

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
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 MATC TEACHERS' UNION LOCAL 243, : Case 77
 WFT/AFT, AFL-CIO : No. 45794
 : MA-6756
 and :
 :
 MADISON AREA TECHNICAL COLLEGE :
 :

Appearances:

Mr. Steve Kowalsky, Staff Representative, Wisconsin Federation of Teachers, appearing on behalf of the Union.
 Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Jon Anderson, appearing on behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and College or Employer respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on February 26, 1992 in Madison, Wisconsin. The hearing was not transcribed. Afterwards, the parties filed briefs and the Employer filed a reply brief, whereupon the record was closed June 19, 1992. Based on the entire record the undersigned issues the following award.

ISSUES

The parties stipulated to the following issues:

1. Did the District violate the provisions of Article IV, Section C, paragraph 5 (a) of the 1989-91 labor contract when it maintained that Ms. Sprecher had accrued, but not acquired seniority rights as of February 26, 1991?
2. If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-91 collective bargaining agreement contained the following pertinent provisions:

ARTICLE IV

Dues Deduction and Seniority

. . .

Section C - Seniority

. . .

5. Replacement Contracts

a. Contracts may be offered to replace contractual staff on leave as defined in Article VIII. The teacher being replaced and the reason for the opening shall be clearly indicated in the offered contract and in the announcement for such vacancy. Replacement teachers shall accrue, but not acquire, one year's seniority after two continuous semesters. If the replacement teacher is offered a contract for the second year, he/she shall acquire seniority rights dating back to the date of initial employment in the previous year.

BACKGROUND

The District uses replacement teachers to replace regular teachers who take leaves of absence. For example, a teacher who takes maternity leave is replaced by such a teacher. Before 1979, there was no language in the labor contract regarding seniority for replacement teachers and said teachers did not have seniority rights. In 1979, the parties decided to grant seniority rights to replacement teachers. However, since the process for hiring replacement teachers can sometimes be shorter and less stringent than the hiring process for regular teachers, the parties decided to treat the seniority of replacement teachers differently from that of regular teachers. Regular teachers acquire seniority immediately upon beginning employment. Replacement teachers do not. This case deals with replacement contracts and the specific language in the labor contract relating to when replacement teachers acquire seniority.

FACTS

The facts are undisputed. Brenda Sprecher was a replacement teacher for the second semester of the 1989-1990 school year and the first semester of the 1990-1991 school year. She was offered and accepted a contract for the second semester of the 1990-1991 school year.

In February, 1991, Sprecher asked Human Services Director Kenneth Niemeyer a question concerning her seniority status. Niemeyer responded to Sprecher with the following memo:

I am writing in response to your question regarding your seniority date. I have reviewed your file and find that you received a contract for the second semester of the 1989-90 school year as a replacement for John Rosenberg. In addition, you received contracts for both semester one and semester two of the 1990-91 school year as a replacement for Gaila Olsen.

Under the language found in the collective bargaining agreement, Article IV, Section C, paragraph 5 (a), you

have accrued seniority as a replacement teacher, but as of this date have not acquired seniority." (Emphasis in original).

Thereafter, the Union filed a grievance on Sprecher's behalf. The grievance stated the following:

It is the Union's position that Ms. Sprecher should acquire seniority rights dating back to the second semester of the 1989-90 school year. This position is based on application of Article IV, Section C-5-a (pp. 6-7, 1989-91 'Agreement').

The grievance was not resolved and was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

