

MINNESOTA BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

In the Matter of the Arbitration)
)
Between)
)
INDEPENDENT SCHOOL DISTRICT #748) BMS 13-PA- 0463
SARTELL- ST. STEPHEN, MN)
)
and) JOHN REMINGTON
) ARBITRATOR
SERVICE EMPLOYEES INTERNATIONAL)
UNION LOCAL #284)
_____)

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a grievance arising from the selection of an applicant for a clerical vacancy, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the procedures of the Minnesota Bureau of Mediation Services, to hear and decide the matter in a final and binding determination.

Accordingly, a hearing was held on March 21, 2013 in Sartell, Minnesota, at which time both parties were represented and fully heard. The parties presented oral testimony and documentary evidence. No stenographic transcript of the proceedings was taken and the parties

requested the opportunity to file post hearing briefs which they did subsequently file on April 23, 2013.

The following appearances were entered:

FOR THE EMPLOYER:

Tim Palmatier Attorney at Law
Kennedy and Graven, Minneapolis, MN

Nicole Hysten Human Resources Director

FOR THE UNION:

Nicholas Frey Contract Organizer

Laurie Stammer Representative

Diane Omann Steward

THE ISSUE

DID THE EMPLOYER VIOLATE THE PARTIES' COLLECTIVE BARGAINING AGREEMENT WHEN IT SELECTED AN EXTERNAL APPLICANT RATHER THAN THE QUALIFIED SENIOR INTERNAL APPLICANT FOR AN ADMINISTRATIVE ASSISTANT POSITION WITH THE DISTRICT AND, IF SO, WHAT SHALL THE REMEDY BE?

PERTINENT CONTRACT PROVISIONS

**ARTICLE IV
SCHOOL BOARD RIGHTS**

Section 1. Inherent Managerial Rights: The exclusive representative recognizes that the School Board is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

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**ARTICLE XII
DISCHARGE, RECALLS VACANCIES,
PROBATION, RETIREMENT, RESIGNATIONS**

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Section 4. Seniority is hereby defined as continuous employment in the School District from the most recent date of employment in the unit.

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Section 8. Vacancies and Layoffs:

Subd. 1. New positions or vacancies of more than thirty (30) days duration will be posted for a period of five (5) days and the senior qualified applicant will be assigned thereto five (5) days after closing of posting. Applicants for posted positions must submit their bid to the proper office in writing and duplicate copies of all bids will be delivered to the steward of the unit by the applicant before the close of the position. Final decision, however, for employment advancement, transfer, or promotion will be made by the employer.

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**ARTICLE XIV
GRIEVANCE PROCEDURE**

Section 1. Grievance Definition: A “grievance” shall mean an allegation by the employee resulting in a dispute or disagreement between the employee and the School Board as to the interpretation or application of terms and conditions of employment insofar as such matters are contained in the agreement.

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Section 3. Definitions and Interpretations:

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Subd. 8 Jurisdiction: The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The

jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and continued in this written agreement; nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlined herein, nor shall the jurisdiction of the arbitrator extend to the matters of inherent managerial policy, which shall include but are not limited to such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, and selection and direction and number of personnel. In considering an issue in dispute, in its order the arbitrator shall give due consideration to the statutory rights and obligations of the public school boards to efficiently manage and conduct its operation within the legal limitations surrounding the financing of such operations.

BACKGROUND

Independent School District Number 748, hereinafter the “EMPLOYER” or “DISTRICT,” operates and administers the public schools in Sartell and St. Stephen, Minnesota. The District is a public employer within the meaning of Minnesota Statutes §179A. The Service Employees International Union (SEIU) and its Local Union #284, hereinafter the “UNION,” is the duly certified exclusive collective bargaining representative for all District clerical personnel whose employment exceeds the lesser of fourteen (14) hours per week or thirty-five (35) per cent of the normal work week and more than sixty-seven (67) work days per year, excluding confidential and supervisory employees.

Rhonda Kaiser, Deborah Johnson and Lisa Schoon, the Grievants in this matter, are all current clerical employees within the above bargaining unit and all applied for an open position as an Administrative Assistant at Oak Ridge Elementary School in June or July of 2012. Kaiser has been employed by the District in various clerical positions, but primarily as a Receptionist, since September 4, 2001. Johnson has been employed by the District, primarily as a

Receptionist, since August 16, 2004, and Schoon has been employed by the District as a part-time Administrative Assistant in the early childhood program since August 11, 2005.

The Employer posted an Administrative Assistant Vacancy, a bargaining unit position, for Oak Ridge Elementary School on June 20, 2012. The position description indicates:

The administrative assistant will assure the smooth and efficient operation of the main office so that the needs of students, staff, and the community are met. A key service that this position will provide is clerical and administrative assistance to the building Principal.

This document goes on to list “essential functions” of the position including providing clerical and managerial assistance to the building principal, managing office operations and duties, providing work direction to the receptionist, hall monitors and volunteers, providing information, covering the nurse’s station as needed and a variety of routine and non-routine clerical and minor administrative duties. The qualifications for the position require:

The successful applicant must have a high school diploma and a minimum of three years of administrative assistant experience. Excellent organizational, grammar, typing, and computer skills are also required. Skill in developing and maintaining effective working relationships with supervisors, co-workers, other staff, students, and members of the public is essential for success. Prior experience working in a school office setting and with confidential information is preferred.

On or about July 26, 2012 the Employer offered the above Administrative Assistant position to one of the external applicants. On August 2, 2012, Union representative Nicholas Frey sent the following letter of grievance to District Superintendent Dr. Joseph Hill:

It was brought to my attention on July 26th 2012 that the District hired an external applicant over three qualified internal candidates for the ORE Administrative Assistant position. According to *Article XII, Section 8, Subd. 1* of the Master Agreement between Local 284 and the Sartell School District, the District must assign the job to the “senior qualified applicant.” This situation is very similar to the arbitration case of Debora Ertl, between Local 284

and Sartell (BMS Case No. 04-PA-333), in which the arbitrator ruled in favor of the internal candidate.

The Union is hereby grieving this violation on behalf of the three internal applicants who applied: Rhonda Kaiser, Deb Johnson, and Lisa Schoon. Individual grievances are attached.

These individual grievances are all signed by Frey and allege violation of Article XII, Section 8, Subd. 1, of the contract. In remedy they each request that “the senior applicant shall be immediately transferred to the position of ORE Administrative Assistant and be made whole for any and all losses of wages and benefits.”

Superintendent Hill responded for the District in a letter to Frey on August 9, 2012. This letter states:

I am in receipt of your grievance(s) regarding the filling of the Oak Ridge Elementary Administrative position. While the contract does refer to the most “senior qualified applicant,” it also states in that same section of contract language that “Final decision, however, for employment advancement, transfer or promotion will be made by the employer.”

The district hired the most qualified applicant for the position.

Grievance denied.

The grievance was appealed by the Union to Step 2 (Mediation) on August 22, 2012 and it was heard in mediation by Mediator Dan Vannelli on September 22, 2012. However, the mediation was unsuccessful in resolving the matter and the grievance was appealed by the Union to the School Board as provided for in Article XIV, Section 5 of the parties’ collective agreement. This provision allows the School Board to designate a committee to hear the grievance on its behalf. The Board appointed committee was composed of School Board Clerk Greg Asfeld and Board Finance Committee member Chris Gross. Asfeld and Gross heard the grievance on November 8, 2012. According to the arbitration hearing testimony of Gross, he and Asfeld then met with

Human Resources Director Nicole Hylen and asked for additional information regarding the hiring decision.¹ On November 26, 2012, Asfeld denied the grievance on behalf of the School Board in a letter to Frey. This letter states, in relevant part:

The process for filling this position was identical to the Administrative Assistant vacancy for Sartell High School in December of 2010.....

Similar to the Administrative Assistant vacancy filling process for the High School, all internal clerical applicants were given an opportunity to interview. Two rounds of interviews were conducted with six total candidates in the first round and three were brought forward for a second interview.....

After full consideration, the district offered the position to the applicant who was most qualified for the position. The district followed a well-established procedure for hiring and selected the most qualified candidate. The contract is clear in Article VII (sic), Section 8, Subd 1 that final decision will be made by the employer.

Grievance denied.

Following receipt of Asfeld's denial, the Union appealed the grievance to arbitration on December 4, 2012. There being no dispute that the grievance was untimely filed or irregularly processed through the contractual grievance procedure, it is properly before the Arbitrator for final and binding determination.

