

**IN RE ARBITRATION BETWEEN:**

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**ISD #191, BURNSVILLE PUBLIC SCHOOLS**

**and**

**SEIU, LOCAL #284**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS No. 09-PA-0165**

**JEFFREY W. JACOBS**

**ARBITRATOR**

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**September 8, 2009**

IN RE ARBITRATION BETWEEN:

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ISD #191, Burnsville Public Schools

and

DECISION AND AWARD OF ARBITRATOR  
BMS # 09-PA-0165  
Kate Quinn grievance

SEIU, Local 284.

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**APPEARANCES:**

**FOR THE UNION:**

Sarah Huntley, Attorney for the Union  
Lori Stammer, Business Agent  
Keith Niemi, Business Agent  
Kate Quinn, grievant  
Rae-Ann Pelinka, Union Steward  
Carol Leegwater, former Cook Mgr. & Union Steward

**FOR THE DISTRICT**

Maggie Wallner, Kennedy & Graven,  
Attorney for the District  
Sue Grissom, Director of Human Resources  
Barbara Lackner, Food Services Director,  
Retired  
Gail Mackey, Cook Mgr. at Sioux Trail Elem.

**PRELIMINARY STATEMENT**

The hearing in the matter was held on July 13, 2009 at 10:30 a.m. at the District Offices in Burnsville, Minnesota. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on August 26, 2009 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement for 2007 to 2009. The grievance procedure is contained at Article XIII. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural issues and that the matter was properly before the arbitrator.

**ISSUES**

The Union listed the issues as follows:

1. Did the School District violate the Grievant's contractual rights when it disregarded the procedural requirements of the posting and selection process contained in the collective bargaining agreement?

2. Did the School District act arbitrarily and capriciously when it awarded the 2008 Summer Feeding Program Manager Position at Sioux Trail Elementary?

3. Did the School District violate the Grievant's contractual rights when it awarded the 2008 Summer Feeding Program Manager Position at Sioux Trail Elementary to a less senior employee despite the Grievant's superior ability, job performance, and greater seniority with the District?

The District asserted that the issue was as follows:

Did the School District violate Article XII, Section 3, subdivision 3 of the Collective Bargaining Agreement when it selected Gale Mackey to continue in the Summer Feeding Program position at Sioux Trail Elementary School? If so, what is the appropriate remedy?

The issues as determined by the arbitrator are as follows:

Did the District violate the collective bargaining agreement at Article XII, subd. 3 when it did not hire the grievant for the Summer Feeding Position at Sioux Trail Elementary School in the summer of 2008? If so what shall the remedy be?

**UNION'S POSITION:**

The Union took the position that the grievant should have been awarded the Summer Feeding Program, Job #420, position and be paid appropriate back pay due to the District's violation herein. In support of this the Union made the following contentions:

1. The grievant has been with the District for 22 years and has served as a Cook Manager since 1996. She is eminently well qualified and holds a Level III SNA and Cook Manager's license through the Minnesota Department of Health. She has been named employee of the year on at least one occasion and her performance evaluations are excellent. She serves 2000 meals a day at the Burnsville High School. The Union asserted that there is little doubt that the grievant possesses the necessary qualifications for the summer feeding program at Sioux Trail Elementary School.

2. The Union further noted that the posting for the summer feeding program at Sioux Trail did not contain the qualifications for that position.

3. Joint exhibit 2 shows the basic information and that the online posting should have contained an attachment, similar to those presented by Union Exhibit 1, that contained the qualifications. Here no such information was presented and there was no evidence to show that the qualifications were ever posted anywhere, online or otherwise. The Union asserted that this was a violation of the provisions of Article XII, subdivision 3, section 6. That language provides as follows: “Consistent qualifications shall be established for all positions and shall be consistently included on the job posting.”

4. The Union further asserted that the failure to post the qualifications on the Summer Feeding position posting so tainted the process that it should be re-done in its entirety. Further, the Union asserted that it is not important that this individual grievant may have already known what those qualifications were. Job postings are designed not to advise those who do know the qualifications but rather to advise those that do not so they know whether to apply. The failure to follow the clear provisions of the labor agreement here may well have discouraged others who wanted to apply and did not because they were not even advised of the qualifications necessary for the position.

