

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MONONA GROVE EDUCATION ASSOCIATION, Complainant,

vs.

MONONA GROVE SCHOOL DISTRICT, Respondent.

Case 94
No. 62973
MP-3992

Decision No. 31089-A

Appearances:

William Haus, Attorney, Haus, Roman & Banks, 148 East Wilson Street, Madison, Wisconsin 53703-3423, on behalf of the Complainant Association.

David Rohrer, Attorney, Lathrop & Clark, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, on behalf of the Respondent District.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On November 5, 2003, the Monona Grove Education Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Monona Grove School District. The complaint alleged that the District's transfers of teachers Jeffrey Albers and Michael Stassi violated the parties' collective bargaining agreement. The Association contended that this action, in turn, violated Sec. 111.70(3)(a)5, Stats. After the complaint was filed, it was held in abeyance pending efforts to resolve the dispute. Those efforts were unsuccessful. On September 30, 2004, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On November 29, 2004, the District filed an answer denying the allegations. Hearing on the complaint was held on December 21, 2004, in Madison, Wisconsin. Following the hearing, the parties filed briefs and reply briefs by June 3, 2005. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

No. 31089-A

FINDINGS OF FACT

1. Monona Grove Education Association, hereinafter referred to as the Association, is a labor organization.

2. Monona Grove School District, hereinafter referred to as the District, is a municipal employer which operates a public school system in Monona and Cottage Grove, Wisconsin. Its offices are located at 5301 Monona Drive, Monona, Wisconsin 53716. At all times material herein, Gary Schumacher has been the District's Superintendent.

3. The Association is the exclusive bargaining representative for the District's regular certificated teaching personnel. At all times material herein, Jeffrey Albers and Michael Stassi were members of the teacher bargaining unit.

4. The Association and the District have been parties to a series of collective bargaining agreements which govern the wages, hours, and working conditions of the employees in the bargaining unit referenced in Finding 3. The parties' most recent collective bargaining agreement was in effect from July 1, 2003 through June 30, 2005. It contained the following pertinent provisions:

ARTICLE III

MANAGEMENT RIGHTS CLAUSE

3/1/1 The Board's right to operate and manage the school system is recognized, including the determination and direction of the teaching force, the right to plan, direct and control school activities; to schedule classes and assign workloads; to determine teaching methods and subjects to be taught; to maintain the effectiveness of the school system; to determine teacher complement; to create, revise and eliminate positions; to establish and require observance of reasonable rules and regulations; to select teachers; and to discipline and discharge teachers for just cause.

3/1/2 The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth, the Board retaining all functions not otherwise specifically nullified by this Agreement.

3/1/3 Nothing in this clause is to be interpreted as limiting the negotiability of any of those items which are herein mentioned as they relate to wages, hours and conditions of work for professional employees represented by the Association.

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ARTICLE IX

CONDITIONS OF EMPLOYMENT

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Section 13: Transfer

9/13/1 A. The Superintendent is responsible for the assignment of instructional staff personnel. It is, therefore, his/her responsibility to effect any and all transfers, reassignments or relocations involving instructional staff members. Reassignment of staff members may become necessary to meet changing enrollments, instructional requirements, the opening of new buildings, and for other acceptable reasons, including the wishes of employees who desire to change their place of employment within the system.

9/13/2 B. Posting of Vacancies and Filling of Added Positions.

i. Known vacancies for the succeeding school year shall be posted in the main office and in the faculty lounge of each school building, as well as distributed by e-mail to current bargaining unit members at their district e-mail addresses, on or before the 20th day of April each year. Requests for transfer to such teaching positions shall be made in writing to the Superintendent within two (2) weeks after posting. No grievance or other claim (including any claim for consequential damages) shall arise out of any aspect of the distribution of vacancy notices by e-mail or the failure of bargaining unit members to receive such e-mail notices; the District obligation being one of good faith without recourse by bargaining unit members or the MGEA.

9/13/3 ii. Vacancies occurring during the school year shall be posted for at least two (2) weeks in the main office and in the faculty lounge of each school building upon such vacancy becoming known to the Superintendent. Transfers to such teaching assignment will be made only at the beginning of the school year.

9/13/4 iii. Such provisions for posting will not continue during the summer vacation period, but teachers may be notified of specific vacancies if they leave a written request for such notice with the appropriate official.

9/13/5 iv. A copy of all vacancy notices shall be forwarded to the President of the Monona Grove Education Association or his/her designee at the time such vacancies become known to the District.

9/13/6 C. Voluntary Transfer. Teachers who seek transfers from their current positions to fill vacancies in the District shall file written statements to that effect with the Superintendent within two (2) weeks of such posting. Vacancies may be concurrently posted internally and externally, in accordance with Section B., above, but qualified internal candidates will be offered the position prior to external candidates. If two or more qualified internal candidates express an interest in the vacant position, the most senior internal candidate will be offered the position first.

9/13/7 D. Involuntary Transfer. Notwithstanding section 9/13/1, when the number of teachers in a grade level or within a department exceeds the number of positions/assignments in that grade level/department and where a vacancy exists elsewhere in the District, the following procedure shall be utilized to identify the teacher to be involuntarily transferred to the vacant position:

9/13/8 i. The Administration first shall seek volunteers to transfer into the vacant position. If two or more teachers volunteer to be transferred, the “Voluntary Transfer” provision shall be utilized to fill the vacancy.

9/13/9 ii. If no teacher volunteers for the vacant position, all teachers within the building where the excess number of teachers exists who are certified for the vacant position will be considered eligible candidates for the involuntary transfer.

9/13/10 iii. The least senior eligible teacher candidate who is certified to fill the vacancy shall be transferred to the vacant position, provided that:

9/13/11 a. The transferred teacher is one of the excess teachers in the grade level or within the department, or

9/13/12 b. if the transferred teacher is not one of the excess teachers in the grade level or within the department, then the transferred teacher’s position is filled by one of the excess teachers in the grade level or department (if more than one such excess teacher is certified for said position, the position shall be filled by the least senior certified excess teacher).

9/13/13 iv. The teacher(s) who is/are involuntarily transferred under this provision shall have no right to displace any teacher, but may apply for any future vacancies that may exist in the District.

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ARTICLE XIII

GRIEVANCE PROCEDURE

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Section 4: Miscellaneous

13/4/5 It is agreed and understood by the parties hereto that although the Association may not be a grievant under this procedure nothing herein shall be construed as constituting a waiver of any sort by the Association of its statutory right to independently enforce the terms and conditions of any collective bargaining agreement in effect between it and the District under Section 111.70(3)(a)5 of the Wisconsin Statutes. Further, it is specifically agreed by the parties hereto that the Association may independently seek to resolve such breach of contract claims in proceedings before the Wisconsin Employment Relations Commission and that said Commission is clothed with the necessary jurisdiction to hear and resolve the same.

5. Some of the language contained in Article IX, Section 13 (Transfers) was changed in the last round of bargaining. The language which was deleted from the agreement is shown below as stricken, and the language which was added to the agreement is underlined. The language in Section 13 which did not change is neither stricken nor underlined.

ARTICLE IX

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Section 13: Transfer

9/13/1 A. The Superintendent is responsible for the assignment of instructional staff personnel. It is, therefore, his/her responsibility to effect any and all transfers, reassignments, or relocations involving instructional staff members. Reassignment of staff members may become necessary to meet challenging enrollments, instructional requirements, the opening of new buildings, and for other acceptable reasons, including the wishes of employees who desire to change their place of employment within the system.

9/13/2 B. Posting of Vacancies and Filling of Added Positions.
[Examiner's Note: The underlining of section titles has been omitted to avoid confusion.]

i. Known vacancies for the succeeding school year shall be posted in the main office and in the faculty lounge of each school building, as well as distributed by e-mail to current bargaining unit members at their district e-mail addresses, on or before the 20th day of April each year. Requests for transfer to such teaching positions shall be made in writing to the Superintendent within ~~one (1)~~ two (2) weeks after posting. No grievance or other claim (including any claim for consequential damages) shall arise out of any aspect of the distribution of vacancy notices by e-mail or the failure of bargaining unit members to receive such e-mail notices; the District obligation being one of good faith without recourse by bargaining unit members or the MGEA.

9/13/3 ii. Vacancies occurring during the school year shall be posted for at least two (2) weeks in the main office and in the faculty lounge of each school building upon such vacancy becoming known to the Superintendent. Transfers to such teaching assignment will be made only at the beginning of the school year.

9/13/4 iii. Such provisions for posting will not continue during the summer vacation period, but teachers may be notified of specific vacancies if they leave a written request for such notice with the appropriate official.

9/13/5 iv. A copy of all vacancy notices shall be forwarded to the President of the Monona Grove Education Association or his/her designee at the time such vacancies become known to the District.

