BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE SCHOOLS

and

EAU CLAIRE SCHOOLS CLASSIFIED STAFF FEDERATION, LOCAL 4018, WFT, AFL-CIO

Case 76
No. 69641
MA-14687

Appearances:

Hawks, Quindel, S.C., Attorneys at Law, by **Timothy E. Hawks**, 700 West Michigan Street, Milwaukee, Wisconsin, appeared on behalf of the Union.

Davis & Kuelthau, Attorneys at Law, by **Kirk D. Strang**, 10 East Doty Street, Madison, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Eau Claire Schools Classified Staff Federation, Local 4018, WFT, AFL-CIO, herein referred to as the "Union," and Eau Claire Schools, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission (herein "WERC") to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Eau Claire, Wisconsin, on July 12, 2010. The parties agreed to file post-hearing briefs, the last of which was received November 18, 2010.

ISSUES

The parties agreed to a statement of the issue as follows:

What is the appropriate seniority date for the disputed Partnership Coordinators?

FACTS

The facts are undisputed. The Employer is a Wisconsin school district. The Union represents various non-supervisory, non-professional employees of the Employer. The Employer employed a number of employees in the position of Partnership Coordinators none of whom were in the bargaining unit represented by the Union. On March 10, 2009, the WERC issued an order accreting those employees employed by the Employer in the position of Partnership Coordinators in the bargaining unit represented by the Union. Thereafter, the parties agreed to include the Partnership Coordinators under the terms of the parties' collective bargaining agreement, but could not agree as to how their seniority should be determined pursuant to Section 7.02 of the collective bargaining agreement. They did agree that pursuant to Section 7.02 those Partnership Coordinators hired on or after September 26, 2002, would have their seniority start as of March 10, 2009, the date they were first included in the bargaining unit. However, there were approximately nine Partnership Coordinators who were hired prior to September 26, 2002, about whom they could not agree. The parties agreed to submit the dispute directly to arbitration, bypassing the grievance procedure.

RELEVANT AGREEMENT PROVISIONS

2002-04 AGREEMENT

Section 7.02 – Seniority

> An employee's seniority is the period of continuous employment in the Bargaining Unit. Employment is not considered interrupted by school recess. An employee does not accrue seniority while on a leave of absence except as specifically agreed elsewhere in this agreement. The Board will provide a seniority list to the Union President annually by December 1 and inform the Union President of any changes in the list when the changes occur. Employees, where hiring choices are restricted, such as Head Start shall not accrue seniority. If employment continues beyond the period of restricted hiring choice, the seniority shall revert back to the first day of work.
>
> An employee's seniority shall be based on the employee's date of hire. Adjustments will be made for any leave of absence during which no seniority is accrued.

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2004-07 AND LATER AGREEMENTS

. . .

Section 7.02 – Seniority

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If hired prior to September 26, 2002, an employee's seniority shall be based on the employee's date of hire. If hired on September 26, 2002 or later, an employee's seniority date shall be based on the employee's date of hire as a bargaining unit employee. Adjustments will be made for any leave of absence during which no seniority is accrued.

. . .

POSITIONS OF THE PARTIES

Union

Section 7.02 has always read that seniority is "the period of continuous employment in the Bargaining Unit." In the 2004-07, the parties agreed to add specific language relating to the seniority dates of particular members hired before September 26, 2002. Section 7.02 is ambiguous and, therefore, the arbitrator should look to the history and other extrinsic evidences. It is ambiguous because the two separate provisions of Section 7.02 could be read to contradict each other. Alternatively, it is ambiguous because the exception provision was never intended to apply to the situation at hand. Also alternatively, it is ambiguous because of the newly added Section 11.03 which defines an "employee" as a member of the bargaining unit. Under that provision, it is arguable that only bargaining unit members can accrue seniority. As the seniority list reflects, all employees hired prior to 2002 had their seniority fixed as the date they entered the bargaining unit, even if the Employer hired them at an earlier date in some other bargaining unit. The sole reason for the exception was a situation which arose when the Employer illegally deducted union dues from temporary employees performing unit duties. The purpose of the language was solely to give those employees seniority for the period that they paid union dues. The negotiation history including, but not limited to, the memorandum of understanding pre-dating the new language in Section 7.02 supports that view. Employees in the currently named Bilingual Education Assistant positions were added to the bargaining unit in the 2004-07 negotiations. Seven of those twenty employees had been hired prior to September 26, 2002, but were given seniority only from the date they were added to the bargaining unit. Other testimony also supports the view that the parties have always started

seniority as of the date that employees first enter the bargaining unit. There are five other examples of employees who were treated in this manner. Schone, Steuck and Thune were employees in the bargaining unit at the time the new exception was added. Their seniority dates should have been recalculated since each was hired prior to September 26, 2002. The parties did not recalculate their seniority. Similarly Smoczyk and Thorson were employed by the Employer prior to September 26, 2002, but entered the unit after the 2004-07 agreement was adopted. Each received a seniority date commensurate with the date each entered the bargaining unit. The annual seniority lists show no changes which would be required to correct seniority dates were the Employer's theory correct. The Union asks that the accreted employees' seniority be applied effective the date that they were added to the bargaining unit.

Employer

The disputed employees' seniority should be treated as commencing as of their date of hire without regard to when they were included in the bargaining unit. The arbitrator should apply the plain meaning of the Section 7.02. The language is not ambiguous. It plainly sets forth the standard for determining seniority as the date of hire and specifically applies a different standard of date of inclusion in the unit for those hired after September 26, 2002. These distinctions make the meaning itself undeniable. Section 5.09 limits the authority of the arbitrator to applying clear terms without deviation.

Alternatively, the evidence of the meaning of the provision also supports the position of the Employer. First, the language should be given its ordinary meaning. Specifically, the term "date of hire" should be given its ordinary meaning. Second, the arbitrator should make that interpretation which does not leave terms of the agreement in dispute as without meaning. Under the Union's view, employees can only be "hired" when they are hired into the bargaining unit. But this interpretation would leave the September 26 language without meaning. Third, the language should be construed against its drafter, the Union. The evidence indicates that the Union proposed this language in negotiation leading to the 2004-07 agreement. It was adopted without change. The prior provision simply read:

An employee's seniority shall be based on the employee's date of hire.

The bargaining history establishes that the original seniority language was based on the date of hire, but that the Union proposed to have two methods of determining seniority.

The Union points to a memorandum to former Director Human Resources Jim Kling from the then-Union president, Pam Campbell, dated September 26, 2002, that date of hire as a bargaining unit employee is the sole determinate. However, she testified that the memorandum had nothing to do with the language proposal described above. Instead it had to do with the issue of collecting dues from temporary employees who were not in the bargaining unit. This was an entirely different issue. In any event, the Union's later proposal to adopt the current seniority language ignored the temporary/permanent employee issue. The new provision, therefore, extinguished any possible contradictory implication by the memorandum.

The Union's anecdotal evidence does not support the Union's position. There is only one employee of those discussed by the Union who could support the Union's position, Lynn Christianson. However, the evidence concerning that person does not support the Union's case.

The Union asserted that Jody Smoczk supported their position. The evidence concerning her is irrelevant, however. She was hired before September 26, 2002, in a temporary position in Head Start and came into the bargaining unit after the disputed change to Section 7.02. Head Start employees do not earn seniority under the other express terms of the Section 7.02. Thus, her history is irrelevant.

The Union offered testimony that Lynn Christianson had been one of the employees improperly charged dues and who had her seniority date changed under the new provision. She came to the Union and the Employer after its adoption and claimed that the language applied to her. The parties adjusted her seniority date to include her temporary service in a position which was not of a type which would have been in the bargaining unit if it were permanent. This is what should be done for the partnership coordinators in dispute.

The circumstances of the English as a Second Language Assistants (ELL) do not support the Union's position because the parties actually negotiated a separate seniority clause for them in Section 7.02 in the 2004-07 agreement.

