

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-B

Appearances:

William Haus, Haus, Roman & Banks, Attorneys at Law, 148 East Wilson Street, Madison, Wisconsin 53703-3423, appearing on behalf of the Monona Grove Education Association.

David Rohrer, Attorney, Lathrop & Clark, Attorneys at Law, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the Monona Grove School District.

ORDER ON REVIEW OF EXAMINER'S DECISION

On October 20, 2005, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, concluding in pertinent part that the Respondent Monona Grove School District (District) violated the collective bargaining agreement between the District and the Complainant Monona Grove Education Association (Association), in violation of Sec. 111.70(3)(a)5, Stats., by voluntarily transferring teacher Mike Stassi from Nichols Elementary School to Monona Grove High School without complying with the voluntary transfer provision contained in Section 9/13/6 of the agreement; and by involuntarily transferring teacher Jeff Albers from Monona Grove High School to Nichols Elementary School, without complying with the procedures governing involuntary transfers contained in Articles 9/13/10 and 9/13/7 of the agreement. The Examiner dismissed an alleged "individual bargaining" violation.

On November 8, 2005, the District filed a timely petition with the Wisconsin Employment Relations Commission (Commission) seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written

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argument in support of and in opposition to the District's petition for review, the last of which was filed on May 26, 2006. For the reasons set forth in the Memorandum that follows, we affirm the Examiner's decision regarding the involuntary transfer of Albers and we reverse his decision regarding the transfer of Stassi.¹

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

- A. The Examiner's Findings of Fact 1 through 19 are affirmed.
- B. The Examiner's Finding of Fact 20 is amended by adding the indicated italicized sentence and as amended is affirmed:

20. Mike Stassi has been a physical education teacher in the District since 1987. He replaced Jeff 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, *except that, at his request, during some school years he was assigned to teach one course at the high school towards the end of the school day.* 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.

- C. The Examiner's Findings of Fact 21 through 33 are affirmed.

¹ The Association has not sought review of the Examiner's decision to dismiss the individual bargaining allegation. We see no error in the Examiner's conclusion in that regard and accordingly it is affirmed without further discussion.

- D. The Examiner's Finding of Fact 34 is reversed and the following Finding of Fact 34 is made:

34. The District was permitted to transfer Stassi to the high school, because the Superintendent was either meeting "instructional requirements" or had "other acceptable reasons" for reassigning Stassi, within the meaning of Article 9/13/1. Article 9/13/6 did not apply to the Stassi transfer, because said transfer was not a voluntary transfer to fill a vacancy within the meaning of that section of the agreement.

- E. The Examiner's Finding of Fact 35 is set aside and the following Finding of Fact 35 is made:

35. When the District transferred Stassi to the high school, the District created an excess of teachers in the physical education department at the high school, as well as a vacancy at the Nichols Elementary School, and therefore created a situation covered by Article 9/13/7 of the agreement. By involuntarily transferring Albers to the vacancy at Nichols, without following the procedures set forth in Article 9/13/8, 9/13/9, and 9/13/10 for selecting the teacher to be involuntarily transferred, the District violated the agreement.

- F. The Examiner's Conclusion of Law 1 is affirmed.

- G. The Examiner's Conclusion of Law 2 is affirmed in part and reversed in part, as follows:

2. The District violated the parties' collective bargaining agreement when it involuntarily transferred Jeff Albers from Monona Grove High School to Nichols Elementary School, without following the procedures set forth in the agreement for selecting teachers for involuntary transfer when there is an excess in a grade level/department and a vacancy elsewhere in the District. The District did not violate the parties' collective bargaining agreement when it transferred Stassi to the high school.

- H. The Examiner's Conclusion of Law 3 is affirmed.

- I. Paragraph 1 of the Examiner's Order is affirmed.

- J. Paragraph 2 of the Examiner's Order is set aside and the following Paragraph 2 is ordered:
2. Take the following affirmative action:
 - A. Offer to reinstate Jeff Albers to a physical education teaching position at Monona Grove High School, and make him whole for any losses he suffered as a result of his involuntary transfer to Nichols Elementary School.
 - B. Follow the procedures set forth in Article 9/13/7 through 9/13/13 before involuntarily transferring Albers or any other bargaining unit member, if there is an excess number of teachers in the physical education department at the high school and a vacancy elsewhere in the District.
 - C. 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.
 - D. Notify the Wisconsin Employment Relations Commission within 20 days of the date of this Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES REPRESENTED BY
THE MONONA GROVE EDUCATION ASSOCIATION**

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 offer to reinstate Jeff Albers to the Monona Grove High School and make him whole for any losses he suffered as a result of his involuntary transfer to Nichols Elementary School.

