

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL DISTRICT OF SOUTH MILWAUKEE

and

SOUTH MILWAUKEE EDUCATIONAL SUPPORT PROFESSIONALS

Case #59

No. 67574

MA-13945

(Amy Gierke Salary Placement)

Appearances:

Ted Kraig, Executive Director, Council 10, 13805 West Burleigh Road, Brookfield, Wisconsin 53005, appearing on behalf of Association.

Mark Olson, Attorney at Law, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the South Milwaukee School District (hereinafter referred to as either the District or the Employer) and the South Milwaukee Educational Support Personnel (hereinafter referred to as the Association) 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 District's salary placement of Amy Gierke. The undersigned was so designated. A hearing was held on February 22, 2008 at the District's offices, at which time the parties submitted such exhibits, testimony and other evidence as was relevant to the dispute. A stenographic record was made, and a transcript was received on March 6th. The parties submitted briefs, the last of which were received by the undersigned on March 29, 2008, whereupon the record was closed.

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 agreed that the arbitrator should frame the issue in his award. The issue may be fairly stated as follows:

Was the Grievant assigned to the correct salary rate in accordance with Article X of the collective bargaining agreement, upon her promotion in the 2007-2008 school year? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

Article 10 – Rates of Pay

. . .

Section 2

Employees who are hired at the Step 1 rate shall move to Step 2 after successfully completing their “Probationary Period” in accordance with Article IV, Section 9 of this Agreement. Employees will then move one step on the wage scale effective July 1 each year if their previous year’s work performance has been judged to be satisfactory. Employees must have worked at least 50% of the previous year’s assigned work year to qualify for step advancement.

Section 3

When an employee is permanently assigned to a job in a higher pay classification, s/he shall be paid at the step of the higher classification which would provide a minimum of a one step increment in their current pay classification (sic) s/he will then move one step on the wage scale effective July 1 each year if their previous year’s work performance has been judged to be satisfactory.

. . .

STATEMENT OF THE CASE

Facts

The District provides general educational services to the citizens of South Milwaukee. The Association is the exclusive bargaining representative for the District's non-supervisory support personnel. The Grievant, Amy Gierke, was employed by the District in the 2006-2007 school year in two part-time positions, as the 4.5 hour per day receptionist at the high school and the 2.95 hour per day secretary at the IMC. Both of these were in pay classification I on the wage scale. In the second semester, she was advised that the receptionist position was being eliminated effective with the start of the next school year. In late April, she saw a posting for the six hour per day job of Faculty Secretary at the elementary school for the 2007-2008 school year. The Faculty Secretary position was a Class II, which was a pay raise from her assignments in the 2006-2007 school year. She signed the posting and was awarded the job. Jennifer Sielaff, the District's Director of Personnel, Administrative and Legal Services confirmed the promotion in a letter dated May 9, advising her that she was hired as the Blakewood Elementary School Faculty Secretary "effective with the 2007-2008 school year", and confirming that she would no longer hold her receptionist or secretary positions, again "effective with the 2007-2008 school year."

After the end of the second semester, the Grievant worked a summer school position as a secretary at the elementary school. That job ran from June 25 through July 27, at the same rate of pay she had received during the regular year. While she held this job as of July 1, the date on which the contract calls for step increases to be paid, temporary summer school positions have never been treated as regular positions, and employees do not receive steps while working those jobs. Any step accrued is paid with the commencement of regular employment for the next school year. Thus the Grievant continued to be paid at the Step 3 rate for a Class I position - \$13.28 per hour - for the duration of her summer school work.

On August 13th, the Grievant started her new job as Faculty Secretary. When she received her first paycheck, she realized that she was receiving \$14.43 an hour, which was the Class II rate at Step 2. She inquired why she had not received a step increase during the prior summer, and was told the District's consistent practice had been to place promoted employees on the step of the schedule providing at least a one step increase in pay over their former rate. The dispute in this case is whether Gierke should have been awarded a step increase in her old position as of July 1st, to Step 4 of Class I - \$15.02 - in which case she would have been placed at Step 3 of Class II upon her promotion - \$15.07.

Association Arguments

The Association takes the position that the Grievant remained an employee of the District at all times. Her new job began as of the start of the new school year. Prior to that point, she was an employee, who had given a year of satisfactory work in her jobs in Class I. Thus, she was entitled to a step increase as of July 1, and at all times thereafter should have been treated as being at Class I, Step 4 of the pay schedule. When she moved to her Class 2 position at the start of the year, the step providing an increase would have been Step 3.

