

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

STOUGHTON AREA SCHOOL DISTRICT

and

STOUGHTON SCHOOL DISTRICT EMPLOYES
LOCAL 2506, WISCONSIN COUNCIL OF
MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO

Case 41
No. 51610
MA-8671

Appearances:

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Ms. Susan C. Sheeran, Suite 600 Insurance Building, 119 Martin Luther King, Jr. Boulevard, P.O.Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the District.

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511-3808, appearing on behalf of the Union.

ARBITRATION AWARD

Stoughton Area School District, hereinafter referred to as the District, and Stoughton School District Employees Local 2506, Wisconsin Council of Municipal Employees, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the filling of a position. Hearing on the matter was held in Stoughton, Wisconsin on December 20, 1994. A stenographic transcript of the proceedings was prepared and received by the Undersigned on January 9, 1995. Post hearing arguments were received by the Undersigned by March 27, 1995. Full consideration has been given to the evidence, arguments and testimony presented in rendering this award.

Issues:

During the course of the hearing the parties were unable to agree on the framing of the issues. The parties did agree that the Undersigned was to answer the arbitrability issue first and that the issue on the merits would be addressed only if the grievance was found to be arbitrable. The Undersigned frames the issues as follows:

"Is the grievance arbitrable?"

If yes,

"Did the District violate Article X, Seniority, when it failed to award the vacant Assistant Maintenance/Custodian position to the Grievant?"

If yes,

"What is the appropriate remedy?"

Pertinent Contractual Provisions:

ARTICLE III
GRIEVANCE AND ARBITRATION PROCEDURE

. . .

Section 3.04 Subject Matter. There must be a separate grievance for each dispute. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, issue involved, the relief sought, the date the incident or violation took place, the specific section the grievance alleged to have been violated and the signature of the grievant and the date.

. . .

ARTICLE X
SENIORITY

. . .

Section 10.10 Promotions and Transfer.

- A. Whenever any vacancy occurs within the unit because of a retirement, the creation of a new unit position, or termination, the vacancy shall be posted on a bulletin board for five (5) working days. The present shift assignment, work location and rate(s) shall be part of the posting. A Job Transfer Request must be completed and submitted to the Human Resources Department within the posting period.

The most senior qualified employee working twenty (20) hours or more per week, ten (10) months or more per year shall be selected for the job, if such employee is qualified and capable and the reassignment will not cause an imbalance in the work force.

- B. Employees who successfully bid on a job shall not be allowed to bid on another job for ninety (90) days from the date of the reassignment.

Section 10.11 Review. Any decision by the Board of Education will be subject to the grievance procedure and to review by arbitrator to determine whether the Board applied the standards of this Article in good faith, and in keeping with the other terms of this Agreement, and any relevant past practice.

...

Background

On July 27, 1994 Neal Smithback, hereinafter referred to as the grievant, filed a grievance alleging the District had violated the seniority provision of the collective bargaining agreement when it awarded a posted position to a less senior employee. The grievant's Statement of grievance is as follows:

"(Circumstance of Facts): (Briefly, what happened) I applied for the position posted as assistant maintenance/custodial. My qualifications for the essential job functions are attached. My seniority status is above the candidate who was offered the position. I feel that since I meet the qualifications required and have more custodial experience within the school system I should have been offered the position.

(The contention - what did management do wrong?) (Article or Section of contract which was violated if any)

Seniority - If both candidates can perform essential job functions and qualifications, seniority in the school system should determine who is offered the position. I have more seniority than Tim."

On September 9, 1994 the following response was made by the District:

...

This response follows a grievance filed on July 27, 1994 that alleged an infraction of the Agreement on July 21, 1994. It also follows a conference on August 26, 1994 attended by Tom Larsen, Mary Kaye Luety, Bob Pulliam, Don Saunders, Neal Smithback, Karen Splinter, Ron Vesterdahl, Maureen Weaver, and myself.

The grievance does not specify the section of the Agreement which is alleged to have been violated as required by Article III, Sec. 3.04. Therefore, the grievance is not properly filed.

Even if the grievance were properly filed, the District did not violate the Agreement in filling the Assistant Maintenance/Custodian position. None of the applicants for the position met all of the stated job qualifications; therefore, the District had no contractual obligation to hire Mr. Smithback or any of the applicants, irrespective of seniority. Alternatively, Mr. Smithback did not have the essential asbestos worker certification and the successful applicant did have the asbestos worker certification.

. . .

