

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
ASHLAND SCHOOL DISTRICT :
and : Case 62
ASHLAND TEACHERS FEDERATION, : No. 41226
LOCAL 1275, AFL-CIO : MA-5327
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Appearances:

Mulcahy & Wherry, S.C., 715 South Barstow Street, Eau Claire, Wisconsin 54702-1030, by Ms. Kathryn J. Prenn, appearing on behalf of the District.
Mr. William Kalin, Staff Representative, Wisconsin Federation of Teachers, 1703 Logan Avenue, Superior, Wisconsin 54880, appearing on behalf of the Federation.

ARBITRATION AWARD

Ashland School District, hereinafter referred to as the Employer or the District, and Ashland Teachers Federation, Local 1275, AFL-CIO, hereinafter referred to as the Federation, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Federation, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a single, impartial arbitrator to hear and decide the instant dispute. On November 15, 1988, the Commission appointed Coleen A. Burns, a member of its staff, to hear and decide the instant dispute. Hearing was held in Ashland, Wisconsin on February 21, 1989. The hearing was transcribed and the record was closed upon receipt of post-hearing briefs which were filed by June 16, 1989.

ISSUE

The parties were unable to agree upon a statement of the issue. The District frames the issue as follows:

Did the District violate Article III, Section B, of the collective bargaining agreement when it denied the grievant's request to be transferred to the Middle School Social Studies/Civics position? If so, what is the appropriate remedy?

The Federation frames the issue as follows:

Did the District violate the collective bargaining agreement when it denied the grievant's request to be transferred to the Middle School Social Studies/Civics position? If so, what is the appropriate remedy?

The undersigned adopts the Federation's statement of the issue.

RELEVANT CONTRACT PROVISIONS

A. Definition

2.1.1 A "grievance" is defined to be a complaint concerning the interpretation or application of any of the terms of this written agreement establishing policies or practices affecting the conditions of employment, salaries or hours of the employees of the Board of Education for whom the Union is the negotiating representative.

ARTICLE II - GRIEVANCE PROCEDURE

. . .

B. Procedure

. . .

- 2.2.3 No decision or adjustment of a grievance shall be contrary to any provision of this agreement existing between the parties hereto.

. . .

Step V

If the decision rendered is unsatisfactory, within ten (10) school days after receiving the decision of the Board of Education, the Union may appeal the decision of the Board directly to the Wisconsin Employment Relations Commission of arbitration.

- (1) Proceedings of the arbitration shall be conducted pursuant to Chapter 111.70 of the Wisconsin Statutes.
- (2) The decision of the arbitrator shall be in writing and shall set forth his opinions and conclusions on the issues submitted to him at the hearing or in writing.
- (3) The decision of the arbitrator shall be final and binding on all parties except as forbidden by law.
- (4) Nothing in the foregoing shall be construed to empower the arbitrator to make any decisions amending, changing, subtracting from or adding to the provisions of this agreement.

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ARTICLE III - WORKING CONDITIONS

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B. Transfer

- 3.3.1 A list of all vacancies shall be posted in the District Office and in each school.
- 3.3.2 A revised up-to-date list shall be posted in the District Office and each school monthly during the school year. During the months of June, July and August a list shall be posted in all open schools and the District Office. A list shall also be mailed to the Union president.
- 3.3.3 Requests for transfers shall be submitted in writing to the Superintendent no later than ten (10) days after the posting the vacancy. New teachers shall not be hired to fill specific vacancies until teachers in the system have had an opportunity to apply and be considered for the position.
- 3.3.4 Transfer requests should show preference of a school, grade level and the subject.
- 3.3.5 Whenever a new school is opened the number of vacancies at each level or in each classification shall be posted in like manner.
- 3.3.6 Such requests shall be granted on the basis of:
 - (1) Training, experience and qualifications of the teacher in relation to the requested position.
 - (2) Seniority in the school system.
 - (3) Priority of request in the case of tied seniority. Exceptions to this rule shall be decided by the Superintendent of Schools and the president of the Union and/or their designees.

3.3.7 Notice of transfer shall be given to the teacher no later than June 1st, except if the vacancy should occur after that date.

3.3.8 If teachers in the system do not receive the positions for which they have applied, they will be notified in writing of the reasons for not receiving that position.

. . .

ARTICLE X

RULES GOVERNING COLLECTIVE BARGAINING AND THIS AGREEMENT

10.1.4 With regard to matters not covered by this agreement which are proper subjects for collective bargaining in that they relate to salaries, hours or other conditions of employment, the Board agrees that it will make no changes in existing rules and regulations for the duration of this agreement without prior consultation and negotiation with the Union.

BACKGROUND

On July 13, 1988, the District posted the following:

NOTICE OF VACANCY

Social Studies - Civics
Position

Ashland Middle School
School and/or grade level(s)

Qualifications

1. Social Studies/Civics
- 2.
- 3.

Applications will be accepted through Noon - July 25, 1988

In response to this Notice, the District received applications from three of the District's teachers, as well as from individuals outside the District. Eight applicants, including William Eggert, hereinafter the Grievant, were interviewed for the position. All of the interviews were conducted by both Assistant Superintendent Moll and Principal Podlesny. All of the interviewees were asked the same questions from lists of questions which had been prepared in advance of the interviews by Assistant Superintendent Moll and Principal Podlesny. Following the interviews, reference checks were made on each outside candidate under consideration. With respect to the Grievant, the only District teacher to be interviewed, the reference check involved a review of his past job performance record in the District. District representatives determined that the Grievant did not meet the qualifications which had been established for the position and, denied the Grievant's request to be transferred to the position of Social Studies/Civics Teacher at the Ashland Middle School. On September 8, 1988, a grievance was filed alleging that the Grievant should have been granted the transfer to the position. Thereafter, the grievance was processed through the parties' grievance arbitration procedure. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

FEDERATION

The District violated the intent, past practice and past application of Article 3.3.6 of the Transfer clause when it denied the transfer request of the Grievant. From the time the contract clause was negotiated into the parties' initial 1966-67 agreement, until the present case, the District and the Federation have interpreted and applied 3.3.6 such that the most senior, certified teacher on staff, applying for a transfer, would receive the requested position.

The District, in 1986, during bargaining leading up to the present collective bargaining agreement, attempted to change the transfer procedure. If the District had been successful in this attempt, then the District would have been able to determine position qualifications and, then, look not only to existing staff, but also to the "outside" for the most qualified applicant. This change, however, was not adopted. The District is attempting to obtain through the grievance arbitration procedure that which they could not obtain

through voluntary collective bargaining. The Transfer clause has been applied as initially bargained for at least 21 years. The agreement and the understanding of the parties should not be set aside because of the wishes of one or two administrators of relatively short tenure with the District.

At hearing, District Superintendent Demotts could cite only three examples of situations which would allegedly contradict the transfer policy based solely on seniority and certification. The Federation submits that none of these situations are relevant to the determination of the instant dispute. Donna Wucherer did not pursue a grievance beyond the Superintendent's level for the reason that she had received another position which she preferred. Jan Horvate was not a member of the teacher bargaining unit at the time she did not receive the position. Pat Robertson, never applied for a transfer, was not certified for the position in question, and determined that she did not want the transfer.

Assuming arguendo, that the arbitrator finds that the intent of the District and Federation, when negotiating Section 3.3.6, fails to support the Federation position in this case, or that the Federation has failed to demonstrate a binding practice of granting transfers based on seniority and certification, the Federation asserts that Section 3.3.6, nonetheless, requires the Grievant to be granted the position in dispute. The Federation asserts that if there is a teacher in the system that meets the requirements of subsection 1 of 3.3.6, that teacher must receive the position. The District cannot deny a transfer to a teacher in the system who meet the requirements of number 1 of 3.3.6 and hire outside the system even if the Administration feels that the outside candidate is more qualified.

The Grievant is certified and licensed as an Elementary Secondary Teacher for Learning Disabilities. He is also certified and licensed as a Secondary School Teacher for Broad Field Social Studies, History, and Geography. His training and educational background include a B.S. Degree in History, Geography and Business from the University of Minnesota, Duluth and a Master Degree from the University of Wisconsin. Additionally, he has 21 graduate credits in History from U.M.D. Through his employment and his current position, the Grievant has experience and knowledge of the curriculum that he would be teaching in the position of Social Studies/Civics Instructor. Such knowledge and experience would be a rarity for any teacher requesting a transfer.

The Wisconsin Department of Public Instruction has defined the terms "qualified" and "regular license". "Qualified" means the holding of the appropriate license. "Regular license" means a license issued under Section PI 3.03 (2) to a person who fully meets the licensing requirements for serving in a given position in education. PI 3.19 lists the licensing requirements for the Civics/Social Studies position in question and the Grievant meets this licensing requirement.

The meaning of Section 3.3.3 is clear, i.e., the District cannot hire from the outside before looking internally and considering the bargaining unit employees under 3.3.6 which states, "such requests (transfer) shall be granted on the basis of . . ." Section 3.3.8 requires the District to notify teachers in the system of the reasons for not receiving the transfer. Under the long established interpretations of Section 3.3.6, teachers are notified when receiving a position based on not being certified for the position or because they were less senior than teacher receiving the requested transfer.

In summary, the intent of the parties when they negotiated the provisions of Article III, Section B, was that the most senior, certified teacher on staff applying for a transfer would receive the requested position. For at least 21 years, the provision was applied such that the most senior, certified teacher on staff applying for a transfer received the requested position. Denial of the grievance transfer request is a violation of the collective bargaining agreement. In remedy of this violation, the District should be required to grant the Grievant the requested position.

DISTRICT

The District's decision that the Grievant was not qualified for the position may not be disturbed absent evidence the decision was arbitrary, capricious, discriminatory, clearly wrong or made in bad faith. None of these conditions exist in the present case.

Under the provisions of the grievance procedure, the Arbitrator has no authority "to make any decisions amending, changing, subtracting from or adding to the provisions of this agreement". Section 3.3.6 provides that one prong of the procedure for acting on transfer requests requires an examination of the teacher's training, experience and qualifications for the position. The District clearly has the authority to establish the qualifications for a position. If a teacher does not meet the qualifications for the position, seniority does not become a factor in the hiring decision.

Section 3.3.3 provides that, in the event of a vacancy, "new teachers shall not be hired . . . until teachers in the system have had an opportunity to apply and be considered for the position". The Grievant was given the opportunity to apply and to be considered for the position. The contract does

not require the District to grant a transfer request on demand. Rather, Section 3.3.6 provides a three prong test for a review of such requests. First, the teacher must meet the training, experience and qualifications for the position. Only if the teacher meets the requirement of the first prong of the test, does seniority in the school system become the deciding factor. In the case of tied seniority, the priority of the request becomes determinative. Section 3.3.8 contemplates that teacher transfer requests are not automatically granted because it requires that teachers whose transfer requests are denied are to be provided with written reasons for the denial. The reference to seniority in Article III, Section B, cannot be viewed in isolation or out of the context of the contract as a whole.

The Federation maintains that the most senior teacher who applies for the job and who is certified should be awarded the job. If the Federation were to prevail in its position, most of Sections 3.3.3, 3.3.6 and 3.3.8 would be rendered useless or inexplicable. Under the basic principles of contract construction, a construction which gives reasonable meaning to all provisions is preferable to one which leaves part of the language useless, or inexplicable, or creates surplusage.

Sections 3.3.3, 3.3.6 and 3.3.8 can easily be harmonized because, in fact, there is no conflict among the provisions. Section 3.3.3 mandates that a vacancy may not be filled before the District's current teachers have an opportunity to apply and be considered for the position. Section 3.3.6 provides that the most senior internal applicant who meets the training, experience and qualifications required for the position, will be awarded the job. Finally, Section 3.3.8 provides that, in the event a transfer request from an internal applicant is denied, that person will be provided written reasons for the denial. Section 3.3.9 provides that involuntary transfers shall be based on seniority, with the least senior teacher in the classification in that school being the first to be transferred. Clearly, the Federation knew how to draft language regarding seniority based transfers. Yet such language does not appear in Section 3.3.6.

The relevant contract language clearly and unambiguously requires that the teacher applicant must possess the required training, experience and qualifications before seniority becomes a factor. Even if it were true that, in the past, most of the transfer requests from senior, certified teachers were granted, such occurrences cannot modify clear and unambiguous contract language. For a party to prevail upon an argument that past practices have modified clear contract language, the party has the burden of proving that both parties accepted or endorsed the practice. No such proof is contained in the present record. As Federation witness Hare admitted at hearing, even as Federation President, she was not privy to the administration's reasons for granting transfer requests. During Superintendent's DeMott's administration, he has had the opportunity to act on numerous transfer requests. The most senior, certified teacher has not automatically been granted the position. Specifically, Donna Wucherer, Jan Horvate and Pat Robertson, were denied transfer requests. The Federation did not grieve the denials of any these three employees.

The Federation does not dispute the fact that the District has retained the right to establish specifications and qualifications for a given job. As the record demonstrates, the District developed qualifications for the position prior to posting the position as a vacancy. The qualifications may be summarized as follows: certified in broad-field social studies, classroom experience, large group class experience, strong discipline background, good role model, positive attitude, team player, innovative curriculum ideas. As the record establishes, while the Grievant did possess the certification for the job, he lacked any experience as a regular classroom teacher on other than a substitute basis. Moreover, a lack of experience teaching social studies in a regular middle school was not the Grievant's only shortcoming. A review of the Grievant's responses during his interview, as well as his prior job performance in the District, clearly supports the reasonableness of the District's determination that the Grievant did not meet the qualifications for the position in dispute. As the record demonstrates, the Grievant arrived late to the interview with no apologies. The Grievant used inappropriate language during the interview process and made inappropriate responses to interview questions. When the Grievant's personnel file was reviewed, it revealed the following: several instances of swearing, as far back as 1985; concerns about the Grievant's disciplinary methods, including his practice of standing children in the corner for long periods of time, a concern raised as recently as 1988; concerns regarding his inability to cooperate with members of the professional staff, including the use of derogatory remarks about other teachers during a team meeting; the use of inappropriate statements to parents, as well as curtness to parents; and a refusal to follow District procedures when making changes in student schedules. Based upon a review and assessment of the Grievant's job performance documentation, as well as his responses during the interview, the administrative team determined that the Grievant did not possess the qualifications which had been established for the position. Therefore, the District had no duty to award the Grievant the position. Had the Grievant met the District's qualifications, the District would have had no right to hire a candidate from outside the District.

In summary, the District had the right to establish qualifications for the

Middle School Social Studies/Civics position in dispute. The qualifications established by the District are reasonably related to the duties and responsibilities of the position. The burden is upon the Federation to present evidence that the District's decision was arbitrary, capricious, discriminatory, clearly wrong or made in bad faith. The burden is not on the District to prove that the past practice alleged by the Federation does not exist. Rather, the burden is on the Federation to prove that the alleged past practice does exist. The Federation has not met this burden.

The District's bargaining proposal would have changed the contract in two important ways. First, the internal applicant would not only have had to meet the training, experience and qualifications criteria established by the District, but would have to do so equally or better than external applicants. Second, if two or more internal applicants had equal or better qualifications than the external candidates, the District could select the best qualified internal candidate without any consideration for seniority. Clearly, the proposal sought far more discretion for the District. However, the fact that the District was not able to negotiate these changes into the contract is irrelevant. The Grievant was not transferred because he was not equally or better qualified than the external candidates. Rather, the transfer was denied because the Grievant did not possess the experience and qualifications established by the District for the position. There has been no contract violation and, therefore, the grievance should be dismissed.

DISCUSSION

The Federation, contrary to the District, argues that the District violated the collective bargaining agreement when it denied the Grievant's request to be transferred into a Middle School Social Studies/Civic position and filled the position from outside the bargaining unit. Specifically, the Federation argues that the parties' labor agreement requires the District to grant transfers to the senior, certified applicant.

While not denying that the Grievant was certified to teach in the position and that the Grievant was senior to the individual selected for the position, the District denies that it was contractually required to grant the transfer request of the Grievant. The District maintains that it has the right to determine position qualifications and that certification, per se, did not qualify the Grievant for the position. The District further maintains that seniority is determinative only when choosing among qualified applicants. The District asserts that the Grievant was not qualified for the position, and therefore, has no seniority right to the position.

It is generally recognized that an employer, such as the District, has the right to establish qualifications which are reasonably related to the duties and responsibilities of the position, unless, and to the extent that, this right is limited by the language of the labor contract. At issue, is whether the parties' contract language limits the District's right to determine position qualifications by requiring the District to grant the transfer to the senior, certified applicant.

Transfer rights, the rights in dispute, are specifically addressed in Article III, B, of the collective bargaining agreement. Section 3.3.6 provides that transfer requests "shall be granted on the basis of:

- (1) Training, experience and qualifications of the teacher in relation to the requested position.
- (2) Seniority in the school system.
- (3) Priority of request in the case of tied seniority. Exceptions to this rule shall be decided by the Superintendent of Schools and the president of the Union and/or their designees."

As a review of this provision reveals, the provision does not express a requirement that the District grant the transfer request of the senior, certified applicant. Nor, for the reasons discussed below, does the language imply such a requirement.

Subsection One expressly refers to the "training, experience and qualifications of the teacher" requesting the transfer. There is no reference to "certification". To be sure, the factor "qualifications of the teacher" is sufficiently broad in scope to include "certification". However, the language of the provision does not demonstrate that the parties intended this factor to be given any greater weight than the other two factors of "training" or "experience". Thus, the plain language of Subsection One neither expresses, nor implies, that certification is a determinative factor in the transfer decision. While seniority is a factor, its placement in Subsection 2, rather than in Subsection 1, indicates that the seniority factor is subordinate to the factors set forth in Subsection 1.

Section 3.3.6 does not limit the District's right to establish position qualifications by requiring the District to grant the transfer request of the

senior, certified applicant. Nor does the language otherwise restrict the District's right to establish qualifications which are reasonably related to the duties and responsibilities of the position in dispute. Giving effect to the plain language of Sec. 3.3.6 and construing the provision as a whole, the undersigned is persuaded that Subsection 1 sets forth factors to be considered when determining whether an applicant meets the qualifications of the position. Seniority becomes a factor only when choosing among qualified applicants. The language of Sec. 3.3.6 neither expresses, nor implies, that certification, per se, is sufficient to "qualify" an applicant for a position.

Under the provisions of Sec. 3.3.8, the District was required to notify the Grievant, in writing, of the reasons for not receiving the position. The District provided the Grievant with a letter, dated August 16, 1988, which stated, in relevant part, as follows:

Under section 3.3.8 we are obligated to inform you in writing of the reasons you did not receive the position. The reasons are as follows as designated under section 3.3.6.

1. You have no current experience in teaching regular classroom Civics. This is a high priority.
2. The responses from you during the interview were not viewed as satisfactory in harmony with the qualifications deemed necessary for the position.

At hearing, District witnesses stated that they had also relied upon the Grievant's personnel file in determining that the Grievant was not qualified for the position. However, the personnel file information was not cited as a reason for denial, and, thus, cannot be considered here. Given the language of Sec. 3.3.8, the District's case must rise or fall upon the reasons which were provided to the Grievant in the letter of August 16, 1988.

To qualify for the position in dispute, an applicant, inter alia, was required to have current experience in teaching regular classroom Civics. 3/ The requirement of current experience in teaching regular classroom Civics is a requirement which is reasonably related to the duties and responsibilities of the position in dispute. Moreover, Sec. 3.3.6 expressly provides that "experience" is a factor which may be considered when acting upon transfer requests. Neither the provisions of Sec. 3.3.6, nor any other provision of the collective bargaining, prohibits the District from establishing the position requirement of "current experience in teaching regular classroom Civics."

While the Grievant, who has been a learning disabilities teacher for approximately fifteen years, has worked with the District's Civics' curriculum when mainstreaming special education students, he does not have current experience in teaching regular classroom Civics. Having failed to meet the experience requirement, the Grievant is not qualified for the Social Studies/Civics position in dispute. 4/ Since the Grievant is not qualified for the position, he does not have a seniority right to the position. The District did not violate Sec. 3.3.6 when it denied the Grievant's transfer request. 5/

The language of Sec. 3.3.3 provides, in relevant part, that "New teachers shall not be hired to fill specific vacancies until teachers in the system have had an opportunity to apply and be considered for the position." In the present case, the Grievant was provided with an opportunity to apply and was considered for the position. The District did not violate Sec. 3.3.3 when it denied the Grievant's transfer request and hired from outside the District.

While the Federation argues that the evidence of bargaining history and past practice demonstrate that the parties intended transfers to be awarded to the senior, certified applicant, this argument is not supported by the record. According to Federation witness Francis Hicks, who retired from the District's teaching staff in 1984, the language of Sec. 3.3.6 was negotiated into the parties' initial 1966-67 agreement. Hicks, who was present at these negotiations as a Federation bargaining representative, testified that he believed that "training, experience and qualifications of the teacher in relation to the requested position was put in there, because we had a lot of non-certified teachers" who "were quite a group in the bargaining unit". 6/ When questioned again regarding the reason for placing this language in the

1/ Tr. p. 112.

2/ The Federation does not argue and the record does not demonstrate that the successful applicant lacked such experience.

3/ While it is argued that the Grievant did not meet other requirements of the position, it is sufficient for the purposes of this discussion to find that he failed to meet the experience requirement. It is immaterial whether he was also unqualified in other respects.

4/ Tr. p. 10.

contract, Hicks replied "Probably to protect those who were here, because they did have some training and experience" 7/ and "Because we had non-certified teachers teaching in the system and those non-certified teachers had some input into the writing of this contract." 8/

Assuming arguendo, that Hicks accurately recalls the 1966-67 bargain, his testimony does not demonstrate that the parties intended for "certification" to be a determinant factor in the transfer procedure. Rather, his testimony concerning the parties' "intent" when they bargained the language of Sec. 3.3.6 is consistent with the "intent" reflected in the plain language of the provision, i.e., that the language of Sec. 3.3.6, Subsection 1, was drafted with the specific intent of having the District consider factors other than certification when acting upon transfer requests.

At hearing, Federation Counsel asked Hicks whether there was any discussion concerning what would happen if there were two persons certified for the position and one was more senior than the other. Hicks responded "yes, that was the reason this clause was put in there." 9/ This response, however is inconsistent with Hicks' other testimony which indicates that the "reason" for the language of Sec. 3.3.6 was to protect the rights of "non-certified" teachers. 10/

At hearing, Hicks' asserted that the parties discussed and intended that the "senior teacher in the system, who was certified, would get the position".

The District's witnesses were not present at the 1966-67 bargaining and Hicks' testimony concerning this discussion was not contradicted by any other witness.

The undersigned, however, does not find Hicks' testimony on this point to be persuasive. Hicks did not identify the participants in the discussion, the statements made by each party, or the circumstances which gave rise to the discussion. Not only does this lack of detail suggest that Hicks' recollection of the discussion is too vague to be reliable, but it also fails to provide the undersigned with a basis to determine whether the District's conduct at that time did evidence an intent to award transfers to the senior, certified applicant. Despite the Federation's argument to the contrary, Hicks' bald assertion that the parties discussed that "the senior teacher in the system, who was certified, would get the position", is not sufficient to persuade the undersigned that the parties' mutually intended such a result.

In arguing that there is a binding past practice of granting the transfer request of the most senior certified applicant, the Federation relies upon the testimony of Hicks, Francine Hare, and Don Johnson. Specifically, the Federation relies upon the following testimony of Hicks, in which he is responding to questions of the Federation's counsel: 11/

Q All right, thank you. From your experience, from 1966-67 until your retirement in 1984, do you have knowledge in the district as to the option of this clause and how it has been implemented since 1966-67 until 1984?

A In all the instances that I recall teachers with the most seniority in the system would have preference for jobs.

Q Do you know of any cases where a teacher that was certified in the system did not receive the requested position and a person was hired from outside the district?

A No.

As the District argues, the Federation misconstrues this testimony when it argues that Hicks' testified that from 1966-67 until 1984, the most senior, certified teacher would receive the position under Sec. 3.3.6. First, Hicks does not address a certification requirement, but rather, indicates that transfer is solely a function of seniority. Secondly, Hicks does not identify the "instances" that he recalls. Neither this testimony, nor any other record evidence, demonstrates that Hicks is recalling all of the transfers, or that, in fact, Hicks has sufficient knowledge of prior transfers to be in a position to comment reliably upon the existence, or non-existence, of a practice involving transfers. Accordingly, Hicks' testimony concerning "past practice" is not persuasive.

5/ Tr. p. 10.

6/ Tr. p. 12.

7/ Tr. p. 11.

8/ Tr. p. 10 and 12.

9/ Tr. p. 12.

At hearing, Hicks related a conversation that he had had with District Superintendent Johnson, who was superintendent from the late 1960's to the mid 1970's. Hicks recalled the conversation as follows: 12/

A. He didn't like the seniority situation, because he would have to put people with seniority in a position where he may have a preference for somebody else, but at that time we used this contract and at that time it was interpreted that the senior person in the system, if they were certified, would get the job.

Q An he made reference to the fact that it was like running a railroad?

A Running a railroad.

While the statements attributed to Johnson indicate that he was not happy that seniority was a factor in the transfer process, the statements attributed to Johnson do not contain an acknowledgement by Johnson that transfers were granted to the senior, certified applicant. 13/ Nor do the remarks attributed to Johnson demonstrate the manner in which Johnson applied the factors of seniority or certification. Rather, there is only Hicks' bald assertion that "it was interpreted that the senior person in the system, if they were certified, would get the job" which assertion, for the reasons discussed supra, is not persuasive. Despite the Federation's arguments to the contrary, the record does not demonstrate that, during Johnson's tenure, Sec. 3.3.6 was implemented such that the senior, certified teacher received the transfer.

Since 1968, when Francine Hare commenced employment with the District, she has been active in the Federation local, holding such offices as President, Vice-President, and chair of the negotiating team. Contrary to the argument of the Federation, Hare's testimony does not demonstrate that, until the issue of the transfer of Donna Wucherer and Bill Eggert, the District has always transferred based on certification and seniority. At hearing, Federation Counsel (Q) and Hare (A) had the following exchange. 14/

10/ Tr. p. 14.

11/ As discussed supra, seniority is a factor when choosing among qualified applicants. Thus, assuming arguendo that Johnson made these remarks, one cannot conclude that he was not addressing this application of seniority.

12/ Tr. p. 22.

Q Do you have any knowledge during your tenure in the system where any teacher was certified for a position and requested the transfer and was the most senior person in the district and did not receive that position?

A None to my knowledge.

Q Do you know of people that had applied for a transfer position and were certified or seniored and did they receive the position?

A As I recall, that is the way it has been done, but I can't think of any specific instances in terms of name and dates and whatever.

On cross-examination, District Counsel (Q) and Hare (A) had the following exchange: 15/

Q Isn't it true, that in that capacity it was not routine for the administrator to consult with you prior to making a transfer?

A Right, that would have been the sensible way to do it, but they didn't.

Q In fact, isn't it true that you were not privy as to the administration's reasons for granting transfer requests?

A No, I guess not.

As with Hicks, supra, the record fails to demonstrate that Hare has sufficient knowledge of previous transfers to comment reliably upon the existence, or non-existence, of a practice involving transfers.

At hearing, Don Johnson, chair of the Federation's grievance committee, stated that, on two occasions, he had been transferred because he was least senior. While his testimony on this point is not entirely clear, it appears that these two transfers involved involuntary transfers. Involuntary transfers are governed by the language of Sec. 3.3.9, rather than Sec. 3.3.6. Accordingly, Johnson's testimony on this point is not relevant to the determination of whether or not the parties' have a binding past practice with respect to the application of Sec. 3.3.6.

At hearing, Johnson also stated that he had knowledge of the fact that since 1973, ten teachers had moved from Chapter I positions into regular classroom positions. 16/ While Johnson stated that these individuals "received the job because they were the most senior", it is not evident that Johnson was privy to the District's decision-making in granting the requests. Rather, it is apparent that Johnson's conclusion is based solely upon the fact that he understood that, in each case, the individual awarded the position was the senior Chapter 1 teacher. Assuming arguendo, that each of the ten teachers referred to by Johnson had been the senior applicant, this fact does not demonstrate that the District did not consider any factor other than seniority when awarding the transfer. As with Hicks and Hare, the record fails to demonstrate that Johnson has sufficient knowledge of prior transfers to comment reliably upon the existence, or non-existence, of a past practice regarding voluntary transfers.

To give effect to a past practice, i.e., to imply a contract provision which is not reflected in the written word of the contract, the record must demonstrate that this practice was (1) unequivocal, (2) clearly enunciated and acted upon and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Such evidence is not present in the instant case.

As the Federation argues, during negotiation of the contract in dispute, the District did propose to amend Sec. 3.3.6 to read as follows:

The Board shall take the welfare of the pupils as the first consideration in the transfer of teachers within the system.

Bargaining unit employees requesting consideration for transfer within the system, when a vacancy occurs, shall make such application in writing to the Superintendent of Schools.

13/ Tr. p. 24.

14/ Tr. p. 29.

Bargaining unit employees within the system shall receive top consideration for transfer, however, the Board shall consider such requests along with those of other applications and base its decision on the merits of the situation.

Bargaining unit employees within the System shall receive an opportunity to present their updated credentials in a personal interview with the Superintendent. If teachers within the system are: 1) certified; 2) have equal or better academic preparation; 3) demonstrate equal or better potential in their job performance for the position/level applied for, they shall be transferred to the position. In the event that more than one teacher from within the District applies for a position, the teacher with the best qualifications based on the above criteria shall be transferred to the position.

As the Federation further argues, this amendment was not adopted and the Sec. 3.3.6 language remained unchanged. Contrary to the argument of the Federation, however, to deny the instant grievance would not provide the District with a right which it had attempted to unsuccessfully gain at the bargaining table. The reason being that, for the reasons discussed supra, the District's conduct herein is consistent with its rights under the collective bargaining agreement which was negotiated by the parties.

As discussed supra, the transfer rights in dispute are expressly addressed in Article III, B, of the parties' collective bargaining agreement. Accordingly, and despite the Federation's argument to the contrary, the language of Sec. 10.1.4, which addresses "matters not covered by this agreement", is not relevant to the determination of the instant dispute.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The District did not violate the collective bargaining agreement when it denied the Grievant's request to be transferred to the Middle School Social Studies/Civics position.
2. The grievance is denied.

Dated at Madison, Wisconsin this 13th day of October, 1989.

By _____
Coleen A. Burns, Arbitrator