BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COUNCIL #10 (SECRETARIAL/CLERICAL EMPLOYEES)

and

BOARD OF EDUCATION OAK CREEK-FRANKLIN JOINT SCHOOL DISTRICT

Case #76
No. 69214
MA-14531

Appearances:

Ted Kraig, Executive Director, Council #10, 13805 West Burleigh Road, Brookfield, WI, 53005, appearing on behalf of Council #10 (Secretarial/Clerical Employees).

Mark L. Olson, Buelow Vetter Buikema Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, WI 53186, appearing on behalf of Board of Education Oak Creek-Franklin Joint School District.

ARBITRATION AWARD

The Board of Education Oak Creek-Franklin Joint School District, hereinafter District or Employer, and Council #10 (Secretarial/Clerical Employees), hereinafter Association, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Association, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to provide a panel of seven WERC Commissioners or staff members from which they could jointly select an arbitrator to hear and resolve a dispute between them regarding the decision of the District to promote an individual other than the Grievant. Commissioner Susan J.M. Bauman was so selected. A hearing was held on May 7, 2010, in Oak Creek, Wisconsin. The hearing was transcribed. The record was closed on August 2, 2010, upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties were unable to agree on a statement of the issue and agreed that the arbitrator could frame the issue based on the evidence and arguments presented. The Association proposed the following statement of the issue:

> Did the Employer violate the contract when it selected a non-bargaining unit candidate for the secretary 1 position at East Middle School instead of the bargaining unit candidate Jody Rossmann, and if so, what is the remedy?

The Employer proposed the following statement of the issue:

> Did the School District violate the terms of Article XIV, Section 1 of the 2008-2009 contract when it did not award the East Middle School secretary 1 vacancy to grievant Jody Rossmann in August 2009.
>
> If so, what is the appropriate remedy?

The undersigned adopts the following statement of the issue:

> Did the Employer violate the collective bargaining agreement when it hired an employee from outside the bargaining unit to fill the Secretary 1 position at East Middle School instead of the Grievant in 2009? If so, what is the appropriate remedy?

BACKGROUND

The facts in this case are largely undisputed. On June 25, 2009, the District promulgated an Internal Posting for a Secretary 1 position at East Middle School. As school was no longer in session, the District followed the provisions of the collective bargaining agreement which required that the posting be mailed to the home of all employees in the bargaining unit timed so as to allow employees seven (7) calendar days from the date of mailing to consider application for the position. On its face, the Internal Posting stated that the Application Deadline was July 2, 2009.

The Grievant, Jody Rossmann, is a library clerk at East Middle School, a position that she has held for over five years. Ms. Rossmann was on vacation at the time the announcement was mailed, and did not receive the position posting until July 7th, 8th or 9th. During the Grievant's vacation, a friend called her, advised her of the availability of the position and said that she was applying for the position. As Ms. Rossmann did not want to compete with her friend for the position, she did not submit a letter of interest to the District by July 2, 2009 and, instead, watched on-line postings on WECAN to see if the District had posted the position to external candidates. Ms. Rossmann assumed that if the position was posted on WECAN, her application would not be in competition with that of her friend.[1]

On July 14th, having observed that the position was posted for external applications, the Grievant submitted a letter of interest in the position to Dr. Larson pursuant to instruction that she received from the District office during a phone call she placed on the same day as she noticed that the position had been posted on WECAN. The letter of interest was submitted the following day. Upon submission of the letter of interest, Ms. Rossmann was advised that she would have to undergo some testing, arrangements for which she made the same day.

Sometime in August, Ms. Rossmann received a phone call from a friend who advised that the position in question had been filled by Amy Lee, an employee in the District who was in another bargaining unit. Ms. Rossmann filed a grievance regarding her non-selection on August 14. The grievance was denied and the matter proceeded to arbitration.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE IV – MANAGEMENT RIGHTS

The Board possesses the sole right to operate the school system 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:

1. To direct all operations of the school system;
2. To establish reasonable work rules;
3. To hire, promote, transfer, schedule and assign employees in positions within the school system;
4. To suspend, demote, discharge and take other disciplinary action against employees, for just cause;

[1] In fact, the friend did not apply for the position.

5. To relieve employees from their duties because of lack of work or any other legitimate reasons;
6. To maintain efficiency of school system operations;
7. To take whatever reasonable action is necessary to comply with State or Federal laws;
8. To introduce new or improved methods or facilities, or to change existing methods or facilities;
9. To determine the kinds and amounts of services to be performed as pertains to school system operations, and the number and kind of positions and job classifications to perform such services;
10. To contract out for goods and services;
11. To determine the methods, means and personnel by which school system operations are to be conducted;
12. To take whatever action is necessary to carry out the functions of the school system in situations of emergency;
13. It shall be the responsibility of the Board to maintain safe and healthful working conditions. Employees shall cooperate with the employer in maintaining these conditions;
14. To place personnel on the salary schedule as to their experience and qualifications. They may further waive Technical Requirements as they deem necessary.

. . .

ARTICLE XIV – PROMOTIONS AND TRANSFERS

1. Whenever it becomes necessary to make a promotion, fill a vacancy, or fill a new position in the bargaining unit, the Board will post such position for a period of five (5) working days on the bulletin boards established herein or by notification of all unit employees. During non-school periods, such postings shall be mailed to the homes of all employees using the most recent address which the employees have provided to the District Office. Mailings will be sent out so as to allow employees seven (7) calendar days from the date of mailing to consider application to the position.

2. Promotions to another job classification shall be determined on the basis of relative ability, experience, and other qualifications as substantiated by an employee's personnel records including his/her performance appraisals. Where qualifications are relatively equal, seniority shall be the determining factor.

3. An employee, upon being promoted to a higher position, shall serve a probationary period of up to sixty (60) days in the classification. An employee who does not satisfactorily complete the probationary period shall be returned to his/her former classification and former rate of pay. In the event the Board determines an employee is not qualified to fill a position before the end of the sixty (60) days, the Board reserves the right to return this employee to his/her former rate of pay.

4. The administration reserves the right to transfer personnel within the school system at their discretion. The transfer of employees shall not result in a decrease in pay.

5. The parties may mutually agree to extend the probationary period.

DISCUSSION

This is a contract interpretation case. At issue is whether the Grievant, Jody Rossmann, should have been awarded the vacant position of Secretary 1 at East Middle School in August 2009 despite the fact that she did not make application for the position within the seven (7) calendar days specified in Article XIV, Section 1 of the collective bargaining agreement. It is the contention of the Association that the Grievant should have been hired pursuant to the language of Article XIV, Section 2 which provides that "[p]romotions to another job classification shall be determined on the basis of relative ability, experience, and other qualifications as substantiated by an employee's personnel records including his/her performance appraisals. Where qualifications are relatively equal, seniority shall be the determining factor." For the purposes of this arbitration proceeding, the parties have entered into a stipulation such that Ms. Rossmann's qualifications for the position are not at issue:

> The District will not take the position that Jody Rossmann was unqualified for the Secretary 1 position at East Middle School during the May 7, 2010 arbitration concerning her grievance or in related briefs. It is understood that this stipulation relates only to this specific grievance arbitration date and any related briefs and not to any future consideration of Rossmann's qualifications.

It is the position of the Employer that, inasmuch as the Grievant failed to make application for the position in question during the posting period, or by the application deadline of July 2, 2009, the provisions of Article XIV, Section 2, are not applicable and although Ms. Rossmann was an internal candidate, her seniority was not a consideration and the District could place the most qualified person in the position.

In a contract interpretation case, the arbitrator's analysis must begin with the contract language itself. If the language is clear and unambiguous, the analysis ends and a decision can be rendered. In the instant case, the language can be interpreted in the manner advocated by both the Association and the District. Accordingly, it is necessary to look at extrinsic evidence including past practice and bargaining history. Additionally, both parties cite arbitration awards on related matters.[2]

Turning first to the question of past practice, the record evidence shows that for all vacancies filled for the school years 2005 – 2006 through 2009 – 2010, the only time an internal applicant (bargaining unit member) failed to apply for a position by the application deadline, was the instant case when Jody Rossmann did not apply by July 2, 2009. In all other instances of the District's hiring an outside candidate either no internal candidate applied for the position or an internal candidate applied by the application deadline but did not meet the qualifications for the position.[3] Although Association members testified that, to their knowledge, applications for positions had been made by bargaining unit members after the application period had closed and they were hired into those positions based on seniority and qualifications, there is no evidence that such is the case. It is clear that there is no clear practice of the District to give the preference to bargaining unit members that the Association seeks to persons who apply after the application deadline. Past practice provides no guidance in resolving this dispute.

Accordingly, we turn to bargaining history. In a proposal to the District on February 28, 2006, Council #10 proposed modifications to Article XIV. The 2003-2004 language read as follows:

> Whenever it becomes necessary to make a promotion, fill a vacancy, or fill a new position in the bargaining unit, the Board will post such position for a period of five (5) working days on the bulletin boards established herein or by notification of all unit employees. During non-school periods, such postings shall be mailed to the home of all employees using the most recent address which the employees have provided to the District Office.

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[2] At the outset, I note that the language of Article XIV Section 1 states: "Mailings will be sent out so as to allow employees seven (7) calendar days from the date of mailing to consider application to the position." This language could easily be read to require that a member of the bargaining unit apply during that period of time, as they are given a specified period in which to consider application, and presumably apply for the position in question. In the instant case, however, the applicant applied after the specified time period and the Employer accepted and processed the application. The Employer did not argue that it did not have to accept and consider the application. Since that question is not before me, I do not render an opinion as to the obligation of the Employer to accept the application.

[3] Indeed, in the filling of the position at issue herein, an internal candidate, Maggie Nachitgall, did apply before the application period closed but she failed to meet the qualifications for the position.

> Promotions to another job classification shall be determined on the basis of relative ability, experience, and other qualifications as substantiated by an employee's personnel records including his/her performance appraisals. Where qualifications are relatively equal, seniority shall be the determining factor.
>
> . . .

The Association proposed the following modifications:

> Add to the first paragraph:
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> Mailings will be sent out so as to allow employees at least five (5) working days to consider application to the position.
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> Add a new second paragraph:
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> District employees will be given first consideration for all open vacancies. Promotions to open jobs shall follow the procedure outlined in Section 2. Qualified District employees will be hired before a position is posted to the general public.

The parties agreed to an addition to the first paragraph: "Mailings will be sent out so as to allow employees at least seven (7) calendar days from the date of mailing to consider application to the position." They did not, however, agree to the additional language which provides that first consideration for a position should be given to existing employees under all circumstances.

It is the position of the Employer that the language which was rejected in bargaining in 2006 has the effect that the Association is now seeking through arbitration. The Employer correctly notes that it is a basic arbitral principle that an Association cannot obtain through grievance arbitration that which it failed to achieve at the bargaining table. The Association's representative at the time of these negotiations, Jason Mathes, had no recollection of the proposal. The District's Human Resources Director, Paul Vance, testified that the District rejected the proposal in order to maintain its right to hire external candidates after the contractual posting period. The Association appears to argue that Mr. Vance's testimony is self-serving and points out that the language could have been related to expansion of contractual rights of employees for transfers as well as for promotions.

Neither the lack of recollection of the bargaining proposals by any Association representative nor the fact that the District's representative was willing to express the opinion that the language at issue might have expanded rights upon transfer as well as in promotional situations negates the fact that the Association made a bargaining proposal to the effect that the District could never hire an external candidate for a

position if there was a qualified internal applicant implies that the Association was aware that, under some circumstances, an external applicant could obtain a position when there was a qualified internal applicant. The practice of the District, as demonstrated in the above-referenced hiring information from 2005 through 2010, is that a qualified internal applicant who applies for a position during the application period will be hired over an external candidate, even when the position has been posted externally. The 2006 bargaining proposal sought to expand the protection of internal candidates. The clear language of Article XIV only provides for a five working day application period, presumptively a "protected" period during which internal candidates have priority over external candidates. Inasmuch as the proposal was not included in the successor agreement between the parties, the bargaining history clearly supports the position of the District.

The Association cites FOND DU LAC SCHOOL DISTRICT, A/P M-97-198 (Rice, 8/20/97) to support its contention that the District herein violated the terms of the collective bargaining agreement in failing to promote Rossmann into the Secretary 1 position. The relevant contract language under consideration in that situation provided:

ARTICLE VII
POSTING OF VACANCIES

A. Whenever a vacancy occurs, or it is known that a new job will be created, all employees shall be notified of such vacancies, along with a brief description of the classification and the qualifications and skills necessary for the classification.

B. Employees shall have five (5) work days following the date of notification to apply for the posted position.

C. Selection of an employee to fill the job vacancy shall be determined by the employee's qualifications, skills, ability, current work record and seniority.

When two (2) or more employees have applied for the vacancy, and where the factors as outlined above are essentially equal, the employee with the greatest seniority shall be selected to fill the vacancy.

. . .

In FOND DU LAC SCHOOL DISTRICT the Grievant was passed over for a position when the Employer determined that an outside candidate was better qualified and hired him instead of the Grievant. In that case, there was no question about the timeliness of the application for the position: it was made within the five day period. Arbitrator Rice determined that, under those circumstances, absent a finding that the Grievant was not qualified for the position in question, the Employer could not consider outside applicants for the position.

The FOND DU LAC SCHOOL DISTRICT case does not support the position of the Association in the case before this arbitrator inasmuch as the Grievant herein failed to meet the threshold for consideration which was met in FOND DU LAC: applying for the vacancy during the period specified in the collective bargaining agreement. The instant case is more similar to that cited by the Employer, RICE LAKE AREA SCHOOL DISTRICT, MA-5951 (Burns, 8/10/90), in support of its interpretation of the collective bargaining agreement. The relevant language in the collective bargaining agreement at issue therein provided:

> ARTICLE VIII – SENIORITY
>
> SECTION 6 – PROMOTIONS
> All new and vacated positions shall be posted at each school for a period of five (5) working days. Such posting shall state the job to be filled, the date the job is to be filled, qualifications for the job and the rate of pay. Interested employees may apply for posted vacancies by notifying the business office, in writing, during the posting periods specified above.
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> SECTION 7 – FILLING OF VACANCIES
> 1. Vacancies shall be awarded to the most senior full-time employee qualified to perform the work available. The qualifications of employees are matters of fact and include physical fitness, knowledge, skill and efficiency.
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> . . .

Arbitrator Burns interpreted this language:

> In adopting the language of Article VIII, Section 6, the parties have recognized that an employe, such as the Grievant, has a right to receive notice of position vacancies so that the employe may apply for such vacancies. The parties have further recognized that an employe who wishes to apply for a position does not have an unlimited amount of time in which to make an application. Rather, such application must be made with five working days of the date of the posting. Since the purpose of the posting is to provide notice, the undersigned is persuaded that the intent of Article VIII, Section 6, is to limit the application period to a period of five working days from the date that an employe knew or should have known of the vacancy.

Similar to the argument made by the Association in the instant case, the Union in RICE LAKE AREA SCHOOL DISTRICT argued that Section 7 of the applicable contract clause provided that vacancies are to be awarded to the most senior full-time employee qualified to perform the work. Arbitrator Burns stated:

> However, Article VIII, Section 7, does not exist in a vacuum and must be construed in a manner which is consistent with the other provisions of Article VIII. To give effect to both Section 6 and Section 7 of Article VIII, it must be concluded that the rights afforded by Section 7 are only available to employes who have made a timely application for a vacancy.

In finding that the Grievant had failed to make timely application for the position in question, Arbitrator Burns found that the District had not violated the collective bargaining agreement when it refused to consider the Grievant's application for the position at issue.

The Association argues that the language at issue in the instant matter is different from the RICE LAKE AREA SCHOOL DISTRICT case in that the language of Article VIII Section 6 is specific that interested employees "may apply for posted vacancies by notifying the business office, in writing during the posting periods..." Arbitrator Burns found that the Rice Lake Area School District did not violate the collective bargaining agreement by not considering the Grievant's application because it was not made during the application period. The Association is correct that this is a distinction between the cases, but it does not resolve the matter in the Association's favor. The Oak Creek-Franklin School District accepted Ms. Rossmann's application and processed it, including testing Ms. Rossmann's qualifications. The case before the undersigned is not, as it was in RICE LAKE, a question of whether the application should be accepted. Here, the question is whether the preference for internal candidates found in Section 2 of Article XIV is applicable when the application is not made within the application period.

In interpreting the language of a collective bargaining agreement, it is necessary for the arbitrator to give effect to all portions of the agreement, to construe the document as a whole. The Association herein argues that the language of Article XIV Section 1 imposes a requirement on the District to post job vacancies and to allow a pre-determined amount of time for members of the bargaining unit to make application for the position. The Association argues that this section of the agreement does not impose any requirements upon members of the bargaining unit to only apply during the specified application period, and that the advantage that they have as members of the bargaining unit to obtain open positions has no time limitations. As attractive as this might be, the bargaining history makes clear that this was proposed during negotiations and rejected by the District. Under these circumstances, it cannot be the proper interpretation of the language.

