

IN THE MATTER OF ARBITRATION BETWEEN

**Education Minnesota – Hermantown,
Paraprofessional and School Related
Personnel Unit, Local 1096 (Union)**

And

**Independent School District No. 700,
Hermantown (Employer)**

DECISION AND AWARD

BMS Case # 17-PA-0936

ARBITRATOR:

JAMES N ABELSEN

HEARING:

October 5, 2018

POST HEARING BRIEFS RECEIVED:

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APPEARANCES:

FOR THE UNION:

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FOR THE EMPLOYER:

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FACTS AND BACKGROUND

In April, 2017, the Hermantown School District (the Employer or District) posted an opening for a Library Clerk position at the Hermantown Middle School. There were five applicants for the job, all of whom were District employees and members of the Bargaining Unit – four from the paraprofessional group and one from the clerical group. Among the five was a 10-year employee of the district who at the time was working as a Special Education Paraprofessional, (hereinafter the “Senior Applicant”) and a 2-year employee of the District then working as a Receptionist in the Elementary School (hereinafter the “Appointee”).

The interview team, made up of four District employees, interviewed each applicant, reviewed their credentials, and based on their unanimous recommendation, the District selected the Appointee to the open position; which prompted the filing of this grievance.

The grievance was based on what the Union contends was a violation of sections 5 and 6 of Article XI of the 2015-17 Collective Bargaining Agreement (the “Contract” or “Agreement”):

Section 5 provides that “*(the notice for) all job vacancies and new positions ... shall state the prerequisites and/or certifications for the position to be filled (and) the District will automatically, without interview, move the most qualified senior candidate into the vacancy...*”.

Section 6 provides that “*If all employees applying for the job are qualified for the work, the most senior employee will be promoted.*”

The Employer’s argument for not automatically placing the Senior Applicant into the position is that Section 5, which the Union relies on, also provides, that the “*(f)inal selection of employees for open positions will be made by the administration*”. And secondly, Section 6, which is also referenced by the Union, provides that “*Recommendations will be made by the Administrator, based on seniority, ability, competence, and will be at the discretion of the Board.*”

So, both Parties cite language in the same sections of the Contract to support their respective positions.

The evidence provided by the District indicates that for a number of years, under different contracts but with this same language in Sections 5 and 6, the District has always selected the person they believed was most qualified, regardless of seniority. In particular, in filling the last six library clerk positions, all but one went to either an external candidate or to an employee who was not the most senior internal applicant.

The Union does not dispute that these hirings took place. However, they point out that the language in question, particularly the seniority language, has changed considerably over the years, and with each iteration it has become more and more clear that when employees apply for open positions in the District, seniority is to be the primary consideration in hiring.

They note that in the 1993-95 Contract, seniority was listed as only one of six factors to be considered, and it was last on the list. In the 1995-97 Contract, reference was made once again to seniority being a factor to be considered for promotion. That language remained

unchanged until the 2001-2003 contract when more specific language was added to provide that the District would "...automatically, without interview, move the most senior qualified candidate into the vacancy." And that language has remained essentially unchanged for the last fifteen years.

So as the Contract has evolved, there is now language in the Contract which supports the Union's position that the most senior qualified person will automatically move into an open position, but there is also language which supports the District's position that they have essentially unfettered discretion in hiring. And it is this conflicting language which gives rise to this grievance, and presents the following issue:

ISSUE

Whether or not the District violated Article XI of the 2015-17 collective bargaining agreement by failing to hire the Senior Applicant for the Middle School Library Clerk position. And if so, what is the remedy?

UNIONS POSITION

I. THE PLAIN LANGUAGE OF THE CONTRACT REQUIRED THE DISTRICT TO HIRE THE SENIOR APPLICANT.

a. When language is this clear, there is no need to go beyond the language.

The Union cites a number of authorities for the proposition that "...when contract language is clear and unambiguous, the plain meaning of that language must be given effect, even where one party finds the result unexpected or harsh", and that "clear and unambiguous contractual language must be enforced without reference to interpretive aids such as past practice or bargaining history".

The Union believes the language in section 5 is clear and unequivocal. The Contract says quite simply, "the District will automatically, without interview, move the most senior qualified candidate into the vacancy." And section 6 is equally clear and unequivocal. "If all employees applying for a job are qualified for the work, the most senior employee will be promoted."

This language, they argue, is not subject to interpretation. It is clear and unambiguous, and whether or not it has been followed in every situation is unimportant. The law and the weight of authority is clear, that because the Senior Applicant was both qualified and the most senior, she was entitled to be placed into the position.

b. The Districts interpretation of Article XI is not in keeping with the norms of contract interpretation.

A basic tenet of contract interpretation is to “avoid any interpretation that renders any negotiated language meaningless, (and) any interpretation which tends to render meaningless any part of the contract should be avoided because of the general presumption that the parties do not write into an agreement words intended to have no effect”.

The Union argues that the District has no reasonable basis for assuming they have unfettered discretion in filling vacancies, in light of the clear language in section 5 which requires the District to “automatically move the most qualified senior candidate into the vacancy”, and in section 6 which provides that if qualified, “the most senior employee will be promoted”

By ignoring that language and relying only on the phrase “final selection will be made by administration”, the District has essentially “rendered meaningless” the clear and unequivocal seniority language in both sections 5 and 6 of the Contract.

On the other hand, the Union does not discount or ignore the language relied on by the District that the “final selection will be made by administration”. All that phrase says is that the District’s administrative team, not the School Board, will actually move the senior person into the open position.

The District’s interpretation of the “seniority” language in Sections 5 and 6 renders meaningless a significant part of the contract which violates the well-established legal principle that language in a contract is there intentionally and should not be interpreted in such a way as to render it meaningless.

c. The Senior Applicant was both qualified and the most senior applicant for the position.

On the issue of being qualified, The Union argues that the Senior Applicant was clearly qualified for the position. She is capable of completing each of the required duties of the job, she has extensive understanding of library and media practices, she has investigated ways in which to make a library more inviting and useable, she is a trained accountant, she is well versed in use of the school’s computer system, and she has significant experience in managing large groups of children under difficult circumstances. All of which make her qualified for the position.

The District expressed concerns about occasional conflicts the Senior Applicant has had in the workplace, which may have led to her not being selected for the position. The Union points out however, that workplace disagreements are not unusual, and are in fact normal in any work setting. And if there had been conflicts of any significance, surely there would have been some level of discipline or warning or a corrective letter. But there were none.

On the issue of determining seniority, and the question of seniority being “bargaining unit wide” versus “classification wide”, the Union notes that there is no reference in the job vacancy or promotion language of the Contract to which seniority list applies. They contrast this with the process for layoffs, which specifically provides that employees are laid-off on the basis of their

seniority standing in the classification or group. The significance of that is that a basic principle of contract interpretation is “that to express one thing is to exclude another” – meaning that because the Contract explicitly provides that seniority for layoffs is determined by “classification or group” but not for filling job vacancies or promotions, those job vacancies or promotional openings are to be filled on the basis of an applicant’s unit-wide seniority. Which in this case is the Senior Applicant.

II. THE BARGAINING HISTORY SUPPORTS THE USE OF SENIORITY WHEN AN INTERNAL APPLICANT APPLIES FOR AN OPEN POSITION.

Even if the contract language was not as clear as it is, the bargaining history supports the Union’s position. They cite several authorities for the proposition that if contract language is not clear, it will be given “the same meaning as that given it during negotiations leading to the agreement, (and) consideration will be given to all of the circumstances leading up to the making of the contract”.

The evidence shows that over the course of more than twenty years the contract language has changed considerably, from no reference to seniority in the pre-1993 contracts, to the current language explicitly requiring seniority as a determinant for filling positions.

In 1993 the District had complete discretion in hiring and transferring employees to open positions, and seniority was only one of six factors to be considered.

In 2001 and thereafter, the parties included language in their Contract providing that the most senior internal applicants would be hired to fill vacancies.

This language still exists, and yet the District ignores this clear language, and ignores the clear bargaining history that goes from complete District discretion in hiring, to seniority becoming an important, if not the determining factor in hiring.

EMPLOYERS POSITION

The Employer believes the Contract clearly supports their position that based on the Appointee’s superior qualifications, the District had the right to make the appointment they made.

I. State law and the Parties Contract support the District’s right to select personnel.

MN. Stat Sec. 179A.07, subd.1, specifically grants public employer’s sole discretion over 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, ...the organizational structure, selection of personnel, and direction and the number of personnel.” And while the employer can relinquish those rights through the negotiation process, Minnesota courts have consistently held that they must do so in clear and unmistakable language.

While the Union believes that is precisely what the employer has done, the District points to several contract sections which make it clear that their right to select personnel has not been relinquished or compromised.

Section 5 of Article XI contains two phrases which can appear to be in conflict. One says “the District will, automatically, without interview, move the most qualified senior candidate into the vacancy”, which is supportive of the Union’s position. But a later phrase, which supports the employer’s position, provides that “final selection of employees for open positions will be made by the administration”.

Likewise, Section 6 of Article XI also contains two arguably contradictory statements. One says “if all employees applying for the job are qualified for the work, the most senior employee will be promoted”, which again, supports the Union’s position. But a later phrase, which supports the Employer’s position, provides that “recommendations will be made by the Administration, based on seniority, ability, competence, and will be at the discretion of the Board.”

The Employer believes that those sections, taken in their entirety, may arguably be contradictory, but there is no clear and unmistakable language which would support any argument that the Employer has relinquished it’s right to select personnel, and therefore, that statutory right is retained by the District.

II. There is nothing in Sections 5 or 6 of the Contract which requires that strict seniority be followed.

The language relied on by the Union which references seniority as the basis for hiring, is, at best, a qualified form of seniority. Section 5 references the “senior applicant” being moved into the position. However, both sections 5 and 6 provide that the final selection will be made by Administration and will be at the discretion of the Board. So seniority is not the sole determinant.

But more importantly, section 5 also provides that the successful applicant not just be senior, but also the “most qualified”, which means he or she has the ability to do the job and possesses the necessary qualifications, as determined by the District. And it is only if the District determines that two or more people are equally qualified, that seniority becomes the deciding factor.

III. If the contract language is deemed to be contradictory, custom and past practice support the Employer’s interpretation of the language.

While the Employer believes the language is clear, if it should be determined otherwise, the Employer would argue that the custom and past practice of the parties clearly establish a consistent practice in filling vacancies that has been well-accepted by the parties and supports the District’s actions in this case.

The general principle for establishing a binding past practice is that the practice need not be absolutely uniform and frequent, but only that there be a showing that there has been a predominant pattern of behavior showing “clarity, consistency, and acceptability” of the practice.

With one exception, there has been a consistent practice since 2012 that the District has not hired the most senior internal applicant for a library clerk vacancy. Outside applicants have been hired over internal applicants, and junior applicants over more senior applicants, which indicate a well-established, uniform pattern of hiring, i.e. the most qualified applicant gets the job.

The Union has been aware of this practice for many years, grievances have not been filed, and the Union has chosen not to bring the issue to the bargaining table. The District has followed this practice with “clarity, consistency, and acceptability” and a binding past practice which supports the District’s actions in this case, has therefore been established.

IV. Even if seniority was the determining factor in hiring, the Senior Applicant’s seniority would not apply to the open Middle School Library Clerk position.

The testimony established that for purposes of job promotions or openings, seniority does not apply across the three job classification seniority lists. When an employee moves from a position in one seniority list to a position in a different seniority list, their date of hire is reset and they start their seniority over on the new classification list.

Here, the Library Clerk position is in the clerical group or classification, and the Appointee was the most senior employee from that group who applied. The Senior Applicant is in the paraprofessional group, not the clerical group, so even if seniority was the determining factor, the Senior Applicant had no seniority standing whatsoever in that job classification.

V. Contract interpretation aside, the Senior Applicant was not qualified for the position.

There is no disagreement that in order to be appointed to an open position the selected applicant must be “qualified”. And the testimony in this case established that the Senior Applicant was not qualified for this open position.

The job description for the Library Clerk position includes the required skill of “communication, interpersonal skills as applied to interaction with students, staff members, and community”.

The testimony established that over the years the Grievant had conflicts with other staff and with students which caused the Grievant to be reassigned, which was an indication to the interview team and her supervisor that she did not possess the required communication and interpersonal skills required for this position. In the Employer’s view, that was evidence that the Senior Applicant was not qualified for the position

ANALYSIS AND DISCUSSION

The fact that this issue has come up is not surprising. The language in Article XI is somewhat confusing, and in some respects, inconsistent.

Section 5 says ... “The District will automatically, without interview, move the most qualified senior candidate into the vacancy”. But it then says, “Final selection of employees for open positions will be made by the administration”.

Section 6 says ... “Recommendations (for job vacancies) will be made by the Administrator ... and will be at the discretion of the Board”. But it then says, “if all employees applying for the job are qualified for the work, the most senior employee will be promoted”.

So, it is not surprising that there is a difference of opinion as to how those statements are to be reconciled. Does an open position go automatically to the most senior applicant who meets the posted job qualifications, or is hiring discretionary with the District? To answer that several sub-issues need to be addressed:

First, is there a consistent “past practice” between the parties which has essentially become the accepted way of interpreting the language in sections 5 and 6?

Second, if “seniority” is a determining factor, how is seniority determined for purposes of filling vacancies – bargaining unit-wide or by job classification? And,

Third, if being “qualified” is the determining factor, who determines that, and how is it determined.

A. Past Practice of the Parties.

Over the last five or six years there have been six library clerk position openings in the District and only one has gone to the most senior internal applicant.

In one of those five other cases there was one internal candidate, who was a member of the bargaining unit, and four external candidates. One of the external candidates received the job.

In the second case, three applicants were external and two were internal candidates and members of the Bargaining Unit. In that case the least senior internal candidate received the job.

In the third case, four applicants were external, one was internal, and an external candidate was hired.

In the fourth case, there was one external candidate, three internal, and the external candidate was hired.

And this is the fifth library clerk opening. All of the candidates were internal. Four were from the paraprofessional group, including the Senior Applicant, and the other, who received the appointment, was a member of the clerical group.

This hiring history establishes a practice of job openings in this bargaining unit being filled by both internal and external candidates. And seniority has not been a deciding factor. It appears that in all these cited cases the Employer went through the job posting process, accepted applications, conducted interviews, and hired the person they thought was most qualified.

And it also appears that the Union was aware of that process. And when a more senior employee was bypassed, the Union either acquiesced, or concurred on a case by case basis that the right choice was made. On its face, it appears that a pattern has developed, and it could be argued that that practice has been so “uniform, consistent, and mutually acceptable to the parties” that a legally binding past practice now exists.

On the other hand, it can also be argued, and the Union cites authority for this proposition, that in order for a past practice to be binding on the parties, the practice must be “mutually acceptable to the parties”, which the evidence in this case indicates was lacking.

The Union Representative testified that she was never informed by the District, nor did she know what the District’s hiring practice was. The Union was never given the names of applicants, so they had no way of knowing if the Contract was being violated. In many instances the Union or the Union Representative raised the issue of seniority and questioned the hiring decision, but for one reason or another, never pursued it. And whether it was a lack of Union support, or the confusing language of the Contract, or an employee’s personal choice, there clearly was not an unequivocal acceptance by the Union of this practice, and therefore a legally binding “past practice” does not exist.

B. Determining which seniority list applies for purposes of filling vacancies.

Both Sections 5 and 6 reference seniority as a major consideration in hiring decisions. Section 5 says “the most qualified senior candidate” automatically gets the job. And Section 6 says that if there is more than one qualified candidate, “the most senior employee will be promoted.” So obviously, the parties regard seniority as an important consideration in filling jobs. But nowhere in sections 5 or 6 is there any indication as to how seniority is to be determined.

The difficulty is that there seems to be two separate seniority lists, or ways of determining seniority.

Article XI, Section 4 provides that the date of hire or the order of seniority “*shall mean the date on which the employee first reports to work in a position other than casual substitute*”. So that would suggest that an employee’s seniority in the bargaining unit begins on the first day of work, and the only thing that changes an employee’s “order of seniority”, is if they are terminated or if there are certain extended absences described in that section.

The second reference to a seniority list is also in Section 4 and provides that “*there shall be three seniority lists*”, one for each of the three classifications: paraprofessional, clerical, and maintenance. And while the contract does not specifically address this, the Superintendent testified that when someone moves from one classification to another, their seniority starts over on whichever classification they move into.

So the Contract appears to provide for two different types of seniority. One seniority list covering the entire bargaining unit where seniority starts on the date of hire into a bargaining unit position, and a separate list for each of the three classifications where seniority starts on the date an employee begins their job in that classification.

In this case the Senior Applicant was the most senior person in the bargaining unit to apply for the open position. But the Appointee, who was less senior in the bargaining unit, was most senior in the clerical classification - the classification for the library clerk position.

If the District had based its decision to hire the Appointee solely on “seniority”, the District would be taking the position that for purposes of promotion or filling vacancies, seniority is determined by one’s ranking within the job classification, not within the overall bargaining unit.

Had that been the case, that would seem to be in conflict with the Contract which references the use of “classification seniority” only in the context of layoffs, and nothing else. In all other cases, seniority is determined by an employee’s date of hire into a bargaining unit position. But in this case, seniority was not a consideration in the final decision. The Employer’s hiring decision was based on which applicant they determined was most qualified.

C. Determining if the applicant is qualified

The District agrees that seniority is a consideration in filling vacancies but before seniority is even considered, the Employer must first determine if a candidate is qualified. And in making that determination, the Employer has a process in place to interview and evaluate the applicants to determine if they meet the prerequisites for the position and are therefore qualified for the job.

In this case, the prerequisites for the position were set out in the posted job description, and included a required level of education or training, a knowledge of library practices, familiarity with computers and search engines, and certain other skills including “communication, interpersonal skills as applied to interaction with students, staff members and community”. So, it was those prerequisites that the interview team, the school principal, and the Board looked at, to determine if an applicant was qualified.

While that term “qualified” is not defined in the Contract, the ordinary meaning of the word, in this context, is someone who has all the qualities and skills listed in the job description. And most of those required qualities or skills could probably be determined objectively or by testing. However, the required skill of “communication, interpersonal skills as applied to interaction with students, staff members, and community” is a skill that can only be determined through interviews, performance reviews, staff input, supervisor’s observations and experience, and managements overall impressions of an applicant’s abilities.

And whether or not an applicant has those skills is a judgment call by the Employer. If the Employer determines that the most senior applicant is “qualified”, section 5 of the Contract would say that person gets the job. But in this case, management’s judgment was that the Senior Applicant did not possess those required qualifications or skills.

Section 6 has similar language to section 5. But in addition to needing the skills listed in the job description, Section 6 has the added requirements of “ability” and “competence”.

Perhaps those two qualities are subsumed in the list of required knowledges and skills in the job description, but these two additional qualifications are much like the requirement that the applicant have “interpersonal skills to work with students, staff and community”. Like interpersonal skills, a determination of one’s “ability” and “competence” cannot be established without interviews, observation, or personal knowledge. And that apparently is what the interview team and administration does, and why a person is not hired unless the process shows the applicant to be “qualified”.

Those two sections, 5 and 6, while being somewhat confusing, can reasonably be read together to say that the District will determine who is “qualified” for a job by looking not only at the basic duties, responsibilities, and qualifications for the job, but also at the skills and knowledge required for the job. And the decision as to whether or not someone possesses those skills and knowledge is a judgment call to be made by Administration and the Board. And if it is determined that the most senior applicant from the bargaining unit is “qualified”, that person gets the job.

FINDINGS

1. The District has the statutory and contractual right to select and hire personnel, and they have not relinquished that right through the negotiation process.
2. The Parties have contractually agreed that in filling open positions from within the bargaining unit, the most senior applicant who is qualified for the position will be hired. If two or more applicants are deemed qualified, Seniority becomes the deciding factor.
3. If seniority becomes the deciding factor, it is an applicant’s seniority in the bargaining unit, not seniority in the job classification, which applies.

4. In filling the last six open positions in the bargaining unit, the Employer has hired the individual they deemed most qualified for the position without considering an applicant's seniority. The Union has not grieved those hiring decisions but they have questioned or otherwise challenged the District's failure to consider seniority. Therefore, the District's hiring decision in this case cannot be supported solely on the grounds that the Union's acquiescence has established a binding past practice.
5. The Employer determines who is qualified for an open position through a process of personal interviews, supervisor's observations and experience with the applicant, and a finding by the Employer, based on that process, that the individual selected is qualified for the position.
6. In this case the Employer determined that the Appointee was the most qualified, if not the only qualified applicant for the position, and therefore the District did not violate Article XI of the 2015-2017 Collective Bargaining Agreement by failing to hire the Senior Applicant for the Middle School Library Clerk position.

AWARD

Based on the record as a whole, and for the reasons cited herein, the Grievance is **DENIED.**

Dated: November 23, 2018

By: *James Abelsen*
James N Abelsen, Arbitrator