9/13/6 C. Voluntary Transfer. ~~i. Teachers who seek transfers from their current positions to fill vacancies which are within the department or departments of current employment in the District shall file written statements to that effect with the Superintendent within one (1) two (2) weeks of such posting. Oral explanations of the reason(s) for the denial shall be given by the Superintendent if the requests for transfer are denied.~~ Vacancies may be concurrently posted internally and externally, in accordance with Section B., above, but qualified internal candidates will be offered the position prior to external candidates. If two or more qualified internal candidates express an interest in the vacant position, the most senior internal candidate will be offered the position first.

9/13/7 ii. ~~Teachers who seek transfers from their current positions to fill vacancies which are outside of the department or departments of current employment shall file written statements to that effect with the primary~~

~~interviewing official within one (1) week of such posting; personal interviews shall be arranged by the primary interviewing official within a week of such request. Oral explanations of the reason(s) for denial shall be given by the primary interviewing official if such requests for transfer are denied, upon request.~~

9/13/87 D. Involuntary Transfer. ~~When in the best interest of the school system a transfer of a teacher from one position to another is required, the individual teacher to be transferred shall be determined by the following process:~~ Notwithstanding section 13/9/1, when the number of teachers in a grade level or within a department exceeds the number of positions/assignments in that grade level/department and where a vacancy exists elsewhere in the District, the following procedure shall be utilized to identify the teacher to be involuntarily transferred to the vacant position;

9/13/98 i. All teachers of the involved departments shall be considered eligible. The Administration shall first seek volunteers to transfer into the vacant position. If two or more teachers volunteer to be transferred, the "Voluntary Transfer" provision shall be utilized to fill the vacancy.

9/13/109 ii. In order to provide leadership and balance for his/her program, ~~the principal of the school whose teachers are to be transferred may freeze up to half of those eligible to be transferred.~~ If no teacher volunteers for the vacant position, all teachers within the building where the excess number of teachers exists who are certified for the vacant position will be considered eligible candidates for the involuntary transfer.

9/13/110 iii. ~~Based upon their knowledge of the specific assignment and their knowledge of the teachers' skills and strengths, the principal of the school receiving the transferred teachers will nominate two (2) teachers for teach transfer position from those remaining on the eligible list. The least senior eligible teacher candidate who is certified to fill the vacancy shall be transferred to the vacant position, provided that:~~

9/13/11 a. The transferred teacher is one of the excess teachers in the grade level or within the department, or

9/13/12 b. If the transferred teacher is not one of the excess teachers in the grade level or within the department, then the transferred teacher's position is filled by one of the excess teachers in the grade level or department (if more than one such excess teacher is certified for said position, the position shall be filled by the least senior certified excess teacher).

~~9/13/12~~¹³ iv. ~~The teachers nominated will be notified by the District Office and within two (2) weeks of this notification be interviewed by the Superintendent. The teacher(s) who is/are involuntarily transferred under this provision shall have no right to displace any teacher, but may apply for any future vacancies that may exist in the District.~~

~~9/13/13~~v. ~~— The Superintendent, within two (2) weeks of the interview, will make the transferred decision and notify the teacher selected.~~

~~9/13/14~~vi. ~~— For purposes of this paragraph, Maywood and Winnequah elementary schools shall be deemed to be one and the same school; provided, however, if Nichols reopens as an elementary school, then Nichols and Maywood shall be deemed to be one and the same school.~~

6. Each year, teachers sign individual teaching contracts. These individual teaching contracts do not identify where the teacher will teach. These contracts cover only the teacher's teaching services – they do not cover any co-curricular positions the teacher may fill. If a teacher performs a co-curricular activity, they receive a separate contract for that. Thus, additive (co-curricular) assignments are separate and distinct from a teacher's teaching assignment. They are mandated to be on separate contracts. Teachers with additive assignments are contractually guaranteed the right to resign from the additive if they follow the contractual process for doing so.

7. There is no District policy that requires that teachers who are members of the coaching staff teach at the school(s) where they coach. Thus, there is no District policy that requires coordination between coaching assignments and teaching assignments. Additionally, the collective bargaining agreement does not contain language that requires that coaches teach at the schools where they coach. The collective bargaining agreement does not grant any special treatment to football coaches. Being the head football coach is a co-curricular/additive position.

8. Football is a popular sport at the high school and one that is highly visible in the Monona Grove community. About 100 student athletes play football at the high school which makes it, numerically speaking, the largest sport at the high school. The head football coach is in charge of a staff of seven paid assistant coaches, along with several volunteer coaches.

9. Historically, the head football coach has been a teacher on the teaching staff at the high school. From the 1950s through Jeff Albers' tenure as head football coach, which ended after the 1998 season, the Monona Grove head football coach has been assigned to teach at the high school. There was one exception – the 1994 season – when Chuck Kubicek left the District at the beginning of the season to take a position with the McFarland School District. Kubicek remained as the Monona Grove head football coach for the remainder of that season. Dan Zweifel assumed Kubicek's position teaching physical education at the high school and was, in turn, displaced by Jeff Albers in 1995. Other than the 1994 season (when Kubicek left

for the McFarland School District), the only football coach who has not been assigned to teach at the high school since the 1950's was Mike Stassi. During the 1999, 2000, 2001, and 2002 seasons, Stassi was not at the high school, but rather was at Nichols Elementary School. As will be noted in Finding 26, this changed in 2003 when Stassi was transferred from Nichols Elementary to the high school.

10. The Monona Grove School District is part of the Badger Conference. All but one school district in the conference has their football coach teach at the high school. Additionally, all nine of the school districts in the neighboring Big Eight Conference have their head football coach teach at their respective high schools.

11. Jeff Albers was hired by the District as a physical education teacher and head varsity football coach in 1995. He was assigned to the high school. In addition to teaching physical education classes, Albers also taught some health classes during the first and second years at the high school. He was not certified in health, so he taught under a temporary license. He is still not licensed to teach health.

12. Albers' assignment to the high school in 1995 resulted in the displacement of Dan Zweifel, another physical education teacher at the high school who had been hired the previous year. Zweifel was reassigned from the high school to two elementary schools in the District. When this happened, Zweifel was a probationary employee. Zweifel agreed to move out of the high school to make room for Albers, but felt that since he was a probationary employee, he had little choice but to agree to same. Since he left the high school, Zweifel has taught physical education at either the elementary or middle school level (as opposed to the high school level). Since 2002, Zweifel has also been the head boys basketball coach at the high school. He wants to move back to the high school to teach, but to date, that has not happened. As will be noted in more detail in Finding 21, there was a vacancy in the physical education department in 2003 when an existing physical education and health teacher resigned. Zweifel did not apply for the position because he is not certified in health.

13. This case involves the transfers of two teachers: Jeff Albers and Mike Stassi. As was noted in Finding 11, Albers was previously the head football coach. Stassi is currently the head football coach. Their transfers had nothing to do with work performance issues.

14. Albers served as head football coach at the high school through the 1998 season. After he was no longer the head football coach, he remained at the high school teaching physical education.

15. During the 2002-2003 school year Albers was a physical education teacher at the high school. That year, he also held two co-curricular (additive) positions: he was the athletic coordinator at the high school and also the intramural coordinator.

16. On April 23, 2003, Albers signed and returned an individual teacher contract for the 2003-04 school year. That teacher contract specified that he was to be a "teacher of

physical education” for the District, but did not specify where he would perform his duties as “a teacher of physical education.” Thus, the teacher contract did not say what school he would be in. On June 9, 2003, Albers signed and returned a co-curricular/additive duty contract for the 2003-04 school year. That contract said that he was to be the “high school intramural director.” Albers did not receive a co-curricular/additive duty contract for the high school athletic coordinator position for the 2003-04 school year. Instead, he received a letter from Superintendent Schumacher that informed him that the administration was “holding an additive contract (Department Coordinator) for one of your assignments due to the uncertainty of budget restraints” and, as a result, it was “possible that his assignment may not be filled in the event that funding is unavailable for this position.” A grievance was subsequently filed on Albers’ behalf, and others, on the grounds that the contemplated denial of this co-curricular contract was untimely under the terms of the collective bargaining agreement. Albers did not perform the duties of the (high school athletic) department coordinator that year, but was nevertheless paid for that additive. The reason he was paid for same was apparently because the District failed to give timely notice that his contract for that additive was not going to be renewed.

17. Dr. Gary Schumacher has been the Monona Grove School District superintendent for about five years. After he became superintendent, he became aware that Mike Stassi wanted to move to the high school. On several occasions, Stassi personally told Schumacher that he wanted to move to the high school. When this happened, Schumacher told Stassi that he could not move to the high school because there was no opening at the high school for a physical education teacher and that such a transfer, if granted, would necessitate the involuntary transfer of another teacher. Thus, Schumacher had denied Stassi’s previous requests to transfer to the high school.