The Association dismisses the District's arguments as inconsistent with the language of the contract and the realities of the compensation system. The District complains that the Grievant shouldn't be treated as having moved to Step 4 during the summer of 2007, because she never actually received the Step 4 rate of pay. However, all continuing employees, including those on leaves of absence, have official rates of pay, and the Grievant's official rate after July 1st would have been \$14.38. The District's theory of this language would lead to the absurd result that, had the Grievant promoted on the second day of the school year, rather than the first, she would have received the step and the promotional increase, but because she promoted as of the first day, she received only the promotional increase.

The record shows that the Association proposed the promotional language of Article X to limit the size of pay raises for employees who were moving up two classifications and prevent very large windfall wage increases. This is the purpose stated in the correspondence transmitting the language to the District. It was never intended to deny employees their normal step increases for a year of good service simply because they had also posted into another position. Nor, contrary to the District's arguments, has it ever been interpreted that way. Of the prior cases examined during this proceeding, five involved employees who were already at the top of the schedule in their former classification, and could not have received any step increase. Two others were negotiated reclassifications, not promotions. Three others were processed in manner consistent with the Association's interpretation. There is no case which supports the District's theory. Even if there were, the Association suffered from disorganized leadership in the past, and the present leaders plausibly testified that they were unaware of any such practice.

District Arguments

The District denies any violation of the contract, and argues that it has treated the Grievant the same as all other promoted employees. The contract clearly provides for initial placement of a promoted employee at "...the step of the higher classification which would provide a minimum of a one step increment in their current pay classification." The Grievant was making \$13.28 and upon taking her new job, she

was paid \$14.43, or five cents per hour more than the next highest step in the Class I pay range. She never at any time made \$14.38, which is the rate the Association claims she should have been treated as making. The contract also provides that, after the initial placement, step increases will be paid as of July 1st – “...s/he will *then* move one step on the wage scale effective July 1.” This is a promotion case and the arbitrator should enforce the specific language governing compensation upon promotion. He should reject the Association’s attempt to read the contract as providing a two step increase upon promotion, something that is mentioned nowhere in the contract.

Even if the Arbitrator concluded that the contract was ambiguous, he should be mindful of the fact that it is the Association that drafted the disputed provision, and thus it is the Association that should bear the brunt of any ambiguity. Moreover, the District contends that past practice supports its interpretation, since every prior case is consistent with its reading of the language. The Association must be held to have known of this practice, which reaches back to the early 1990’s, as some of the promoted employees have been members of the bargaining team and/or officers of the Association. By its acquiescence in the past practice, the Association has acknowledged the propriety of the District’s interpretation. The arbitrator should therefore dismiss the grievance.

DISCUSSION

The question in this case is what the Grievant’s salary was prior to her promotion on August 13th. The District’s theory is that her salary was \$13.28, the Class I, Step 3 rate she had been earning at the close of the prior school year in June. The Association believes the appropriate rate was \$14.38, the Class I, Step 4 rate she would have been entitled to in Class I after July 1. Both parties appeal to the plain language of the contract. The Association argues that Article X, Section 2 clearly provides that employees who have completed a satisfactory year of employment will receive a step increase effective July 1. The District points out that the language of Section 3, specifically governing promotions, states that initial placement should be at the point in the schedule providing at least a one step increase over the current salary, and that step increases will then follow in succeeding Julys.

The District’s focus on the structure of Section 3 is misplaced. While it is true that the specific governs the general, and therefore the provisions for compensation on promotion would trump the general compensation provisions of the contract if the two conflicted, there really is no dispute over what Section 3 says or means, and no inconsistency between Sections 2 and 3. The parties agree that upon promotion she is entitled to an increase equal to at least one step in her former classification. The issue here is whether the Grievant was first entitled to a step increase in her former pay

grade as of July 1, 2007, even though she was not actively employed in that grade on that date.¹ That turns on the wording of Section 2, not Section 3.²

Either party's interpretation is permissible under the language of Article X, although the language of Section 2, on its face, provides greater support for the Association than it does for the District. The contract states that movement is "effective July 1 each year" while the letter sent to the Grievant stated that she would no longer hold her Class I jobs "effective with the 2007-2008 school year." The District contends that it treats July 1 as the start of the next school year, and that there is support for its interpretation in the way in which it has handled past promotions.

The District argues that it has a long-standing past practice of using the pay rate from the former school year, and not crediting any July 1 step increase, when promoting employees for the following school year. On the contrary, I find what little relevant information can be gleaned from past practices supports the Association. Four of the nine cases presented by the District were directly negotiated placements as part of a contract settlement that reduced the number of pay classifications. In three of those instances, the affected employees stayed in the same jobs. Those four cases do not shed much light on how the contract language is intended to work in cases of promotion. In two other cases, the employees were already at the top step of the pay classification when they were promoted. Under either party's theory, they could not have received a step increase in their former pay grade because there was no step for them to advance to. In two other cases, the employees were promoted at the beginning of September, after the school year had started. They received a step increase for satisfactory performance in the prior school year upon the commencement of regular employment for the school year, and a promotional increase upon moving into their new positions. This, too, is consistent with both party's theories. Since those employees had actually worked in the lower pay classification for a few days, they were entitled to a step increase, and when they were then promoted, that was the rate from which the promotional increase was calculated.

The final case is that of JoAnn Chowaniec, who was promoted from a Class III Faculty Secretary to a Class IV Principal's Secretary. According to the District, the promotion was effective July 1, 2003. She went from a 2002-2003 wage of \$15.73 to a 2003-2004 wage of \$16.75. In order for her to have reached that level, she had to have been credited with a step increase – to the Step 6 wage of \$16.39 – and then have received a promotional increase. Otherwise, she would have been placed at Step 3 of

¹ While she was working a summer school job in Classification I, summer employment is not treated as regular employment for purpose of step increases.

² For this reason, I do not address the argument that ambiguous language should be construed against the drafter. There is no evidence of which party drafted Section 2.

Class IV (which coincidentally was also \$16.39) as that would have been the Step in Class IV providing at least one step increase over her prior wage. This is consistent with the Association's theory and inconsistent with the District's theory.

In sum, the evidence of past practice shows one case in which an employee who was eligible for a step increase in their lower classification and promoted at the start of the school year did not receive the step and then the promotional increase. That case was the result of contract negotiations over the consolidation of the salary schedule, not the result of applying the contract language to an employee moving through an established schedule. There is only one case that is directly comparable to the Grievant's, and in that case the step was awarded and then the promotional increase was paid, in the same fashion as the Association claims should have been done here. Thus, there is no past practice proving the District's theory, and but a single instance supporting the Association. Even though promotions are relatively rare in this bargaining unit, a single case will not make out a binding practice. Examination of prior instances provides some support for the Association, but it cannot be held to be determinative.

In concluding that the Association's interpretation of this language is the more plausible, I am influenced by the fact that the District's interpretation makes relatively little sense when applied to two identically situated employees, both being paid \$13.28 at Step 3 in Class I, and both interested in a Class II position. Assuming a promotional opportunity presents itself for a job starting at the beginning of the school year, and assuming that both apply, the one who is selected would be the one who has relatively better ability, experience and qualifications – in short, the one the District believes to be the better candidate.³ Under the District's theory, that person would not receive a step increase on July 1st, and would be paid \$14.43 upon promotion. If, after the start of the school year, another Class II vacancy occurred, and the lesser candidate applied and received the job, that person would be paid \$15.07, because they would have received their step increase from July 1, and then received the promotional increase. So, even though the second applicant was less qualified and would, by definition, always be less experienced in the Class II job than the first applicant, he or she would be paid more both at the start and forever thereafter. That is an extremely odd result, yet it must occur under the District's theory of the language.

The weight of the record evidence persuades me that the step increase for satisfactory prior service is distinct from the promotional increase received for moving to a higher paying classification. Article X, Section 2 is reasonably clear, and calls for the payment of the step increase effective July 1, which is prior to the date on which the Grievant's promotion took effect. The evidence of past practice is scant, in that

³ Article VI, Section 4 provides that promotions will be based on these factors, with seniority as a tie breaker if the candidates are relatively equal.

eight of the nine cases provided are distinguishable from the Grievant's in important ways. The one case which is on point supports the Association's reading of the language. Finally, consideration of the practical effects of adopting one party's theory over the other mitigates against the District's theory, since it would lead to results which could fairly be characterized as harsh or absurd.

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

AWARD

1. The Grievant was not assigned to the correct salary rate in accordance with Article X of the collective bargaining agreement, upon her promotion in the 2007-2008 school year. The Grievant was assigned a rate of \$14.43, while the correct salary rate for the year should have been \$15.07.
2. The appropriate remedy is to make her whole for the difference for all hours worked.
3. The arbitrator will retain jurisdiction for a period of thirty days following the issuance of the Award, for the sole purpose of resolving disputes over the remedy.

Dated at Racine, Wisconsin, this 13th day of May, 2008.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator