

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BELOIT SCHOOL DISTRICT

and

LOCAL 1475, AFSCME, AFL-CIO

Case 55
No. 52513
MA-9006

Appearances:

Wisconsin Council 40, AFSCME, AFL-CIO, by Mr. Thomas Larsen, Staff Representative, appearing for the Union.

Davis & Kuelthau, S.C., Attorneys at Law, by Ms. Mary L. Hubacher, appearing for the District.

ARBITRATION AWARD

Local 1475, AFSCME, AFL-CIO, herein the Union, and Beloit School District, herein the District, jointly requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. The undersigned was designated as the arbitrator. Hearing was held in Beloit, Wisconsin, on June 20, 1995. A stenographic transcript was made of the hearing and a copy of said transcript was received on July 10, 1995. The parties completed the filing of post-hearing arguments on August 4, 1995.

ISSUES:

The parties were unable to stipulate to the issues and agreed that the arbitrator should frame the issues in his award.

The Union presented the following statement of the issues:

Did the District violate the collective bargaining agreement by not giving the position of head serviceperson at Gaston Elementary to Doug Burris?

The District presented the following statement of the issues:

Did the District violate the collective bargaining agreement when it promoted the most qualified applicant for the position of head serviceperson over the more senior applicant? If so, what is the appropriate remedy?

The undersigned believes that the following is an accurate statement of the issues:

Did the District violate the collective bargaining agreement when it did not award the position of head serviceperson at Gaston School to Doug Burris? If so, what is the appropriate remedy?

BACKGROUND:

In the fall of 1994, the District was notified that the head serviceperson at Gaston Elementary School was retiring in December of 1994. The principal at the Gaston School also had notified the District of his intent to retire after the 1994-95 school year. Said individuals had been the only principal and head serviceperson at the present Gaston School. The District posted the vacancy and two members of the bargaining unit, Doug Burris and Adolphus Williams, applied for the position. Both applicants were interviewed by the selection committee.

Burris began his employment with the District on July 2, 1984. Since April 29, 1987, Burris has been the head serviceperson at the Cunningham Elementary School. In that capacity Burris holds a "boiler license" issued by the City of Beloit, oversees the work of a half-time serviceperson, and reports to the building principal.

Williams began his employment with the District on October 27, 1986, as a serviceperson. In the absence of the head serviceperson during the summer of 1994, Williams had performed the duties of the head serviceperson at the Gaston School and had cleaned the building by himself. Williams also has performed the duties of the head serviceperson at the Gaston School since the head serviceperson retired in December of 1994. Thus, Williams was very familiar with the building and its various maintenance systems.

The selection committee considered the following factors in evaluating the qualifications of the applicants: current assignment and performance in that assignment, performance in any previous assignments, any recommendations both in the applicant's file and from the applicant's current supervisor, attendance records, and responses to the questions which were asked during

the interviews of the applicants by the selection committee. Based on those factors, the committee concluded that Williams was the most qualified applicant and he was awarded the position.

On or about January 12, 1995, Burris grieved the selection of Williams for the position of head serviceperson at the Gaston School. The grievance was processed through the contractual grievance procedure and is the basis for the instant proceeding.

The contract provides that at the beginning of each school year, each serviceperson is credited with a bank of fourteen days of paid leave (twelve sick days and two personal days). The sick leave days can accumulate indefinitely. As of June 30, 1992, Burris had not accumulated any days of paid leave. Burris also took a ninety-one day unpaid leave of absence in the 1988-89 school year. In August of 1986, Burris received a written warning for failing to report for work on time and for failing to report his absences to the personnel office or his supervisor.

On July 2, 1991, Burris received a written warning for failing to lock the doors and to set the security alarm system at the Cunningham School on June 13, 1991.

Both Burris and Williams were asked the same set of questions during their respective interviews by the selection committee. In the opinion of the selection committee, Burris did not provide acceptable answers to the questions, including certain technical questions relating to boiler operation. The selection committee concluded that Williams did respond correctly to the same questions.

The language contained in Section 8.5.2. of the 1992-1995 contract has remained unchanged since said language was included in the 1984 contract. Prior to the 1992-1995 contract, the contracts between the parties also included the following language as Section 8.1:

Seniority is a factor in promotions when the abilities, aptitudes, and work habits of two or more candidates for a given position are the same.

