

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Disputes Between

SUPERIOR SCHOOL DISTRICT EMPLOYEES
LOCAL #1397, AFSCME, AFL-CIO

and

SCHOOL DISTRICT OF SUPERIOR

Case 106
No. 50383
MA-8235

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, 1701 East 7th Street,
Superior, Wisconsin 54880, on behalf of Superior School District Employees
Local #1397, AFSCME, AFL-CIO.

Mr. Kenneth A. Knudson, Hendricks, Knudson & Gee, S.C., Attorneys at Law,
312 Board of Trade Building, Superior, Wisconsin 54880, on behalf of School
District of Superior.r

ARBITRATION AWARD

The Superior School District Employees Local #1397, AFSCME, AFL-CIO (hereinafter Union) and the School District of Superior (hereinafter Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for the final and binding arbitration of unresolved disputes by an arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission) from its staff. On January 18, 1994, the Union filed with the Commission a request to initiate grievance arbitration in this matter. The Employer concurred in said request. On February 22, 1994, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on May 18, 1994, in Superior, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was not transcribed, and the parties filed briefs and reply briefs, the last of which was received February 6, 1995. Full consideration has been given the evidence and arguments of the parties in reaching this decision.

STATEMENT OF THE FACTS

A position with the District opened when Edwina Kuechler (hereinafter Incumbent) left her employment as a Special Education Assistant. The job was posted, in part, as follows:

September 3, 1993

STAFF BULLETIN #29
SUPPORT STAFF
Inside/Outside Posting

Allocation will be received until 4:00 p.m., Wednesday, September 15, 1993 at the Administrative Offices, School District of Superior, 3025 Tower Avenue for following position:

SPECIAL EDUCATION ASSISTANT

TERMS OF EMPLOYMENT

- * Previously held by Edwina Kuechler
- * 1993-94 program assignment: Early Childhood
- * Six (6) hours per day/four (4) days per week
- * Step i of hourly rate schedule, including benefits

...

Any special education assistant who is qualified and eligible will be considered as follows: Those oldest in point of service shall be given preference in filling this job, provided the qualifications and physical fitness of the applicants are relatively equal. those employees that are interested must submit a support staff transfer request.

...

Phyllis Currie (hereinafter Grievant) applied for the position. The District offered the Grievant a position, but it was not the position previously held by the Incumbent; the District transferred another employe into that position, an employe with less seniority than the Grievant.

The Grievant declined the position. The Union filed a grievance, which was not resolved during the parties' contractual procedure. The Union filed for arbitration, and said grievance is properly before this Arbitrator.

PERTINENT CONTRACT LANGUAGE

Article 7 - Seniority - Promotions - Layoffs

. . .

Section 4. In the event a job vacancy or new position occurs, each employee shall receive a notice of such vacancy or new position within ten (10) days of the date of the vacancy. The notice shall state the prerequisites for the position to be filled and said prerequisites shall be consistent with the requirements of the job. Each interested employee shall apply for the job vacancy or new position, in writing, and only those applicants who meet the prerequisites will be considered for the job. Applicants who meet the prerequisites will be considered in the following order:

- A. Those regular employees who have applied from with the job classification in which the vacancy occurred, (sic) will be considered. Those oldest in point of service shall be given preference in making promotions and filling job vacancies provided the qualifications and physical fitness of the applicants on said list are relatively equal.

- B. If no employee for the classification is selected for the position, the employer may fill the same from either inside or outside the bargaining unit. If the qualifications and physical fitness of the applicants are relatively equal, seniority shall prevail. The Assistant Superintendent-Personnel or designee and Supervisor shall determine and pass on employee qualifications. Should any employee be dissatisfied with a ruling regarding the qualifications of any employee for the position, the matter may be submitted to the applicable step of the grievance procedure of this Agreement.

. . .

Section 6. When vacancies occur, the Assistant Superintendent-Personnel is authorized to fill the vacancies temporarily during the

period required to post a bulletin and receive and pass on the bids for the position.