18. In May, 2003, Stassi once again told Schumacher that he wanted to move to the high school and teach full-time there. This time, Schumacher did not reject Stassi’s transfer request outright as he previously had done. Instead, Schumacher said that he was not sure what he could do, but that he would look into it.

19. After the above-referenced conversation, Schumacher began to consider who would have to move out of the high school physical education department if Stassi were to move into the high school. At the time, there were three full-time physical education teachers at the high school: John Verhelst, Kelly Bethke and Albers. Verhelst was the head track coach and Bethke was the head girls volleyball coach, while Albers was no longer a head coach. Of the three, Verhelst was the most senior and Bethke was the least senior.

20. Mike Stassi has been a physical education teacher in the District since 1987. He replaced Albers as head football coach in 1999. When Stassi became head football coach at the high school, he was a full-time physical education teacher at Nichols Elementary School. He remained at Nichols full-time after he was named head football coach at the high school. After he became head football coach, Stassi talked with several District administrators about transferring to the high school. Specifically, he talked about it with then-Superintendent Phil

Sobocinski, High School Principal Georgi Giese, District Athletic Director Jeff Schreiner and current Superintendent Gary Schumacher. Stassi told them all that he wanted to be at the high school full-time and teach physical education there. Stassi verbally reiterated his request for a transfer to the high school numerous times. In April, 2003, he made a written request to be transferred to the high school.

21. In 2003, there was a vacancy in the physical education department at the high school when an existing teacher resigned. The teacher who resigned, Jill Phillips, taught both physical education and health, but mainly health. Had Phillips not resigned, she would have continued to mainly teach health. While Stassi is certified to teach health, he did not apply for this vacancy because he did not want to teach health exclusively. Stassi was willing to teach some health though, and he told Schumacher so.

22. In June, 2003, Schumacher talked with District Athletic Director Schreiner about moving Stassi to the high school. Schreiner told Schumacher that he was in favor of having Stassi at the high school. About that time, Schumacher called Stassi at home and told him that he was considering transferring him to the high school, but that before he did, he wanted to know if Stassi still wanted to transfer to the high school. Stassi told Schumacher that he did indeed want to transfer to the high school.

23. On July 14, 2003, Schumacher called Albers at home and told him that he wanted to have a meeting to discuss his assignment for the 2003-2004 school year. Albers agreed to meet with Schumacher the next day. Albers assumed that the meeting was going to relate to the athletic coordinator position.

24. At the meeting on July 15, 2003, Schumacher stated that the meeting's purpose was to discuss a possible transfer of Albers from his physical education teaching position at the high school to a position as physical education teacher at Nichols Elementary so that Mike Stassi could transfer to the high school from Nichols Elementary. Schumacher first asked Albers if he would voluntarily agree to such a transfer. Schumacher hoped that Albers would agree to the transfer. That did not happen. Albers responded that he was not willing to voluntarily transfer to Nichols Elementary. His stated reasons for declining to voluntarily transfer were as follows: that he had spent virtually his entire career at the high school level; that he had spent a lot of time and effort rewriting the high school athletic department curriculum; and that his son was a student at the high school and driving to school each day in the morning was a bonding experience that he wished to continue through his son's upcoming senior year. Albers also told Schumacher that one of the high school physical education teachers, John Verhelst, was going to retire at the end of the following school year (i.e. in the summer of 2004), and that this would create a vacancy at the high school. Schumacher responded that he had heard the rumor that Verhelst was considering retiring, and he had talked with Verhelst about it, but Verhelst had not given him a specific (retirement) date.

25. On July 17, 2003, Schumacher called Albers and told him that he (Schumacher) had decided to transfer Albers to Nichols Elementary so that Stassi could move to the high

school. This was confirmed in a letter from Schumacher dated July 24, 2003 which provided in pertinent part:

Dear Mr. Albers:

This letter is sent to confirm our recent discussion regarding your assignment for the 2003-2004 school year. You will be assigned to teach physical education at Nichols School. . .

26. The transfers referenced above were implemented at the start of the 2003-2004 school year. Albers transfer from the high school to Nichols Elementary was an involuntary transfer/reassignment because Albers did not want to transfer away from the high school. When Albers was transferred/reassigned to Nichols, he replaced Stassi (who was transferred to the high school). The only District administrator who talked with Albers about this transfer was Schumacher; the high school principal never discussed the matter with Albers.

27. The transfers referenced above were the first in Schumacher's tenure as superintendent where he involuntarily transferred a teacher as a result of granting another teacher's request for a voluntary transfer. Thus, this was the first time in Schumacher's tenure as superintendent when a voluntary transfer required the displacement of another teacher.

28. Schumacher's stated reasons for transferring Stassi to the high school were as follows. First was the fact that Stassi had requested to be transferred to the high school. Second, the District had been experiencing a series of disruptive incidents associated with the Homecoming festivities that the administration was anxious to quell. The administration was also concerned about unsatisfactory academic progress among student athletes, including football players. Schumacher thought that if Stassi was located at the high school, he could help alleviate these problems by proactively monitoring the academic progress of the football players, dealing with behavior issues, recruiting players for the team and being accessive to the 100-plus student athletes who play football. With regard to the last point just referenced, many of the student-athletes who play football use the weight room, and Stassi is the weight room supervisor. Third, Schumacher felt that Stassi commanded respect among students at the high school, and not only among the football players, but with the general student body as well. Fourth, college recruitment of Monona Grove High School football players has become a common occurrence, due in part to the recent successes of the football program, and Schumacher felt that having the high school football coach assigned to the high school would facilitate the recruitment process because college recruiters visit the high school expecting to meet with prospective student athletes and to talk with the football coach about the players. Fifth, the fact that Stassi was certified to teach health gave the administration more flexibility in scheduling at the high school.

29. Schumacher's stated reasons for picking Albers as the high school physical education teacher who had to move (i.e. be involuntarily transferred) to Nichols Elementary in order to create a space for Stassi at the high school were as follows. First, of the three

physical education teachers at the high school, Albers was the only one who was not a head coach; the other two were head coaches. Second, Albers was not certified to teach health.

30. Following his reassignment out of the high school, Albers still performed as the high school intramural coordinator during the 2003-2004 school year. He was paid what was owed him under his additive duty contract.

31. John Verhelst retired from his physical education position at the high school at the end of the 2003-2004 school year. He notified the District of his impending retirement in March, 2004. His retirement created a vacancy. Albers applied for the position, but did not receive a response from the superintendent. Another teacher who applied for the position was Dan Zweifel. As previously noted in Finding 12, he is the head boys basketball coach at the high school, but teaches at an elementary school. He was not selected to fill the Verhelst position. Brian Storms was selected to fill the Verhelst position. Storms was not a new hire; he was a physical education teacher at one of the District's elementary schools. He had been a long-time assistant track coach for Verhelst. He was also the senior internal applicant. Schumacher indicated that the reason Storms got the position was his seniority.

32. Albers grieved his transfer from the high school to Nichols Elementary School. The grievance was processed through the contractual grievance procedure but was not appealed to arbitration.

33. On November 5, 2003, the Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission to have the grievance referenced in Finding 32 heard and decided in the instant proceeding.

34. Stassi's voluntary transfer from Nichols Elementary School to the high school violated 9/13/6 because there was not a vacancy at the high school when Stassi transferred there.

35. Albers' involuntary transfer from the high school to Nichols Elementary School violated 9/13/7 because there was not a vacancy at Nichols Elementary School when Albers transferred there. Even if there was a vacancy at Nichols, Albers' selection as the teacher to be involuntarily transferred to Nichols did not comply with the procedure referenced in 9/13/10, and derivatively 9/13/7.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Since the parties' collective bargaining agreement referenced in Finding of Fact 4 contains a provision which gives the Commission the authority to resolve the merits of Sec. 111.70(3)(a)5 breach of contract claims, the Examiner exercises the Commission's jurisdiction to decide whether said agreement was violated in violation of Sec. 111.70(3)(a)5, Stats.

2. The District violated the parties' collective bargaining agreement when it transferred Mike Stassi from Nichols Elementary School to Monona Grove High School, and when it transferred Dave Albers from Monona Grove High School to Nichols Elementary School. By violating the collective bargaining agreement, the District violated Sec. 111.70(3)(a)5, Stats.

3. The District did not engage in any individual bargaining with employees represented for purposes of collective bargaining by the Monona Grove Education Association, and thus did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., by its conduct herein.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

Monona Grove School District, its officers and agents, shall immediately take the following action that the Commission finds will effectuate the purposes of the Municipal Employment Relations Act:

1. Cease and desist from violating the collective bargaining agreement between the Monona Grove School District and the Monona Grove Education Association.
2. Take the following affirmative action:
 - A. Transfer Mike Stassi from Monona Grove High School to Nichols Elementary School and transfer Dave Albers from Nichols Elementary School to Monona Grove High School.
 - B. Notify all employees represented for the purposes of collective bargaining by the Monona Grove Education Association by posting copies of the Notice attached hereto as Appendix A in conspicuous places on its premises where said employees work. The Notice shall be signed by an official of the District and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

- C. Notify the Wisconsin Employment Relations Commission within 20 days of the date of this Order as to what steps have been taken to comply therewith.

Dated at Madison, Wisconsin this 20th day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT violate the collective bargaining agreement between the District and the Monona Grove Education Association.

WE WILL transfer Mike Stassi from Monona Grove High School to Nichols Elementary School and Dave Albers from Nichols Elementary School to Monona Grove High School.

Dated this _____ day of October, 2005

Monona Grove School District

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MONONA GROVE SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

POSITIONS OF THE PARTIES

Association

The Association contends that the District committed prohibited practices and violated the collective bargaining agreement when it granted Stassi a voluntary transfer into the high school physical education department when there was no vacancy to accommodate his transfer and when it involuntarily transferred Albers out of the high school physical education department to effectuate Stassi's voluntary transfer. It elaborates on these contentions as follows.

The Association begins by noting the following factual background. After Stassi became head football coach in 1999, he repeatedly requested a voluntary transfer to the high school, but Schumacher denied Stassi's requests. The Association notes that when Schumacher denied these requests, he told Stassi there was no opening at the high school and that such a transfer, if granted, would necessitate the involuntary transfer of another teacher. The Association notes that this changed in the summer of 2003 when Schumacher decided to accede to Stassi's request, for whatever reason, and granted Stassi's voluntary transfer request. In granting Stassi's request to voluntarily transfer to the high school, this resulted in Albers being involuntarily transferred/reassigned away from the high school.

Having given that factual background, the Association points out that a significant ingredient in Schumacher's decision to transfer Stassi was that he (Stassi) voluntarily requested a transfer. As the Association sees it, it is "most telling" that Schumacher checked with Stassi to make sure that he (Stassi) wanted the transfer before proceeding to implement the transfer. The Association asks rhetorically why the superintendent was so solicitous of Stassi's wishes/desires to be voluntarily transferred to the high school, yet so disregardful of Albers wishes/desires not to be transferred away from the high school. Said another way, the Association asks rhetorically why was Stassi's willingness to transfer so significant (in the final outcome) while Albers unwillingness to be reassigned was not significant (in the final outcome).

Next, the Association addresses Schumacher's stated reasons for transferring Stassi and Albers. First, with regard to Schumacher's concerns about the academic performance of the student-athletes, the Association contends that the superintendent had no basis for concluding that the academic performance of student-athletes was tied to having a football coach on staff at the high school. In addition, the Association submits that concerns about student grades were not specific to the football team. Second, with regard to Schumacher's concerns about vandalism committed during homecoming week, the Association asserts that Schumacher had

no basis for concluding that the vandalism committed during homecoming week was attributable to students on the football team, or was going to be broken or even significantly affected by having a football coach at the high school. That being so, it is the Association's view that no nexus was shown between the location of the football coach and problems cited by the District. Third, with regard to the fact that the high school head football coach has generally been on the high school teaching staff, the Association characterizes this as legally insignificant. In support thereof, it notes that there have been substantial changes in the pertinent contract language. It also notes that the collective bargaining agreement gives teachers a right to resign from additive positions (such as coaching positions). Relying on same, the Association alleges there is no basis for imposing the sanction (on Albers) of an involuntary transfer as a consequence for his properly exercising his contractual right to vacate the head football coach position. Finally, the Association claims that the District abandoned "the alleged practice" (of having the head football coach be on the high school teaching staff) for four years (after Stassi took over from Albers as head football coach).

Having addressed Schumacher's stated reasons for granting Stassi's voluntary transfer request and involuntarily transferring Albers, the Association next comments on the timing of Schumacher's decision. It notes that while Schumacher testified that he started considering transferring Stassi to the high school in May, 2003, the football and homecoming problems that he talked about occurred in the fall semester of the school year. That being so, the Association asks rhetorically why Schumacher would begin consideration of the transfers in May.

The focus now turns to the contract language. The Association begins its analysis of same with the following general comments. It avers that there are no special terms or rules in the collective bargaining agreement that apply to a teaching assignment based on one's status as a coach. It also points out that there is nothing in the collective bargaining agreement that provides special treatment for a teacher on the basis of his serving as head football coach at the high school.

The Association maintains that the District's reliance on the Management Rights clause in this case is misplaced. Here's why. As the Association sees it, this case is about the proper interpretation and application of Article IX, Section 13 – specifically, the proper use of and limits for the granting of voluntary transfers and the imposition of involuntary transfers. Relying on that premise, it is the Association's position that the Management Rights clause is simply not significant to this case. The Association also contends that the Management Rights clause does not give the District the power to transfer teachers from one school building to another. Thus, the Association disputes the District's contention that that clause gives the District the right to transfer teachers.

Next, the Association addresses Article IX, Section 13 (the transfer provision). The Association argues that the District's actions herein violated several portions of that section.

First, the Association contends that Stassi's voluntary transfer into the high school physical education department violated 9/13/6 (the Voluntary Transfer section) because voluntary transfers can only be accommodated when there is a vacant position available. To support that premise, it notes that the provision provides that someone seeking a "voluntary transfer" must file a written statement expressing a wish to transfer within two weeks of the posting of a vacancy. Thus, there must be a vacancy. The Association avers that there was no vacancy here, because Albers' position was never posted. As the Association sees it, there can be no displacement or bumping of an incumbent to accommodate a voluntary transfer, but there was here, and Albers was displaced/bumped, so the District violated 9/13/6.

Next, the Association submits that since the District involuntarily transferred Albers out of his position at the high school to accommodate Stassi, it had to comply with 9/13/7 (the Involuntary Transfer section). According to the Association, that did not happen. Here's why. The Association notes that in the 2003 negotiations, that section underwent wholesale revision. It specifically notes that the language which said that the District could involuntarily transfer a teacher from one position to another on the basis of "the best interest of the school system" was deleted. According to the Association, the removal of this language from the contract "certainly had some consequence, regardless of Superintendent Schumacher's present recollection to the contrary" because that language was not explicitly restricted to reductions in force. It is the Association's view that giving up the "best interest of the school system" language (as a basis for involuntary transfers) did not result in an expanded meaning for 9/13/1, and did not enhance the District's prerogatives with respect to making involuntary transfers. The Association avers that the use of the word "notwithstanding" in 9/13/7 "makes it clear that the procedure set forth in 9/13/7 is to be used in all circumstances to identify teachers for involuntary transfers." Thus, as the Association sees it, the word "notwithstanding" has the effect of narrowing the District's discretion under 9/13/7 rather than broadening it. Applying that meaning here, the Association submits that when the superintendent granted Stassi's voluntary transfer request, this resulted in an excess number of teachers in the physical education department at the high school. The Association maintains that the resulting excess staff in that department "could not be alleviated at the whim of the superintendent." The Association argues that Albers should not have been involuntarily displaced from his position at the high school in order to accommodate Stassi's request to voluntarily transfer to the high school. Instead, Albers should have retained his position at the high school.

The Association contends that the contract provision which the District relies on to support Stassi's transfer to the high school physical education department - 9/13/1 - is not controlling herein. The basis for this contention is as follows.

First, the Association asserts that that section (9/13/1) only makes the superintendent "responsible" "to effect any and all transfers, reassignments or relocations involving instructional staff members," but does not give him the "authority" to do so (specifically, to involuntarily transfer bargaining unit employees). The Association faults the superintendent for assuming that his "responsibility" for the assignment of instructional staff personnel and

his responsibility “to effect any and all transfers. . .” includes the “authority” to carry out his responsibilities. The Association maintains that there is a clear and substantial difference between the word “authority” and the word “responsible”. In support of this argument, the Association cites the definitions of those words from Webster’s New World Dictionary, Second College Edition. Relying on the definitions contained therein, the Association avers that it is commonplace to assign responsibilities without necessarily granting authority to make decisions.

Next, the Association contends that in addition to not having any authority with respect to transfers and reassignments, the reassignment of Stassi to the high school and the transfer of Albers to the elementary school was in contravention of 9/13/1 because it did not meet the two conditions under which reassignment of staff members can be effectuated: 1) when “necessary to meet. . .instructional requirements”; and 2) “for other acceptable reasons.” As the Association sees it, Stassi’s reassignment and Albers’ transfer did not meet either condition. It elaborates on these contentions below.

