a minimum of three years. Grievant's Brief at 2 and 10.

[4] District Brief at 14 et seq., citing, OUTAGAMIE COUNTY, WERC MA-12743 (Millot, 12/06/05) at 13-15 [the District cited the case as "MA-2385," to which the page labels throughtout the document incorrectly refer. See correction on first page of decision on-line at http://werc.wi.gov/grievance_awards/6930.pdf.]

conclude that the District did not violate Art. VI Sec. 1 by its consideration of outside candidates in addition to the Grievant or by its selection of an outside applicant rather than the Grievant for the Robinwood position.

DISCUSSION

Resolution of the **ISSUES** noted above turns on the meaning and application of Art. VI Sec. 1. That provision constitutes an express limitation on the rights "to assign work loads" and "to select . . . teachers" that are generally reserved to the District by Art. II read together with Art. I Sec. 7. The Grievant bears the burden of persuasion that Art. VI Sec. 1 was applicable to the Robinwood position at issue and that the District violated the requirements of that Section when it failed to place the Grievant in that position it for the 2006-07 school year.

The language of Art. VI Sec. 1, both in its title and in its text, refers to "NEW POSITIONS" and to situations "[w]hen new positions open up within the District." (emphasis added).

The record clearly establishes that the Robinwood position at issue was one that existed in 2005-06 as well as in 2006-07. It was one of three Robinwood first grade positions that existed and were held by bargaining unit personnel during both of those school years. The Robinwood position was therefore not newly created in 2006-07, nor was it newly held by a bargaining unit member in 2006-07. The Grievant's testimony that it was newly held by a bargaining unit member in 2006-07 has been shown to have been factually incorrect.

The Robinwood first grade position was newly open and vacant when the District chose to require Grievant to compete with outside applicants and when it ultimately selected the outside applicant rather than the Grievant for that position. However, Grievant's proposed interpretation of "new position" as meaning all vacant positions is an unusually broad usage of the term "new." In that regard, is quite common for public sector collective bargaining agreements in Wisconsin to treat new positions and vacant positions as different.[6]

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[5] District Brief at 25 et seq., citing, WEST DEPERE SCHOOL DISTRICT, WERC MA-8824 (Gallagher, 08/10/95) at 21.

[6] See, e.g., MERCER SCHOOL DISTRICT, WERC MA-13143 (Shaw, 10/2/06)("All present bargaining unit employes shall be given first consideration to transfer to any new or vacant position provided they are qualified." Id. at 4); OUTAGAMIE COUNTY, supra, ("In the event a job vacancy or new position occurs, a notice of such vacancy or new position shall be posted on the employee bulletin board . . .". Id. at 3.); KEWAUNEE COUNTY, WERC MA-12878 (Burns, 8/16/05)("The employer shall post any new or vacant position within the scope of the bargaining unit for a period of eight (8) calendar days. Any interested employee may apply for the position in writing to the County Administrator. At the end of the eight (8) days posting period, the applicants shall be interviewed by the County Administrator. The job shall be awarded to the senior qualified applicant except that transfers to the position of investigator shall be awarded on the basis of qualification, not seniority. An employee may move from one classification to another only if a vacancy in the classification occurs or a new position is created." Id. at 2); and LAC DU FLAMBEAU SCHOOL DISTRICT, WERC MA-10181 (Greco, 07/31/98) ("All present bargaining unit employes shall be given the right to be reassigned to any new or vacant position within their area of assignment as described in Article XIV, Reduction in Force, paragraph A, provided they are qualified." Id. at 4.);. .

Notably, when reading Art. VI Sec. 1 in the context of the Agreement as a whole, significantly different language appears in Art. VIII Sec. 2 establishing the right of qualified bargaining unit members to fill "vacancies" in co-curricular, i.e., extra-duty, assignments. In that language, which was added sometime after what is now Art. VI Sec. 1, the drafters refer generally to "co-curricular positions" and to "extra-duty vacancies" rather than to "new co-curricular positions." The use of those different terms in the two Sections implies that "new positions" in Art. VI Sec. 1 was understood to have a different meaning than the ordinarily more broadly-inclusive term, "vacancies," used in Art. VIII Sec. 2.[7]

Furthermore, and most importantly, the Grievant's proposed interpretation of Art. VI Sec. 1 effectively requires interpreting the phrase "when new positions open up within the District" to mean "when positions open up within the District." Such an interpretation would render the word "new" meaningless. Under well-established contract interpretation standards, such an interpretation should be avoided, if possible, because all of the words of an agreement are ordinarily presumed intended to have some meaning.

