

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
RHINELANDER EDUCATIONAL SUPPORT PERSONNEL

and

SCHOOL DISTRICT OF RHINELANDER

Case 65
No. 67887
MA-14048

(Biesterveld Grievance)

Appearances:

Mr. Fred Andrist, Executive Director, Northern Tier UniServ, 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501-1400, on behalf of the Association.

Ruder Ware, L.L.S.C., by **Attorney Dean R. Dietrich**, 550 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of the City.

ARBITRATION AWARD

The Rhinelander Educational Support Personnel (herein the Association) and the School District of Rhinelander (herein the District) are parties to a collective bargaining agreement covering the period from July 1, 2006 to June 30, 2008, which provides for binding arbitration of certain disputes between the parties, and which was in effect at the time of the events at issue herein. On April 2, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a dispute concerning the posting and filling of a Scholarship Secretary II position at the high school by the District. The undersigned was appointed to hear the dispute and a hearing was conducted on July 17, 2008. The proceedings were not transcribed. The parties filed initial briefs by August 27, 2008 and reply briefs by September 17, 2008, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issue. The Association would frame the issues as follows:

Did the District violate the Master Agreement, particularly Articles 8 and 9 when they posted this position as temporary and did not hire Ms. Biesterveld?

If so, what is the appropriate remedy?

The District would frame the issues, as follows:

Whether the District violated Article 8 and Article 9 of the Labor Agreement when it assigned secretarial work to Bassette?

If so, whether the District violated provisions of Article 9 – Job Postings, Paragraph A – Posting when it selected Bassette to perform the work of the Scholarship Secretary on a temporary basis?

The Arbitrator frames the issues, as follows:

Whether the District violated Articles 8, Section F. and Article 9, Section A. of the collective bargaining agreement when it posted the Scholarship Secretary position as a temporary position?

If so, whether the District violated Article 9, Section A. when it selected Chris Bassette over Renee Biesterveld for the position?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 2

Management Rights

The Board possesses the sole right to operate the District and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

- A. To direct all operations of the District
- B. To establish reasonable work rules and schedules of work
- C. To hire, promote, transfer, schedule and assign employees in positions with the District

...

F. To maintain the efficiency of District operations

...

J. To determine the kinds and amounts of services to be performed as pertains to District operations, and the number and kind of classifications to perform such services

...

L. To determine the methods, means, and personnel by which District operations are to be conducted

Article 8

Seniority and Reduction in Force

A. Seniority: Seniority shall commence upon the last date of hire in the District and shall be based upon the actual length of continuous service for which payment has been received by the employee.

...

F. Temporary Employees

1. A temporary employee is one who is hired for a specific period of time and to perform a temporary specific job, not to exceed six (6) months. Temporary employees are not covered by the terms of this Agreement.

...

2. The board shall not use temporary employees to avoid hiring regular bargaining unit employees.

Article 9

Job Postings

A. Posting: The Union will be notified within twenty (20) days following a vacancy if such a vacancy is going to be eliminated or posted. When a vacancy in a bargaining unit position is to be filled or a new position is created within the bargaining unit, the District agrees to post a notice of

such vacancy or new position at each school for five (5) days on a bulletin board reserved for Association notices, before posting to the general public. The vacancy will not be filled until the notice has been posted at all work sites for at least five (5) working days. Employees may apply for vacancies to obtain additional hours up to a maximum of eight (8) hours per day or forty (40) hours per week, if possible, based upon the employee's current work schedule. Seniority within the bargaining unit shall be the determining factor for all positions applied for within the respective category defined in Article 8. Bargaining unit employees applying for positions outside of their category defined in Article 8 shall be given preference over non-bargaining unit employees, if the bargaining unit employee qualifies. If two (2) or more bargaining unit employees are similarly qualified, the most senior employee shall be awarded the position.

BACKGROUND

The Rhinelander School District employs a full-time bargaining unit employee to fill the position of Scholarship Secretary. The Scholarship Secretary works with students, parents, colleges and the scholarship foundation in the process of assessing eligibility for and distributing approximately \$300,000.00 of scholarship funds annually. At the time of the events herein, that position was held by Sue Grannan.

In February 2007, a meeting was held regarding the status of the District's scholarship program. The meeting included the District Administrator, Roger Erdahl, the District Personnel Director, Chuck Radtke, the Guidance Counselor Cheryl Hanson, and a representative of the Citizens' Scholarship Committee, Kathy Richards Best. At the meeting, Richards Best indicated that the committee was frustrated because the scholarship program was not being properly managed and necessary work was not getting done. Erdahl was sensitive to the committee's concerns and told Radtke additional staff was needed to get the scholarship work done correctly and in a timely manner. As a result, the District hired Chris Bassette as a temporary employee to work with Grannan on the scholarship program. Since the position was temporary, the District was not required to post and fill the position in accordance with the provisions of Article 9. Radtke subsequently met with the Association leadership, explained the circumstances and assured them that the temporary hire was a one-time fix. Bassette's position expired after the period for awarding scholarships had ended.

In the 2007-08 school year, Radtke retired and was replaced by Marta Kwiatkowski, the Director of Business Services, in handling personnel matters with the support staff. Further, Cheryl Hanson was replaced as Guidance Counselor by Nicky Meyer. In November, 2007, Richards Best contacted the administration again and expressed her dissatisfaction over the fact that the scholarship processing was still not being completed timely or satisfactorily. As a result, Erdahl directed Kwiatkowski to correct the problem. Kwiatkowski determined that it was again necessary to add a temporary clerical position to insure that the scholarship work

would be completed on time. Since Kwiatkowski did not know Bassette, she determined to post the position. Bassette responded to the posting, as did Renee Biesterveld, the Grievant herein, who was a part-time Library and Instructional Paraprofessional. Biesterveld had greater seniority than Bassette. Kwiatkowski reviewed the qualifications of the two applicants and selected Bassette, primarily due to her greater availability during the school day and the fact that she had satisfactorily served in the position the previous year. Biesterveld filed a grievance on the basis that the position was actually regular, rather than temporary, and that, due to her seniority and qualifications, she should have been awarded the position. The matter was advanced through the grievance procedure to arbitration. Additional facts will be referenced in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Association asserts that the language of the contract defines a temporary employee as one hired for a specific period not to exceed six months. The clear language of the contract and the clear meaning of the term “temporary” establish that the position of Scholarship Secretary II was, in fact, a regular position. As such, it was subject to the contract and should have been filled in accordance with Section 9.A. Had the position been posted and filled as specified in the contract, Ms. Biesterveld should have been awarded the position over Ms. Bassette because she had more seniority. The District claims that Bassette is more qualified, but that is only due to the fact that she was given the position in the previous year, as well. In fact, the only qualification for the position is a high school diploma. Beyond that, Biesterveld has extensive clerical experience and computer training and would have been qualified for the position in 2006-07 if it had been posted then. The District claims that Biesterveld would not have been able to fill the position because her existing schedule limited the number of hours she was available to work, but the Association believes it was possible to adjust her schedule, which would have allowed her to complete the duties of the Scholarship Secretary. The Association asserts that if the grievance is not sustained, it will permit the District going forward to create temporary positions, place their preferred candidate in the position and, later, make the position permanent and award it to their preferred candidate based on previous experience as a temporary employee. The result will be to undercut the principle of seniority and allow the District to effectively avoid the requirements of Section 9.A in posting and filling positions.

The District

The District asserts that it did not violate the contract in awarding the Scholarship Secretary position to Chris Bassette. The District’s management rights permit it to direct all operations of the District, including ability to hire and the kinds and amounts of services to be provided. The District hired Sue Grannan to do the scholarship work and she did not complete the work, so the District hired Bassette temporarily to finish the work. The District did not hire a temporary employee in order to avoid hiring a bargaining employee, but only to meet its obligations to the students applying for scholarships in the short term.

The District asserts that Bassette's position was temporary and, therefore, Article 9 did not apply. In 2006-07, Bassette worked from March until May. In 2007-08, she worked 15 hours per week, up to two hundred fifty hours. In each case, the assignment was less than six months. It is irrelevant that the position was filled two years in a row. In many cases, temporary positions reoccur from year to year. Here, the District hired Bassette due to unforeseen circumstances because Grannan did not do her job. Grannan received a poor performance evaluation and the District has developed a plan to avoid the situation in the future.

In the event Article 9 is held to apply, the District believes that Bassette was the more qualified applicant, primarily because her schedule permitted her to work in the afternoons at the same time as the Guidance Counselor and when she would be accessible to students. Biesterveld's schedule precluded her from being at the high school before 2:00 p.m., or 1:30 p.m. at the earliest, so she would only be able to spend 5 - 7.5 hours per week working with students and, thus, could not meet the requirements of the position.

