

BEFORE THE ARBITRATOR

-----  
 :  
 In the Matter of the Arbitration :  
 of a Dispute Between :  
 :  
 HURLEY SCHOOL DISTRICT :  
 :  
 and : Case 24  
 : No. 46352  
 : MA-6955  
 IRON COUNTY PUBLIC EMPLOYEES :  
 LOCAL 728-B, AFSCME, AFL-CIO :  
 :  
 -----

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40,  
Mr. Roger Myren, District Administrator, 15517 Range View Drive, Hurley,

1822 Lackawanna  
 Wisconsin

ARBITRATION AWARD

According to the terms of the 1988-91 collective bargaining agreement between Hurley School District (hereafter District) and Iron County Public Employees, Local No. 728-B, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving Jill Zaleski's opportunity to fill the Junior/Senior High School Secretary vacancy. The Commission appointed Sharon Gallagher Dobish as arbitrator and she made full written disclosures to which no objections were raised. Hearing was held at Hurley, Wisconsin on January 7, 1992. No stenographic transcript of the proceedings was made. The parties filed their written briefs by February 20, 1992. The parties waived their right to file reply briefs at the hearing.

ISSUES

The parties stipulated that the following issues shall be determined by the undersigned in this case:

Did the Employer violate the collective bargaining agreement and/or past practice by denying Jill Zaleski the opportunity to fill the vacant Junior/Senior High School Secretary position.

If so, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

### ARTICLE VI - PROMOTION

1. When a vacancy exists or a new position is created which the District wishes to fill, promotion to the new position or vacancy shall be according to seniority, provided the Senior Employee can qualify for the position to be filled and is physically capable to perform the work.
2. In the event a dispute should arise in the promotion of a qualified Employee with less seniority than some other qualified Employee, the matter shall be negotiated between the Employer and the Grievance Committee.
3. A notice of said opening shall be posted at least ten (10) days prior to the filling of said opening. Said notice shall contain the prerequisites for the position, and said prerequisites shall be consistent with the requirements of the position. Each interested Employee shall sign the notice, and provided the Employee can qualify for the position to be filled, they will then be considered according to their length of service with the Employer.
4. The Employee selected for the position shall serve a trial period of thirty (30) calendar days, to determine whether he/she is suited for the position. If during the thirty (30) day period the Employer decides the Employee is not suited for the position, or the Employee decides he/she does not want to remain in the position, he/she may return to his/her former position without the loss of any seniority. In this event, the next Senior Employee who signed the notice shall be given an opportunity for a trial period on the position.
5. When any position is abolished, the Employee whose position is abolished may displace any employee having less seniority, provided he/she is qualified to fill the position.

## FACTS

Ms. Jill Zaleski, the grievant, has been employed by the District since 1985. Zaleski was initially employed as a part-time substitute cook. For her first two years at the District, she worked two hours per day, two days per week during the school year. Thereafter, her hours were increased, until the 1991-92 school year, when she was made a full-time school year cook. Ms. Zaleski has a spotless work record with the District. In 1977, Zaleski earned a one year certificate as a Medical Transcriber at Gogebic Community College in Ironwood Michigan. In April, 1991, Zaleski received a certificate indicating she had completed 25 classroom hours in a course entitled "Introduction to Microcomputers" from Wisconsin Indianhead Technical College.

Prior to her employment with the District, Ms. Zaleski had been employed by various employers as a laundry worker, a head cashier at a movie theater, a

caterer's assistant, and a production line worker in a factory. In only one of these jobs (the cashier) had Zaleski done any clerical work. As head cashier for three years, Zaleski had done no typing or computer work but she had done some bookkeeping, inventory work and report preparation.

Since 1985, Zaleski has also been involved in volunteer work for various local organizations, including 4-H and the local Hockey Club, as a fund raiser, organizer, public relations worker, typist, recordkeeper and treasurer. Ms. Zaleski has never actually worked or been employed as a secretary during her work history.

In July, 1991, a vacancy was created by the resignation of the Junior/Senior High School Secretary. This was and is the only secretarial position at the Junior/Senior High School. The District did not post the opening. 1/ Rather, as had been the practice in the past, District Administrator Myren inquired of the incumbent District clericals whether any of them wished to move into the opening. Since none of the current secretaries expressed an interest in the job, the District placed ads in the local newspapers, again according to practice, which stated the qualifications for the job as follows:

1. Considerable experience in clerical, secretarial, and some bookkeeping work.
2. Computer experience; word processing, data base, and spread sheet understanding necessary.
3. Excellent communication skills with students, parents, and faculty members; conscientious and reliable work ethic.
4. Some college background preferred.

Ms. Zaleski saw this ad in the local papers and she asked District Administrator Myren if she could apply. Myren indicated that she could and that she could use her original employment application to apply for the opening but that she should submit a current resume. Zaleski timely submitted a current resume which contained her detailed work history information (summarized above). Zaleski was the only District employe who applied for the job.