For those reasons, the language of the Agreement strongly supports rejection of the Grievant's proposed interpretation of "new position" in Art VI Sec. 1 as including all vacant positions. Therefore, the Agreement language also strongly supports rejection of Grievant's contention that the Robinwood position at issue was a "new position" within the meaning of that Section.

The respective evidence and arguments of the parties regarding matters beyond the language of the Agreement -- namely bargaining history and past practice -- do not persuasively support different conclusions.

Both parties presented witnesses, including respective witnesses with many years of experience in negotiating and administering the drafters' agreements over the years, who offered squarely contradictory understandings of what the language of Art. VI Sec. 1 means, consistent with the parties' respective proposed interpretations of that Section[8]. However, such subjective understandings, where, as here, they are unsupported by evidence of communications between the parties regarding Art VI Sec. 1 at the bargaining table or in the administration of the Agreement, are not a reliable guide to the mutual intentions of the drafters regarding the meaning of that Section. See, e.g., St. Antoine, *The Common Law of the*

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[7] It can similarly be noted that the drafters chose to use different terminology than "new positions" when they added the recall language in Art. VI Sec. 9, with its more general references to "a teaching position available" and "the vacancy."

[8] Compare, for example, the testimony of the District's Human Resources Director, Judy Mueller (tr. I at 117-118), based on her experience over the past 15 years as administrator with hiring process responsibilities, with that of Grievant's witness Peter Godfrey (tr. II at 12-13) based on his combined experience as an Association grievance representative, bargaining team member and chief negotiator over a 35 year period beginning in about 1966.

established by objective evidence, then testimony as to the 'intent' of one party that was not communicated to the other party is not relevant to establish its meaning. Comment: Testimony as to uncommunicated intent is commonly offered but has no relevance to establish what both sides agreed to . . . ".)

The record does clearly establish that Art. VI Sec. 1 first appeared in the drafters' 1971-73 Agreement in the context of a two-sentence section entitled "Seniority Clause," the second sentence of which section read, "In the event that (a) teaching position(s) within a teaching certification area is (are) eliminated, employees will be laid off in the reverse order of the date of their appointment."

There is also evidence indicating that for many years through at least 1997, it was common for the District to inform existing personnel of positions that would be open in the future, and to accommodate existing staff members' requests for transfers to different bargaining unit positions, without requiring those staff members to compete in a selection process involving outside applicants. No teacher complained to the Association in those years that the District had denied the teacher's request for a transfer to an open position in favor of filling it with an outside applicant. In more recent years, the District has accommodated some existing staff members' requests to transfer to different bargaining unit positions without requiring those staff members to compete in a selection process involving outside applicants. However, the District has not accommodated other transfer requests, and no grievances have been filed in any of those instances.

There is also evidence indicating that the District has for several years frequently filled vacant positions by use of the selection process it utilized for filling the Robinwood first grade position at issue in this case. While no grievances have ever been filed challenging the propriety of using that selection process, the record does not make it clear how often an existing staff member has participated in that process without being selected for the vacancy involved.

Finally, the record clearly establishes that in 1997, Grievant requested and was transferred to the Diagnostic Teacher position that she currently holds, without being required to compete with outside candidates. That position was newly created by the District at that time, with the School Board reviewing and approving a newly created job description. It is not clear how many other positions have been newly created before or since, or how such other positions were filled when they were created.

As noted above, the Arbitrator does not find the evidence and arguments of the parties regarding matters beyond the language to be a persuasive basis for reaching conclusions different than those strongly supported by the language of the Agreement itself. The Arbitrator therefore rejects the Grievant's proposed interpretation of "new position" as used in Art. VI Sec. 1 and concludes: that the Robinwood position at issue was not a "new position" within the meaning of Art. VI Sec. 1; that Art. VI Sec. 1 therefore did not apply to the Robinwood

position at issue; and that the District therefore has not been shown to have violated Art. VI Sec. 1 by its failure to place the Grievant in that position for 2006-07.

Those conclusions suffice to resolve the **ISSUES** submitted in this case. Accordingly, it is unnecessary for the Arbitrator to offer an opinion regarding whether the Grievant was "qualified" or "given first consideration" within the meaning of that Section or whether, hypothetically, the Robinwood position would have been a "new position" within the meaning of that Section had the position been an additional first grade position not held by anyone the preceding semester.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the **DECISION AND AWARD** of the Arbitrator on the **ISSUES** noted above, that

1. The District did not violate Agreement Art. VI Sec. 1 when it failed to place the Grievant in a first grade position in the Robinwood Elementary School for the 2006-07 school year.

2. Consideration of a remedy is therefore neither necessary nor appropriate.

Dated at Shorewood, Wisconsin this 26th day of September, 2007.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator

MLG/gjc

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