

IN THE MATTER OF THE GRIEVANCE ARBITRATION BETWEEN

Independent School District No. 720, Shakopee, Minnesota

and

BMS Case No. 07-PA-1001

Service Employees International Union Local 284
(Food Service Employees) Debbie Jo O'Brien and Joann Svac

NAME OF ARBITRATOR: George Latimer
Faith Latimer, Assistant

DATE AND PLACE OF HEARING: July 30, 2007
Shakopee, Minnesota

POST-HEARINGS BRIEFS RECEIVED: August 14, 2007

DATE OF AWARD: August 22, 2007

APPEARANCES

FOR THE EMPLOYER: Gloria Blaine Olsen, Kennedy & Graven
Ronald E. Ward, former Director of Administration
Jon McBroom, Superintendent
Elece Shoquist, Head Cook
Lynn Breeggemann, Head Cook
Shaleen Roth, Director of Human Resources
Mike Burlager, Director of Business Services
Deborah Ross, Food Service Director
Mitchell Perrine, Principal Red Oak Elementary

FOR THE UNION: Pamela Twiss, SEIU Local 284
Keith Niemi, SEIU Local 284
Joann Svac, Grievant
Debbie Jo O'Brien, Grievant
Donna Pittman (Friedmann) by phone, New Prague
Area School District
Marian Plekkenpol, Food Service Worker
Susan Stradtman, SEIU Local 284
Kathleen Anne Harding, Food Service Worker

BACKGROUND

Grievants JoAnn Svac and Debbie Jo O'Brien were both employed as Food Service Workers in the Shakopee school district in 2006. In July 2006 the District (Employer) posted an opening for a Head Cook position at Red Oak Elementary School, where the Grievants were employed. Ms. O'Brien applied for this position but was not interviewed. Carolyn Dougher was hired for that position as a new employee. Ms. Dougher left District employment shortly thereafter. In October 2006 this Head Cook position was again posted. Both Grievants applied, but were not interviewed. Tanya Gerold was hired for the position as a new employee. In November 2006 the District posted an opening for another Head Cook position, this one at Pearson Elementary School. Both Grievants applied and were interviewed for this position. Judy Griese was hired for this position as a new employee. The Union grieved this action on December 5, 2006. Meanwhile Ms. Gerold left employment. The Head Cook position at Red Oak Elementary was again posted. In January 2007 Ms. O'Brien applied and was hired for this position. (Joint Ex 2, 3, & 5; Emp Ex 11, 12, 14, 16-19, 21 & 22)

STATEMENT OF THE ISSUE

Did the School District violate the contract when it hired an outside applicant for the position of Head Cook, passing over two current bargaining unit members for that position?

If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

2006-2008 CONTRACT

Article VI Miscellaneous
Section 10 Job Postings

Subd. 1 Positions which become available will be posted in all school kitchens for a period of at least five (5) working days and the position should normally be filled in thirty (30) days. Whenever a position is increased by any amount of time, the position will be posted and filled according to the procedure below. Increases in assigned work time will be posted as whole positions whenever possible. A copy of the posting shall be sent to the Union Steward(s) at the time of public notice. Applications of the interested parties should be sent to the office of the Human Resources Director.

Subd. 2 The school district may temporarily fill a posted position by assignment or temporary hire to meet the district's immediate needs.

Subd. 3 A promotion means any change in position which involves an increase in Grade level.

Subd. 4 In filling any vacancy not involving a promotion as defined in subd. 3, the district shall award the position to the most senior applicant who is qualified for the position.

Subd. 5 In filling any vacancy involving a promotion as defined in Subd. 3, the district shall award the position to the best qualified employee who applies for the position. In posting a position which could be a promotion position, the district will clearly state on the posting the qualifications required for the position. If two or more employees who apply for a promotion position have comparable qualifications, the most senior employee shall be awarded the position. The Cook Manager position shall be filled by the best qualified candidate without regard to seniority.

Subd. 6 The School District reserves the right to fill any position with an outside applicant if no current employee who applies for the position has the necessary qualifications for the position or if no current employee applies for the position.

Subd. 7 Any applicant not granted a position has the right to request, in writing, the reasoning behind the administration's rejection of the employee's application with the intent being to increase or correct any qualifications that are lacking in order to be considered in future job postings. The district administration will respond in writing to the employee's inquiry if the employee so indicates in the employee's written request. The district shall provide to the union a list of all qualifications required for each position in the bargaining unit. Any updates or changes to the qualifications list shall be immediately provided to the union. The qualification list shall include education, training and experience, and any other requirements.

Article VII Compensation and Hours

Section 1

Subd. 2 Certification Pay.....Head cooks in a production kitchen shall hold a Level 3 certification. Head cooks in a satellite kitchen shall hold a minimum of a Level 2 certification. If not already certified at the appropriate level, head cooks will have a period of one year to obtain each successive level of certification required for their position.

UNION POSITION

In November 2006 two current employees who were qualified for the position of Head Cook applied for that position. Section 10 Subd 5 requires the school district to select whichever employee is the best qualified (without regard to seniority), and offer

her the position. Subd 6 would apply only if no current employee had applied for the position, or if no employee applied who met the necessary qualifications.

The Union argues there was long standing practice in the District that Head Cooks are promoted from within, that in the whole history of the District it has hired an outside applicant for Head Cook only once in 1997, and on three recent occasions preceding this grievance. (Union opener and brief, testimony of Marian Plekkenpol, Ronald Ward)

In 1994 the Union sought in bargaining to 'strengthen and improve' what was already established practice. It proposed language requiring seniority to be considered for all hiring. The District rejected that, and bargaining resulted in compromise language. "This language did not require that the district hire the most senior internal candidate for head cook positions, but it did require that if there was a qualified internal candidate, the district must hire that internal candidate." (U brief, testimony of Donna Pittman)

The Union points out the language in Subd. 6 is very clear, that the District has the right to hire an outside applicant if no qualified internal applicant applies. On the other hand the language about Cook Manager positions comes at the end of a paragraph which refers entirely to internal promotions. Indeed the word 'seniority' within that sentence must refer to current employees, since seniority does not exist among non-employees. "The Cook Manager position shall be filled by the best qualified candidate without regard to seniority"...is simply intended to show that seniority can be discounted, and the District need only look at an employee's qualifications when hiring for Head Cook.' (U brief, testimony of Donna Pittman)

Both Grievants testified they believe they were qualified for the Head Cook position. Both had been cross trained on the range of kitchen duties. Both had performed Head Cook duties at Red Oak Elementary for a number of weeks when that position was vacant. Both had Level 2 Child Nutrition Certifications in process. Ms. O'Brien testified she was asked by the Employer to train in the new Head Cooks. Ultimately she was deemed qualified and hired for that position in 2007.

Both the Grievants and the Union fully accept the Employer has the right to write job descriptions and requirements however it sees fit, and the right to determine

whether applicants meet those requirements. Neither does the Union ask that a particular position be awarded to Ms. Svac as remedy for this grievance. Rather it argues the contract language requires that employee applicants' qualifications be evaluated first, and that only if no employee applicant qualifies is the District permitted to hire outside.

EMPLOYER POSITION

The Employer argues the language in question is clear and unambiguous. Since at least 1992 the contract has contained language ensuring the District has the discretion to select the best qualified applicants for Cook Manager positions, whether from inside or outside.

The Union argument that past practice favors its interpretation is flawed since this language is unambiguous, and takes precedence over any existing practice. In addition, there is no evidence that qualified outside candidates ever applied for Head Cook positions over the years, therefore the past practice argument would be meaningless. Finally these positions have been filled so infrequently, there is no consistent pattern established. (Joint Ex 5, Emp brief)

Retired Director of Administrative Services Ronald Ward testified that from about 1990 to 2000 he was directly involved in bargaining and administering this contract. During this 10 year period the District always maintained it had the right to hire the best candidates for Head Cooks and Lead Custodians. He did not recall any occasion of hiring an outside applicant as Head Cook prior to the one in 1997, but stated there was very little turnover in these positions, therefore few hires. He stated that the District practice prior to the 1994 contract was that with the exception of Head Cook positions, qualified internal candidates were given preference.

During bargaining of the 1994-96 contract Mr. Ward testified the District always 'reserved the right to go outside' for Head Cook, that it was not obligated to hire a minimally qualified internal applicant over an outside applicant with superior qualifications. The District proposed language which would have allowed this discretion on any promotion: "In filling positions involving a promotion as defined in Subd. 2 above, the position shall be filled with the best qualified candidate as determined by the

school district.” (Emp Ex 7) The District later dropped this proposal. However it maintained the Cook Manager exception language. This language applied to no other category except the Cook Manager. When asked on cross examination about the word ‘seniority’ in the last sentence of subd 4, the witness stated that applicants could be internal or external, but that if an internal applicant were selected, seniority would not play a part in the selection.

Mr. Ward also recalled the Union proposal during 1998 bargaining to change the word “candidate” to “employee” (Emp Ex 6). He stated that proposal would have been a ‘deal breaker’ for management. District management was aware the District was growing, and it was very important to them to maintain their discretion on the Cook Manager hires. The fact that the Union failed to achieve their proposed changes in this language reinforces the Employer argument that the language in fact gives it the right to hire the best qualified candidate, regardless of employment status. (Emp argument and brief)

The Employer argues the language resulting from the 1994 bargaining laid out three separate categories of position postings. First, non-promotional positions, which are awarded by seniority; second, promotional positions which are awarded to the best qualified employee applicant, but with seniority as the tie-breaker in the event two employees are comparably qualified; and third, Cook/Baker Manager positions are awarded to the ‘best qualified candidate’, internal or external. Further, it argues the language in then Subd 5 is general in application, while the language in Subd 4 is more specific and therefore should control. (Emp opening and brief)

The District asserts that the Union acquiesced in the interpretation of the disputed language at least twice in recent years. In 1998 the Union filed a grievance when the District filled a Head Cook position with an external applicant over an employee applicant, Mary Stay. This grievance was denied, and the Union later withdrew it. This indicates the Union accepted the Employer’s interpretation of the language. (Jt. Ex 6) There was no significant change in the relevant language in later rounds of bargaining. However during negotiations for the 2002-04 contract, Superintendent Jon McBroom asserted that the language in then Subd 5 allowed the hiring of an outside candidate for Cook Manager. No one on the Union bargaining team

took issue with that. (Emp brief, testimony of Jon McBroom, Elece Shoquist, Shaleen Roth)

ARBITRATOR'S ANALYSIS and AWARD

On the question of the Grievants' qualifications for the position in question, there appears to be some dispute. The Arbitrator declines to make any judgment about the merits of the District's qualification assessments. First because there is not sufficient evidence to make a fair evaluation about alleged performance problems, secondly in the Arbitrator's view it is not relevant to the central question here.

This case is clearly a dispute over contract interpretation. Section 10 of the current contract (Job Postings) contains eight subdivisions. All but subdivisions 2 and 8 are relevant to the dispute at hand. While particular sentences contained in these six subdivisions are clear, taken together this language is ambiguous. Examination of the history and intent of this language is needed in order to reach a conclusion about its present meaning.

The 1992-94 contract contains the following:

Section 10 Job Postings: Positions which become available will be posted in all school kitchens for a period of at least five (5) working days and the position should normally be filled in thirty (30) days. A copy shall be sent to the Union Steward and Local 284 Business Representative at the time of public notice. Applications of the interested parties should be sent to the office of the Director of Administrative Services. In all positions with the exception of the Cook or Baker Manager the senior qualified candidates whose background and abilities best meet the requirements of the posted position shall be sent to the appropriate supervisor, the appropriate steward, and the business agent. Any applicant not granted a position has the right to request, through the Union Steward, the reasoning behind the administration's rejection of the employee's application with the intent being to increase or correct any qualifications that are lacking in order to be considered in future job postings. (Emp Ex 1)

This language indicates that since at least 1992, the issue of filling of vacancies and mobility for employees was of importance to the parties. Cook Manager positions were designated as 'exceptions' to the general language. The general language makes reference to seniority, but not in precise terms. In this paragraph the word 'candidates' appears to refer to internal job applicants.

In 1994 more detailed language was negotiated, much of which remains in the current contract. In examining Union Exhibits 1-5, Employer Exhibits 1,2, & 8, and testimony of former Director of Administrative Services Ronald Ward and former Business Agent Donna Pittman, the following appears to have transpired.

The Union sought a system requiring 'straight seniority' in filling all positions. It also sought deletion of the Cook Manager exception language.

The District wanted language allowing it to select the 'best qualified' applicant for any promotion, without regard to seniority. It also sought to retain the Cook Manager exception language.

In the resulting 1994 agreement, the Union's language was adopted with respect to filling non-promotions (subd 3). In filling positions for promotion, the agreement contains the Employer's 'best qualified' language, with seniority used as a tie-breaker when two employees have comparable qualifications. The Cook Manager exception language remains, however it is reworded and placed at the end of this paragraph (subd 4). Each party also won some other language in the article not directly at issue in this grievance.

The language in subd 5 reserves the Employer's right to fill a position with an outside applicant "if no current employee who applies for the position has the necessary qualifications..." (emphasis added). The parties reached agreement on this language well before agreeing on the other subdivisions. Union witness Pittman's testimony appears to be consistent with the District's Exhibit 8 on this point. The Arbitrator is persuaded that following the 1994 bargaining, each party was in good faith in its own belief about the language. The Employer believed it had held on to its 'exception' language. The Union believed that although it had compromised on its desire for straight seniority on internal hires, the Employer had committed not to hire outside applicants, provided internal applicants were qualified.

Section 10 of the 1994-96 Contract follows:

Section 10 Job Postings

Subd. 1: Positions which become available will be posted in all school kitchens for a period of at least five (5) working days and the position should normally be filled in thirty (30) days. Whenever a position is increased by more than sixty (60) minutes or if the

increase will cause the employee in the position to be eligible for increased benefits under this contract, the position will be posted and filled according to the procedure below. A copy of the posting shall be sent to the Union Steward and Local 284 Business Representative at the time of public notice. Applications of the interested parties should be sent to the office of the Director of Administrative Services.

Subd. 2: A promotion means any change in position which involves an increase in Grade level.

Subd. 3: In filling any vacancy not involving a promotion as defined in subd. 2, the district shall award the position to the most senior applicant who is qualified for the position.

Subd. 4: In filling any vacancy involving a promotion as defined in subd. 2, the district shall award the position to the best qualified employee who applies for the position. In posting a position which could be a promotion position, the district will clearly state on the posting the qualifications required for the position. If two or more employees who apply for a promotion position have comparable qualifications, the most senior employee shall be awarded the position. Cook Manager and Baker Manager positions shall be filled by the best qualified candidate without regard to seniority.

Subd. 5: The School District reserves the right to fill any position with an outside applicant if no current employee who applies for the position has the necessary qualifications for the position or if no current employee applies for the position.

Subd. 6: Any applicant not granted a position has the right to request, in writing, the reasoning behind the administration's rejection of the employee's application with the intent being to increase or correct any qualifications that are lacking in order to be considered in future job postings.

Subd. 7: Administrative Transfers: The parties recognize that an administrative transfer may be necessary...administrative transfer.
(Emp Ex 2)

Negotiations for the 1996-98 contract resulted in a few language changes in Article 10, but no changes in the subdivisions most at issue, subdivisions at this point numbered 5 and 6 (Emp Ex 4).

During bargaining for the 1998 contract, the Union proposed changing the words 'best qualified candidate' to 'best qualified employee'. It followed up with proposed language specifying a process to be used in filling Cook Manager positions which would require that qualifications of internal applicants be reviewed first, and the successful

applicant chosen from the internal pool, provided there are qualified internal applicants. (Emp Ex 6 & 9) These proposals were not agreed to. Mr. Ward credibly testified that during negotiations he was clear that District management felt strongly about maintaining its ability to hire from the outside for Cook Managers. There were no significant changes in the relevant language in subsequent contracts.

In support of its position, the Employer argues that at two points in time the Union acquiesced to the District's interpretation of this language. First by choosing not to take the 1998 grievance to arbitration on behalf of Mary Stay. (Emp oral argument and brief, U Ex 6) This is not a persuasive argument. Most grievances which arise in a collective bargaining relationship are resolved in some manner without arbitration. That fact does not bar either party from future disputes on the same or related issue.

Similarly the Arbitrator rejects District arguments that during negotiations of the 2002-04 agreement, some members of the Union bargaining team agreed with Superintendent McBroom's statements about the District's interpretation of this language. In the context of contract negotiations it is not unusual for confusion to occur between acknowledging the other party's position, and consenting to it. This may have been one of those occasions. In any event, SEIU did not relinquish its concerns or objections concerning this language. Testimony from all sources taken as a whole convinces the Arbitrator there is a long history of disagreement about this piece of contract language, which has now made its way to arbitration.

This long standing disagreement also convinces the Arbitrator that while promotion from within has certainly been customary and perhaps expected, there has been no mutuality in the understanding of this practice, as it pertains to Cook Manager positions. Therefore this custom does not constitute a 'past practice' as generally understood in grievance arbitration.

The Arbitrator returns now to the contract language itself, and its bargaining history. As stated earlier, reading this Section as a whole does reveal some lack of clarity. It is difficult to discern precisely what was intended by the parties prior to 1992, whenever the exception language was first introduced.

The Union is correct in pointing out that the placement of that language at the end of current subd.5 is not favorable to the Employer's position, as the context

addresses internal promotions. However the 1998 Union proposals do indicate that by 1998, both parties understood the exception language to include the District's ability to hire from outside.

Despite competing factors outlined above, finally the Arbitrator is convinced by the fact that over many contracts, the Employer maintained language naming this particular job as a special category. The specificity of this language, which has a longer history than the more general subd 6, stands out as significant. Therefore the Arbitrator believes the more faithful reading of this contract language is that the District has the right to select the best qualified candidate, whether a current employee or not. The Grievance is denied.

George Latimer, Arbitrator

August 22, 2007

Date