The District delegated the task of analyzing the applications, interviewing applicants and making an initial recommendation regarding who the Board should hire to Dr. Mortenson, Junior/Senior High School Principal. Dr. Mortenson received 45 applications for the job which he reviewed along with the applicants' resumes. Zaleski was one of 39 applicants whose papers were reviewed by Mortenson and who did not receive an interview. Mortenson stated that his analysis of the 45 applications and resumes involved looking primarily for recent and/or current work experience in a secretarial position or positions. Mortenson stated that after the work experience factor, he looked for secretarial training and computer training and experience, communications skills and some college background. The person Mortenson selected, after interviewing the six most qualified applicants (in his opinion), was Susan Misconi. Ms. Misconi had worked as a secretary and computer operator for the F

---

1/ The parties agreed that no posting issue is before me. They have resolved this issue to the Union's satisfaction -- all vacancies will apparently be posted in the future.

& M Bank in Hurley for six years and for the 4 to 5 years prior thereto, she had worked as a secretary at a Title Company in Hurley. Mortenson then recommended that the School Board hire Misconi as his secretary based primarily on her 10 to 11 years of recent secretarial and computer experience. The Board took Mortenson's recommendation and hired Misconi.

On July 29, 1991, Dr. Mortenson sent Zaleski and the other 43 unsuccessful applicants a letter indicating Misconi had been selected for the vacancy. After receiving a copy of Dr. Mortenson's July 29th letter, Ms. Zaleski filed the instant grievance which was timely processed. The sole question before me, by agreement of the parties, is whether Ms. Zaleski should have been given the position in question pursuant to the language of Article 6 and/or past practice.

At the hearing herein, Ms. Zaleski and Local Union President Duane Levra, stated that they felt that Ms. Zaleski should have been given the position and allowed to try it out for a 30-day trial period based on the language of Article 6 and Zaleski's seniority. Ms. Zaleski admitted that she would have needed some training during this trial period, "like anyone" would have, and that she does not know what computer programs the District uses.

Both Levra and School Board member Mr. Gary Aimone stated that no other situation like this one has occurred in at least the past 10 years in the District: No other District employe has tried to use Article 6 to move from one type of support staff job to a different type of job (i.e. from a cook's job to a secretary's job) with the District. Board member Aimone also stated that it has been the Board's practice to select the most qualified person for each job based upon the District managers' analysis and recommendations to the Board.

#### POSITIONS OF THE PARTIES

##### Union

The Union asserted that pursuant to Article 6, Ms. Zaleski had a right to post for and receive the position of Junior/Senior High School Secretary and to serve a 30 day trial period in that job based upon her bargaining unit seniority (as well as her educational background and work history). The Union contended that the language of Article 6 is clear and unambiguous, that because Zaleski had a good work history with the District and because she had done some clerical work in the past and had some recent secretarial training and education, the District had a "reasonable expectation that (she) could do the job." Thus, the Union implied that these factors demonstrated that Zaleski was qualified for the opening. The Union pointed out that there no evidence of a past practice existed showing that a similar use of Article 6 had previously occurred. Therefore, the District should not be allowed to rely on any evidence of past practice to abrogate the clear meaning of Article 6.

Based on the record, the Union sought that the grievance be sustained, that Zaleski be placed in the position and that she receive back pay from July 29, 1991 forward.

##### District

The District contended that it has applied its normal, long-established practice here - to seek and select the best qualified applicant for the opening. In this regard, the District emphasized that its need for previous on-the-job secretarial and computer experience in the successful applicant was completely reasonable and comports with the District's past practices. The District asserted that Ms. Zaleski simply had not had sufficient recent

secretarial job experience to qualify her for an interview. Thus, the District felt that Zaleski was not qualified for the opening and that therefore (by implication) her seniority could not be used to bootstrap her into the position.

The District also noted that no other unit employe had ever attempted to use the language of Article 6 to gain what it termed "an automatic promotion," although the language of Article 6 has been stated in prior contracts exactly as it appears here. The District observed that during the past few years, it has filled three prior secretarial positions and the Union did not file grievances thereon pursuant to Article 6 or any other contractual provision. The District therefore urged that the grievance be denied and dismissed in its entirety.

#### DISCUSSION

I agree that the language of Article 6, Section 1 is clear and unambiguous, as the Union has asserted. Thus, the evidence of past practice proffered by the District is not admissible and may not be considered here to vary or modify the clear language of the agreement. However, I disagree with the Union's interpretation of the language contained in Article 6. Under generally accepted rules of construction used by arbitrators and judges, a provisional phrase such as the one in the first sentence of Article 6, Section 1, must be satisfied before the remainder of that sentence can operate. Thus, only if the "Senior Employee" (Ms. Zaleski) "can qualify for the position" and is "physically capable to perform the work" could she have been promoted to fill it, based on her seniority." Zaleski's seniority, therefore, could only have insured her the position if she had been otherwise deemed qualified to fill it. 2/

Absent specific language limiting the employer's discretion, traditionally, it is the Employer that retains the power, authority and duty to judge and to determine whether a senior employe is, in fact, qualified for a job opening/promotion under contractual provisions such as Article 6. The method and the means of determining employe qualifications is generally left up to the employer and may be based upon criteria the employer deems to be reasonable, absent specific contractual language limiting the employer's discretion in these areas. So long as the criteria used and the procedures followed by the employer are basically fair and regular, they will not be second-guessed or set aside by an arbitrator.