It is the Union's position that the Employer violated the contract when it determined that Sprecher had accrued but not acquired seniority (as a replacement teacher) as of February 26, 1991. In its view, Sprecher should have acquired seniority upon the offer and acceptance of a teaching contract for the second semester of the 1990-91 school year. In support thereof, it first relies on the contract language contained in Article IV, C, 5, a, and its reading thereof. According to the Union, the trigger point for a replacement teacher to acquire seniority is the offer of employment for the second year regardless of the length of employment. In the Union's view, the key is the offer of work and it is not particularly relevant what the length of the contract is. The Union argues that any other interpretation other than the one just noted would lead to harsh and absurd results. Next, the Union argues that the parties' bargaining history supports the Union's position here. It notes in this regard that the language involved here was placed in the contract in 1979 and has remained unchanged since then. It also notes that in 1987, the District tried to alter two parts of Article IV, C, 5, a. First, in the sentence dealing with accruing seniority, it proposed to change "two continuous semesters" to "three continuous semesters". Second, in the sentence dealing with acquiring seniority, it proposed to change "second year" to "second full year or fourth semester." Both proposed changes were ultimately dropped by the Employer. The Union contends that what the Employer is attempting to do here is get in arbitration that which it failed to obtain in bargaining. Finally, the Union disputes the Employer's assertion that a binding past practice exists on the clause in issue. According to the Union, there is no past practice whatsoever. In order to remedy this alleged contractual breach, the Union asks the arbitrator to sustain the grievance and order the District to recognize the grievant as having acquired seniority upon the offer and acceptance of contract number 422 (i.e. the one for the second semester of the 1990-91 school year). It also requests that the grievant be made whole for any losses suffered as a result of the District not recognizing her acquired seniority.

It is the Employer's position that it did not violate the labor contract when it determined that Sprecher had accrued but not acquired seniority (as a replacement teacher) as of February 26, 1991. According to the Employer, the applicable contract language (Article IV, C, 5, a) is clear and unambiguous concerning the circumstances under which a replacement teacher accrues and acquires seniority. In its view, its actions here were consistent with that language. The Employer believes that in order for a replacement teacher to acquire seniority, the replacement teacher must be offered a contract for the second year and not simply a portion thereof. It asserts that if the parties had meant for the replacement teacher to acquire seniority when offered a third contract of any duration, the labor agreement would have so stated. It notes that the labor agreement does not, however, so state. The Employer therefore

argues that the contractual language does not support the Union's position that the acquisition of seniority in Sprecher's case may be premised on receipt of a contract for the third consecutive semester. The Employer believes that in order for the Union to prevail herein, the arbitrator would have to amend the contract. The District argues in the alternative that even if the applicable contract language is held to be ambiguous, a clear, unequivocal and long-standing practice exists by the District. That practice, according to the District, is that the Human Services Department has administered the contract language involved here in the same manner, to wit: namely that replacement teachers have acquired seniority only after they have been given a replacement contract for the second year. The District notes that the Union offered no evidence that the College has ever treated any similarly situated replacement teacher differently than the grievant in this case. The District therefore argues that this practice demands that the grievance be denied. Finally, concerning bargaining history, the District argues that the evidence of bargaining history should not be considered as the language is clear and unambiguous. However, if the arbitrator construes the language to be ambiguous, the Employer submits that the evidence of bargaining history should be construed as an attempt, on the part of the Employer, to seek a clarification in the contract language and the principle of contract interpretation urged by the Union should not be employed. The Employer therefore requests that the grievance be denied.

DISCUSSION

At issue here is whether the grievant, a replacement teacher, has acquired seniority. The Association contends that she has while the Employer disputes this assertion. If it is found that the grievant has acquired seniority as a replacement teacher, then the Employer violated the contract by failing to credit her accordingly. On the other hand, if the grievant has not acquired seniority as a replacement teacher, then no contractual violation occurred.

In deciding this question, the undersigned will focus first on the applicable contract language. If that language does not resolve the matter, attention will be given to evidence external to the agreement, to wit: an alleged past practice and the parties' bargaining history.

Both sides agree that the contract language applicable here is Article IV, C, paragraph 5, a. That clause provides in pertinent part:

Replacement teachers shall accrue, but not acquire, one year's seniority after two continuous semesters. If the replacement teacher is offered a contract for the second year, he/she shall acquire seniority rights dating back to the date of initial employment in the previous year.

The first sentence cited above deals with how replacement teachers accrue seniority. By its express terms, it establishes that after a replacement teacher works for two continuous semesters, they have accrued but not acquired seniority. Said another way, if a replacement teacher works two continuous semesters, that teacher accrues seniority. The second sentence cited above deals with how replacement teachers acquire seniority. Specifically, it provides that in order to acquire seniority, the replacement teacher who has accrued one year of seniority must be "offered a contract for the second year." This means that if the replacement teacher, after having accrued seniority, "is offered a contract for the second year", that teacher then acquires seniority. In my opinion, the language just quoted (i.e. "is offered a contract for the second year") is clear and unambiguous in establishing two

necessary conditions for replacement teachers to acquire seniority: the first is that there be an offer of a contract and the second is that it be "for the second year." Both of these conditions must be met in order for a replacement teacher to acquire seniority.