On July 15, 1994 the District had posted a twelve (12) month, forty (40) hours/week position, Tuesday through Saturday, with flexible shift capability from November 1 - February 28. The position's job description had been developed by the District's Manager of Buildings and Grounds, Robert Pulliam, with input from a Total Quality Management Committee (TQM) and is as follows:

STOUGHTON AREA SCHOOL DISTRICT

Position Description

(94)

ASSISTANT MAINTENANCE/CUSTODIAN

Job Summary: The Assistant Maintenance/Custodian is responsible for up keep of grounds, assisting mechanical and carpentry maintenance staff as needed, and providing custodial services. By maintaining the physical plant, facilities and grounds, the district's mission statement of students as the number one priority, will be attained.

Reports To: Maintenance Supervisor

Essential Job Functions:

- 1.) Provide grounds care district-wide to include mowing, tree trimming, bush trimming, weeding, grounds pick-up and maintenance, and also sweeping of the parking lots.
- 2.) Prepare athletic and pep band fields district-wide for competition by striping, lining, mowing, and setting up temporary fencing.
- 3.) Remove snow from sidewalks district-wide.
- 4.) Maintain the weight room at the High School.
- 5.) Set-up and take down of equipment for athletic and school events district-wide.
- 6.) Prevention, identification and removal of safety hazards.
- 7.) Work cooperatively with staff, students, parents and community to respond to issues of immediate concern.
- 8.) Comply with the absence policies of the District.
- 9.) Complete tasks such as sweeping, mopping floors, washing walls, windows, climbing ladders, vacuuming of carpets, moving furniture, striping & waxing floors, realigning desks and chairs, emptying trash, cleaning restrooms, dumping waste, and removing litter from grounds.
- 10.) Clean and maintain equipment used for grounds upkeep, snow removal and etc.

Requirements of Essential Functions:

Constant (66-100%) bending, pushing, pulling, lifting, walking and stair/ladder climbing in order to perform essential job functions.
Frequent (34-66%) squatting and reaching.

Lifting:	0-10 pounds	constantly (67-100%)
	11-50 pounds	frequently (34-66%)
	over 50 pounds	occasionally (1-33%)

Marginal Job Functions:

- 1.) Substitutes for the custodial staff when absences or vacancies occur.
- 2.) Delivers Food for the lunch program in absence of food service driver.
- 3.) Assists bus garage staff when needed.
- 4.) Completes tasks such as cleaning furniture, painting, and replacing light bulbs.
- 5.) All other duties as assigned which relate to the functions of the job.

Job Qualifications:

- 1.) High School degree or equivalent.
- 2.) Must have excellent communication skills in order to work effectively with outside suppliers, community parents, students, and staff.
- 3.) Excellent manual and mechanical ability.
- 4.) Ability to work independently in a variety of environmental situations including inside building, outside building, confined spaces, and high places.
- 5.) Possess valid drivers license, and CDL bus license.
- 6.) At least one year of experience in grounds upkeep and athletic field preparation preferred.
- 7.) Fourteen Hour Asbestos Worker Certification and ability to perform O&M asbestos removal.
- 8.) Must be able to operate and maintain grounds equipment such as mowers, tractors, snowblowers, etc.

- 9.) Must be able to identify and use proper tools for a given task.

Essential job functions are those functions which are essential to attaining job objectives. Marginal job functions are those functions which also need to be done but are done so on an occasional basis.

Four (4) employees with the following seniority dates applied for the position:

Bob Klingamon	2/16/85
Diane Femrite	8/24/87
Neal Smithback	8/27/90
Tim Polich	8/28/91

The grievant signed the posting for the position and submitted the following application:

NEAL W. SMITHBACK
4342 Old Stage Road
Brooklyn, WI 53562
(608) 455-0106

POSITION APPLYING FOR: Assistant Maintenance/Custodial Position

QUALIFICATIONS ACHIEVED:

1. I have been employed several years part-time, 20 hours/week and summer months with a landscaping company where my functions included: lawn mowing, weeding, trimming of bushes, laying sod, and planting various plants. I have worked with a variety of equipment and feel confident with its proper use and maintenance.
2. I currently work part-time delivering salt for Dvorak Plumbing, which entails lifting of many 80 pound salt bags and driving a large delivery truck.
3. I feel I have been competent with custodial tasks during the past four years of employment with Stoughton Schools.

4. I am in very good physical condition, and am able to perform heavy lifting and continuous walking, without difficulty.

5. I have had a Chauffeur's license in the past, and have driven a variety of heavy equipment, tractors, snow blowers, and miscellaneous large vehicles during current and past employment.

6. I feel I work well with other employees and supervisors. I do my job efficiently and thoroughly, and can work well independently.