The Association claims that the District’s assertion that Stassi’s reassignment and Albers’ transfer were “necessary to meet. . .instructional requirements” is without merit because no “necessity” was cited for the change. To support this premise, the Association relies on the following: that Albers’ and Stassi’s assignment had been stable for years; that Albers had been doing a satisfactory job teaching physical education at the high school; that almost all of Albers prior professional experience was at the high school level; that Albers was largely responsible for the development of the physical education department curriculum; and that Albers was the coordinator of the high school athletic department. Second, the Association calls attention to the fact that Schumacher did not cite any criticism of Albers’ performance as a high school teacher. Third, the Association avers that the assertion that student grades and student behavior were problems that were brought on by the football coach not being assigned to the high school is speculation that should not be elevated to “necessity”. In support thereof, it submits that the grade problem was not restricted to or specific to the students in the football program. Fourth, the Association alleges that no special treatment is accorded football coaches under the collective bargaining agreement, nor does it require that coaches teach at the schools where they coach. Fifth, the Association asserts that the District does not even have a policy requiring coaches at any level or in any sport to teach and be located at the high school. It notes in this regard that about half of the District’s coaches are not even members of the teaching staff. The Association further notes that if there was a clear nexus between having coaches assigned to the high school and the academic performance and the general behavior of students, that conclusion is not reflected in any policy change because the District’s existing policy does not require or even encourage that coaching staff be assigned to the schools where they are coaching. Sixth, the Association avers that Wisconsin law does not require that coaches teach at the schools where they coach. To support this premise, it relies on the case of *RICHARDS V. BOARD OF EDUCATION, JT. SCHOOL DISTRICT NO. 1, SHEBOYGAN*, wherein the Wisconsin Supreme Court ruled that additives (co-curricular duties) are not part of a regular teaching contract, so a teacher who is also a coach does not have the same protection for their coaching position as they do for their teaching position. Seventh, the

Association maintains that teaching duties and coaching duties are separate and distinct because a teacher receives an individual teaching contract and, if they perform co-curricular activities, they receive a separate contract for that. Given their severability, there is no nexus between a teaching assignment and a coaching assignment. The Association argues that when Albers relinquished the head football coach position, he did not also relinquish his teaching position at the high school. Thus, his replacement as head football coach (Stassi) had no contractual right to his teaching position at the high school. As the Association sees it, Stassi could not displace Albers from his position at the high school because doing that (i.e. displacing him) imposed a sanction against Albers for exercising his contractual right to vacate the coaching additive.

Next, the Association addresses the phrase “and for other acceptable reasons” which is contained in 9/13/1. According to the Association, whatever the “other acceptable reasons” are, they must be “necessary” and limited to reasons similar in kind to the reasons that are specifically stated, namely “changing enrollments, instructional requirements, the opening of new buildings. . . .” In support of this argument, the Association points to the doctrine of *ejusden generis* which, briefly stated, provides that where a general term follows specific items in an enumeration, it is assumed that the parties intended to include under the latter items only items that are like the specific ones, that is, of the same general nature or class as those enumerated, unless it is shown that a broader scope was intended. The Association avers that nothing in the record establishes that “a broader scope was intended”, so reassignments under 9/13/1 must be based on necessity, and not the superintendent’s whim or will. The Association submits that the application of the principle of *ejusden generis* here does not require the parties to state “and for other similar reasons” because the word “similar” is implied.

Finally, the Association comments on the last phrase in 9/13/1 which provides that reassignments may be based on “the wishes of employees who desire to change their place of employment within the system.” According to the Association, this sentence establishes a general consideration of employees (plural) who wish to change the location of their assignment. For example, if two teachers mutually wish to switch positions, the superintendent can accommodate their requests. That said, it is the Association’s view that this sentence does not give the superintendent the authority to involuntarily transfer one teacher in order to accommodate the transfer request of another teacher.

Having addressed 9/13/1, the Association next addresses the subject of bumping. According to the Association, it is “well established law” that employees may not bump other employees unless that right is established by contract. The Association alleges that bumping occurs when one employee opts to displace another employee from a position (where there is no vacancy). The Association maintains that when the superintendent decided to honor Stassi’s request for a reassignment to the high school, this resulted in his (Stassi’s) bumping (displacement) of Albers.

The Association also contends that the District’s voluntary transfer of Stassi and involuntary transfer of Albers was not justified on the basis of past practice. According to the

Association, the action taken by the District in the present case is unprecedented. In support thereof, it avers that Schumacher could not name a single instance during his tenure where a voluntary transfer of one bargaining unit member was granted which involuntarily displaced another bargaining unit member. The Association also cites the testimony of Phil Dowling, who has continuously served on the Association bargaining team from 1956 to date, to the effect that prior to the instant case, he did not know of a single example where a request for a voluntary transfer by one bargaining unit member was accommodated on the basis of bumping or involuntarily transferring another bargaining unit member. The Association also argues that none of the other transfers referenced in the record are relevant here. With regard to the Zweifel situation, the Association maintains that what happened there should not be considered precedential because the language of the collective bargaining agreement was different then and because he (Zweifel) agreed to the transfer. Additionally, the Association maintains that Albers “had no role in the machinations that the District may have engaged in” with respect to Zweifel’s transfer, so there is no basis for laying Zweifel’s treatment at Albers’ feet. The Association argues that the District’s contention that Albers should somehow be ashamed of challenging the transfers in the present case due to the District’s treatment of Zweifel is wrong and is little more than a cheap shot.

Finally, the Association argues that the District committed a prohibited practice by bargaining individually with Stassi when it granted his “voluntary transfer” request. The Association avers that by doing that, the District violated its legal obligation to refrain from unilateral negotiations with bargaining unit members.

In sum then, it is the Association’s position that the District violated the collective bargaining agreement, and thus committed prohibited practices, when it granted Stassi a voluntary transfer to the high school and involuntarily transferred Albers away from the high school. As a remedy, the Association asks that both Albers’ involuntary transfer, and Stassi’s voluntary transfer, be reversed and both teachers returned to the positions they were in (prior to the transfers). The Association also asks for a cease and desist order.

District

The District contends that the transfer of Jeff Albers from a physical education teaching position at the high school to a physical education teaching position at Nichols Elementary School did not violate Sec. 111.70(3)(a)5, Stats. It makes the following arguments to support this contention.

First, the District avers that since this is a case of contract interpretation, the Association bears the burden of proof which it must sustain by a clear and satisfactory preponderance of the evidence. According to the District, the Association did not sustain its burden of proof herein.

Next, the District argues that its actions in transferring Albers from his physical education position at the high school to a physical education position at Nichols Elementary

School and reassigning Stassi to the high school position did not violate any portion of Article IX, Section 13. In the District's view, it was totally within its contractual rights to make those transfers.

The District begins its analysis of Section 13 of Article IX by focusing initially on 9/13/6 (the Voluntary Transfer section). The District avers that it did not transfer Stassi to the high school under any of the provisions of 9/13/6. Building on that premise, the District submits that 9/13/6 is inapplicable here and the Association's reference to the need for a "vacant position" is simply off the mark. The District therefore maintains that its actions herein did not violate 9/13/6.

Next, the District addresses the language contained in 9/13/7 (the Involuntary Transfer section). The District argues that that section, like 9/13/6, also has no applicability to the situation at hand. According to the District, that entire section (i.e. 9/13/7) deals with involuntary transfers necessitated by a surplus of teachers "in a grade level or within a department" and a "vacancy exists elsewhere in the District. . ." The District argues that was not the case here because Albers transfer by the superintendent from the high school to Nichols Elementary School was not the result of a "surplus of teachers" or because there was a vacancy (at Nichols). Instead, it was for other reasons (which will be identified later). Thus, the District submits that 9/13/7, like 9/13/6, is inapplicable here, and the Association's argument that 9/13/7 applies here is simply erroneous. The District therefore maintains that its actions herein did not violate 9/13/7.

Having addressed the sections of the collective bargaining agreement which it believes are inapplicable here, the District next addresses those sections which it believes are applicable. According to the District, those sections are 9/13/1 and the Management Rights clause. It addresses those sections in the order just listed.

The District contends that 9/13/7 is not the exclusive means for the District to effect an involuntary transfer. The District avers that an involuntary transfer can also be effected pursuant to 9/13/1. In its view, that should be apparent from the beginning of 9/13/7 which starts with these words: "[n]otwithstanding section 9/13/1. . ." It asserts that since 9/13/7 begins by referencing 9/13/1, the parties intended that involuntary transfers may also occur pursuant to that section (i.e. 9/13/1).