Applying this language to the instant facts, there is no question that Sprecher satisfied the first condition (i.e. "offered a contract") since she was, in fact, offered a contract. The question here is whether the length of the contract she was offered satisfied the second condition. She was offered a contract for one semester, which happened to be her third consecutive semester.

In effect, she was offered a contract for part of a year. It is the Union's position that this contract was sufficient for Sprecher to acquire seniority. I disagree. In my view, the contractual language does not support the Union's position that Sprecher acquired seniority upon receiving a contract for a third consecutive semester. As noted above, in order to acquire seniority the replacement teacher must not only be "offered a contract", but in addition it must be a contract with a specific length or duration, namely one "for the second year." I believe it is implicit that "year", when used in the foregoing context, means a full year. Sprecher's contract was not for a full year, but was instead simply for part of a year, namely a semester. While the Union argues that Sprecher's individual contract was a contract "for the school year 1990-91", this contention overlooks the fact that the language just referenced is the boilerplate portion of the individual contract which was modified by the typed-in portion of the contract. The typed-in portion makes it clear that the contract was not for a full year but instead just for the "second semester only of the 1990-91 school year." Given the foregoing, it is held that the District correctly determined that Sprecher had not acquired seniority under the terms of the labor agreement as of February 26, 1991 because she was not offered a contract "for the second year."

If the parties had meant for the replacement teacher to acquire seniority when offered a third contract of any duration or for part of a year, they could have so stated. The labor agreement does not, however, so state. Additionally, the use of both the terms "semester" and "year" in Article IV, C, paragraph 5, a (the language governing the accrual and acquisition of seniority for replacement teachers) indicates that the parties understood the distinction between the two terms and, when drafting this language, did not inadvertently use the term "year" when describing what was needed to acquire seniority. It is a well-known arbitral principle that the parties' contract reflects their intent. The fact that the words "for the second year" were used indicates the parties intended them to have some meaning. In my view, the Union's interpretation that a replacement teacher acquires seniority on receipt of the third contract renders the words "for the second year" inoperative. In order for the Union to prevail herein, the Arbitrator would essentially have to amend the contract language to read that a replacement teacher acquires seniority if he/she "is offered a contract for part of the second year." Obviously, the Arbitrator is not empowered to make such a change.

It is therefore held that the pertinent contract language is clear and unambiguous and that the Employer's actions here were consistent with that language. As a practical matter, this finding disposes of the stipulated issue. In light of this holding, the undersigned sees no need to resort to evidence external to the agreement, specifically either an alleged past practice or the parties' bargaining history. Consequently, no comments will be made concerning same.

In so finding, the undersigned is well aware that the above holding results in a situation where replacement teachers can be issued a number of successive contracts with no acquisition of seniority. For example, at the hearing in response to a hypothetical presented by the Union, Niemeyer

acknowledged that Sprecher might not acquire seniority until the fifth semester. A parallel example is contained in the record and involves Frances Soukup. Soukup received four contracts as a replacement teacher and had only accrued, and not acquired, seniority. These examples show that it is possible under the existing contract language to postpone the acquisition of seniority for a lengthy period of time depending on the nature of the contract offered to a specific replacement teacher.

The Union views the foregoing as an injustice and a harsh and absurd result. The undersigned does not disagree with this characterization. Be that as it may, this is what the parties bargained. That being so, the undersigned has little choice other than to enforce the language as written.

In light of the above, it is my

AWARD

1. That the District did not violate the provisions of Article IV, Section C, paragraph 5 (a) of the 1989-91 labor contract when it maintained that Ms. Sprecher had accrued, but not acquired seniority rights as of February 26, 1991.

2. That the grievance is therefore denied and dismissed.

Dated at Madison, Wisconsin this 10th day of July, 1992.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator