

In the Matter of the Grievance Arbitration Between

AFSCME Council 5

and

BMS Case #12 PA 0579

University of Minnesota

Before: Arbitrator Harley M. Ogata

Date and Place of Hearing: June 15, 2012
University of Minnesota
Minneapolis, MN

Date of Submission of Briefs: July 16, 2012

Advocates:

For the Union:

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This is a contract interpretation grievance arbitration. The parties stipulated that the matter is properly before the arbitrator. The hearing took place on June 15, 2012. The parties had witnesses testify under oath and evidence was submitted. The parties submitted briefs on July 16, 2012.

Introduction and Issue

The core issue in this case is whether the employer violated the terms of the collective bargaining agreement by failing to interview bargaining unit members for a vacant position in the unit. More specifically, the focused issue in this case is whether the University added a requirement of a teaching license for the position in question, or whether a license was merely a preference rather than a requirement. If it is determined that the University required a teaching license as a precondition for being hired into the vacant position, the arbitrator would rule in favor of the union. If a teaching license was not a requirement but was merely a preferred attribute, the arbitrator would rule in favor of the University.

The vacant position in question is a child care worker in the University of Minnesota Child Development UMCDC (UMCDC). The UMCDC is a day care program that also acts as a place for research in child development and a training center in early childhood development for student teachers.

The University determined that it needed to try to fill a vacancy in the UMCDC with applicants who held a Minnesota teaching license. The employer

contended that it desired this criterion for this position because of an expected increase in the number of student teachers assigned to the UMCDL would necessitate an increase in licensed teachers. Only licensed teachers may supervise student teachers and the UMCDL was short of the number of licensed teachers it needed to adequately supervise the student teachers it anticipated receiving.

The collective bargaining agreement prohibits the requirement of a four year degree in the "essential qualifications" of a position within the unit. The union contended that requiring a teaching license for the vacant position created a de facto requirement for a four year degree, in violation of the express terms of the Collective bargaining agreement.

The University countered that it did not require a license as an "essential qualification" for the position, but listed the license as a "preferred" job related selection criterion for the position. In other words, the University maintained that the teaching license was not a requirement or precondition to be hired for the position in question. In the end, the University only interviewed licensed teachers for the position and did not interview otherwise qualified applicants from within the unit.

Relevant Contract Language

Article 5 - Recruitment and Employment (Section 1 - Vacancy and Posting):

Postings shall include, at least, the classification, campus and work location of the job, salary and/or salary range, shift and hours of work, whether overtime or consecutive Sunday work are conditions of employment, a summary of the duties and essential qualifications for the job, as determined by the Employer. There shall be no essential qualifications which require four-year or greater college degrees for vacancies in the bargaining unit.

Article 5 - Recruitment and Employment (Section 4 - Applicant Consideration):

Applicants who apply for vacancies and who have been certified by the Employer as meeting the qualifications and measurable, job related selection criteria for a vacancy shall be considered in the following order:

A. The two (2) most senior employees by University Seniority who have applied for a vacancy in the bargaining unit within seven (7) calendar days of the posting following the procedures above, and who are qualified as determined by the Employer, and meet the measurable, job related selection criteria as applied by the Department, shall be offered the opportunity to interview for the vacancy.

B. All other applicants.

Discussion

The union's primary argument in this matter is that the employer required a teaching license for the position in question and thereby imposed a *de facto* requirement that the position be filled by someone with a four year degree, in violation of the collective bargaining agreement. For reasons more specifically outlined below, the arbitrator holds that a Minnesota license (and therefore a four year degree) was not an actual requirement for the vacant position and the terms of the agreement were therefore not violated. The union's position would be

sustained in this arbitration if it were true that the employer required a teaching license for the position in question.

Currently, under Minnesota law, a bachelor's degree is a minimum requirement to obtain a license to teach in Minnesota. There are other methods and qualifications that might qualify a person to obtain a permission to teach in Minnesota, but a permission is not a license as that term is defined under Minnesota rules and laws. So, if the University had required a license as a necessary prerequisite for the position in question, the arbitrator would have ruled that the license requirement was a *de facto* requirement of a four year degree, in violation of the collective bargaining agreement.

The University asserted that there is a difference between essential qualifications and other job related selection criteria, which it deemed as "preferred" qualifications. It asserted that the language in the collective bargaining agreement only bars a four year degree as an essential qualification. If the University had required the license as a precondition to the position, it would have created another type of *de facto* essential qualification that would have violated the collective bargaining agreement regardless of the label they put on the criteria. Instead, the University's assertion that essential qualifications are the only requirements and that other job related selection criteria are merely preferred qualifications was bolstered by testimony and evidence presented at the hearing.

On this issue, the testimony of Sarah McKee, the Education Coordinator for UMCDC was most telling. Ms. McKee testified that if none of the applicants met all the selection criteria, they would have hired from those that met only the essential qualifications. In other words, the University would have filled the position from those applicants who did not have a teaching license.

The difference between the essential qualifications and the preferred qualifications is further bolstered by the arguments of the University wherein it cites the language of Article 5, Section 4, which mandates an interview of the two most senior internal applicants, only if the person meets both the essential qualifications and the job related selection criteria. Requiring both types of criteria to mandate an interview again lends credence to the argument that the two types of criteria are different.

Further, the employer points to the layoff language which requires that an employee meet both criteria in order to bump into a position. Here, the parties could have agreed to allow bumping rights into positions which only require essential qualifications, but apparently chose not to do so.

Finally, the University's position on this issue is solidified by contrasting the language in question with the language of the University/AFSCME contract in unit 6, the clerical unit. This unit is also represented by AFSCME Council 5. In the comparable section of the collective bargaining unit, the language states that "There shall be no essential qualifications or selection criteria which require four

year degrees for vacancies in the bargaining unit." Article 5, Section 1, AFSCME, unit 6/University collective bargaining agreement, (emphasis added).

The union's request for relief asks for an award that orders "no Essential or Required/Preferred Qualifications for teaching license or specific four year or greater degrees." Essentially, it asks for a requirement or language in the collective bargaining agreement that mirrors that of the clerical unit. The arbitrator believes that is best left to the parties to negotiate mutually.

In the big picture, the employer has the inherent right to select its employees, subject only to limitations established in the collective bargaining agreement. Here the only relevant limitation is that it cannot establish an essential qualification that requires a four year degree. The testimony and evidence presented at the hearing established convincingly what the terms "essential qualifications" and "selection criteria" mean in the context of the "law of the shop" in the University setting. Relevant to the facts of this arbitration, the arbitrator holds that essential qualifications are requirements and selection criteria are preferred qualifications that do not exclude candidates from being selected. Both parties did a good job of trying to establish their positions within the context of the work environment. Arbitrators rely on this to provide an understanding of the full import of language in collective bargaining agreements and its intended meaning.

Finally, the union notes in its brief that "requiring" a specific teaching license discourages internal applicants from promotional opportunities and

denies internal applicants from being interviewed. The arbitrator has sympathy for these arguments, even in the context of establishing "preferred" criteria, but believes they are best left to be made at the bargaining table.

Conclusion

For the foregoing reasons, the grievance is denied.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'H. Ogata', with a long horizontal stroke extending to the right.

Harley M. Ogata

Dated: August 13, 2012