Section 7. All bids for vacancies posted must be in writing and must be submitted to the Director of Personnel within ten (10) working days after the bulletin is posted and before 5:00 p.m. on the date due. The appointment shall be made within three (3) working days thereafter. Successful bidders for a vacancy may return to his/her old position if he/she chooses within five (5) working days.

. . .

Article 22 - Management Rights

Section 1. The Board, on its own behalf, and on behalf of the electors of the district, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and the United States, included, but without limiting the generality of the foregoing, the right:

- A. To the executive management and administrative control of the total school system and its properties and facilities, and the assigned school activities of the employees;
- B. To hire all employees;
- C. To establish job specifications for their employees, the reasonableness of which shall be subject to arbitration.

Section 2. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgement and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

ISSUES

The parties stipulated that the Arbitrator would frame the issue in the Award.

The Union would frame the issue as follows:

Did the Employer violate the terms of the Collective Bargaining Agreement and past practice by denying the Grievant the vacant posted position and awarding this vacant position to a less senior employee?

And if so, the remedy is for the Employer to award the position to the Grievant who has more seniority.

The Employer would frame the issue as follows:

Did the Employer violate the Collective Bargaining Agreement by making a job assignment within a classification?

I frame the issue as follows:

1. Did the Employer violate the collective bargaining agreement by awarding the position previously held by Edwina Kuechler to an employe less senior than the Grievant?
2. If so, what is the appropriate remedy?

POSITION OF THE PARTIES

On brief, the Union argues that the issue in this case is that of seniority; that employes, based upon their seniority with the Employer, have the contractual right to bid upon vacant positions; that seniority is the mechanism by which employes are given the chance to make job changes; that in this case the Grievant wanted to make a change; that the position previously held by Edwina Kuechler as vacated; that she was the most senior interested and qualified employe for the position; that the Grievant wanted the specific position which had been held by Kuechler per Staff Bulletin #29; that the long standing past practice which was clearly testified to by the union witnesses was that all posted positions contained the name of the previous employe who held the position; that the usefulness of this information to employes was that interested employes in vacant position would know what the job entailed; that employes could readily identify the number of hours to be worked, the specific location of the job, duties associated with the position and other related information; that with such knowledge, the interested employe could make an informed decision as to whether to pursue the vacancy in question; that the District has suddenly ceased the

practice of noting the incumbent's name on posted vacancies; that the result of this change is that employes are denied vital information about job vacancies; that a sinister game of 'bait and switch' is being played by the Employer; that with this deliberate method of attempting to obscure and confuse the employe, the District is engaging in a concerted effort to deny qualified and senior employes the fundamental right to bid on particular vacant positions of the employe's choosing; that seniority rights are being undermined and destroyed by the Employer; that a less senior employe is being transferred into a position which a more senior employe has expressed a desire to fill; that this is a situation where the explicit contractual rights are being ignored by the District; and that the Arbitrator should sustain the grievance and direct the Employer to award the position to the Grievant who is the most senior and qualified employe for the position.

