

## **ARBITRATION OPINION AND AWARD**

In the matter of the arbitration between:

**PUBLIC SCHOOLS**

and

**Union**

Case Number: **Groty # 2**

ARBITRATOR – C. KEITH GROTY

Appearances:

Employer  
Attorney  
Director Human Resources  
Business Manager  
Food Service Supervisor  
Supervisor of Transportation

Union  
Uniserve  
Grievant  
Union Treasurer

Hearing Held: October 12, 2005

Time: 10:00 a.m.

Place: Offices

Briefs Filed: November 21, 2005

## **Statement of the Issue**

Whether the employer acted within the terms of the collective bargaining agreement in selecting a member of the bargaining unit with less seniority than the grievant for a vacant bus driver position.

## **Pertinent Contract Clauses**

***Agreement  
Between the  
Board of Education  
And the  
Union  
2002-2003, 2003-2004, 2004-2005***

### ***ARTICLE IV – Grievance Procedure***

#### ***E. Step III***

*In the event the aggrieved is not satisfied with the decision of the Employer, the grievance may be submitted to arbitration by the Union delivering written notice to arbitrate to the Employer and the American Arbitration Association within twenty (20) work days after the aggrieved's receipt of the decision of the Employer. The arbitrator shall be selected and the arbitration shall be conducted under the rules of the American Arbitration Association. The fees and expenses of the arbitrator shall be shared equally by the Employer and the Union.*

*The arbitrator shall not invade the province of the courts to render opinions on the legality of any provisions of the contract, but rather, the arbitrator shall confine his decision to the sole question of whether or not there has been a violation of this contract. He shall give no opinion with respect to any matter left by this Agreement or by law to the discretion of the Board. The arbitrator may not make an award, which in effect grants the grievant and/or the Union that which is was unable to secure during collective*

*negotiations. The Arbitrator's decision on any issue properly before him shall be final and binding on the Employer and the Union and any employee involved.*

- F. Whenever a grievance submitted to arbitration has as a proposed remedy retroactive pay and/or assignment, the Employer and the Union shall mutually attempt to select an arbitrator who shall conduct the hearing within ninety (90) days from the date of submission of the grievance to the arbitrator. All claims for back wages shall be limited to the amount of wages that the employee would otherwise have earned, less any compensation that my have been received from any source during the period of the back pay. No decision in any one case shall require a retroactive wage adjustment in any other case, unless other case were filed and pending on the representative case.*

#### *ARTICLE VIII – Vacancies, Promotions and Transfers*

- B. Any employee may apply for such vacancy. In filling such vacancy within the bargaining unit, the employee with the greatest seniority within the classification of the vacancy at the time it exists will be given opportunity for said position whenever said employee meets the criteria established by the Board. If no employee within the classification applies for said position, the district will employ the bargaining unit applicant of greatest qualification who meets the criteria established by the Board as determined by the Director of Human Resources and Supervisor of Facilities, Supervisor of Transportation, Supervisor of Food Service, or Elementary Curriculum Specialist, whichever is appropriate. In determining qualifications, the factors of ability, aptitude, competence, efficiency, initiative, leadership, physical fitness, references, seniority, skill, training, and work record will be considered. Should no employee of the bargaining unit apply or be qualified for the vacancy, the district will employ the applicant of greatest qualification who meets the criteria established by the Board in the manner set forth in this paragraph.*

## *ARTICLE XXI – Management Rights Clause*

*The Union recognizes the right of the School District to hire, promote, transfer, suspend or otherwise discipline or discharge any employee, subject to the right of the employee concerned to lodge a grievance in the manner and to the extent herein provided. It is further understood and agreed that any of the powers an authority given to the School District by the Michigan Constitution or State Statute prior to the signing of this or any other agreement are retained by the School District, excepting those specifically approved, declared or granted by this Agreement.*

### **Statement of the Facts**

The school district posted a vacant position for a bus driver on December 11, 2003 with a starting date to be effective January 2004. Subsequently, there were three applicants for the position from the union's bargaining unit; Ms. B, seniority date February 1, 2001, Ms. Z, seniority date August 28, 2001 and Ms. P, seniority date, September 25, 2001. Each of these applicants for had experience as a substitute bus driver in the district. Ms. B also worked for the district as a food service helper. The other two applicants also worked as bus aides.

After reviewing the applicants, the school district's supervisor of transportation, discussed the candidates with the district's human resources director, and the district business director manager. The supervisor also contacted the supervisor of food service, and received an excellent

recommendation concerning Ms. B's work in her department. Following this review, the supervisor came to the conclusion that all the candidates met the qualifications for the bus driver position, and the only appreciable difference between the candidates was their seniority with the district. Since Ms. B had nearly seven months greater seniority than the grievant, the position was awarded to Ms. B.

On January 13, 2004, there was a posting for a food service helper. One of the qualifications for this position was prior food service experience in a cafeteria setting. Once again there were three applicants from the bargaining unit and one of those was the grievant. After reviewing the personnel record of these candidates the grievant was eliminated because she did not have experience of food service in a cafeteria setting. No grievance was filed on that selection. However, a grievance was filed concerning the bus driver selection claiming that the district violated the collective bargaining agreement at Article VIII, Section B, when in the first case they used seniority as the final determinant for selection when in the second case the grievant was eliminated for failing to have experience in the food service department. It is claimed that experience was the appropriate qualification and since the grievant had more driving time as a substitute bus driver then

the chosen candidate she was more experienced and should have been awarded the position over the more senior employee.

### Findings and Conclusions

The employer argues that the criteria set forth in the contract was utilized in making the selection for both the vacant positions. While there are twelve (12) different factors outlined within the contract to be used to determine the applicant of greatest qualification, the contract is silent as to the standard of review and the application of these criteria. Failing any clear understanding of the precise way in which these factors are to be applied, the employer argues that they should have wide latitude in weighing these factors as long as the candidates meet the stated requirements for the position. Failing a show that the action of the employer was arbitrary, capricious, or unreasonable, the employer must be free to utilize the criteria set forth in the contract in a way that best fits the needs of the district and the characteristics of the various applicants.

A careful reading of Article VIII, Section B, shows that the parties placed great weight upon seniority when in the second sentence they state, “In filling such vacancy within the bargaining unit, the employee with the greatest seniority within the classification of the vacancy at the time it exists will be given an opportunity for said position. Whenever said employee

meets the criteria established by the Board.” It then goes on to state that if there is no one in the classification persons within the bargaining unit with the greatest qualification who meet the criteria established by the board should be the recipient of the position. It further states that a determining qualification the employer is to apply twelve (12) listed factors. Nowhere within the listing of the factors does it state any relative importance of one over another. In fact, the twelve (12) factors are listed in the contract in alphabetical order and therefore there should be no assumption that any one factor is more important than any other.

In the present case after a complete review of the applicant’s records for the bus driving vacancy, the employer determined that all factors were equal and chose to apply seniority as the differentiating factor in the selection. The union argues that the employer should have placed heaviest weight on the number of hours that the grievant and the selected candidate had spent in their substitute bus driver role. It is claimed that the greater number of hours in driving as a substitute, which the grievant possessed over the selected candidate, made the grievant the applicant with the “greatest qualification.” While this is a perfectly legitimate interpretation of the contract language, it is not the only interpretation which could flow application of the various listed factors. As stated in the final sentence of

this contractual paragraph “the district will employ the applicant of greatest qualification who meets the criteria established by the Board in the manner set forth in this paragraph.” The contract clearly gives the decision on determining the applicant of greatest qualification to the district as long as the district has applied the factors set forth in the paragraph. Unless the union can show that the application of these criteria by the employer was arbitrary, capricious, or unreasonable, the employer is free, as was done in this case, to determine that all other factors were substantially equal and that one factor, seniority, would be the determinant to finalize the decision. No showing has been made by the union that the employer acted in an arbitrary, capricious, or unreasonable manner in making the selection. Whether the arbitrator agrees or disagrees with the employer decision, the arbitrator will not disturb the decision of the employer if the employer has acted within the terms of the contract in a way that is neither arbitrary, capricious, or unreasonable.



**Award**

The employer in making the selection for the vacant position of bus driver, exercised its rights within the terms of the collective bargaining agreement. Grievance is denied.

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C. Keith Groty, Arbitrator

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Date