This language was deleted from the 1992-1995 contract.

The District asserted that there had been at least nine other cases where the best qualified applicant was selected for a vacancy without regard to whether other applicants had more seniority than the successful applicant. The District was able to specify the following situations: a general delivery person in 1988, a maintenance specialist position in 1989, a head serviceperson at Robinson School in 1989, a head serviceperson at the high school in 1994, and three positions at the high school in either late 1994 or early 1995.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE II

MANAGEMENT RIGHTS

2.1 Management retains rights of possession, care, control and management that it has by law and retains the right to exercise these functions under the term of the collective bargaining agreement except to the extend (sic) such functions and rights are restricted by the terms of this agreement. These rights include, but are not limited to the following:

...

2.1.3 Hire, promote, transfer, schedule and assign employees to positions to which they are qualified within the school system, as well as to eliminate positions within the school system;

...

2.1.5 Take action where necessary to carry out the functions of the school system in situations of emergency, or to maintain the efficiency of school system operations, unless endangering employees;

...

2.1.10 Select employees and evaluate employee performance;

...

ARTICLE III

COOPERATION

3.1 The Board and the Union Agree (sic) that they will cooperate in every way possible to promote harmony and efficiency among all employees in order to provide the best possible educational facilities in the School District of Beloit, and the education and well-being of students shall be the primary concern of both parties to the agreement.

. . .

ARTICLE XIII

SENIORITY

. . .

8.5.2 The qualified senior employee applying for the position shall have the preference. If applicants are available and qualified, the appointment will be made in fifteen (15) working days after applications are closed.

. . .

POSITION OF THE UNION:

The District is not correct in asserting that it only has to consider the senior employee, since Section 8.1 in the 1989-92 contract was not continued in the 1992-95 contract. It is clear that, by such a deletion, the parties intended to clarify language which may have been contradictory in the 1989-92 contract. Section 8.5.2 requires the District to award a vacancy to the senior employee who applies, if the senior employee is qualified for the position. Burris was the most senior of the applicants. There can be no doubt that Burris is qualified to perform the duties of a head serviceperson at the Gaston School, since he has been serving as the head serviceperson at the Cunningham School for a number of years.

The District failed to show that it had selected employees outside the line of seniority in prior situations. In at least some of the cases cited by the District the employees chose not to pursue the positions after initially applying for the positions.

The District's use of Burris' work record is not relevant because the information was outdated, Burris was never disciplined for his sick leave usage, and a fair comparison of the work records of Burris and Williams was not made.

The grievance should be upheld and Burris should be given the position of head serviceperson at Gaston School.

POSITION OF THE DISTRICT:

Unlike a strict seniority clause which requires the employer to select the most senior employe for a position without regard to any other factors, the modified seniority provision in the agreement in this case allows the District to compare the qualifications of the employes bidding for a position and seniority becomes a determinative factor only when the qualifications of the candidates are substantially equal. Moreover, under a modified security clause, where a comparison of the qualifications of the two candidates demonstrates that the junior employe is substantially more qualified than the senior employe, the junior employe may be given preference. The assessment of the candidates' qualifications is expressly within the District's prerogative, pursuant to Article II of the agreement.

The District's interpretation, that the modified seniority clause allows the comparison of the relative qualifications of the candidates, is necessary to avoid rendering meaningless other provisions of the contract. Section 2.1.5 provides that the District may take the action necessary "to maintain the efficiency of the school operations." In the instant case the District was facing the loss of both the principal and the head serviceperson at the Gaston School. Both of those individuals had held those positions since the Gaston School opened 22 years earlier. Under those circumstances the District was concerned about transitional issues and needed to act in a manner least disruptive to the efficient operation of the school. Since Williams was already familiar with the school, his selection met that need.

The record contains numerous examples regarding the District's past practice of hiring the more qualified junior applicant over the senior applicant, which instances were not grieved by the Union.