The Association in Reply

The Union asserts that the District has slashed positions to the point that the available employees cannot get the necessary work done. If additional employees are to be hired to get the work done, the District should hire a regular part-time employee to do the work, inasmuch as the problem has arisen two years in a row. This is not comparable to a recurring need for temporary summer help, two different positions, or a temporary need to replace an employee on leave. The District perhaps could not have anticipated the need in 2006-07, but did not have the same excuse in 2007-08. Further, giving the incumbent regular employee a bad performance review does not create the time necessary for her to do the assigned work. This should be a regular part-time position. Biesterveld was the senior qualified applicant for the position and could have performed the work if the District had adjusted her work schedule. She should have been awarded the position and the grievance should be sustained.

The District in Reply

The Association's assertion that the District is trying to avoid hiring bargaining unit positions by hiring temporary employees is pure speculation. There is no history of such practice and the District was only taking temporary steps to solve an unanticipated problem. This was well within the District's management rights. Further, Bassette was the most qualified employee for the position because she was available to work the hours the position required. Bassette also had the work skills for the position and performed the work well in 2006-07. This is not a case of the District being understaffed, but of a regular employee who did not do her job, putting the District in a short-term need of a temporary employee to get the work done. The Association does not cite authority to counter the case law supporting the District's position. Further, the proper definition for temporary is found in the contract - a position existing for six months or less. The Scholarship Secretary position fits squarely into the definition of temporary and the grievance should be denied.

DISCUSSION

In this case, the District, on two occasions, created a temporary position for a Scholarship Secretary to assist the regular employee performing that function because the work was not getting done and the deadline for awarding scholarships was approaching. There is no evidence that the District ever hired a temporary employee to do this work prior to 2007. The Association believes that this situation arose as a result of staff cutbacks in the District in recent years, which resulted in the remaining staff being overworked. The Association contends, therefore, that this will be a recurring position and should be treated as a regular part-time position subject to the posting and filling provisions of Section 9.A. The District asserts that the position was created to resolve a temporary, limited-term problem, that it believes it has resolved the underlying problem that created the need and that it should not be necessary to hire an employee for the position in the future.

The record does not reflect any intent on the part of the District to use the temporary employee provision as a means to select a particular employee for a temporary position and avoid the posting and filling language in Section 9.A. Section 8.F. defines a temporary employee as “one who is hired for a specific period of time and to perform a temporary specific job, not to exceed six (6) months.” The parties negotiated this language into the contract and it must be given appropriate weight in determining whether the Scholarship Secretary position is properly regarded as “temporary.” The language is specific. The characteristics of a temporary employee are: 1) an employee who is hired for a specific time period, 2) to do a specific job, 3) for no more than six months.

Here, the grievance alleges that when the District created and filled a temporary Scholarship Secretary position for the second year in a row it became, in effect, a regular position and should have been filled in accordance with the provisions of Section 9.A. The contract language, however, makes no distinction between regular and temporary positions based on whether they exist from year to year. And, as the Association points out in its brief, arbitrators will be guided by particular or colloquial meanings to terms that parties adopt in their agreements.

The Scholarship Secretary position was created specifically to assist in the processing of scholarships during the late fall and spring of the school year. It was scheduled for up to fifteen hours per week, to a maximum of 250 hours, or approximately seventeen weeks. At fifteen hours per week, this position would last for approximately four months and one week. There is no evidence that it existed for more than six months. Thus, the parameters of the position falls into the definition of a temporary employee set forth in Section 8.F. The fact that the position was created and filled two years in a row is, in my view, irrelevant in this instance. This is not dissimilar to situations where an employer has need for seasonal help from year to year, such as for mowing lawns or to serve as lifeguards at outdoor swimming pools. Certainly, the character of the work is different, but it is of a type that arose during a specific time of year when a particular type of work, scholarship processing, had to be done. After the scholarship “season” ended, the position was no longer necessary and was eliminated.

Since the position could properly be considered as temporary, the language of Section 8.F. controls. That provision makes it clear that temporary employees are not subject to the collective bargaining agreement. Thus it is within the purview of the District, under its management rights, to select an employee of its choice, from within or outside the bargaining unit and without reference to the requirements of Section 9.A., to fill the position. In this case, it selected Chris Bassette, who had held the position the previous year and who was available to work the hours the position required. On its face, this was not an unreasonable decision and it was within the discretion of the District to make.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The District did not violate Articles 8, Section F. and Article 9, Section A. of the collective bargaining agreement when it posted the Scholarship Secretary position as a temporary position. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 15th day of December, 2008

John R. Emery /s/

John R. Emery, Arbitrator