The Association argues that the plain language of the contract does not require that a bargaining unit employee apply within the posting period to have priority rights to a position. Unfortunately, the Association's argument must fail. Management has retained all its rights that are not specifically modified by the terms of the collective bargaining agreement. Accordingly, in order for the priority rights to a position to exist absent application during the posting period, there must be clear language to that

effect. The Association's argument attempts to undermine the very clear language of the management rights clause: "The Board possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this contract and applicable law." There is no specific provision that provides for the preference or priority of existing employees except when application is made during the posting period.

The Association also contends that its position is fair and equitable. It argues that the District could easily have hired the Grievant for the position of Secretary 1 at East Middle School. Of course the District could have hired Ms. Rossmann. The question is whether the District was obligated to hire her. Such is not the case. The Association also contends that the contract interpretation it seeks places no great burden on the District and that the fact that seniority is highly valued by the Association should have priority over any alleged burden to the District.

I do not find these arguments to be persuasive. This is a contract interpretation case for which the outcome must be based in the contract, not the values of the Association or the relative burdens on the District. Nevertheless, the arguments raise some interesting points. As an employer, the District has an obligation to seek the most qualified candidates for positions within the District, absent restrictions that it has agreed to in the course of collective bargaining. Here, it is clear that it has agreed that existing qualified employees will be promoted or transferred based on seniority, all other circumstances being equal, if application is made during the time provided in Article XIV Section 1. It has also agreed, as demonstrated by its practice for at least the last five years, that it will not hire an outside candidate for a position if there is a qualified bargaining unit member who has applied for the position during the posting period. To find that the Employer must hire any qualified bargaining unit member for a position, regardless of when that bargaining unit member makes application, would bind the District's hands in a way to which the District has not agreed to be bound. If bargaining unit members retained their preference beyond the posting period, at what point could the District hire an outside candidate? Could the District go through an entire qualification testing/interviewing/reference checking cycle and be on the verge of offering the position to an outside candidate when an internal candidate suddenly indicated interest in the position? In such a case, it would appear the Association contends the internal candidate gets the position. Or, is the Employer required to provide notice to internal applicants that it is about to fill the position with an external candidate, so as to allow last minute applications? What section of the collective bargaining agreement requires this? Interestingly, the Association argues that had the District "immediately filled the position with an external candidate before Ms. Rossmann applied on July 14, 2009, the Association would not have reasonably complained or disputed the District's decision." The Association's position makes it crystal clear that there must be a defined period during which the preference for

qualified internal applicants applies.[4] The parties have negotiated the posting period in Article XIV Section 1 to address that issue.

While neither of the scenarios posited is present in this instance, they could happen if the Association were to prevail. Certainly, the parties are free to bargain a variation on the current situation which would allow internal applicants a preference period should they apply after the posting/application period. They could also agree to a longer posting period so as to address the concerns the Association raises about Ms. Rossmann's having been on vacation at the time that the position was announced.[5] However, they have not done so. I find that having failed to apply during the contractual application period, Ms. Rossmann's application was treated properly, without any preference provided to her because she was an internal candidate.[6]

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The Employer did not violate the collective bargaining agreement when it failed to award the vacant Secretary 1 position at East Middle School to Jody Rossmann. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 21st day of September, 2010.

Susan J.M. Bauman /s/
Susan J.M. Bauman, Arbitrator

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[4] What position would the Association take if an offer of employment had been made to an external candidate on the same day that Ms. Rossmann applied? Would that offer have to be withdrawn? Would the time of day that the application or the offer was made be determinative?

[5] I find the Association's argument that Ms. Rossmann was on vacation and had no way of knowing of the posting or applying for the position to be rather disingenuous given the Grievant's testimony that she was told of the position and determined that she would not apply because she did not want to compete against her friend for the position.

[6] The Association also argues that Ms. Rossmann was qualified for the position. The record evidence does not support this statement. Rather, the record contains a stipulation to the effect that for the purposes of this arbitration proceeding, the District will not take the position that Ms. Rossmann was unqualified for the position. In its reply brief, the District takes issue with the Association's argument that Ms. Rossmann was qualified and, in fact, states that she was not qualified. Were I to have found that the District violated the collective bargaining agreement in not giving Ms. Rossmann preference as an internal candidate, this dispute would have to be resolved as part of the remedy. However, given my finding that after the posting period the District is free to hire the most qualified applicant without regard to bargaining unit status, I need not address the meaning of the stipulation or whether Ms. Rossmann was qualified to perform the duties of Secretary 1 at East Middle School.

SJMB/dag
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