I feel this position is well-suited to my past experiences, strengths, and interests. My hours can be flexible to best suit the needs of this position.

After reviewing the job's qualifications and the applicants personnel records Pulliam concluded none of the applicants possessed a bus driver Certified Driving License (CDL) and that Femrite and the grievant did not have the required asbestos training.

Pulliam than determined to interview each applicant. He formed a committee consisting of himself and employes Darwin Bohn, Don Saunders, and Maureen Weaver. After interviewing the four (4) applicants Pulliam agreed with the committee's first (Klingamon) and second (Polich) choice for the position. The position was offered to Klingamon who declined it. The position was then offered to Polich who accepted the position.

Thereafter the matter was processed to arbitration.

District's Position, Arbitrability

The District contends the grievance was not properly filed and is not arbitrable. The District argues the language of the agreement mandates that a grievance shall contain the specific section of the contract alleged to have been violated. The District asserts it has preserved the arbitrability issue and has not waived its objection to the procedural defect. The District also argues there are no facts or circumstances which excuse the procedural defect.

The District points out the grievance does not contain the specific section of the agreement which the grievant alleged was violated as required by Section 3.04 of the collective bargaining

agreement. The District also points out the grievance form filled out by the grievant does not direct the grievant to include the specific section which was alleged to have been violated. However, the District argues the form was developed by the Union, was distributed by the Union, and the Union has not sought to amend the grievance to identify the specific section alleged to have been violated. The District also directs the undersigned to Femrite's grievance, which specifically identified Section 10.10. The District concludes the language is mandatory and asserts it has not waived any objection.

The District also asserts the Union defense that the word "seniority" on the grievance refers to Article X, Seniority, fails because an Article is not a section and sections are clearly identified in the collective bargaining agreement. The District also argues that arbitrators do not sit as a Chancellor in Equity, but to interpret and apply the agreement without modification or dispersment of their own brand of industrial justice.

The District would have the Undersigned find the grievance not arbitrable.

Union's Position, Arbitrability

The Union argues the key in the arbitrability issue is the use of the word "section" as used in Section 3.04 of the collective bargaining agreement. The Union contends this provision is not very clear. The Union points out the grievance clearly points out specifically "Seniority" as the Article or Section of the agreement alleged to have been violated. The Union stresses that elsewhere in the collective bargaining agreement, unlike Section 3.04, specific divisions of the agreement are capitalized. The Union argues that since the word "section" is not capitalized in Section 3.04 the term "section" does not mean a specific number section of the agreement but a portion or segment of the agreement. The Union contends the grievance's reference to "Seniority" meets the requirements of Section 3.04. The Union also asserts the District has not demonstrated any prejudice or that it has been otherwise been misled as to the nature of the grievance.

The Union would have the Undersigned find the grievance arbitrable.

District's Reply Argument

The District argues the Union's defense that section does not mean titled Section of the agreement is absurd. Further, the grievant's citing of Seniority refers to a Article of the agreement, not a section of it. The District asserts that there is no evidence to conclude that "section" means "article" particularly when subdivisions of articles are denoted as "Section." The District asserts a general reference to the subject matter of the grievance or an article of the agreement is insufficient to comply with Section 3.04. Further, that there is no contractual basis for the arbitrator to excuse or overlook the Union's failure to comply with the express requirements of Section 3.04.

Arbitrability Discussion

The record demonstrates that when the grievant filed the instant grievance he cited "Seniority" as the specific section of the agreement he alleged the District had violated. The grievant further identified the position he applied for and alleged he met the qualifications of the position. The Undersigned finds the grievance reasonably identifies the specific section of the agreement alleged to have been violated. While the record demonstrates no specific "number" of the section of the agreement was identified, the description offered in the grievance clearly identified the provision the grievant believed to have been violated. The Undersigned notes here Section 3.04 does not require a specific numbered section be identified, just that the section be specified. In this instance it is clear the grievant is alleging that seniority was not followed when a job was awarded through the posting procedure. The Undersigned concludes that the content of the grievance filed on July 27, 1994 met the requirements of Section 3.04 and is therefore arbitrable.