WE WILL comply with the provisions in Article 9/13/7 through 9/13/13 of the collective bargaining agreement before involuntarily transferring a teacher when there is an excess of teachers in a grade level or department and where a vacancy exists elsewhere in the District.

Dated this _____ day of _____, 2006.

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 ORDER

Summary of the Facts

This case arose from the District's decision during the summer of 2003 to transfer a Physical Education (Phy Ed) teacher, Mike Stassi, from the elementary school position he had held since 1987 to the high school, in order to better accommodate his work as the District's head football coach and his availability as a respected resource for high school students. Stassi had requested such a transfer on a regular basis since becoming head football coach in 1999. The District had denied Stassi's earlier requests because the Superintendent was reluctant to move another Phy Ed teacher out of the high school involuntarily in order to make room for Stassi. Stassi himself chose not to apply for a Health teaching vacancy at the high school in 2002-03, because, though certified in Health, he did not want to teach it full time. When Stassi again requested a transfer in the spring of 2003, however, the Superintendent, after a period of deliberation, decided to grant the request. The District's reasons were its growing concerns about the academic performance of some of the football athletes, its growing concern about rowdiness and vandalism accompanying some of the home games, the need for Stassi to be more readily available to recruit athletes from the student body and to assist athletes in pursuing scholarships and arranging visits with prospective college coaches. The Superintendent also considered Stassi's certification in Health to be an asset for flexibility of assignments. In short, the District became persuaded that Stassi's popularity and respect among the student body, stemming in part from his success with the football program, would benefit the District more if he were a regular presence at the high school during the school day.

Historically, the District's head football coach has been a teacher at the high school. The only exceptions were the 1994 season, when the coach (who had been at the high school) resigned at the outset of the season, and the four seasons that Stassi coached before his transfer to the high school in 2003. As a general rule in the District's football conference and in the neighboring conference, the head football coach teaches at the high school. On the other hand, it is not uncommon in the District for the head coach in other competitive sports (including, for example, boys' basketball) to teach at a different school in the District.

Jeff Albers had taught Phy Ed at the high school since the District hired him in 1995. From 1995 until 1998, Albers was also the head football coach, at which time he resigned that position but continued to teach at the high school. During the 2002-03 school year, Albers was also the athletic coordinator and intramural coordinator at the high school. Albers was not certified to teach Health, but had been assigned to teach some Health classes during some school years, under a temporary license. At the time of the events in question, there were three full time Phy Ed teachers at the high school: John Verhelst, Kelly Bethke, and Albers. Verhelst was the most senior and also the head track coach. Bethke was the least senior and also the head girls' volleyball coach. Albers' seniority was in the middle.

The District asked Albers in the summer of 2003 whether he would be willing essentially to trade places with Stassi, i.e., transfer to the Nichols Elementary School as a Phy Ed teacher. Albers was unwilling to do so voluntarily, for certain valid professional and personal reasons. Nonetheless, in July 2003, the District informed Albers orally and in writing that he was being “reassigned to teach physical education at Nichols School . . .” At the same time the District transferred Stassi to the high school.

The instant situation was the first occasion on which the District had involuntarily transferred one teacher in order to make room for another teacher’s voluntary transfer. At the time the District effectuated these transfers, it was aware that Verhelst (the head track coach) might retire at the end of the 2003-04 school year. Subsequently, Verhelst did submit his resignation, thus creating a vacancy at the high school. The District posted the position and selected an internal applicant, a teacher from one of the elementary schools, who was the most senior applicant and had been the assistant coach to Verhelst. The District based its selection for this vacancy upon seniority. Albers had applied for the vacancy, but his application was unanswered for reasons unexplained by the record. However, it appears undisputed that he would not have been selected, because he had less seniority than the successful applicant.

Albers grieved his involuntary transfer and the grievance was processed through the contractual grievance procedure, at which point the Union chose to file a prohibited practice complaint rather than a request for arbitration, a choice permitted by the contract.²

The most pertinent provisions from the agreement are as follows:

ARTICLE IX

CONDITIONS OF EMPLOYMENT

. . .

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

² The contract is unusual in giving the parties an option of having contractual violations decided either through a prohibited practice complaint based on Sec. 111.70(3)(a)5 or through arbitration. The Examiner discussed whether this contract language properly conferred jurisdiction upon the Commission to hear and decide the instant matter and concluded that it did. Neither party has sought review of this portion of the Examiner’s decision, and we affirm it without further discussion.

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.

...

Discussion

A. The Stassi Transfer

The Examiner interpreted the “voluntary transfer” language set forth above to prohibit the District from voluntarily transferring a bargaining unit member unless a vacancy exists, and, in that case, concluded that the District must follow the posting and selection provisions in Article 9/13/2 through 9/13/6, set forth above. As the Examiner saw it, Article 9/13/6 (labeled “Voluntary Transfer”) “contemplates that in order for there to be a voluntary transfer,

there must first be a vacancy. ... 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.” Examiner’s Decision at 31. Accordingly, the Examiner concluded that the District violated the contract by transferring Stassi to the high school.

The District challenges this conclusion, arguing that: (1) under general labor contract interpretation principles, the District retained the right to transfer or reassign teachers except as expressly limited by the contract; (2) the parties further expressly agreed in Article 9/13/1 that teacher reassignment “may become necessary” for various “acceptable reasons, including the wishes of employees who desire to change their place of employment within the school system”; (3) in this case, reassigning Stassi was necessary for acceptable reasons involving the benefits of his all day presence at the high school; and (4) Article 9/13/6 (“Voluntary Transfer”) limited the District’s transfer prerogatives only in situations where there was a vacancy, and there was no vacancy here.

In response, the Association argues that Article 9/13/6 constitutes an explicit limitation on the District’s transfer prerogatives and precludes the District from voluntarily transferring a teacher unless there is a vacancy. As the Association sees it, since there was no high school Phy Ed vacancy, Stassi in effect was seeking to “bump” a teacher at the high school, and Article 9/13/6 did not give Stassi that right. Further, according to the Association, Article 9/13/1 did not authorize the Superintendent to transfer Stassi, because that article spoke only to the Superintendent’s “responsibility,” which is distinct from “authority.” Finally, the Association contends that, even if Article 9/13/1 applied, the District has not established that transferring Stassi to the high school was “necessary” to meet any legitimate District needs.

The District has the better of these arguments. It is well-established that a labor contract limits traditional managerial prerogatives, such as assigning, deploying, and transferring employees, only where the contract specifically so provides. Contrary to the Association and the Examiner, we see nothing in Article 9/13/1 or 9/13/6 that expressly limits the District’s general authority to redeploy Stassi for the reasons it did so here.

As to 9/13/1, we agree with the Examiner that the Association’s proposed distinction between the Superintendent’s “authority” and his “responsibility” is artificial. Further, while the Examiner assumed without deciding that moving Stassi to the high school was necessary for “acceptable reasons,” within the meaning of Article 9/13/1, we think it appropriate to reach that conclusion directly. We agree with the District that the contract provision does not require the Superintendent to establish that his *reasons* were necessary, but rather, if the reasons were “acceptable,” that the *transfer* was necessary to serve those reasons. In this case, the District decided to accommodate Stassi’s desire to move to the high school, because doing so might improve the academic performance of the athletes, address some behavioral problems associated with the football program, and provide other benefits to the high school program.

Accommodating Stassi's desire is a specifically identified "acceptable reason" under 9/13/1, and we have no trouble finding the other asserted reasons "acceptable" as well. Once the District decided upon these acceptable goals, transferring Stassi was clearly "necessary" in order to achieve them, in order to obtain Stassi's day to day presence at the high school.

Regarding 9/13/6, we agree with the Examiner and the Association that Stassi had no "right" under this provision to voluntarily transfer to the high school. We further agree that Article 9/13/6 gives teachers a right to transfer voluntarily only when there is a vacancy, and in this case there was no vacancy at the high school. However, this case is not about whether Stassi had a *right* to voluntarily transfer absent a vacancy, but rather whether the District had the *authority* to move Stassi without an existing vacancy. The provision contains fairly standard posting and vacancy language that does, indeed, create some rights for teachers when there is a vacancy and to that extent limits the District's managerial prerogatives in filling vacancies. For example, the language gives substantial weight to seniority as among qualified candidates, and the District appears to have applied it that way in choosing Verhelst's successor. However, the provision simply has no bearing in the myriad of potential redeployment decisions, such as this one, that do not involve filling a vacancy. Thus, for example, if the District had refused Stassi's request in the instant situation, Stassi would have had no recourse under 9/13/6. But, even though Stassi had no right to demand the transfer, nothing in 9/13/6 prevents the District from choosing to grant his request, as it did here.

Accordingly, we conclude that the Stassi transfer satisfied the requirements of Article 9/13/1 and was not constrained by Article 9/13/6 or any other specific provision in the agreement. We therefore dismiss the alleged violation of Sec. 111.70(3)(a)5 regarding the Stassi transfer.

B. The Albers Transfer

Unlike the Stassi transfer, the Albers transfer was involuntary. The Examiner therefore appropriately reviewed the "Involuntary Transfer" language contained in Article 9/13/7 and concluded (1) that it applied to the instant situation and (2) that it expressly limited the District's prerogatives to select employees for involuntary transfer. We agree, although on somewhat different reasoning.

The District contends that the involuntary transfer restrictions apply only in situations where the District is reducing the number of available positions, thus creating an excess of teachers in a particular grade level or department. In addition to the reduction in positions, the District contends that there must be a vacancy elsewhere before Article 9/13/7 comes into play. In the instant case, says the District, neither element is present. Since the transfer is authorized under Article 9/13/1, i.e., it was necessary in order to meet the District's "acceptable" reason (i.e., moving Stassi to the high school), and since Article 9/13/7 has no bearing, the District contends it did not violate the contract.

As to Article 9/13/1, it is not clear to us that it was “necessary” to transfer/reassign Albers in order to accommodate Stassi’s move. It may have been necessary to transfer someone from the high school Phy Ed department, but there were two other possibilities besides Albers. Nonetheless, if no other contractual provision expressly limited the District’s prerogatives in selecting which individual to transfer, we would have some difficulty on this record in overturning the District’s decision to select Albers.

However, we agree with the Examiner that the contract does contain express language limiting the District’s discretion in selecting teachers for involuntary transfer. The question is whether that language applies to the instant situation. Contrary to the Examiner, we do not believe that, simply because the provision is entitled “Involuntary Transfer” it necessarily limits the District’s prerogatives in all involuntary transfer situations. Instead, we agree with the District that the general rule still applies, i.e., that the District retains basic managerial prerogatives, such as discretion over staff deployment, except where specifically limited. We turn then to determine whether Article 9/13/7 specifically limits the District’s discretion in the situation at hand.

Under standard contract construction principles, the language itself, rather than bargaining history or past practices, will prevail to the extent it is clear. To restate, the pertinent language provides:

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.

In that situation, the contract specifies a selection procedure, beginning with seeking volunteers for the vacant position and, if that fails, moving along to selecting “The least senior eligible teacher candidate who is certified to fill the vacancy,” with certain other provisos. Clearly, as the Examiner held, if the instant situation is covered by 9/13/7, then the District violated the contract because it failed to seek volunteers and Albers was not the least senior eligible teacher for the involuntary transfer.

We conclude that the instant situation is covered by 9/13/7 and hence that the District violated the contract in selecting Albers for involuntary transfer. First, although the bargaining history indicates that the language was written in contemplation of a reduction in force (RIF) situation, and while the language clearly would apply in such RIF situations, its coverage is clearly broader than that on the face of the language. For example, it does not read, “when, *owing to a reduction in force*, the number of teachers” Instead, applied literally, it covers the instant situation.³ Having transferred Stassi to the high school, the

³ We also note that the contract contains a separate provision governing reductions in force, Section 16, lending further textual support to our conclusion that this separate provision, entitled “Involuntary Transfer,” is not

District created a situation where “the number of teachers in [the Phy Ed department at the high school] exceeds the number of positions/assignments in that grade level/department.” Moreover, contrary to the District’s argument, once Stassi was moved, there literally was a vacancy at the Nichols Elementary School. Hence, the District should have utilized the procedures in 9/13/8 through 13 in filling the Nichols Phy Ed position.

In reaching these conclusions, we recognize potential inefficiencies or anomalies in the resulting mechanisms for handling some staffing decisions. At minimum, applying the procedures in Article 9/13/8 through 13 for filling Stassi’s former position would likely have been cumbersome. It is understandable that the District would prefer a more streamlined process. It is also likely that, in negotiating the involuntary contract provisions, the parties may not have considered fully all the ramifications of their language. This is not unusual, but unless the result of applying literal contract language is absurd or nonsensical, an arbitrator (or the Commission under Sec. 111.70(3)(a)5) is not free to adjust the language to render it more elegant or more palatable. This task is for the parties to undertake in the collective bargaining process, if they choose to do so.

For the foregoing reasons, therefore, we hold that the District violated Sec. 111.70(3)(a)5, Stats., when it involuntarily transferred Jeff Albers to the Nichols Elementary School.

Dated at Madison, Wisconsin, this 7th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

reasonably read to apply only to RIF situations.

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