There is no evidence that the parties intended in the 2004-07 negotiations that the disputed revision of Section 7.02 be applied retroactively. Thus, the anecdotes about those employees who were hired into positions outside the unit and who came into the unit before those 2004-07 negotiations are irrelevant. Some of its example employees would not have qualified for seniority adjustments because of other limitations in the agreement.

Employer Reply [1]

The Union's claim that the disputed language is limited to situations involving employees who had Union dues deducted from their pay check is simply not supported by the language or the rules of contract construction. First, the more specific language of the September 26, 2002 distinction should govern over the general language of the statement of policy in the first sentence of Section 7.02. Second, the general context of the provision supports the Employer's view. All of the other provisions in Section 7.02 relate to specific exceptions to seniority. Thus, the disputed provision should also be viewed as a specific exception. Third, the Union's view leaves some of the language of this provision as meaningless.

The Union's proposed interpretation of Section 7.02 is contrary to the evidence. Contrary to the Union's position, it is not clear that the parties were ever consistent in how

[1] The Union did not file a reply brief.

they applied seniority prior to the addition of the disputed language in the 2004-07 agreement. Ms. Campbell's memorandum of September 26, 2002, is not limited to concern over dues being deducted from so-called "temporary" employees; it also expressed concern that "previous officers may have indicated that seniority begins to accrue at the date of temporary *or* permanent hire." Her memorandum thus sought to grandfather affected persons and to change the "past practice," rather than perpetuate it. This suggests that Ms. Campbell's testimony that the reason was limited to those who had dues deducted appears to be only half of the reason for her September 26, 2002, correspondence. The parties agreed not only to language concerning employees hired before September 26, 2002, they agreed to language concerning those hired after that date.

The Union's argument that the meaning of the language should be based on its subjective intent is without merit. The Union's subjective intent is not self-evident. The Union's argument that there would have been far greater discussion within the Union over the table had the language had general applicability does not change the fact that the Employer accepted the language as it was written.

The Union maintains that if the Employer were correct, the seniority date for all members hired before September 26, 2002, would need to be changed. The record establishes that the parties have negotiated separate seniority issues over the years and have not always used the same measure to resolve those issues. The record concerning the 2004-07 agreement does not indicate that the parties intended to make the new language retroactive.

There is no proof that this change was a change in past practice. Union leaders before Ms. Campbell approached seniority differently than she did. Dues were being deducted from so-called "temporary" employees which conduct she wanted to stop. Those facts do not speak to the proposal Ms. Campbell actually made in the 2004-07 contract negotiations.

The individual employee experiences cited by the Union do not support the Union's position. The employees cited by the Union did not earn seniority for other reasons, came into the bargaining unit before the 2004-07 contract was negotiated, or, like Lynn Christensen, were given the full benefit of the Employer's interpretation with both parties' blessing. Accordingly, the Employer's interpretation of the disputed provision should be adopted.

DISCUSSION

Section 7.02 defining "seniority" says that "seniority" is the period of "continuous service" in the bargaining unit. This language has been in the parties' collective bargaining agreement as long as anyone can remember. In negotiations leading to the 2004-07 agreement, the parties added a separate exception in another paragraph which specifies seniority for employees hired prior to September 26, 2002 is their "date of hire." I conclude that this latter exception does not apply to the employees in dispute because the language was intended to have limited rather than general applicability. The disputed employees are not in the class of employees to whom it was intended to apply.

It is the responsibility of the arbitrator to apply the agreement of the parties as it is written. If a provision is ambiguous, the arbitrator has to determine what the parties intended when they wrote that provision. A provision in a collective bargaining agreement is ambiguous if it is fairly susceptible to more than one interpretation. An ambiguity can be patent; that is, obvious from the language itself. An ambiguity can also be latent; that is it becomes only apparent when it is applied to a set of facts. If the agreement is ambiguous it is the responsibility of the arbitrator to determine the correct interpretation and apply it. The arbitrator also applies time honored principles of contract interpretation in order to make that determination. As is relevant here, the arbitrator looks to the context of the specific provision, the scheme of regulation of the agreement as a whole, the bargaining history of the provision, any agreement of the parties, and their "past practice."

The concept of "past practice" is defined and its application discussed in NAA, *The Common Law of the Workplace: The Views of the Arbitrators* Sec. 2.20 (BNA, 2d. Ed); see, also, Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements" 1961 Proceedings of the National Academy of Arbitrators, page 31 (BNA, 1961). In essence, a "past practice" is a pattern consistently undertaken in recurring situations so as to evolve into an understanding of the parties.

Section 7.02 contains seniority provisions which are contradictory on their face. It contains the following three sentences:

> An employee's seniority is the period of continuous employment in the Bargaining Unit.
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> . . .
>
> If hired prior to September 26, 2002, an employee's seniority shall be based on the employee's date of hire. If hired on September 26, 2002 or later, an employee's seniority date shall be based on the employee's date of hire as a bargaining unit employee.

As it relates to the situation in dispute, the second two sentences may fairly be read as an explanation or modification of the first sentence. In that case, it would apply to employees who come into the bargaining unit after the language was adopted. It is also possible to read the two sentences as contradicting each other. This is a patent ambiguity. It is possible that the second paragraph is time limited while the first sentence is not. For example, it is also possible that the parties did not expect that anyone else would come into the bargaining unit who was hired before September 26, 2002. Thus, there is a latent ambiguity as to whether this language continues to provide an exception for employees who come into the bargaining unit after a certain date, but who had been originally hired prior to September 26, 2002. This is particularly true in labor relations where "grandfathering" provisions are common. A "grandfathering" provision is one intended to make a change applicable to circumstances which occur after a certain date, but not those affected by the same circumstances prior to that

date. The relevant language of Section 7.02 is in a form common to grandfathering provisions.

The conflict was not created by the disputed change in the language of Section 7.02. There was a similar conflict in the language of the predecessor agreement. It read:

> An employee's seniority is the period of continuous employment in the Bargaining Unit.
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> . . .
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> An employee's seniority shall be based on the employee's date of hire.

These sentences on their face are flatly contradictory as to employees hired in a position not in the bargaining unit and who came into the bargaining unit while remaining in continuous service. The evidence of past practice demonstrates that the parties under the former language historically limited the seniority of employees who came from non-bargaining unit positions into the bargaining unit to the date they took a position in the bargaining unit. Campbell testified that she was aware of no circumstance under the prior provision in which employees were given a different seniority date. The specific examples of employees who did come into the unit at that time are consistent with that past practice.

The circumstances surrounding the adoption of the current Section 7.02 are in dispute. The provision as it existed prior to the 2004-07 agreement is listed above. Pam Campbell was the president of the Union at that time. James Kling was the Employer's personnel director. Campbell testified in this proceeding, but Kling was no longer employed by the Employer and unavailable as a witness. Campbell testified that to her knowledge all employees who had ever come into the bargaining unit under the former Section 7.02 had their seniority date commence from the date they were first employed as a member of the bargaining unit even if they had been employed by the Employer before coming into the bargaining unit. She had a meeting with Kling on August 28, 2002, in which she discussed the fact that Union dues were being deducted from employees who were hired into non-unit temporary positions which, if permanent, would have been part of the bargaining unit. She and Kling agreed to have seniority start for all employees when they first came into a permanent position in the bargaining unit. They agreed to have seniority for those who had their dues deducted start at the date they first were hired in a temporary position. After that meeting she composed and sent a memorandum dated September 26, 2002 summarizing what their conversation had been, the substance of which memorandum is as follows:

> As discussed in our meeting on August 28, 2002, I am requesting that seniority for the Support Staff Union 4018 be accrued by strictly following the current contract language which states, "An employee's seniority is the period of continuous employment in the Bargaining Unit," which should be interpreted as the first day of <u>permanent</u> employment by the District in a bargaining unit

> position. The only exception to this is in regard to positions with restricted hiring practices. As stated in the contract, "Employees, where hiring choices are restricted, such as Head Start shall not accrue seniority. If employment continues beyond the period of restricted hiring choice, the seniority shall revert back to the first day of work." As indicated, the seniority date would revert back to date of the first day of permanent employment by the District.
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> I would also like to clarify that the date used for longevity and vacation accrual is the hire date with the school district, whether employment began in a permanent or temporary position. The only exception would be individuals hired from CESA, such as Educational Interpreter/DHH, Terry Halida, who would refer to their CESA hire date, the COTA's and Cindy Schaaf-Milne.
>
> I understand that previous officers may have indicated that seniority begins to accrue at the date of temporary ***or*** permanent hire. For those individuals affected by this instruction, I would request that their accrued seniority be grandfathered into their seniority date, however, from this date forward, the past practice will no longer be recognized by the parties as of the date of this memo.
>
> I am pleased that we are able to agree on this matter in order to clarify the situation and come to a mutual decision and recommendation. If you have any questions regarding this request, please contact me.

Kling assented to that memorandum. Thereafter, on March 24, 2004 (more than a year later) in the negotiations leading to the 2004-07 agreement, the Union proposed to add the English as a Second Language Assistants to the bargaining unit and to add the disputed language to Section 7.02. Campbell's subjective intent in making this proposal was to keep seniority essentially as the date employees first became permanently employed in a position in the bargaining unit except for those employees who had been charged dues. As to those employees, the purpose was to grant seniority from the date they were hired. The change to Section 7.02 was adopted without question or discussion from the Employer. Kling was the lead spokesperson in those negotiations. The ESL Assistants were added to the bargaining unit eventually and the parties expressly agreed that their seniority commence as of the date they came in the unit but be staggered by one day to distinguish their length of overall service with the Employer among the ESL Assistants. [Thus, the most senior had his or her seniority start on the day he or she came into the bargaining unit while the second and successive less senior ESL Assistants had his or her seniority delayed by one successive day.]

I conclude Campbell's testimony is entirely credible. However, a fair reading of the September 26, 2002 memorandum indicates that Kling's view of the situation was somewhat different than Campbell's. [2]

It is important to note that the situations described in Campbell's testimony, where the Employer deducted dues from a limited group of non-unit employees and, thus, treated them as if they are in the unit and where the Union may have previously confused employees as to what their seniority would be if they came into the bargaining unit, are both circumstances in which it is hard to draft collective bargaining agreement language defining the class of employees affected. This is true because Sec. 111.70(3)(a)3, Stats, may make a provision providing different seniority for employees based on dues payment unlawful. The new language of Section 7.02 is consistent with an effort to deal with a limited class of employees.

The Union's subjective intent in proposing ambiguous language does not ordinarily establish its meaning. However, in this case, the preponderance of the evidence and the rules of construction support the view that the Employer shared essentially the same subjective intent. Mr. Kling negotiated the memorandum and participated in the negotiations leading to the adoption of the disputed language. Because he participated in the negotiation of the issues leading to the September 26, 2002 memorandum, it is likely that he would have expected that the Union would propose language to implement it. The language proposed referred to the same date as the date of the memorandum and that date has no other meaning.

If the seniority structure of Section 7.02 were interpreted as proposed by the Employer, it would be highly unusual. It is not uncommon to have seniority provisions which start when employees are first hired by the Employer (hire date seniority). It is not unusual to have provisions start when employees first come into the unit (bargaining unit seniority). The other specific exceptions of Section 7.02 are not unusual in collective bargaining agreements. However, it is highly unusual to have a mixture of the both hiring date seniority and bargaining unit seniority. Mr. Kling never questioned this proposal when it was presented. If he had

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[2] The Employer has correctly argued that the September 26, 2002, communication is ambiguous as to the affected class of employees. It argues that the paragraph:

> I understand that the previous officers may have indicated that seniority begins to accrue at the date of temporary *or* permanent hire. For those individuals affected by this instruction, I would request that their accrued seniority be grandfathered into their seniority date, (sic) however, from this date forward, the past practice will no longer be recognized by the parties as of the date of this memo.

It is not clear from the communication whether the Employer agreed that the "past practice" would end or that matter remained in dispute. Campbell's testimony credibly indicates that this paragraph refers to those temporary employees who had dues improperly deducted. It may affect others affected by any officer of the Union's misstatements about seniority. None of the employees involved herein had dues deducted and any such misstatement is irrelevant.

Thus, it is conceivable that Mr. Kling might have rejected the proposed change in "past practice." However, the fact that he did not question the Union's proposal in the 2004 negotiations makes it likely that he accepted the Union's view.

believed that he and the Union were still in disagreement after the September 26, 2002 correspondence, it is likely he would have discussed this proposal at length. In any event, it is more likely than not that he was acquiescing in the Union's purpose in this situation.

The evidence indicates that the parties mutually recognized that the provision had limited applicability. Neither party sought to apply this provision to retroactively grant seniority back to the date of hire to employees who prior to the 2004-07 agreement had had their seniority dates set at the date they came into the bargaining unit rather than an earlier hire date. As a practical matter, it is highly unlikely that the parties would have made this retroactive had they intended this to be a generally applicable provision rather than one applicable only to a limited group of employees.

Had the parties intended to create a generally applicable exception to seniority in accordance with the interpretation now espoused by the Employer, the simple construction would have been to only change the first sentence of Section 7.02 to read: "An employee's seniority is the period of continuous employment in the Bargaining Unit, except for those employees hired by the District prior to September 26, 2002 whose seniority date would be their actual date of hire." A review of the proposals made during the negotiations leading to the 2004 agreement indicates that the parties were of sufficient skill to have drafted the more concise language if they intended to have the exception have general applicability.

That the parties expressly contemporaneously negotiated the seniority date for all of the ESL employees coming into the unit (including those hired by the Employer prior to September 26, 2002) essentially on the basis of the date of entry into the bargaining unit implies, at the very least, that the Employer did not have a fixed view that every employee hired prior to September 26, 2002 should have his or her seniority based on his or her full service with the Employer.

The fact that the parties had some problems identifying the class of employees to whom the language should apply after it was adopted does not indicate that the parties intended that the language have continuing applicability. Lynn Christianson is a Secondary School Office Assistant. She has a seniority date of September 18, 1995 on the current seniority list. She was employed as substitute for one semester as a substitute special education assistant in 1993. In the fall of 1994 she was hired as a temporary education assistant for the full year. The position of permanent special education assistant is a position in this bargaining unit. In the August 1995, she subbed as a special education assistant. In September 1995 she was hired as temporary special education assistant for the remainder of the school year. In the fall of 1996 she was hired as a permanent special education assistant in the classified unit. The Employer correctly set her initial seniority date as the fall of 1996, the date she came into the bargaining unit. It is unclear whether she was identified in the 2002 dispute, but she was one of the employees who had been charged dues while in a temporary position which would have been in the bargaining unit if it were a regular position. In 2004, she inquired of the Union and the Employer as to whether she fell under the terms of the then newly negotiated provisions of Section 7.02 and whether she was entitled to have her seniority date adjusted. The parties

mutually agreed to adjust her date, but that adjusted date does not reflect all of her service. The evidence is insufficient to support either party's position herein. However, the fact that she did receive an adjustment and the new language was not retroactively applied to other employees with similar situations does support the view that the parties mutually agreed that the new language had limited applicability.

Accordingly, the better view of the evidence is that the parties mutually intended the disputed language to have limited applicability. The language is, therefore, not intended to apply to the disputed employees. Accordingly, the seniority date for the disputed employees shall be the date they were accreted into the bargaining unit.

AWARD

The seniority date of the Partnership Coordinators hired before September 26, 2002, shall be set as of the date that they were accreted into the bargaining unit.

Dated at Madison, Wisconsin, this 6th day of January, 2011.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

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