BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BRODHEAD EDUCATION ASSOCIATION	
and	Case 10 No. 41260 MA-5343
BRODHEAD SCHOOL DISTRICT	

Appearances:
Ms. Renee Scholen, UniServ Director, Capital Area UniServ-South, 4800 Ivywood Trail, McFarland, Wisconsin 53558, and Ms. Donna A. Weikert, Attorney at Law, Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003, Madison, WI 53708-8003, on behalf of Brodhead Education Association.
Kittelsen, Barry, Ross and Wellington, Attorneys at Law, by Mr. Rodney O. Kittelsen, 916 17th Avenue, P.O. Box 710, Monroe, Wisconsin 53566-0710, on behalf of Brodhead School District.

ARBITRATION AWARD

Brodhead Education Association (hereinafter Association) and Brodhead School District (hereinafter District or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved disputes involving the interpretation or application of a specific provision of the agreement. Said agreement also provides for arbitration by a three-member panel with the Association and District each appointing one member and these two members selecting an impartial third party to act as chair of the panel. Said agreement also limits arbitration to those matters that have been processed through the grievance procedure within the prescribed time limits.

The Association selected Lysabeth N. Wilson as its member of the arbitration panel. The District selected Shannon E. Bradbury as its member. On November 9, 1988, the Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (hereinafter Commission). Arbitrator Bradbury advised the Commission by letter that Arbitrator Wilson and she had selected Marshall L. Gratz, a member of the Commission's staff, as the impartial third party to act as chair of the arbitration panel. On November 22, 1988, the Commission appointed Marshall L. Gratz as the impartial arbitrator. On December 9, 1988, Arbitrator Gratz advised the parties that he would not be available to serve as the impartial arbitrator. On December 14, 1988, the parties advised the Commission that they had selected James W. Engmann, a member of the Commission's staff, as the impartial third party to act as chair of the arbitration panel. On December 21, 1988, the Commission appointed the undersigned as an impartial arbitrator in this matter. By letter dated December 21, 1988, the arbitration hearing in this matter was scheduled for February 2, 1989.

Prior to January 11, 1989, the parties agreed to brief and have the arbitration panel determine if this matter had been processed through the grievance procedure within the procedural time limits. The parties agreed to postpone the hearing to allow time for briefing of and decision on the issue of timeliness. On January 11, 1989, the arbitration hearing scheduled for February 2, 1989, was postponed to February 17, 1989. The parties submitted stipulated facts, joint exhibits, briefs and reply briefs, the last of which was received on January 27, 1989. The arbitration panel conferred by a conference call on February 1, 1989. Full consideration was given to the evidence and arguments of the parties in reaching a decision in this matter. In a letter to the parties dated February 3, 1989, the undersigned stated the issues before the panel and answered in summary form the questions posed by these two issues. In sum, the undersigned found the grievance to be timely. Arbitrator Wilson

concurred in the decision. Arbitrator Bradbury dissented from the decision. The undersigned issued the Preliminary Arbitration Award dated February 24, 1989, which included a Statement of Facts, Pertinent Contract Language, Positions of the Parties and Discussion.

A hearing on the merits was held on February 17, 1989, in Brodhead, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. A transcript was made of the hearing. The parties submitted briefs and reply briefs, the last of which was received on April 24, 1989. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

James Fouts (hereinafter Grievant) was hired by the District as a teacher in June 1985. At the time of hire he had ten years experience as a teacher. Initially the Principal recommended that the Grievant be given credit for five years of teaching experience in placement on the salary schedule. After the Grievant discussed the matter with District Administrator Eugene Hamele (hereinafter Administrator), the Grievant was given credit for seven years experience.

In March 1988 the Association met with the Board of Education (hereinafter Board) for the purpose of negotiating a successor collective bargaining agreement. In its initial proposals, the Association proposed a change in the determination of credit for previous teaching experience. On April 6, 1988, the Board responded in writing as follows:

> The Board feels that flexibility at the time of hire is an important management right which should not be diluted. Since the beginning of the present administration everyone hired has been given full credit for outside experience so this provision is causing no trouble at this time.