In its brief, the District argues that the real issue in this case is who assigns job duties and on what basis; that job assignments are not based on a popularity contest where employes within a job classification can pick with whom they would like to work; that management considers factors which may include experience with specific teachers, experience with specific children and their needs or problems, and other issues including factors generally considered when deciding duties and placement; that only when management would not guarantee the Grievant that she could pick the teacher with whom she would work did she refuse the job offer; that there is potential for conflict if the Union's position was accepted and applied across the District; that it is improper management and simply not professional to provide educational services without considering the many factors necessary in making a proper job placement; that the posting requirements were followed in totality; that the Grievant was offered the position, which she declined; that there is nothing in the contract to guarantee any employe the right to pick the exact person with whom they will work; that the Union attempts to create some type of past practice by claiming a particular assignment was offered because the employer included, as a courtesy, on the job posting the name of the employe who had left creating the position; that the facts do not support that assertion; that in the past postings would list the name of the employe who left the job, but no where in the contract or in past practice did that guarantee a new employe the right to pick a certain teacher with whom to work; that the Union's argument that management is engages in a "sinister game of bait and switch" is absurd and unworthy of comment; that good management considers the needs of the children to be served and who can best fill those needs, who can best compliment each other to work together, who has the experience to deal with specific children's problems and ages, all factors which seniority alone cannot address, but good management must consider; that the real issue in this case is whether management can consider any other factors, other than seniority, in making job assignments in pairing an aide with a teacher, children and their needs; that Article 22 clearly indicates that this is a management right and, the District submits, an educational need; that the Grievant's refusal to take the offer unless guaranteed the right to pick with whom she would work could create both a management and educational nightmare; that the District followed the terms of the contract; and that this grievance should be denied.

On reply brief, the Union argues that past practice clearly exists in this case; that for years vacant positions were posted with the name of the incumbent vacating the position noted on the

new vacancy notice for that position; that the fact that the name of the previous employe was always on the job posting has far more significance than a mere courtesy by the Employer to its employes; that the listing of the name of the prior employe on the posting gave all interested employes a clear identification as to what job was open upon which to bid; that it was clearly the identifying factor to each vacancy; that with the change in the past practice of clearly noting the vacant position by the name of the incumbent, the District has undermined employe's seniority rights; that the fundamental right of employes knowing what vacant position was open is gone; that the long standing past practice of having employes making informed decisions as to what job is available is now erased and replaced with total uncertainty; that employes need accurate information to make reasoned and informed decisions; that informed employes thus can exercise their seniority to secure the positions in which they have an interest; that by obscuring the actual job which is open or at least appears to be open weakens employes ability to use their seniority rights; that it does not take much imagination to envision the specter of favoritism and other behavior of a capricious nature arising as senior employes are denied positions in favor of other employes for whatever subjective reasons; that while this particular case involves no economic loss to the Grievant, the Union strongly defends the right of employes to make changes for other than economic reasons; that employes secure in their seniority and exercising their seniority to bid on known positions which they have an interest certainly ensures a greater degree of employe satisfaction; that, consequently, this positive situation produces better job performance; and that with happy employes, the needs of the children are certainly met.

DISCUSSION

The question before me in this case is whether the Grievant had a contractual right to the position as posted in Staff Bulletin #29.

The District argues that management rights grants it the power to determine which teacher aide is best suited for which position. The District also argues that there are important policy reasons why the management of the District should determine which teacher aide works in each position.

But the truth of the matter is that management rights can be negotiated away, and said rights are limited by the collective bargaining agreement. And while policy reasons may suggest a certain result in any matter, again, the contract determines the relationship between the parties and the rights of the Grievant in this matter.

And Article 7 of the collective bargaining agreement is clear on its face: "In the event a job vacancy or new position occurs. . . (t)hose (employes) oldest in point of service shall be given preference in making promotions and filling job vacancies provided the qualifications and physical fitness of the applicants on said list are relatively equal."

The District does not dispute that the Grievant was qualified and physically fit for the job,

nor does the District dispute that the Grievant was more senior than the employe the District transferred into the job. The District's argument is that management rights and public policy allow it to select the employe to fill a specific position.

I disagree. Under the District's view of the case, this language would be null and void, even though it appears on the Staff Bulletin that the District itself issued in regard to this position.

Therefore, for the reasons stated above, the Arbitrator issues the following:

AWARD

1. That the Employer did violate the collective bargaining agreement by awarding the position previously held by Edwina Kuechler to an employe less senior than the Grievant.

2. That the Employer is directed to award the position to the Grievant who is the most senior and qualified employe for the position.

Dated at Madison, Wisconsin, this 8th day of September, 1995.

By James W. Engmann /s/
James W. Engmann, Arbitrator