Union's Position on the Merits

The Union contends the key to the instant matter lies in the reasonableness of the District in establishing qualifications required to hold this position, Fourteen (14) Hour Asbestos Worker Certification and ability to perform O&M asbestos removal. The Union does not dispute the grievant lacks such a certification, however, the Union argues the grievant has inquired of his supervisor, Irv Ring, as to his taking this course and was advised he did not need to take it and that enrollment was limited. The Union points to Femrite's testimony that applicants were informed that they need not have all the specified qualifications, that the person selected would have ninety (90) days to obtain the necessary requirements. The Union notes here that none of the candidates, including Polich, held a CDL to operate a school bus, that the District provided to ten (10) employees asbestos training after the position was filed, and that the District could have trained the grievant had he been selected for the position. The Union argues that the District did not comply with Section 10.10 in good faith when it cited lack of possession of qualifications as the reason for disregarding seniority. The Union asserts a reasonable standard would be ability to obtain a CDL and the Asbestos Certification. The Union asserts the grievant, as well as the person selected, met this standard.

The Union would have the Undersigned sustain the grievance.

District's Position on the Merits

The District contends it has in good faith followed the provisions of the agreement concerning promotions and transfers. The District points out the language has been in the parties' agreement since 1979, the first agreement. Since that time two changes have occurred. The first, in the 1988-90 agreement, which limited the availability of the provision to only employees working twenty (20) or more hours per week, ten (10) or more months per year. The second, in

the 1992-94 agreement, which required applicants to submit Job Transfer requests to the Human Resources Department. The District points out the job description for the position was developed by Pulliam with input from the Total Quality Management Committee (TQM). The District argues the CDL requirement was necessary because the person in the position was to help the bus garage with bus transport. The fourteen (14) hour asbestos worker certification and ability to perform asbestos removal are necessary qualifications because certification is required to perform this function.

The District contends the qualifications were established in good faith and asserts the Union is attempting to gain through arbitration what it has been unable to gain through negotiations. The District points out there has been no change in the standard of review or any effect on the District's ability to determine qualifications since the first agreement between the parties. The District argues the job qualifications were established because a CDL and the asbestos certification were necessary in order to perform the duties of the position. The District concluded none of the applicants possessed a CDL and of the two who possessed the asbestos certification the District offered the position in accordance with seniority, with Polich being selected and informed he had ninety (90) days to obtain a CDL.

The District also points out that in the past when no applicants met the posted requirements for the position no employe grieved the matter, even though the District hired from the outside.

The District contends the grievant acknowledged he did not meet the qualifications for the position and that the Union failed to demonstrate that the District established the asbestos certification solely to eliminate the grievant from consideration. The District also points out the Union did not rebut Pulliam's testimony that the requirements were established with input from employes, the committee that discussed the matter discussed the full scope of the position, and the Union did not call Union President Ron Vesterdahl to testify even though he participated on the committee. The District further asserts the grievant did not dispute he discussed certification training with his supervisor in 1993, that the supervisor said he could take the training but the grievant declined it, and that the supervisor did not discourage him from taking the training. Tr. 23-26. The District also argues it is not required to promote employes who are not qualified for a position but could become qualified at a later date.

The District would have the Undersigned deny the grievance.

Discussion:

A careful review of the record establishes the following. The District established two specific requirements for the Assistant Custodial/Maintenance position, a CDL and Asbestos certification. It did so after a careful review of the position and with input from employes. Four (4) employes applied for the position, none having met the CDL requirement and only two having met the asbestos requirement. The District offered the position to the most senior employe who

had the asbestos certification. This employe declined the position. The District then offered the position to the next most senior employe who had the asbestos certification. This employe accepted the position and the matter was grieved by the grievant. However, as the District has pointed out, the grievant does not possess the asbestos certification, he had an opportunity to obtain it but declined to do so, 1/ the position requires asbestos certification, and the Union has presented no evidence which would demonstrate the duties of the position do not require such a certification. The fact that the grievant is more senior than the individual selected for the position has no bearing on the instant matter if the grievant cannot meet the qualifications for the position. Particularly as herein where the grievant testified he declined an opportunity to receive the training necessary to receive the certification. The grievant's decision to decline the asbestos certification training also renders the Union's argument that it would have been reasonable for the District to eliminate the certification requirement moot. The District had already made such training available to the grievant. The District therefore had already acted in a reasonable manner. The undersigned finds no requirement in the collective bargaining agreement which would mandate that the District go beyond this and allow the grievant to receive such training after obtaining the position.

Therefore, based upon the above and foregoing, the testimony, evidence and arguments presented, the Undersigned concludes the District did not violate Article 10, when it did not offer the Assistant Maintenance/Custodial position to the grievant. The grievance is denied.

AWARD

The District did not violate Article X, Seniority, when it failed to offer the Assistant Maintenance/Custodial position to the grievant.

Dated at Madison, Wisconsin this 15th day of August, 1995.

By Edward J. Bielarczyk /s/
Edward J. Bielarczyk, Jr., Arbitrator

1/ Tr. p.24.