On April 7, 1988, the Association negotiator advised the Grievant of this statement by the Board. On April 13, 1988, the grievance was filed with Principal. The grievance stated as follows:

> (The Grievant) was not given full credit for years of experience outside of the Brodhead School District when past practice under this administration was to give full experience and also after (the Grievant) was hired, full experience was given for years outside the district to other teachers hired.

The remedy sought in the grievance was stated as follows:

> Past practice in the Brodhead School District dictate that (the Grievant) be given full credit for his years experience outside the Brodhead School District and be placed appropiately (sic) on the salary schedule to reflect his full experience. The (Grievant) shall be made whole for all retroactive wages and benefits appropriate to the correct placement.

On April 15, 1989, the Principal denied the grievance. On April 22, 1988, the grievance was filed with the Administrator. The following statement was added to the Statement of Grievance:

> Section VII, B. 2 of the Master Agreement is deprived of practical significant in that it refers only to candidates' record and (the Grievant's) record is and was above reproach.

On April 29, 1988, the Administrator denied the grievance. The Administrator cited Article VII(B)(2) as giving the Administrator discretionary authority on placement of teachers on the salary schedule when they are first hired. He stated that other teachers were given less than full credit for experience outside the district at the time of hire.

On May 10, 1988, the grievance was filed with the Board. On June 9, 1988, the Board President sent a letter to the Grievant denying the grievance. On June 15, 1988, the Association gave the Board written notice of its request for arbitration.

PERTINENT CONTRACT LANGUAGE

VII. TEACHER EMPLOYMENT PRACTICES - GENERAL

. . .

B. Experience

. . .

2. Experience outside of the local system will be evaluated by the school administrator. When, in the opinion of the administrator, the record does not warrant full credit, placement on the salary schedule will be determined by the administrator. This placement shall not be reduced (i.e. from 5 to 4 years) for a continuing employee. However, a teacher may be held at an experience increment as outlined in VII, C, (3).

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XI. BOARD OF EDUCATION POLICIES

Previously adopted Board of Education policies which are primarily related to wages, hours and conditions of employment will be in effect.

XII. GRIEVANCE PROCEDURE

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B. Definition - For the purpose of this Agreement, a grievance is defined as any dispute regarding the interpretation or application of a specific provision of this Agreement.

C. Grievances shall be processed in accordance with the following procedures:

STEP 1

a. An earnest effort shall first be made to settle the matter informally between the teacher and his immediate supervisor.

b. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the immediate supervisor within five days after the facts upon which the grievance is based first occur or first become known. The immediate supervisor shall give his written answer within five days of the time the grievance was presented to him in writing.

. . .

XII. BINDING ARBITRATION

A. In order to process a grievance to Arbitration, the following must be complied with:

1. Written notice of a request for such arbitration shall be given to the Board within ten days of receipt of the Board's last answer.

2. The matter must have been processed through the grievance procedure within the prescribed time limits.

3. The issue must involve the interpretation or application of a specific provision of the Agreement.

. . .

C. When a request has been made for arbitration, a three-member panel shall be established in the following manner: The employer and the employee representative shall each appoint a member of the panel and shall notify the other of the name of its appointee to the panel within five days of receipt of the written appeal. These representatives shall meet in an attempt to select an impartial third party to act as Chairman of the panel. Failing to do so, they shall, within fifteen days of the appeal, request the Wisconsin Employment Relations Commission to submit a list of five names for their consideration. The employer and the employee representatives shall determine by lot the order of elimination and thereafter each shall, in that order, alternately strike a name from the list, and the fifth and remaining name shall act as Chairman of the panel.

D. The panel shall meet with the representatives of both parties, hear evidence and issue a decision.

E. It is understood that the function of this panel shall be to provide an opinion as to he interpretation and application of specific terms o this Agreement. This panel shall not have power, without specific written consent of the parties, to either advise on salary adjustments, except the improper application thereof, or to issue any opinions that would have the parties add to, subtract from, modify or amend any terms of this Agreement. The decision of the panel shall be binding on the Board, Association and teachers represented by the Association.

. . .

STATEMENT OF THE ISSUES

The Association proposes framing the issues as follows:

1. Did the Employer violate Article VII, Section B, Subsection 2 of the collective bargaining agreement by not giving the Grievant full placement for his outside experience?

2. Did the District violate Article XI of the collective bargaining agreement when it acted inconsistently with established practice?

3. Was the District's failure to grant the Grievant full credit on the salary schedule for his outside experience arbitrary, capricious and inequitable?

The District proposes framing the issue as follows:

> Did the Employer violate Article VII, Section B, subsection 2 of the collective bargaining agreement or the past practice between the parties by not giving the Grievant full placement for his outside experience when hired?

The Arbitrator frames the issues as follows:

1. Did the District violate Article VII, Section B, Subsection 2 of the collective bargaining agreement when at the time of hire it gave the Grievant less than full credit on the salary schedule for his years of teaching experience outside the District? If so, what is the remedy?

2. Did the District violate an established past practice between the parties when at the time of hire it gave the Grievant less than full credit on the salary schedule for his years of teaching experience outside the District? If so, what is the remedy?

3. Has the District violated the collective bargaining agreement since the filing of the grievance in this matter by not giving the Grievant full credit for his years of teaching experience outside the District? If so, what is the remedy?

POSITIONS OF THE PARTIES

1. Employer Brief

The Employer argues that any agreement negotiated by the parties should not be disturbed, that the agreement clearly differentiates between hiring of employes within the district and those from without the district, that as to those hired from within the district, Section VII(B)1 clearly states that experience in the district shall be accounted at full value, and that as those hired from without the district, Section VII(B)1 clearly states that experience outside the local system will be evaluated by the administrator and when, in the opinion of the administrator, the record does not warrant full credit, placement on the salary schedule will be determined by the administrator. The Employer also argues that erroneous information was given to the Association that all persons hired from outside the district were given full credit for their outside teaching experience, that the record demonstrates that the Grievant received more credit when he was hired than was initially offered to him, that this demonstrates that he was not treated in an arbitrary or capricious manner, that erroneous information given in a negotiation session does not establish a past practice, that the record shows that not all teachers hired in the Brodhead School District with outside experience were given full credit, that the agreement has not set forth any specific criteria on which the administrator must form an opinion in judging the applicant's record, except that as a matter of general law, the action must not be arbitrary or capricious, which it was not in this case, and that, therefore, the grievance should be denied.

2. Association Brief

The Association argues that the Employer violated Section VII(B)2 of the agreement by not giving the Grievant full placement for his outside experience; that Section VII(B)2 contains an explicit exception to granting full credit for outside teaching experience, thus excluding any other exceptions; that the term "the record" contained in Section VII(B)2 means a teacher's individual record of outside experience; that using the rules of language and the logic of outlining, the Association interprets Section VII(B)2 to illustrate and explain how an individual teacher's experience outside the District affects placement on the salary schedule; that in analyzing the paragraph structure of Section VII(B)2, the sentence that includes the words "the record" is telling about the main idea of the paragraph, namely experience outside the local school system; that the ordinary and popularly accepted meaning of the word "record" is a report, list or aggregate of actions or achievements which, in this case, would include a resume, letters of reference, college transcripts and evidence of certification; that contract language interpretation requires that the document be read as a whole, that the Grievant's record contains no evidence that would warrant placement at less than full credit; that even if the District Administrator had sole discretion to place the Grievant, failure to grant the Grievant full credit under the circumstances herein was arbitrary and capricious; that the District had an announced and well established practice of granting full credit for teaching experience outside of the District; and that it was arbitrary and capricious to treat the Grievant differently than all the other teachers hired during this administration. The Association also argues that the District violated Article XI of the collective bargaining agreement when it acted inconsistently with established policy. The Association asserts that an appropriate remedy would include pay retroactive to the occurrence of improper placement on the salary schedule.

3. Employer Reply Brief

The Employer argues that for a past practice to be binding on the parties, it must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties; that the burden of proof is on the party asserting the past practice to show that the past practice exists because it represents an implied agreement by mutual consent; and that the factors frequently examined by arbitrators include frequency, consistency and longevity of the practice, the circumstances surrounding the creation of the practice and whether the continuation of the practice has been discussed in negotiations or during the grievance and arbitration procedure. The Employer therefore argues that a violation of past practice did not occur when the Grievant was hired in the summer of 1985, that to determine the past practice, one must look to the summer of 1985 and before, that several teachers were hired and placed at less than their actual outside teaching experience, and that no clear past practice existed by granting full credit for outside experience for teachers hired in the District in the summer of 1985. The Employer also argues that the scope of the grievance should be limited to past practice; that a person's record includes his or her entire experience, written and unwritten; that the negotiated contract language is clear; and that the Association brought a proposal to bargaining to change the Administrator's discretion in the spring of 1988. Finally, the District argues that the District did not act arbitrarily or capricious; that when the Grievant was not satisfied with the Principal's recommendation of granting credit for five years experience, the Grievant negotiated with the District Administrator who granted credit for seven years experience, that this cannot be said to be arbitrary or capricious in any manner, and that a misstatement made in negotiating which was later corrected cannot establish a past practice.

4. Association Reply Brief

The Association argues that the District practice being grieved is clearly that of the present Administrator, that under this Administrator there was a consistent policy of giving full credit for outside experience, that the District violated this policy in that it treated the Grievant differently without giving any rationale to do so, and that this is arbitrary, capricious and discriminatory. In a footnote the Association states that it is not so much arguing a "past practice" per se but, rather, is arguing that there was a clear, consistent, announced policy of this administration which was deviated from for no reason in the hiring of the Grievant, and that, since it is this Administrator that the Association contends acted arbitrarily and capriciously, it is appropriate to look at the practice of only this Administrator. The Association also argues that the District made misstatements of fact and erroneous descriptions and contentions in its reply brief, that in the summer of 1985 these was a clear practice of granting full outside experience for teachers, that the District's assertion that the Association did not prove at hearing that all teachers hired with outside teaching experience, except the Grievant, were given full credit is untrue, and that the authority cited by the District supports the Association's claim that the District Administrator acted in an arbitrary, capricious and unequitable manner.

DISCUSSION

A. Issue 1

In the Preliminary Arbitration Award in this matter, the parties disputed whether the grievance in this matter had been timely filed. The District argued that since the Grievant knew at the time of hire that he was not being given full credit for his years of teaching experience, he was barred almost three years later from challenging that decision. The Association argued that while the Grievant did not file the grievance within the required number of days after learning of his placement on the salary schedule, he did file the grievance within the required number of days after learning of the past practice of the District in placing teachers with experience outside the District on the salary schedule. In the alternative, the Association argued that the grievance was timely filed because the improper placement constituted a continuing violation.

In the Preliminary Arbitration Award, the District asserted that the fact upon which the grievance was based was the Administrator's use of discretion is placing the Grievant on the salary schedule which the Grievant knew about at the time of hire, nearly three years prior to the filing of the grievance. This Arbitrator agreed with the Association and found that the grievance had been timely filed because "the fact upon which the grievance is based is not the Administrator's use of discretion in placing the Grievant on the salary schedule, but the improper placement of the Grievant on the salary schedule." 1/ The placement was allegedly improper because it was "a violation of the practice of this administrator to give full credit for outside experience." 2/ But I noted that the District would have been correct if the fact upon which the grievance is based was the administrator's use of discretion in placing the Grievant on the salary schedule. Arbitrator Wilson concurred in the award and Arbitrator Bradbury dissented.

At hearing I advised the parties that this issue of the initial placement was time-barred. Yet much of the Association's argument in the case in chief goes to the improper use of discretion by the Administrator in granting the Grievant credit for seven years of experience teaching outside the District at the time of his hire. The Grievant knew and the Association knew or should have known of the Administrator's use of discretion in the summer of 1985. The grievance was not filed until April 1988. As the District argued in the Preliminary Arbitration Award, the Grievant is barred from challenging that decision as that issue is untimely.

Therefore, as to Issue 1, the grievance is denied as untimely.

B. Issue 2

The Association argues a violation of past practice. "In the absence of a written agreement, 'past practice' to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties."3/ The burden to prove that a past practice exists rests with the party claiming existence of the past practice; in this case, the Association. The Association does not meet that burden in several ways.

First, the Association desires to limit the practice to this particular District Administrator who became Administrator in July 1984. But if a past practice exists, it exists between the parties; in this case, the Association and the District. The Association may want to limit the practice to a particular administrator beginning with July 1984, but the practice is not so limited.

Second, much of the argument of the Association goes to the practice of the District after the incident in question. However, the proof of a past practice must go to show that the practice existed at the time of the incident; in this case, the hiring of the Grievant in June 1985. The Association cannot show a practice existed after that time to prove that the practice existed in June 1985. Past practice cannot be applied in a retroactive fashion.

Third, in looking at the years 1980-1985, the practice of the District was to grant one-half credit for teaching experience outside the District. The Association has not shown that it is clear and unambiguous that the District always gives full credit for teaching experience outside the District. In fact, the District did not.

1/ Brodhead School District, Case 10, No. 41200, MA-5343 (Engmann, 2/89) at page 7.

2/ Id.

3/ Celanese Corporation of America, 24 LA 168, 172 (Justen, 1954).

Fourth, the alleged past practice was certainly not clearly enunciated and acted upon in the summer of 1985. The Association argues that the practice was clearly enunciated by the negotiation document presented in April 1988; that is of little use to show that the alleged past practice was clearly enunciated in 1985. Nor was the alleged past practice acted upon in 1985; the Grievant himself is the proof that shows the practice as alleged by the Association did not exist. In addition Cherly Stangl was given one-half credit for outside experience the following year, confirming an inconsistent policy at best after 1984. 4/

Fifth, the practice is not readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. It certainly cannot be said with certainty that the practice existed as of June 1985. Nor was it accepted by both parties. It is doubtful if the Association knew of this alleged past practice before April 1988. The Association submitted language in negotiations to remove the discretion of the Administrator to determine placement on the salary schedule. In fact, at least one association team member was not aware of the alleged practice until it was mentioned in a negotiating document. That negotiator was the Grievant and if he didn't know, it does not seem to be a practice knowingly accepted by both parties. (Indeed, if the Association knew of the past practice in 1985, its grievance is time-barred. If it did not know, there was no practice)

Sixth, under the Association's argument, discretion unused is discretion lost. I disagree.

Seventh, the Association states in its Reply Brief that it is not so much arguing a past practice per se but rather is arguing a policy existed from which the Administrator deviated from. This is an attempt to prove a violation of Article XI. This attempt must fail. No evidence was presented to show that a policy of the District was adopted prior to the hiring of the Grievant which required the Administrator to give him full credit for his years of outside teaching experience.

In sum, the Association worked hard to show that a past practice existed in April 1988. For the past practice to apply in this case, however, the Association needed to show that the past practice existed in June 1985. This it failed to do. Therefore, as to Issue 2, the grievance is denied on the merits.

C. Issue 3

In its brief of the Preliminary Arbitration Award, the Association argued that the District's denial of proper placement on the salary schedule constitutes a continuing violation of the agreement, citing much authority. I agree that an improper placement on a salary schedule constitutes a continuing violation of this agreement. Although Issue 1 is time-barred, the evidence offered there goes to the question of whether the District continues to improperly place the Grievant on the salary schedule.

The parties agree that the standard to be used in evaluating the administrator's use of discretion is one of arbitrary or capricious. "An arbitrary or capricious decision is one which is either so unreasonable as to be without a rational basis or the result of an unconsidered, willful and irrational choice of conduct." Pleasant Prairie v. Johnson, 34 Wis.2d 8, 12, 148 N.W. 2d 27 (1967); Olson v. Rothwell, 28 Wis.2d 233, 239, 137 N.W. 2d 86 (1965).

The Association argues that the term "the record" means a teacher's individual record of outside experience. I do not read the term so tightly. If the parties had intended the term to mean only the teacher's experience, they could have easily said that. In fact, by not specifically stating that the opinion of the Administration relates to the teachers experience, the language implies that "the record" means more than just experience.

In exercising his discretion to place teachers on the salary schedule, the Administrator testified he used the following criteria: recommendations of he supervisor who interviewed the candidate; total years of experience, including elementary and secondary teaching; outside experience related to teaching, such as vocational school and internship records; subject area and availability of teachers in that area, including the number of individuals who applied for the position.

4/ The Association makes much of the fact that one year later Stangl's placement was changed. The Association concludes this is a "correction" of an inappropriate placement. I see it as a reevaluation of a placement consistent with the practice of giving one-half credit. Thus, the change is irrelevant; the initial placement (the issue in dispute here) is consistent with the Board's position.

In this case a large number of candidates applied for the Grievant's position, several of whom were as qualified as the Grievant. The Principal, consistent with his view of the past practice, recommended that the Grievant be given credit for one half or five of his ten years outside experience.

However, the Grievant discussed the Principal's recommendations with the Administrator. The Grievant indicated that he did not want to take a pay cut to move to Brodhead. The Administrator then offered the Grievant a placement of seven years experience so the Grievant would not lose money in the move. The Grievant accepted the offer.

The decision to offer a salary placement of seven out of ten years experience is not so unreasonable as to be without a rational basis. In fact, it is reasonable. The past practice as viewed by the District of granting credit for one-half of the years of outside experience is a common one. In this case, considering the number of qualified candidates, the offer of five years credit was reasonable.

But the decision making process did not stop there. When the Grievant indicated he would lose salary at that rate, the Administrator exercised his discretion to offer two more years experience. This decision to offer seven years experience so the Grievant would not lose salary is certainly rationally based.

In essence, the Association disagrees with the criteria which should be used to determine placement. It believes that the criteria should be based solely on facts related to the teacher's experience. But the contract does not limit the Administrator's opinion to just those kind of facts. And in this case the Administrator made a considered, willful and rational choice in first offering five years experience and then choosing to offer seven years experience. As such the Administrator's use of discretion was neither arbitrary nor capricious. Since the initial decision to grant the Grievant less than full credit for his years of outside teaching experience was not arbitrary or capricious, continuing to deny him said credit does not violate the agreement.

Therefore, as to Issue 3, the grievance is denied on the merits.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator renders the following

AWARD

1. That the District did not violate Article VII (B) (2) of the collective bargaining agreement when at the time of hire it gave the Grievant less than full credit on the salary schedule for his years of teaching experience outside the District.

2. That the District did not violate any established past practice between the parties when at the time of hire it gave the Grievant less than full credit on the salary schedule for his years of teaching experience outside the District.

3. That the District had not violated the collective bargaining agreement since the filing of the grievance in this matter by not giving the Grievant full credit for his years of teaching experience outside the District.

4. That the grievance herein is hereby denied and dismissed.

Dated at Madison, Wisconsin this 21st day of July, 1989.

By _____
James W. Engmann, Arbitrator

Arbitrator Bradbury concurs in this decision.

Arbitrator Wilson dissents from this decision.