The District interprets 9/13/1 as follows. First, it notes that the section says that the superintendent is responsible for the assignment of instructional staff personnel and that it is his responsibility to "effect any and all transfers, reassignments, or relocations involving instructional staff members." The District contends that the Association is simply wrong in arguing that the superintendent, while being responsible for the assignment of instructional staff personnel, has no authority to carry out these responsibilities. As the District sees it, the Association's argument defies common sense and must be rejected. Second, the District notes that 9/13/1 provides that "[r]eassignment of staff members may become necessary to meet changing enrollments, instructional requirements, the opening of new buildings, and for other

acceptable reasons. . .” The District argues that under this language, a reassignment is “necessary” when it is directly related to and required for the implementation of an employer policy judgment regarding the management of the school district. The District avers that what happened here is that the superintendent made a policy judgment that the head football coach should be located at the high school for various reasons. The District maintains that the transfers which followed were directly related to and required for the implementation of the superintendent’s policy judgment, and thus were “necessary” within the meaning of 9/13/1. Third, the District notes that the final portion of that section says: “including the wishes of employees who desire to change their place of employment within the system”. The District argues that this is an example of an acceptable reason to reassign personnel, rather than a precondition for reassignment. Thus, it is the District’s position that nothing in the language of section 9/13/1 limits its right to transfer employees contingent upon the willingness of the workers to be transferred.

Building on the foregoing, the District contends that the question to be answered here is whether or not the reassignment of Stassi to the high school was done either for “instructional requirements” or “for acceptable reasons” as those terms are used in 9/13/1. It answers that question in the affirmative. It avers that the evidence shows that “instructional requirements” did play a role in the Superintendent’s transfer decision because Stassi was certified to teach health while Albers was not. Additionally, it submits that the administration had concerns about the academic progress of the District’s student-athletes, and it believed Stassi could deal more effectively with this issue. Aside from those “instructional requirements,” the District maintains there were “other acceptable reasons” for the transfer decision. Before it elaborates on those reasons though, the District addresses the Association’s contention that the interpretation of the phrase “other acceptable reasons” should be read in the context of, and therefore must be limited by, the prior reference to “changing enrollments, instructional requirements, the opening of new buildings. . .” The District disputes the contention that “other acceptable reasons” are to be defined by the examples given. According to the District, the Association’s argument based upon *ejusden generis* might have some validity if the sentence in question ended after the phrase “and for other acceptable reasons.” If that is where the sentence ended, the District submits one might then be compelled to look at the preceding words to define “other acceptable reasons.” The District notes though that sentence instead goes on to characterize “other acceptable reasons” as *including* “the wishes of employees who *desire* to change their place of employment within the system.” (emphasis added). As the District sees it, this characterization of “other acceptable reasons” is decidedly unlike the specific words that precede it because the wishes of employees are not the same kind of reason for transferring employees as “changing enrollments, instructional requirements, the opening of new buildings.” The District also avers that characterizing “other acceptable reasons” as “including the wishes of employees” who desire to transfer renders any requirement of “necessity” a nullity. The District asks rhetorically how can it be that a reassignment is “necessary” to meet the “wishes” of employees who “desire” to transfer. The District therefore contends that as it is written, the phrase “other acceptable reasons” should not be limited by the specific words that precede it, including the word “necessary,” because accommodating the “wishes” of employees who “desire” to transfer is not logically a matter of “necessity.”

The District then argues there were myriad reasons why Schumacher changed his mind about the value of the head football coach being at the high school and decided to reassign Stassi there (i.e. to the high school). According to the District, the reasons were as follows. First were the needs of the student-athletes and the interests of the school. The District avers that the record evidence established that the superintendent, and others, were concerned about student behavioral problems arising out of the homecoming festivities, which is an event closely connected to the football program, and the academic progress of the student-athletes at the high school. Second, the District asserts that the record shows that the players on the football team benefit during the college recruitment process from having the head football coach located at the high school. The District submits that when it is able to assist players in getting opportunities to pursue their college educations, that is beneficial not only to the student-athletes but also to the District. The District's final reason for wanting the head football coach at the high school relates to the demands of running a highly-successful football program. It notes in this regard that the football program at the high school is highly visible in the community with a large number of student-athlete participants (i.e. 100). According to the District, these factors should not be minimized. The District also suggests that the fact that nearly every other comparable school district in the area has its head football coach assigned to teach at the high school is persuasive evidence of the need.

The District also contends that it has the right to transfer teachers pursuant to the Management Rights clause (Article III). In support thereof, it relies on the language contained in 3/1/1 that gives the Board the right "to operate and manage the school system. . . including the determination and direction of the teaching force. . ." The District avers that the right to transfer teachers is included in the right to determine and direct the workforce. To support that premise, it cites Elkouri for the following two propositions dealing with "management's right to transfer": 1) that management has an "inherent right to transfer employees as a necessary element in the operation of its business;" and 2) when management reserves the right to direct the workforce, it has simultaneously reserved the right to transfer. With regard to the latter point, the District once again emphasizes that it has the right, under the Management Rights clause, to "direct. . .the teaching force. . ." It argues that since management expressly has that right under the Management Rights clause, it does not matter that 9/13/1 does not expressly confer "authority" on the superintendent to transfer teachers. The District also contends that even if the right to transfer employees is not among the enumerated functions expressly conferred in 3/1/1, the District still has the right to transfer employees as an inherent management right under the "reserved rights doctrine." According to the District, that doctrine is a well-entrenched labor relations principle and is memorialized in this Management Rights clause in 3/1/2 (the reservation of rights clause). The District therefore maintains that the Association's assertion that "[t]he management rights clause does not specifically reserve the power to transfer teachers from one school building to another" is erroneous.

The District also asserts that just because Albers did not agree to the transfer to Nichols Elementary does not mean that the District could not transfer him. According to the District, their right to transfer teachers is not conditioned on the teacher's willingness to be transferred. The District avers that since this collective bargaining agreement does not specify that an

employee's approval must be secured before the District makes job assignments or transfers, or give employees veto rights over any involuntary transfers, it is irrelevant whether Albers wanted to leave the high school.

Next, the District argues that Stassi's assignment to the high school was not inconsistent with any past practice. The District's argument in this regard is that there is no past practice that the Association can point to that restricts the right of management to transfer teachers and that the assignment of Stassi is not "unprecedented" as the Association has argued. To the extent that any relevant past practice can be identified, the District avers it is this - for 40 years, except for one year, the head football coach has always been assigned to teach at the high school - except until Stassi became head football coach. In making this argument, the District points out that when Albers was hired as head football coach in 1995 and assigned to the high school, he displaced another physical education teacher at the high school - Dan Zweifel. The District claims that Albers was the beneficiary of this longstanding practice (i.e. having the head football coach assigned to teach at the high school), but now wants to deprive Stassi of this same opportunity, now that Stassi is head football coach. In response to the Association's argument that the District has failed to effectuate any transfers in the past, the District contends that its failure to exercise its right to transfer employees pursuant to 9/13/1 would not prevent it from doing so in this instance because a failure to exercise a right under a collective bargaining agreement does not constitute a waiver or a loss of a right to exercise that authority.

Next, the District addresses the matter of the parties' bargaining history. The District asserts that when the involuntary transfer language contained in 9/13 of Article IX which applied to reductions in force was modified in the last round of negotiations, the new language did not alter management's right to transfer employees as set forth in 9/13/1, because as part of the change in language, the phrase "notwithstanding section 9/13/1" was added to 9/13/7. The District argues that by making this change in the involuntary transfer language, it did not abandon its right to reassign or transfer teachers, since that language expressly applied only to reductions in force, and its rights under 9/13/1 were expressly preserved.

Finally, the District responds to the Association's contention that it committed a prohibited practice by bargaining individually with Stassi and granting him a "voluntary transfer" in contravention of the collective bargaining agreement. The District disputes that contention. The District notes that Stassi had requested a transfer to the high school on numerous occasions, and his requests for same were rebuffed. The District avers that it was only after the superintendent determined that there were needs at the high school that Stassi's presence there fulltime could fulfill that the superintendent decided to effectuate the transfer. The District asserts that there is no evidence in the record to suggest that the reassignment of Stassi to the high school was driven by Stassi's desires. That being so, the District maintains no prohibited individual bargaining occurred.

In sum then, it is the District's position that the Management Rights clause and 9/13/1 give it the right to transfer employees, so its transfer of Albers from the high school to Nichols

Elementary School was in accord with the collective bargaining agreement. Thus, it is the District's view that it did not violate the parties' collective bargaining agreement nor did it commit any prohibited practice by its actions herein. It therefore asks that the complaint be dismissed.

DISCUSSION

The Association contends that the District's conduct violated both the collective bargaining agreement and constituted individual bargaining. These claims will be addressed in the order just listed.

The Breach of Contract Claim

I. Jurisdiction

The instant complaint contends that the District violated Sec. 111.70(3)(a)5, Stats., by its conduct herein. That section provides that it is a prohibited practice for a municipal employer:

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . .

This provision makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. While this statutory provision provides one mechanism for enforcing a collective bargaining agreement, it is not the only enforcement mechanism available. Usually, collective bargaining agreements in Wisconsin are enforced via grievance arbitration. The collective bargaining agreement at issue here contains a grievance arbitration provision. Given the existence of same, and the fact that there was no contract hiatus present here, one would think that an unresolved grievance, such as the one at issue here, would be resolved by a grievance arbitrator appointed pursuant to the grievance arbitration provision rather than a WERC examiner hearing the grievance as a (3)(a)5 case. However, this collective bargaining agreement gives the Association the right to have unresolved grievances decided in either forum. This right is contained in 13/4/5 of the collective bargaining agreement which provides as follows:

ARTICLE XIII

GRIEVANCE PROCEDURE

. . .

Section 4: Miscellaneous

13/4/5 It is agreed and understood by the parties hereto that . . .nothing herein shall be construed as constituting a waiver of any sort by the Association of its statutory right to independently enforce the terms and conditions of any collective bargaining agreement in effect between it and the District under Section 111.70(3)(a)5 of the Wisconsin Statutes. Further, it is specifically agreed by the parties hereto that the Association may independently seek to resolve such breach of contract claims in proceedings before the Wisconsin Employment Relations Commission and that said Commission is clothed with the necessary jurisdiction to hear and resolve the same.

In this case, the Association opted to have an unresolved grievance resolved by the WERC as a Sec. 111.70(3)(a)5 breach of contract claim. Such was its right. Accordingly, the undersigned invokes the Commission's jurisdiction under Sec. 111.70(3)(a)5 and will act as a de facto arbitrator to determine if the District's conduct breached the collective bargaining agreement. Obviously, this will require an interpretation of the parties' collective bargaining agreement.

II. Merits

The salient factual background for this contract interpretation dispute follows. In 1999, Stassi replaced Albers as head football coach. After that happened, Albers stayed at the high school (even though he was no longer head football coach) and continued to teach physical education there. Stassi also stayed where he was at, Nichols Elementary, and continued to teach physical education there. He went over to the high school after the school day ended to perform his football coaching duties. After he became head football coach, Stassi made no secret of his desire to move to the high school. He repeatedly requested to be transferred there, but his requests were denied. In denying Stassi's transfer requests, Superintendent Schumacher told Stassi there was no opening at the high school and that if Stassi's transfer was granted, it would require the involuntary transfer of another teacher. In the summer of 2003, Schumacher changed his mind and granted Stassi's transfer request. Stassi's transfer to the high school meant that an existing physical education teacher had to be involuntarily transferred out of the high school over to Nichols Elementary to replace Stassi. The teacher selected for this involuntary transfer was Albers. Albers grieved his involuntary transfer.

At issue here is whether the District violated the collective bargaining agreement when it granted Stassi a voluntary transfer into the high school physical education department when there was no vacancy to accommodate his transfer and when it involuntarily transferred Albers out of the high school physical education department to Nichols Elementary to effectuate Stassi's voluntary transfer to the high school. Based on the rationale which follows, I answer those questions in the affirmative, meaning that the District's actions did violate the collective bargaining agreement.

Here is how my discussion is structured. Attention will be focused first on the contract language cited by the parties. The District relied on the Management Rights clause and 9/13/1 while the Association relied on 9/13/6 and 9/13/7. After that contract language has been reviewed, attention will be given to certain evidence external to the collective bargaining agreement. The evidence I am referring to is the parties' bargaining history and an alleged past practice.

My analysis of the contract language begins with the following preliminary comments relative to coaching and teaching assignments. While there may be some teacher collective bargaining agreements that give coaches special treatment relative to their teaching assignment, or mandate that coaches teach at the school where they coach, that is not the case here. The instant collective bargaining agreement does not contain any special treatment for coaches relative to their teaching assignment or mandate that coaches teach at the school where they coach. That being so, there is no contractual requirement that the head football coach has to teach, or be physically located at, the high school.

The first contract provision relied on by the District is the Management Rights clause which is found in Article III. That clause provides that the District has the right "to manage the school system" and to direct "the teaching force." This language establishes, as a general principle, that the District has the right to run the school system and direct the workforce. However, these general principles are not really at issue in this case. As previously noted, this is a transfer case. That being so, it certainly would be noteworthy if the right to transfer was specifically enumerated in 3/1/1. It is not. The word "transfer" is not found anywhere in the Management Rights clause. Thus, the Management Rights clause does not say anything explicitly about transferring teachers from one school building to another. While it is possible to infer a District right to transfer teachers from one school building to another from the phrases "manage the school system" and direct "the teaching force", the undersigned declines to make such an inference in this case. Here's why. The collective bargaining agreement involved here is not silent on the matter of transfers. To the contrary, there are contract provisions yet to be reviewed which deal with transfers, voluntary transfers and involuntary transfers. I am referring, of course, to the language contained in Article IX, Section 13, namely 9/13/1, 9/13/6 and 9/13/7. Since this case involves transfers, specifically granting voluntary transfers and imposing involuntary transfers, it logically follows that the contract language most applicable to such a case would be found in the Transfer language and not in the Management Rights clause. As it relates to transfers, the language contained in the Management Rights clause can fairly be characterized as general language, while the transfer language in Article IX, Section 13 can fairly be characterized as specific language. In contract interpretation, general language does not trump specific language; it is the converse. Consequently, this decision will not be based on the contract language contained in the Management Rights clause.

The focus now turns to an examination of the language found in Article IX, Section 13. The parties dispute which part of Section 13 is applicable here. The District contends that the dispositive section is 9/13/1. The Association disagrees. It avers that the dispositive sections

are 9/13/6 and 9/13/7. While 9/13/1 does not have a title or description, the other two sections do. 9/13/6 is entitled “Voluntary Transfer” and 9/13/7 is entitled “Involuntary Transfer”.

I will first address 9/13/1 - the section which the District relies on to support both transfers. The first sentence of that section says that the superintendent is responsible for the assignment of instructional staff personnel and the second sentence says that it is his responsibility to “effect any and all transfers, reassignments, or relocations involving instructional staff members.” As the Association sees it, this language means that while the superintendent is responsible for the assignment of instructional staff personnel, he does not have the authority to carry out those responsibilities. In my view, that interpretation does not make sense. I conclude that the superintendent’s “responsibility” for the assignment of instructional staff personnel and his responsibility “to effect any and all transfers, reassignments or relocations. . .” includes the “authority” to carry out those responsibilities. The third sentence of 9/13/1 then goes on to identify four situations where the “reassignment of staff members may become necessary.” The four situations are 1) to meet changing enrollments, 2) instructional requirements, 3) the opening of new buildings and 4) other acceptable reasons. When all the sentences are read together, this section gives the superintendent the authority to reassign teachers when certain situations exist. If it is shown that the reassignment fits into one of those situations, then it (i.e. the reassignment) passes muster under 9/13/1.

The District argues that the transfers involved here fit into two of the situations just referenced – namely, “instructional requirements” and “other acceptable reasons.” Building on that premise, the District maintains that the transfers should pass muster under 9/13/1. The Association strongly disputes that assertion.

For the purpose of analysis herein, the Examiner assumes that the transfers involved herein met those conditions. In other words, it is assumed for the purpose of discussion herein that the transfers of Stassi and Albers were done either for “instructional requirements” or “for other acceptable reasons” as those terms are used in the third sentence of 9/13/1. My reason for making this assumption will become apparent later.

The District also proffered numerous reasons why, after previously rejecting Stassi’s request to transfer to the high school, Schumacher changed his mind about same and decided, as the District puts it in their brief, that it was “in the best interest of the school district to have the head football coach located predominantly at the high school.” The Association strongly disputes that assertion.

Once again, for the purpose of analysis herein, the Examiner assumes that the District’s proffered reasons were legitimate. In other words, it is assumed for the purpose of discussion herein that the District’s proffered reasons why it was “in the best interest of the school district” to have Stassi at the high school were legitimate. My reason for making this assumption will become apparent later.