CONTENTIONS OF THE PARTIES

The Union takes the position that the language of Article XII, Section 8, Subd 1 restricts the employer to award a bargaining unit vacancy to the senior qualified bidder. While it recognizes that the language of this section reserves the final decision to the Employer, it argues that such final decision is limited by the first sentence of Subd. 1. The Union maintains that to

¹ Gross testified at the hearing that he requested additional information because he was uncertain as to why the three internal applicants had been rejected. He further testified that he again requested this information in writing on November 28, but that no additional information regarding the apparent disqualification of the three Grievants was provided.

grant the Employer unlimited discretion in selection would render this first sentence of the clause meaningless. The Union further takes the position that the 2010 selection incident noted in Asfeld's denial letter, supra, is immaterial since the Union was unaware of a senior qualified applicant being bypassed in that one incident and no grievance was filed. Rather, the Union argues that a 2004 arbitration decision by Arbitrator David Paull which awarded another position to the senior qualified applicant under identical contract language is controlling. The Union maintains that all three of the Grievants were qualified for the Administrative Assistant position based on the Employer's job posting and that the senior Grievant should be awarded the position. Finally, the Union contends that the Employer violated its own procedures and circumvented its appointed grievance committee by rendering a decision before the committee had reached a decision. Accordingly, the Union requests that the grievance be sustained.

The Employer takes the position that Article XII, Section 8, Subd. 1 is a "modified seniority clause" which permits the Employer to make an initial determination/selection, a decision which can only be challenged by the Union demonstrating that this decision was unreasonable, arbitrary, capricious or discriminatory. It argues that the Union has made no such showing here. Rather, the Employer argues that it followed the contractual provisions and established a fair process which provided Grievants every opportunity to demonstrate their skills and qualifications for the position. These qualifications were reasonable and wholly within the reserved managerial discretion of the Employer. In this connection the Employer argues that the substantial skill-set requisite for an Administrative Assistant distinguishes the Administrative Assistant position from other clerical positions in the District. The Employer further takes the position that the contract and the record of the hearing do not support the remedy requested by the Union because the successful applicant must be qualified and that none of the three Grievants

was qualified in the estimation of the selection committee. Consequently, the Employer asks that the grievance be denied.

DISCUSSION, OPINION AND AWARD

There can be no doubt that the resolution of this dispute is controlled by the language of Article XII, Section 8, Subd. 1. It is well accepted in labor arbitration that, in the interpretation of contract language, it is the role of the Arbitrator to first determine whether or not the language in dispute is clear and unambiguous. If the intent of the language appears to be unambiguous and the intent of the parties is clear, it is the duty of the Arbitrator to so find. This is the case here. Section 8, Subd. 1 plainly states that “new positions or vacancies of more than thirty days duration will be posted for a period of five days and the senior qualified applicant will be assigned thereto five days after close of posting. (Emphasis added.) This is what the Union characterizes as a “sufficient ability” provision. Such a provision prohibits the Employer from comparing the relative abilities of qualified applicants. Once it is determined that an applicant is qualified, the only additional consideration is the seniority of the applicant. Accordingly, if there are any qualified internal applicants, no external applicant may be considered.² While the Employer retains the right to make a final decision, this right may only be exercised where the Employer demonstrates that the internal applicants are incapable of performing the work and are therefore unqualified.

Given the Arbitrator’s above finding that the controlling language is clear and unambiguous, it follows that the above noted appointment of an external applicant to an Administrative position as the high school in 2010 is immaterial. While the Arbitrator does not question the Employer’s contention that Administrative Assistant positions are critical and are somewhat different and more complex than other clerical positions within the bargaining unit, it

² See Union Exhibit #31, BMS Case No. 04-PA-333, (Paull, Arbitrator) at pp. 20-21.

cannot be denied that there is no exclusion or special exception for Administrative Assistant positions in the collective bargaining agreement. The language of Article XII, Section 8, Subd. 1 is applicable to all clerical positions within the bargaining unit.

It is abundantly clear in the record that the Employer misinterpreted its obligation under the collective agreement. Rather than seeking a qualified applicant, it used its search and screening procedure to select the best applicant from both internal and external sources. The initial grievance response from Hill to Frey (8/9/12) references selection of the “most qualified” applicant as does the grievance denial letter from Asfelt to Frey (11/26/12). Further, the testimony of Oak Ridge Principal Randy Husmann who chaired the screening/selection committee indicates that his “team” was seeking the “best” candidate for the Administrative Assistant position and not attempting to determine whether or not the Grievants were minimally qualified. Indeed, in discussing the internal applicants he testified that two of the Grievants were not the “best” candidates. This testimony was essentially corroborated by the testimony of Committee/Team member and High School Principal Brenda Steve who indicated that, in its deliberations, the committee was looking for the “best” candidate for the position.³

We are left then with the matter of qualifications. In summary, the posted (and apparently the only objective) qualifications announced by the Employer included the minimum requirements of possessing a high school diploma and three years of administrative assistant experience. Presumably the administrative assistant experience requirement is generic and not specific to school office settings although the posting does state a preference for prior school office experience. The posting further requires excellence in grammar, typing and computer skills as well as skill in developing and maintaining effective working relationships with

³ Steve testified that she joined the committee at Husmann’s invitation after the first round of interviews and apparently had no role or input into the decision to reject Grievants Kaiser and Johnson.

supervisors, co-workers, other staff, students, and members of the public. The Employer argues that there are other “essential functions” which are implicit in the position of Administrative Assistant, an argument with which the Arbitrator is sympathetic. These functions or duties include: providing clerical and managerial assistance; managing office operations and duties; providing work direction to others; compiling, developing and designing reports and other published materials and special projects; ensuring that decisions made in the absence of the principal are procedurally correct and are reflective of the Principal; evaluating and handling emergencies, maintaining accurate records; ensuring substitute staff coverage; and establishing and maintaining confidential files for students. It is therefore of importance to assess how the Grievants were evaluated on these qualifications and skills. In doing so it is not the Arbitrator’s role to second guess the Employer’s representatives in the evaluation and selection process or to substitute his judgment for that of the Employer, but rather to determine if the Grievants were disqualified for reasons other than their qualifications and skills.

Rhonda Kaiser

The Union contends that Kaiser possessed all of the requisite qualifications and skills of the position. However, the Employer’s interview team, based on the testimony of Husmann, Josh Bentley, and Steve (the only interview team members who testified at the hearing), determined that she was not qualified. This determination was based partly, as Husmann testified, on the perception that Kaiser was apparently not warm, “friendly and welcoming” or “excited” about the position. Husmann also cited problems with Kaiser’s “communications style.” Bentley testified that committee members had expressed their concern about Kaiser’s technology skills and her ability to work effectively in an elementary setting. Accordingly, it would appear that, in terms of the posted qualifications, the committee had reservations about

Kaiser's technology (computer) and interpersonal skills as related to her ability to develop and maintain effective working relationships. While it is clear from his testimony that Husmann wanted a candidate with a warm, outgoing and welcoming personality, these subjective traits are obviously not specified in the job qualifications or requisite skills and cannot be considered even minimal qualifications.

The Employer also raised concerns about Kaiser's past work performance as evidenced by a less than satisfactory evaluation given to her by the Principal who supervised her as a Receptionist in 2011, and an incident with a parent in 2008. The Union strenuously objected to the admission of the 2011 evaluation, noting that it was extraordinary and that Kaiser had no opportunity to respond. The Union also contended that the purpose of the evaluation was to discipline Kaiser. However, it cannot be denied that Kaiser never grieved the evaluation and admitted, on cross examination, that the content of the evaluation had been discussed with her at the time. She did not directly dispute its contents. In summary, it would appear that the committee/interview team had legitimate reservations concerning Kaiser's qualifications and work history. The Arbitrator must therefore find that the decision to eliminate Kaiser from consideration was neither arbitrary nor capricious and was based, at least in part, on objective evidence of her lack of qualifications.

Deborah Johnson

The Union also asserted that Johnson was fully qualified to assume the Administrative Assistant position. While Husmann characterized her as unqualified for the position in his testimony, he simply opined that her "interpersonal skills didn't come across during the interview process" and that other members (unspecified) had shared his view. Bentley was equally vague about the decision to reject Johnson indicating only that there was some mention

in the committee concerning her office management ability. Steve did not interview Johnson. It would appear that the committee did not deem Johnson to be the best qualified applicant but there is nothing of substance in the record to show her lack of qualifications in terms of the posted requirements and related skills. The Union presented strong reference letters supporting Johnson from Greg Johnson, Grievant's Principal at Pine Mountain Elementary where she worked as a Receptionist and regularly filled the Administrative Assistant position in the absence of the incumbent, and from Deb Ploof, an Administrative Assistant who served on the selection committee/team.⁴ In summary, there appears to be no meaningful evidence in the Employer's possession, based on the stated qualifications and skills, to deem Johnson unqualified, and so the Arbitrator finds.

Lisa Schoon

The Union maintained that Schoon, like Kaiser and Johnson, was fully qualified. Unlike Kaiser and Johnson, Schoon survived the first round of interviews and was advanced to the second round along with two external candidates. A review of the testimony and documentary evidence concerning Schoon's candidacy reveals that the reservations concerning Schoon expressed in the testimony of Husmann, Bentley and Steve were vague and the questions raised in the committee (reliability possibly attributed to attendance issues and timeliness of response) were not supported by any data or examples, nor are they directly relevant to the stated qualifications. Indeed, it is readily apparent that Schoon was rejected because the interview committee deemed her less qualified than the external candidates, both of whom were ineligible for selection given the availability of at least two qualified candidates. Accordingly, the Arbitrator must also find that Schoon was qualified within the meaning of the collective agreement and the posted qualifications.

⁴ Ploof, a bargaining unit member, did not testify at the hearing.

Brief comment is warranted with regard to the screening and selection procedure utilized by the Employer in this matter. Although the Union objected to the procedures primarily because they are not provided for in the collective agreement, it must be stated that the Employer was fully entitled to utilize a screening/ interview and selection committee to aid in the process of identifying qualified candidates, and that such procedures are not prohibited by the agreement. Unfortunately, the committee apparently concluded that its role was to select the best candidate rather than determine which candidates were qualified within the meaning of the collective agreement and the posted qualifications. It is likely that the committee was influenced in this regard by Husmann who effectively chaired the committee and appointed its members. Husmann's role in this regard is particularly troubling since the new appointee was to become his Administrative Assistant and he was put in a position to influence, if not control, the committee in its deliberations and determinations. There can be little doubt that Husmann was responsible for the addition of unpublished subjective qualifications such as "passionate" and "warm and welcoming" to factors considered by the committee. In this connection, the timing of the decision by the Employer to deny the grievance at the final step of the grievance procedure prior to arbitration is also troubling. Employer Grievance Committee member Chris Gross testified that he was concerned about the process and was still waiting for additional information and/or clarification concerning Schoon's qualifications and the requirements of the collective agreement when the Employer accepted Husmann's determination and denied the grievance.⁵

The Arbitrator has made a particularly detailed review and analysis of the entire record in this matter, and he has carefully read and considered the cogent post hearing briefs submitted by the respective parties. Further, he has determined that certain issues which arose in these proceedings must be deemed immaterial, irrelevant, or side issues, at the very most and therefore

⁵ Union Exhibit #40

have not been given any significant comment, if at all, for example: Article XII, Section 5 of the collective agreement which deals only with layoff and recall and is not relevant here; whether or not the placement of an external candidate into an Administrative Assistant position in 2010 was grieved by the Union; whether or not the Union called any of the bargaining unit members of the interview committee to testify; the comparable worth study commissioned by the District; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance, and within the meaning of the parties' collective agreement, that the Union has established, by a preponderance of the evidence, that the Employer violated the agreement when it failed to appoint the senior qualified applicant to the Administrative Assistant position at Oak Ridge Elementary School. The grievance must be, and is hereby, sustained. Accordingly, an award will issue, as follows:

AWARD

THE EMPLOYER VIOLATED THE PARTIES' COLLECTIVE AGREEMENT WHEN IT SELECTED AN EXTERNAL APPLICANT FOR AN ADMINISTRATIVE ASSISTANT POSITION IN THE DISTRICT. THE GRIEVANCE OF DEBORAH JOHNSON MUST BE SUSTAINED.

REMEDY

GRIEVANT DEBORAH JOHNSON SHALL BE AWARDED THE ADMINISTRATIVE ASSISTANT POSITION AND SHALL RECEIVE BACK PAY AND BENEFITS, IF ANY, EQUAL TO THE DIFFERENCE IN PAY AND BENEFITS BETWEEN AN ADMINISTRATIVE ASSISTANT AND HER CURRENT CLERICAL POSITION FROM AUGUST 3, 2012 TO THE DATE SHE BEGINS WORK AS AN ADMINISTRATIVE ASSISTANT IN THE DISCTRICT.

JOHN REMINGTON, ARBITRATOR

May 13, 2013

Inver Grove Heights, MN