5. The Union further asserted that this is simply more evidence of the Union’s ultimate assertion that the District acted arbitrarily and capriciously in the hiring process used to determine which candidate would be awarded the Summer Feeding position. The Union pointed to Union Exhibit 1, listing various job postings in the past for various jobs within the District. The District has always posted the qualifications for their open positions on those yet did not do so here. See Joint Exhibit 2, and Union Exhibits 4 & 5.

6. The Union also introduced testimony that over time there have been multiple grievances filed over job posting and, irrespective of how they were eventually decided, in all of them, the District posted the qualifications for the position in question in those cases. The Union argued that the parties’ longstanding practice has been to post the qualifications and that the procedural requirement of posting the qualifications is fundamental to the fairness of the entire process.

7. Further, the Union argued that there should have been an interview for this position pursuant to Article XII, subdivision 3, section 1. That language provides as follows: “Job vacancies will be posted. During the summer months, job postings will be accumulated and mailed to employees at one time on or near August 15 each year. Internal applicants for first cook and cook manager will receive interviews.” It is the last clause that the Union asserted was violated here since no interview was ever held for the position at issue here.

8. The Union argued that the Summer Feeding position in question was in fact a Cook Manager position and that an interview should have been held for this position. The Union asserted that the pay grade for the two positions was the same and that the qualifications necessary to hold the jobs were the same. See Article VI – Compensation. That provisions sets forth the wages for these various positions as follows:

Section 1. Rates of Pay:

**2007-08**

	<b>Step 1</b>	<b>Step 2</b>	<b>Step 3</b>
Cook Manager (Secondary)	\$20.34	\$21.24	XXX
Cook Manager (Elementary)	\$19.55	\$20.51	XXX
Snack Bar Manager Hamburger Fry Cook (BHS) Assistant Cook Manager	\$15.16	\$16.70	\$17.60
2nd Cook	\$12.37	\$13.95	\$15.64

**2008-09**

	<b>Step 1</b>	<b>Step 2</b>	<b>Step 3</b>
Cook Manager (Secondary)	\$20.90	\$21.82	XXX
Cook Manager (Elementary)	\$20.09	\$21.07	XXX
Snack Bar Manager Hamburger Fry Cook			

(BHS) Assistant Cook Manager	\$15.58	\$17.16	\$18.08
2nd Cook	\$12.71	\$14.33	\$16.07

9. In addition, the prior postings referred to this same job in prior years as a Cook Manager position. The 2006-07 contract referred to the position as either “secondary manager’s pay” or “secondary manager’s wage.” Moreover, the qualifications and certifications necessary for a Cook Manager and the Summer Feeding Manager are identical.

10. For all intents and purposes, the Union asserted, this position was that of a Cook Manager and pursuant to the clear provisions of Article XII, subd. 3, Section 1 above, there should have been an interview. No interview was ever held for this position even though there were multiple applicants. Moreover, the fact that no interviews had been held in the past does not control this scenario since in the past there had never been more applicants than there were open positions.

11. The Union cited arbitral precedent for the proposition that interviews are necessary where the CBA provides for them even though the manager knows the individual involved. There are many times facts and other matters that become known in an interview that are not generally known or which the manager was not aware of that could well affect the decision to hire. Thus, while both candidates were well known to the manager that was no excuse for violating the contract.

12. Instead, the Union argued, the District made a decision about whom to hire prior to ever holding interviews and decided that Ms. Mackey would be awarded the position. This was done arbitrarily at best and without ever fully considering the seniority, ability and job performance of the grievant.

13. The Union pointed to the provisions of Article XII, subd, 3, section 3 provides as follows: “Seniority, ability and job performance will be considered in filling posted positions. Administration reserves the right to final decision. Applicants will be informed at the time of the interview whether or not there are more senior applicants for the position.”

14. With regard to those 3 criteria, i.e. seniority, ability and job performance, the Union argued that when truly considered, the grievant was a far better choice. The Union acknowledged that the decision is made by Administration but argued that the contract requires that the 3 criteria must be considered and argued that here they were not.

15. The Union further asserted that the decision to hire a junior person (SM. Mackey has 15 years with the District while the grievant has over 22) was arbitrary and must be overturned. The grievant has far more experience with more meals served in the busiest school in the District. Moreover, the Union asserted that the overall record shows that the decision was in fact made before the District ever fully considered the factors and that it simply decided up front that Ms. Mackey would get the job and never truly considered the grievant's application.

16. The Union asserted that the grievant's overall job performance has been exemplary and was at least as good as Ms. Mackey. Likewise, her ability to perform the job has been demonstrated over the course of her many years working at the high school where there are many more meals served. Her performance there has increased sales of food and her evaluations reflect that.

17. The Union argues that the grievant's ability and performance were both equal to and greater than Ms. Mackey and that given her far greater seniority, she should have been awarded the position. The fact that she was not shows that the District clearly pre-selected Ms. Mackey and simply tailored the process to reach that result.

18. Finally, the Union asserted that there was an element of personal preference at work here and that Ms. Lackner made her decision based on the fact that Ms. Mackey was going through a divorce and needed the money. Further, when confronted about her decision by the grievant, Ms. Lackner's response was something to the effect of, "what was I supposed to do, screw Gale?" (Meaning Gale Mackey). The Union argued that this response supports the conclusion that Ms. Lackner was essentially acknowledging that her decision was not based on the required factors set forth in the contract but rather on personal preference.

19. The Union asserted that provisions like those found in the contract here are there to prevent the very sort of arbitrary and capricious action taken in this very instance and that the arbitrator should overturn it and award back pay to the grievant for the violation here.

The Union seeks an award requiring the District to pay the grievant appropriate back pay for the Summer Feeding Program Job she should have been given but was denied due to the District's violation herein.

**DISTRICT'S POSITION:**

The District took the position that no contract violation occurred here, and that the grievant has been more than adequately compensated for her actual duties. In support of this the District made the following contentions:

1. The District initially objected to the expansion of the issues to include assertions regarding the posting and the alleged failure to conduct an interview. The District pointed to the grievance itself and the specific reference to "Article XII sub. 3," see Joint Exhibit 3, which only deals with the requirement to consideration of seniority, ability and job performance. The District argued that the issue is solely whether there was a violation of the contract in the decision to hire Ms. Mackey for the Summer Feeding position and whether the Union could therefore establish that the District did not consider the 3 required factors set forth above. The District asserted that the grievance mentions that part of the contract and that up until the hearing that was the Union's sole theory and that only the question of whether there was a violation of Article XII, subd. 3 is properly before the Arbitrator.

2. The District alleged most strenuously that all 3 factors were considered and pointed to Ms. Lackner's testimony in that regard. Further, the District alleged that prior arbitrators have all supported the District's right to make the final decision and placed a heavy burden on the Union to establish that the District acted arbitrarily or capriciously. The District argued that the record is devoid of any such evidence and that the Union has failed to meet its burden of proof.

3. The District pointed to the provisions of Article XII, section 3 subd. 3, as follows:

Seniority, ability and job performance will be considered in filling posted positions. Administration reserves the right to final decision. Applicants will be informed at the time of the interview whether or not there are more senior applicants for the position.

4. The District emphasized the clause whereby the “Administration reserves the right to final decision” as reserving to the District an absolute right to make the final decision as to which applicant is to be selected in any open job. This of course would include the position in question here.

5. The District asserted that the only requirement is that seniority, ability and job performance be “considered.” There is no provision giving any greater weight to any of those factors. Seniority is but one factor to consider – nothing more and nothing less. Here all the relevant factors were considered and Ms. Mackey was selected as a better person for the job. The District noted that it does not need to show that the grievant was unqualified nor does it have to show that Ms. Mackey was better qualified – it need only show that the factors contained in the contract were considered.

6. The District asserted that Ms. Lackner was very clear that she considered all relevant factors in making the determination and that she did not, as the Union suggests, “make up her mind early.” She noted that the grievant is more senior and that this was a factor in her favor. The District argued however that seniority is not the only factor considered and is not given greater weight than others and cited multiple prior arbitration decisions between the parties for that very proposition.

7. The District noted that Ms. Mackey has performed the actual Summer Feeding job multiple times and has a demonstrated excellent record in that job. She has a good rapport with elementary aged children, which the grievant does not as she works in the high school, and further has an exemplary work record. Ms. Mackey has never had any deficiencies in her performance at all and has a demonstrated excellent record of food ordering, meal planning and kitchen configuration at the Sioux Trail Elementary School. The grievant has no such experience. Ms. Mackey has also been named employee of the year as well. These factors were considered and weighed heavily in Ms. Mackey’s favor.

8. Further, with respect to ability, while the District acknowledged the grievant's generally good work performance in her job there have been a few problems with the grievant's performance over time and those issues were considered as well.

9. The District pointed to several prior arbitral awards over virtually the same issue as is presented here. These cases all hold that the District retains the right to a final decision pursuant to the language of Article XII set forth above and that seniority is not the primary consideration in determining which applicant is awarded an open position. Those cases upheld the right of the District to hire or promote a junior person as long as the 3 factors were properly considered. One even upheld the decision to hire a person from the outside over an internal applicant. See BMS Case # 93-PA-46, ISD 191 and SEIU #284, (1993 Vernon).

10. In response to the Union's claim that an interview should have been held that the requirement for an interview is only for the first cook and cook manager position, the District asserted that the Summer feeding position is not a cook manager or first cook position. While it is paid the same in order to attract qualified candidates, the job requirements are vastly different and there is no one to manage in the summer feeding job. The contract language in Article XII, section 3 subd. 1 requiring an interview does not therefore apply. Further, Ms. Lackner was well acquainted with both applicants and knew their qualifications and abilities and would not have needed an interview anyway.

11. Further, in response to the Union's claim that the posting was inadequate, the District argued that the grievant was well aware of the requirements of the summer feeding job and of the qualifications necessary to hold that position. In these circumstances posting the qualifications would have changed nothing.

12. In both of the above claims, i.e. that the posting was deficient due to the failure to list the qualifications and the lack of a formal interview, the District reiterated that these matters were outside of the original grievance and should not be considered by the arbitrator.

13. The essence of the District's argument is that the Union has not met its burden of showing that the 3 factors in Article XII were not considered and that even the Union's witnesses acknowledged that there was no evidence to show that Ms. Lackner somehow failed to do so. Under these circumstances and facts, there are no grounds to find that a contract violation occurred here.

14. Finally, since the grievant performed no work in the summer of 2008 granting her pay for that time would be inappropriate even if the arbitrator were to find a contractual violation here. In that event the remedy would be to award the grievant the next summer feeding position that becomes available but no back pay should be awarded of any kind.

The District seeks an award denying the grievance in its entirety.

#### **MEMORANDUM AND DISCUSSION**

The facts of the matter were straightforward. The grievant has 22 years with the District and has performed her job as Cook Manager at the Burnsville High School very well. Her performance evaluations with minor exceptions are quite good. Further, she has a demonstrated ability to manage school kitchens and feed large numbers of student. She was awarded the very first employee of the year awarded by the District. She is by all accounts very good at her job.

The District raised some concerns about her performance and while those were not strictly at issue, these were relatively minor in nature. Further, the incident involving a student wanting to touch the food and the grievant's response to that was frankly shown by the evidence to have been appropriate. There were some subjective issues raised as well but these too were minor in nature.

The question here though is whether under the facts and contract language there was a violation of the terms of Article XII. Initially the scope of the grievance was called into question by the District. The grievance itself references "Article XII subd. 3." That provision deals only with the 3 criteria for selection of the individual to be awarded a position.

The District argued that the Union expanded the scope and very nature of the grievance by alleging deficiencies in the substance of the posting and for the failure to conduct an interview for the job. These provisions, as noted above, are as follows: Section 3. Job Posting:

Subd. 1. Job vacancies will be posted. During the summer months, job posting will be accumulated and mailed to employees at one time on or near August 15 each year. *Internal applicants for first cook and cook manager will receive interviews.* (Emphasis added).

Subd. 6. *Consistent qualifications shall be established for all positions and shall be consistently included on the job posting.* (Emphasis added).

The District argued that these last two matters were not contained in the body of the grievance and should not therefore be considered by the arbitrator. The Union asserted that the whole process under Article XII by which the grievant was passed over for this position was what was at issue here.

There is something of a balancing act to be performed here. Grievances are generally regarded as somewhat informal statements of alleged contractual violations and must be sufficiently clear to place the Employer on notice of what the alleged violation is and what remedy the Union seeks as a result of it. Generally too, arbitrators disfavor “surprises” and attempts to add whole new theories to an existing grievance at the hearing, especially when there have been ample opportunities to discuss the grievance at the steps and the “new” theories have not been brought forward there.

On the other hand, grievance documents are not like statutes and are usually not filled out by lawyers. They must be read in that context with an eye toward whether the employer was placed on notice enough to be able to mount a meaningful and cogent defense to the allegations. Here the grievance document makes specific reference to “Article XII sub. 3” and presumably that referred to the provisions of Subdivision 3 providing for the 3 factors to be considered and contains the clause regarding the administration reserving the right to a final decision. There was no evidence regarding what statements were made during the steps of this grievance and it was apparent at the hearing that the District was well prepared for the arguments raised by the Union regarding the lack of an interview and the lack of qualifications on the posting.

On these facts those matters can be considered since the record as a whole demonstrated that the District was aware of these arguments prior to the hearing and was able to raise defenses to them at the hearing. Having said that though, the next inquiry is whether there was a showing of a violation of these provisions. As will be discussed below, this was a mixed bag as well.

Initially, there was evidence to show that the posting was deficient in that it did not include the qualifications for the job on the posting. Joint exhibit 2 shows only the location, position type and job title. It also lists the opening and closing dates for the applicants to apply and indicates, "there is no attachment." Presumably this would have been the list of qualifications. There was further no evidence of what the online application may have contained and without evidence that it did contain that information, in light of the testimony from the Union that it did not, it can be inferred from the evidence that it did not. This was a technical violation of the requirements of Subdivision 6. The job posting should have contained that information.

The District argued that the grievant knew well what those qualifications were and did not need them. This is something of a false argument however in that the provisions of Article XII are about protecting the process by which positions are posted and applicants are selected. Thus, these requirements do not exist to protect those individuals like the grievant who do know what the necessary qualifications are but rather to protect those who do not. The Union did not raise the issue of whether there were others who might have applied if they had known the qualifications and whether that failure may have had a chilling effect on such applicants, so no decision can be made with regard to that question. Here though that part of the grievance that pertains to the lack of the qualifications is sustained. As will be discussed below, no specific remedy will be ordered other than to require that the qualification for such postings be included in the future. However, under different circumstances and different facts the District should be aware that a different remedy might well be ordered if this occurs again.

The second question is whether there needed to be an interview for this position pursuant to Article XII, section 3 Subdivision 1. The basis for the Union's claim is that the summer feeding position was in fact a Cook Manager position. The Union cited multiple postings from past years that seem to equate the job to that position and further argued that the pay grade is also the same. Under the provisions of Subdivision 1, the argument goes, an interview is required for a first cook or cook manager position. Here there was not one and even though Ms. Lackner knew both applicants well an interview is required and one should therefore have been done.

If the position in question were really a cook manager position an interview would have been required without question whether the manager knew the applicant or not. There is some merit to holding an interview since there are as the Union pointed out, many instances where things are learned even where the interviewee is well known to the person doing the hiring. More importantly, these provisions are about process. Frankly, if the evidence had shown that this position was a cook manager position an interview would have been required and the process may well have had to be re-done.

Here however, the facts did not support the Union's claim that this position was a cook manager position within the meaning of the provisions of Article XII. The evidence showed that the cook manager position as described in the contract language is a different position than the summer feeding program position. For one thing, there is no one to manage since the person works alone. Second, the evidence showed that the actual job duties are different as well. Thus, while the pay grade may be the same that does not equate to making the two jobs the same for purposes of the contract language requiring an interview. Thus, the evidence here did not support the Union's claim for a violation of that part of the contract and is denied.

The ultimate question though is whether the evidence showed that the District violated the contract at subdivision 3 by failing to consider the three factors listed there. It did not. The District cited 7 prior awards between these parties going back almost 25 years on the question of whether the District violated some provision of the labor agreement by hiring a junior person, and in one case a person from the outside, for a position over a more senior employee.

The first such case was decided by Arbitrator Christine Ver Ploeg in *ISD 191 and SEIU # 284*, BMS # 86-PP-51-B. She considered an earlier version of the clause at issue but which was virtually identical in its language. Arbitrator Ver Ploeg discussed the very provision under consideration here as follows:

“... the question which confronts the arbitrator is whether there is evidence that the District did not properly consider seniority when it awarded the position of cook manager to a less senior applicant.

This in turn gives rise to the question: What does it mean to ‘consider’ seniority? Does it mean, as the Union claims, that when two highly qualified applicants compete for a position it must be awarded to the senior employee? Or does it mean, as the District argues, that a position may be awarded to the person it feels is most qualified for that position, even though there may be another qualified, and more senior, employee who has bid for the position? I have considered this question and have concluded that the contract does not support the Union’s interpretation of this section of the contract. The simple fact that two applicants are qualified for a position does not require the award of that position to the most senior applicant.” Slip op at 6.

Arbitrator Lewis Solomon decided a similar case only 2 years later, see, *ISD 191 and SEIU #284*, BMS 88-PP-9-B. He ruled against the District and distinguished Arbitrator Ver Ploeg’s decision on the ground that the junior applicant in the Ver Ploeg decision was clearly superior to the more senior applicant. Arbitrator Solomon then embarked on a sometimes dangerous journey of assessing the relative abilities of the two applicants in the case before him and found that the junior applicant in that case was not the “most qualified.” He further found that the contract clause whereby the administration reserved the right to make a final decision was “not absolute or sacrosanct” and determined that the District had acted unreasonably in making its decision.

The next arbitrator to wade into this issue was Arbitrator Gil Vernon, *ISD 191 and SEIU #284*, BMS # 93-PA-46 (1993). He upheld the District's right to hire an outside applicant over an internal applicant for an open position and noted as follows:

"... the question to be answered is whether management gave reasonable and appropriate consideration to all the relevant factors combined, as a whole. It is the conclusion of the arbitrator that when considering job experience and ability, the District was not unreasonable in its determination that Ms. Beveridge has significantly more ability as borne out primarily by experience and that the difference was great enough to outweigh the grievant's greater seniority." Slip op at page 8.

Arbitrator James Reynolds, in *Independent School District No. 191 and School Services Employees Local 284*, BMS Case No. 96-PA-2247 (1996) provided further clarification of the proper role of the arbitrator in determining how selections for openings under this particular clause should be handled and what the standard should be for determining whether the District violated that part of the contract or not. He noted as follows:

Previous arbitrators have interpreted and applied this very language in earlier grievances between these parties. What is clear from these rulings is that the District may not be arbitrary, capricious, or unreasonable in making its selection. It is, of course, the criteria of seniority that is at issue in all of these prior cases and the instant grievance. Because the Union is the moving party, it must show with a preponderance of the evidence that the District failed to consider seniority at all, and was therefore, unreasonable in its selection. Such a burden is indeed heavy. It requires the proof of a negative, which is always difficult. Such a proof could be made, however, if the evidence produced no showing that the District considered seniority in any way, or that the qualifications of the selected employee were not at least arguably superior to those of the grievant. Slip op at page 10.

In addition, Arbitrator Koehler in *ISD 191 and SEIU 284*, BMS 97-PA-193, ruled as follows:

"Neither the Arbitrator nor the Union can stand in the place of the Employer to determine whether the employer's perception of a candidate's qualification are totally accurate or its assessments are fair to all interviewed. The employer not only owns the right to assign personnel, but in its inherent position possesses knowledge and information of the working environment, through its observation and employee associations, beyond that which be qualified in the words, "ability and job performance."

She found that the District had not placed undue weight on any one factor and had acted properly under the contract.

Arbitrator James Boyer likewise upheld the District's decision to hire a junior applicant in *SEIU 284 and ISD 191*, 96-PA-2249 (1996). He cited excerpts from the Solomon award and noted that "management's decision should not be overturned unless it is arbitrary, capricious or wholly unreasonable."

Finally Arbitrator Befort ruled in 2000, see *SEIU #284 and ISD 191*, BMS 00-PA-160, that the Union had failed to show that the District had acted arbitrarily. He, as well as Arbitrator Reynolds noted that the burden placed on the Union by the language involved here is heavy indeed, not only because it requires the proof of a negative, i.e. that the proper factors were not considered at all, but also because of the very nature of the requirement of proving arbitrary and capricious action. See Slip op at page 7.

This case presents a similar sort of question in this regard. The question is whether the Union has shown that the District failed to consider "seniority, ability and job performance." Other arbitrators have delved into the question of the relative ability and job performance of the various applicants. The language would not seem to even require that. All that is required is that the District must consider these factors. Also, as noted above, the language is clear that no one factor is to be given greater or lesser weight than the others.

Here too, Ms. Lackner gave credible testimony that she indeed did consider all three relevant factors and concluded that Ms. Quinn's seniority was certainly greater and that this was a factor that weighed in her favor. The other two factors were also considered and those came out in favor of the junior applicant. The fact that Ms. Mackey has in fact held this very job several years in a row and has performed it very well by all accounts was a significant factor. Further, while the performance issues raised by the District to undermine the grievants abilities were relatively minor and may not have affected her performance that much, the evaluations of Ms. Mackey were beyond reproach and were again by all accounts exemplary. Ms. Lackner testified credibly that she gave due consideration to these factors as well and found that the factors weighed in favor of Ms. Mackey.

This is not to say that the grievant could not have performed the job as well; but that is not the question. The question is whether the District considered the 3 factors and the great weight of the evidence demonstrated that it did.

In the final analysis, the clause that really governs this case is the second sentence of Article XII, subd. 3 section 3 wherein “Administration reserves the right to final decision.” That clause means exactly what it says and absent a showing of arbitrary or capricious action by the District it is simply not for an arbitrator to substitute his or her judgment for that of the District in this regard.

The Union raised the issue of Ms. Mackey’s personal situation and that this may have been a factor in the decision to hire her. There was no evidence of this and the allegation appeared to have been based on pure conjecture. The statements allegedly made to the grievant about “screwing Gale” during discussions about who was to be awarded this job, even if one assumes these to be true, do not rise to the level of a showing that the District acted arbitrarily. At best those statements were in response to the stark fact that the District had one job opening and two applicants, one of which was determined to be better qualified for it – nothing more and nothing less. Accordingly, the Union’s claim that there was a violation of Article XII, subdivision 3, Section 3 is denied.

The question now remains as to what back pay or other remedy, if any, should be ordered due to the District’s apparent failure to put the qualifications on the posting as noted above. On these facts it would be inappropriate to award the position to the grievant, since the District retained the final decision under the contract. Neither is it appropriate to award back pay for much the same reason.

To be sure this was a technical violation of the requirements of the contract. Moreover, there was no showing that the grievant’s situation would have been any different under these facts if the District had posted the proper qualifications. Accordingly, on these specific facts no specific remedy will be ordered other than to require that the contract be adhered to and that appropriate qualifications be posted in the future pursuant to the provisions of Article XII. As noted, under a different set of facts that result could be different but no decision or speculation can be made about that at this point.

## **AWARD**

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievance is sustained to require the qualifications for the summer feeding program manager to be listed on future postings for that position. The remainder of the Union's grievance is denied as set forth above.

Dated: September 8, 2009

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Jeffrey W. Jacobs, arbitrator

Burnsville School and Local 284 Award.doc