It follows from the factual assumptions just made that the transfers involved herein complied with 9/13/1. As the District sees it, that finding (i.e. that 9/13/1 was not violated) means that no contract violation occurred herein because, in their view, 9/13/1 is the only part of Section 13 that applies to those transfers. I find otherwise. It would be one thing if 9/13/1 was the only part of Section 13 that referenced transfers. However, it is not. Section 13 goes on to say more about transfers than just what is referenced in 9/13/1. Specifically, it goes on to have a section dealing with voluntary transfers (9/13/6) and a section dealing with involuntary transfers (9/13/7). While the District characterizes Stassi's transfer to the high school as something other than a voluntary transfer, I have decided to assume, at least at this point in the discussion, that Stassi's transfer to the high school was a voluntary transfer. This assumption gives me a contractual basis to look at 9/13/6 and decide if it applies here. The same rationale applies to Albers' transfer out of the high school to Nichols Elementary. Thus, it is assumed, at least at this point in the discussion, that Albers' transfer to Nichols Elementary was an involuntary transfer. This assumption gives me a contractual basis to look at 9/13/7 and decide if it applies here.

The first sentence of 9/13/6 provides that someone seeking a voluntary transfer from their current position to a vacancy in the District has to file a written statement expressing a wish to transfer within two weeks of the posting. The word "posting" refers to a vacancy. This section contemplates that in order for there to be a voluntary transfer, there must first be a vacancy. Thus, a voluntary transfer under 9/13/6 cannot occur unless there is a vacancy. The reason is simple – there has to be a vacant position to accommodate the transferee. When this vacancy requirement is read in conjunction with the language of 9/13/1, it means that the District can make "transfers" for all the reasons referenced in 9/13/1, but when the transfer involved is a voluntary transfer covered by 9/13/6, it has to be to a vacancy. In my view, that interpretation is necessary to harmonize 9/13/1 with 9/13/6.

The District maintains that it did not transfer Stassi under 9/13/6, but instead did so under 9/13/1. Even if that is so, and the District "transferred" Stassi pursuant to 9/13/1, the District still has to comply with 9/13/6 when the "transfer" involved is a voluntary transfer covered by 9/13/6. While the District tries to characterize Stassi's transfer to the high school as something other than a "voluntary transfer", the fact of the matter is that it was just that. Stassi had requested a transfer to the high school for several years, and most recently, just months before it happened. When Schumacher accommodated him and granted his request to be transferred to the high school, a "voluntary transfer" occurred that was covered by 9/13/6. That being so, 9/13/6 applied here. The District's contention to the contrary simply is not persuasive.

Application of 9/13/6 to the instant facts yields the following results. There was no vacancy at the high school when Stassi transferred there. Albers' position there was never posted. Since there was no vacant position in the physical education department at the high school when Stassi transferred there, Stassi had no contractual right to move to the high school when he did. Stassi's movement to the high school when no vacancy existed to accommodate him resulted in another employee's displacement from his position at the high school. This

violated 9/13/6, because nothing in 9/13/6 allows a teacher seeking a voluntary transfer to displace someone else in order to accommodate their voluntary transfer. While it is understandable why Stassi wants to have his teaching position be located at the high school, he must wait for a vacancy to arise in the department and then he must apply for it. That is how voluntary transfers work under this contract language.

The focus now turns to 9/13/7 (the Involuntary Transfer section). That section begins with the following phrase: “Notwithstanding section 9/13/1. . .” As previously noted, 9/13/1 gives the superintendent the authority to reassign teachers when certain situations exist. A standard dictionary definition of “notwithstanding” is “in spite of”. When the phrase “notwithstanding section 9/13/1” is used at the beginning of 9/13/7, it means that the language in 9/13/7 which follows narrows the discretion granted to the superintendent in 9/13/1. In my view, the phrase “notwithstanding section 9/13/1”, which immediately follows the introductory phrase “Involuntary Transfer”, makes it clear that the procedure set forth in 9/13/7 is to be used in all circumstances to identify which teachers are involuntarily transferred when there is an excess staff in a department. The District argues that this language applies only to reductions in force. However, the language does not expressly say that, so I conclude that 9/13/7 is not limited solely to reductions in force. 9/13/7 then goes on to identify a seniority-based procedure that “shall be utilized to identify the teacher to be involuntarily transferred to the vacant position.” Before the focus turns to the procedure though, it is important to focus on the last two words in the language just quoted (i.e. “vacant position”). Those words, of course, refer to a vacancy. Thus, 9/13/7, like 9/13/6, also refers to a vacancy. In the discussion on 9/13/6, it was noted that that section contemplates that in order for there to be a voluntary transfer, there must first be a vacancy. The same principle applies to involuntary transfers. Since 9/13/7 also refers to a vacancy, 9/13/7 likewise contemplates that in order for there to be an involuntary transfer, there must first be a vacancy. When this vacancy requirement is read in conjunction with the language of 9/13/1, it means that the District can make “transfers” for all the reasons referenced in 9/13/1, but when the transfer involved is an involuntary transfer covered by 9/13/7, it has to be to a vacancy. In my view, that interpretation is necessary to harmonize 9/13/1 with 9/13/7.

The District maintains it did not transfer Albers under 9/13/7, but instead did so under 9/13/1. Even if that is so, and the District “transferred” Albers pursuant to 9/13/1, the District still has to comply with 9/13/7 when the “transfer” involved is an involuntary transfer covered by 9/13/7. I find that Albers transfer to Nichols Elementary was an involuntary transfer that was covered by 9/13/7 because Albers did not want to transfer away from the high school. Simply put, he wanted to stay where he was at. That being so, 9/13/7 applied here. The District’s contention to the contrary simply is not persuasive.

Application of 9/13/7 to the instant facts yields the following results. There certainly was an opening at Nichols Elementary after Stassi moved over to the high school, but Stassi’s former physical education position there was not posted. Since Stassi’s position at Nichols Elementary was never posted in accordance with the posting procedure referenced in 9/13/2, I conclude that a vacancy never formally existed at Nichols Elementary after Stassi moved to the high school.

While it was just held that there was no vacancy at Nichols Elementary, I have nonetheless decided to assume, for the purpose of further discussion, that there was a vacancy there after the superintendent accommodated Stassi's transfer request and that the superintendent could transfer someone to Nichols Elementary to fill Stassi's former position there. The question then becomes which physical education teacher at the high school gets transferred to Nichols Elementary. None of the three existing full-time teachers in the high school physical education department volunteered to be transferred out of the high school to Nichols Elementary to accommodate Stassi's move into the high school. The superintendent simply picked one of the three, namely Albers, and transferred him to Nichols Elementary. Since 9/13/7 applied here, the next question is whether the superintendent was empowered to do that (i.e. select Albers as the teacher to be involuntarily transferred from the high school to Nichols Elementary). I find he was not. The parties have negotiated a procedure for deciding which teacher has an involuntary transfer imposed upon them. The District has contractually obligated itself to comply with that procedure. Albers' selection as the teacher to be involuntarily transferred did not comply with that procedure. Here's why. As previously noted, the procedure is seniority-based. Specifically, 9/13/10 says that the teacher selected for the involuntary transfer will be the "least senior" teacher. That did not happen here. There were three full-time physical education teachers at the high school at the time: Verhelst, Albers and Bethke. Albers was not the least senior of the three. That being the case, he should not have been the teacher who was involuntarily transferred; instead, he should have retained his position at the high school. Since Albers was selected for the involuntary transfer, the District violated 9/13/10, and derivatively 9/13/7, by doing so.

...

In litigating this case, both sides relied on evidence external to the collective bargaining agreement to buttress their respective positions. I am referring, of course, to the parties' bargaining history and an alleged past practice. Arbitrators sometimes use bargaining history and past practice to help them interpret ambiguous language. The key word in the previous sentence is "ambiguous". The reason that word is key is because that is not the case here. I have found that 9/13/6 and 9/13/7 are clear in the following respect: both require a vacancy before there can be, respectively, a voluntary transfer or an involuntary transfer. Given that finding, I conclude it is unnecessary to resort to using the parties' bargaining history or an alleged past practice to help interpret the collective bargaining agreement. Consequently, no comments are made concerning same.

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Finally, it is noted that those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

III. Remedy

In order to remedy this contractual breach, the District shall reverse both of the transfers involved herein, so that Stassi and Albers are returned to the positions they were in prior to the transfers. Specifically, Stassi shall be transferred from the high school to Nichols Elementary and Albers shall be transferred from Nichols Elementary to the high school.

The Individual Bargaining Claim

The focus now turns to the Association's claim that the District's conduct also constituted individual bargaining. The law applicable to this claim is as follows: once a group of employees has chosen its majority representative for purposes of collective bargaining, a municipal employer is precluded from negotiating directly with any individual in the bargaining unit regarding wages, hours or conditions of employment. If it does, that constitutes individual bargaining which violates Sec. 111.70(3)(a)4, Stats. While Stassi's transfer violated the collective bargaining agreement, I find that Schumacher's discussion with Stassi about a voluntary transfer did not constitute individual bargaining within the meaning of Sec. 111.70(3)(a)4. Accordingly, no violation of Sec. 111.70(3)(a)4 has been found.

Dated at Madison, Wisconsin this 20th day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