I note that in the instant case there is no contractual language limiting the District's powers to set the qualifications for job openings. In addition, Dr. Mortenson's approach to selecting the most qualified applicant for the job was reasonable on its face. All applicants submitted applications and current resumes, which Mortenson analyzed and compared before he cut 39 applicants (including Zaleski) out of further contention for the job. Given the type of job opening -- the sole secretarial/clerical position at the Junior/Senior High School office -- it was appropriate and reasonable for Mortenson to seek an individual with recent on-the-job secretarial/clerical work experience who could immediately perform most office tasks without intensive training.

Notably, Mortenson recommended and the Board of Education ultimately hired Misconi, who had had 10 to 11 years of recent secretarial/clerical/computer work experience at the time of her application.

---

2/ I presume Ms. Zaleski is physically capable of performing the job in question as there was no contention here that she was incapable.

Although Ms. Zaleski's work record as a food service worker had been excellent, the facts demonstrated that Zaleski had not had any recent on-the-job secretarial/clerical work experience at the time she applied for the opening in issue. In fact, the record showed that Zaleski had never worked in a paid secretarial position during her work life. In all of these circumstances, I cannot fault Dr. Mortenson's judgment that Ms. Zaleski was not sufficiently qualified to be interviewed for the position.

It should be noted that no evidence was submitted in this case to show that Dr. Mortenson (or the District) had applied the stated criteria in an arbitrary, capricious or discriminatory fashion, that he (or the District) had otherwise treated Ms. Zaleski differently than the other applicants or that he (or the District) had in any way discriminated against Zaleski. On the contrary, the evidence demonstrated that Zaleski was treated in the same manner as the 38 other applicants who were not deemed qualified and who therefore did not receive an interview.

My analysis of the meaning of the language of Article 6, Section 1 is further supported by language appearing later on in the same Article. In Article 6, Section 3 the provisional language of Article 6, Section 1 is repeated, as follows:

. . . Each interested Employee shall sign the notice, and provided the Employee can qualify for the position to be filled, they will then be considered according to their length of service with the Employer (emphasis supplied).

The above-quoted language demonstrates the parties intended to assume that a senior employe must otherwise be deemed qualified by the District before his/her seniority could be used to gain a promotion/vacancy based on seniority.

Also, Article 6, Section 4 describes the nature of the 30 day trial period that the senior employe is to receive in the vacancy. Specifically Section 4 states:

The Employee selected for the position shall serve a trial period of thirty (30) calendar days, to determine whether he/she is suited for the position . . . (emphasis supplied).

The parties' use of the words "is suited," shows that the trial period was not designed as a time period when a senior employe could prove that he/she is qualified for the position. Rather, the trial period described in Article 6 was designed to allow either the employe or the employer to elect to return the employe to his/her former job not because the employe is not qualified to perform the work, but because other aspects of the job or the job environment make it uncomfortable, inefficient or otherwise inappropriate to retain the employe in the job. 3/ Had the parties intended the trial period to be essentially a qualification or a training period, they could have expressly indicated this intent by using the words "is qualified," "is trained", or words to that effect. The parties chose not to do this. Although the parties used the words "can qualify" in Article 6, Sections 1 and 3, this language taken alone, does not compel a conclusion that the trial period (described in

---

3/ The employe who receives a trial period, absent specific language to the contrary, must generally be qualified and be able to step into and perform the job with only a minor period of familiarization with job procedures.

Article 6, Section 4) must be deemed to be a period of qualification or training. Such an intent was not expressed clearly and the language of Section 4 expressly demonstrates the parties' intent to the contrary.

Having found Zaleski unqualified for further consideration for the opening, the District had no responsibility to give her the job for a 30-day trial period. As stated above, the remainder of Article 6 only becomes operational if the senior employe is first found "qualified" for the vacancy. Zaleski was not found qualified. 4/ In all the circumstances of this case and based upon the relevant evidence and argument, I issue the following

AWARD

The Employer did not violate the collective bargaining agreement or past practice by denying Jill Zaleski the opportunity to fill the vacant Junior/Senior High School Secretary position.

The grievance is, therefore, denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 7th day of April, 1992.

By \_\_\_\_\_  
Sharon Gallagher Dobish, Arbitrator

---

4/ The fact that Zaleski had recently taken some courses in office procedures does not mean that she was thereby qualified to perform the Junior/Senior High School Secretary job.