Williams was more qualified than Burris. Not only did he have significant experience related to the duties of a head serviceperson which he had acquired before coming to work for the District, he had been performing the head serviceperson duties at the Gaston School for much of the preceding six months. Moreover, Burris had attendance problems throughout his employment with the District, while Williams has not had similar attendance problems. During their individual interviews, Burris did not correctly answer technical questions which were within the scope of knowledge he was expected to have as a head serviceperson, while Williams answered all of the technical questions correctly.

DISCUSSION:

The District accurately interprets Section 8.5.2 to be a modified seniority provision. The District goes on to categorize said provision to be a "relative ability" type of seniority clause under which comparisons between the qualifications of the employees bidding on a job are necessary and proper with seniority becoming the determining factor only if the qualifications of the bidders are equal. If the language contained in Section 8.1 in the contracts preceding the 1992-1995 contract had been continued in said contract, then the District's interpretation would be a reasonable one. However, Section 8.5.2 is clearly the type of seniority clause commonly referred to as a "sufficient ability" clause. Under this type of clause, preference is given to the senior employee, if that employee is qualified to do the job.

The District interprets Section 2.1.5 to mean the most efficient method of operation. Such an interpretation would ignore the express provision in Section 2.1 by which the specified management rights, including the maintaining of the efficiency of school system operations, are restricted by the other terms of the contract. Section 8.5.2 is such a restriction on the District's ability to select an applicant for a vacant position.

The parties agree that Burris had more seniority than did Williams. Thus, it is necessary to determine whether Burris, who was the senior bidder, was qualified to perform the duties of the position, regardless of whether Williams was more qualified than Burris.

Although the District argues that Burris has had attendance problems throughout his employment with the District, Burris had not been disciplined for an attendance problem since he received a written warning in August of 1985.

During his interview, Burris gave answers to certain questions relating to the operation of a boiler, which answers the interviewers felt were incorrect. Those answers were part of the basis for Williams being rated as more qualified than Burris. There is no evidence in the record to show that Burris has been unable to perform the technical aspects of the job of head serviceperson at the Cunningham School, which position he has held since 1987. Therefore, it must be concluded that Burris is qualified to hold the position of a head serviceperson. If the District had established that Burris was not qualified to hold said position, then its argument concerning the maintaining of the efficiency of the school operations would have been relevant.

The District asserted the existence of a past practice of junior employees being promoted over more senior employees when the junior employees were more qualified and referred to nine previous examples of such occurrences. However, specific information was provided with respect to only five of said occurrences, involving seven positions. One of those examples was a vacancy for a general delivery person in 1988. A junior employee was selected over a more senior employee. The more senior employee decided not to grieve the selection because he then was applying for another position.

Another example was a vacancy for a maintenance specialist position in 1989. The more

senior employe was not qualified to do the small engine repair work and so there was no grievance filed.

Also in 1989 there was an opening for a head serviceperson at Robinson School. A grievance was initiated, but the senior employe, who had been bypassed, decided not to continue the grievance for personal reasons.

In late 1994 or early 1995, three positions were added to the high school staff. Two of the applicants for those positions were bargaining unit members. Neither of those employees were selected for the vacancies. One of those employees withdrew from consideration because he wanted a grounds keeping position. The other unit employee transferred to a different school, which satisfied her desire for a new position.

In 1994, the District had an opening for a head serviceperson at the high school. The employee selected for the position had less seniority than two of the other applicants. One of those more senior applicants withdrew his application prior to being interviewed and the other more senior applicant stated during his personal interview that he did not have all the necessary experience, thereby indicating that he was not qualified.

Although the foregoing examples do not reach the total of nine to which the District's witness referred, said examples were the only situations for which testimony was given at the hearing.

The situations which occurred prior to the 1992-95 contract have little relevance to the instant matter in light of the deletion from said contract of the language contained in Section 8.1 in the prior contracts. The two situations which occurred in 1994 and 1995 fail to establish the existence of a practice whereby the District has chosen the most qualified applicant, even if said individual had less seniority than one or more of the other qualified applicants. Because no practice was established, it is unnecessary to decide whether such a practice would be sufficient to overcome the clear language of Section 8.5.2.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the District did violate the collective bargaining agreement by failing to award the position of head serviceperson at the Gaston School to Doug Burris; and, that the District award said position to Burris and transfer Burris to the position.

Dated at Madison, Wisconsin, this 30th day of October, 1995.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator