

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WEST ALLIS-WEST MILWAUKEE

and

SCHOOL DISTRICT OF WEST ALLIS-WEST
MILWAUKEE, ET. AL.

Case 64
No. 42958
MA-5859

Appearances:

Ms. Sandra L. Schwellinger, Executive Director, West Suburban Council, 4620 West North Avenue, Milwaukee, Wisconsin 53208-1286, appearing on behalf of West Allis-West Milwaukee Education Association.

Mr. Herbert P. Wiedemann, Foley and Lardner, Attorneys at Law, First Wisconsin Center, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5367, appearing on behalf of the School District of West Allis-West Milwaukee, et. al.

ARBITRATION AWARD

West Allis-West Milwaukee Education Association (hereinafter Association) and School District of West Allis-West Milwaukee, et. al. (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 disputes concerning the interpretation or application of the provisions of said agreement if not resolved through the grievance procedure. Said agreement also provides for appointment of an arbitrator by the Wisconsin Employment Relations Commission (hereinafter Commission) from its staff if the parties are unable to agree on an arbitrator. On October 4, 1989, the Association filed a request to initiate grievance arbitration with the Commission. On October 13, 1989, the District concurred in the request. On November 29, 1989, the Commission appointed James W. Engmann, a member of its staff, to act as the impartial arbitrator of this dispute. A hearing was held on January 11, 1990, in West Allis, Wisconsin, at which time the Association and the District were afforded the opportunity to present evidence and to make arguments as they wished. A transcript was made of the hearing which was received by the Arbitrator on January 22, 1990. The parties filed briefs, the last of which was received February 23, 1990, and they waived the filing of reply briefs. Full consideration has been given to the evidence and arguments of the Association and the District in reaching this decision.

STATEMENT OF FACTS:

The basic facts are not in dispute. The District reduced the staff at Nathan Hale High School (hereinafter High School), in six different areas for the 1989-90 school year. This was due to budget cuts and a reduction in the number of students moving from the middle school level to the high school level. one of the areas in which a reduction was necessary was social studies. No social studies teachers were laid off, however, since a social studies position opened at Horace Mann Middle School (hereinafter Middle School). This meant that one of the High School social studies teachers had to be transferred to that position at the Middle School. There were nine High School teachers certified to teach social studies at the middle school and high school levels. Listed in order of length of service, beginning with the most senior, they were: Gordon Martinson, Lee Todd James Hanrahan, Robert Ritter, Jerome Zielinski, Donald Bublitz, Glenn Jacoby, im Rohde and Tina Riduege.

Lee Todd (hereinafter Grievant) has taught in the District for over 20 years. Prior to the 1989-90 school year, the Grievant had taught psychology, sociology, economics, American history, social issues and political issues at the High School. The Grievant is certified by the Wisconsin Department of Public Instruction to teach all social studies subjects except psychology in grades seven through twelve.

On May 26, 1989, High School Principal Don Page (hereinafter Principal) met with the Grievant and told him that a High School social studies teacher would probably be transferred to the Middle School. The Principal read off criteria regarding the transfer which included years of service, health problems, certification, family problems, supplementary contracts, and the fact that some teachers were involved with advanced placement programs. On May 31, 1989, the Principal met again with the Grievant and advised him that he would be transferred.

Sometime after that the Grievant telephoned Director of Personnel David W. Carstens (hereinafter Director) to explain how upset he was over the transfer and to tell the Director that he intended to contact the Association. In a letter dated June 6, 1989, the Director informed the Grievant that the Director and the Principal had met regarding which staff member would be involuntarily transferred to the Middle School. The Director also informed the Grievant that the Director and the Principal had agreed that the Grievant would be the teacher transferred based upon the following criteria: volunteers, recent move or previous involuntary transfer, Middle School certification, program offerings at both schools and supplementary contracts.

On June 8, 1989, a meeting was held between Superintendent of Schools Sam J. Castagna (hereinafter Superintendent), Association Representative Sandy Schwellinger (hereinafter Representative), the Director and the Grievant to discuss the Grievant's involuntary transfer. At that meeting, the Grievant stated that he had had problems with high blood pressure in the past and was concerned about the stress factor due to the transfer. He also stated that he had an older child

with some problems. In a letter dated June 14, 1989, the Director advised the Grievant that the Director had met with the Superintendent to review the Grievant's involuntary transfer. By that letter, the Director reaffirmed that the Grievant would be involuntarily transferred from the High School to the Middle School effective with the 1990-91 school year.

On or about June 30, 1989, the Grievant filed a grievance, alleging that his involuntary transfer violated Article XX: Staff Transfer and Appointments to Vacancies and past practice regarding the factors considered for transfers. A grievance meeting was held on August 2, 1989, which was attended by the Grievant, the Representative, the Director and the Superintendent. The Director and the Superintendent reviewed each social studies teacher at the High School and explained why all but the Grievant were eliminated from consideration for the involuntary transfer. In a letter dated August 18, 1989, to the Grievant, the Superintendent denied the grievance and reaffirmed the Grievant's involuntary transfer to the Middle School. The letter also reviewed the factors which were discussed at the meeting on August 2, 1989. These factors were volunteers, teacher professional qualifications, the staff needs of the schools, teacher's previous transfers, supplementary contract assignments, seniority and personal considerations.

The Grievant was transferred to the Middle School effective with the 1989-90 school year.

PERTINENT CONTRACT LANGUAGE:

ARTICLE XX

STAFF TRANSFER AND APPOINTMENTS TO

. . .

"Any potential involuntary transfer which is apparent during a school year will be discussed, making known the reasons therefor, by the principals) and the teacher(s) involved before a decision is made by the District. Any potential involuntary transfer which is apparent after the close of school in June will be discussed, making known the reasons therefor, by the principals) and the teacher(s) involved before a decision is made by the District provided the teacher(s) involved is (are) readily available; if any teacher involved is not readily available a representative of the Association will be notified and given the opportunity to participate in the discussion on such teacher's behalf. Upon request, and before the decision is made if practicable, the teacher(s) involved will also be entitled to a conference with the Superintendent. No involuntary transfers or reassignment shall be made arbitrarily or for reasons of discipline.

No involuntary transfer shall be made without advance notification to the Association, with the reasons given of the contemplated action.

STATEMENT OF THE ISSUE:

The parties were unable to agree as to the framing of the issue for the Arbitrator's consideration. The parties did stipulate that the Arbitrator has authority to frame the issue in the Award.

The Association asserts that the issue should be framed as follows:

Did the District violate the provisions of the 1987-90 Master Contract Agreement - Article XX - Staff Transfer and Appointments to Vacancies, when they involuntarily transferred Lee Todd?

If the answer is yes, what is the appropriate remedy?

The District asserts that the issue should be framed as follows:

Under the collective bargaining agreement between the parties which is in evidence as Joint Exhibit 1, what disposition should be made of the grievance of Lee Todd, date of filing June 30, 1989, which is in evidence as Joint Exhibit 2?

The Arbitrator frames the issue as follows:

Did the District violate the collective bargaining agreement when it involuntarily transferred the Grievant?

If so, what is the remedy?

POSITION OF THE PARTIES:

A. Association

The Association argues that the involuntary transfer of the Grievant to the Middle School was done arbitrarily and violated the provisions of the Master Contract Agreement, Article XX - Staff Transfer and Appointments to Vacancies. Specifically, the Association argues that while there are no standards listed in the agreement on which the District is to base its decision regarding transfers, the agreement does require that the involuntary transfers shall not be made arbitrarily;

that this means that the criteria that the District uses must be "fixed or standard", citing the definition of "arbitrary" from Black's Law Dictionary (Revised Fourth Edition) ; that the criteria that the District shared with the Grievant varied from meeting to meeting and letter to letter; that the criteria shared with the Grievant was different for each administrator and specifically the Principal, Director and the Superintendent; that the criteria were not "fixed or standard" for all the administrators involved; that fixed or standard criteria for involuntary transfers do not appear to exist; and that the criteria of the Special Studies Supervisor who testified at hearing was again different from the other administrators.

In terms of the criteria used by the Superintendent, the Association asserts that there were no volunteers to transfer; that most if not all the High School social studies teachers were certified to teach at the Middle School level; that it is unclear how the District used staff needs as a criteria since the principal of the Middle School did not interview any High School social studies teacher; that three other teachers had not been transferred; that the Grievant had been asked to assist with the Academic Decathlon extra-curricular activity; that six other teachers had less seniority than the Grievant; and that the Grievant had physical and family problems while five other teachers had no specific personal considerations which were shared with the District.

Finally, the Association argues that the District appears to arbitrarily make decisions on what criteria are to be used, how they are to be weighted and how many must be met, depending on whom it wishes to transfer; that during the 1989-90 school year, the Grievant was the only High School teacher teaching economics and the courses for slower students; and that the District did not consider the needs of these students when it selected the Grievant to be involuntarily transferred.

In view of the facts and arguments set forth, the Association requests the Arbitrator to rule that the involuntary transfer of the Grievant was a violation of Article XX of the collective bargaining agreement and to direct the District to return the Grievant to a social studies position at the High School at the start of the 1990-91 school year.

B. District

The District argues that the reasons for selecting the Grievant for involuntary transfer are not arbitrary; that a decision is arbitrary only if it is the result of an unconsidered, willful or irrational choice of conduct, citing Olson v. Rothwell, 28 Wis. 2d 233, 239 (1965); that a good faith exercise of judgment and discretion is not arbitrary even if reasonable people differ with the result; that the Grievant believes that other teachers could have been transferred utilizing the same factors; and that it is not his judgment that controls but the District's decision to make.

In addition, the District asserts that the Grievant's position is that seniority should have been a major consideration; that the Superintendent testified that seniority was not a major factor

in making the determination but a tie-breaker consideration; that the Grievant's contention was made in a previous arbitration before Arbitrator Dennis P. McGilligan; that in that case the Arbitrator held that there is nothing in the agreement which prohibits the District from assigning greater weight to factors other than seniority; and that Article II of the agreement emphasizes that the District's judgement and discretion are not to be overruled.

Therefore, the District asks the Arbitrator to rule that the grievance should be denied.

DISCUSSION:

There is no dispute that the grievance in this matter is properly before this Arbitrator, having proceeded through the grievance procedure in a proper manner. Nor is there a dispute that the District followed the procedural requirements of the agreement in executing this involuntary transfer. The two sentences relied upon by the Association are from Article XX as follows:

No involuntary transfers or reassignment shall be made arbitrarily or for reasons of discipline. No involuntary transfer shall be made without advance notification to the Association, with the reasons given of the contemplated action.

In addition, the parties agree that the involuntary transfer was not made for the reason of discipline. It is further agreed that the Association was given advance notice of the involuntary transfer.

Thus, the dispute revolves around whether the involuntary transfer was arbitrary and whether the Association was given reasons for the action.

In terms of whether the action of the District in involuntarily transferring the Grievant was arbitrary, the Association relies on part of the definition for that term found in Black's Law Dictionary. The full definition of "arbitrary", as quoted in the Association's brief, reads as follows:

Means in an "arbitrary" manner, as fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgement; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic; . . . without fair, solid and substantial cause; that is, without cause based upon the law. . . not governed by any fixed rules or standard.

A more precise definition of the term "arbitrary" has been given us by the Wisconsin

Supreme Court in Pleasant Prairie v. Johnson, 34 Wis. 2d 8 (1967). There the Court said that an arbitrary decision is one which is "so unreasonable as to be without a rational basis or the result of an unconsidered, willful and irrational choice of conduct." 34 Wis. 2d at 12, citing Olson v. Rothwell, 28 Wis. 2d 233, 239 (1965). Using either definition, it is clear that the District's decision in this matter was not arbitrary.

The decision to involuntarily transfer the Grievant was not unreasonable. Each administrator was able to state to the Grievant the basis for his position that the Grievant should be the teacher involuntarily transferred. This is true of the Principal, the Director and the Superintendent, all of whom met with the Grievant and explained the criteria each was using, and two of whom followed up the meeting with the Grievant with a letter that specified the criteria being used.

Nor is this a decision that was the result of an unconsidered, willful and irrational choice of conduct. The Principal met with the Grievant, after which the Principal met with the Director who affirmed the Principalls choice of the Grievant. The Director met with the Grievant and the Superintendent, after which the Superintendent affirmed the Director's choice of the Grievant. At each of these meetings the criteria being used by each person was known and used.

And based upon that criteria, the choice of the Grievant is not irrational. The District had three witnesses testify at hearing, stating the criteria and applying the criteria under direct and cross examination to show how each arrived at the position that the Grievant should be involuntarily transferred. Nothing in this testimony or the decision-making process was shown to be irrational.

The Association makes much of the fact that the criteria was different for each administrator and that, therefore, the decision is arbitrary. In essence, the Association argues that it was not given the precise reasons for the action. The criteria used by each administrator did vary somewhat; this, in and of itself, does not make the decision arbitrary. In this case, no matter what criteria was used, the conclusion reached was that the Grievant was the one who should be transferred. The Association's argument would be of more concern if the District was not able to show how under whatever criteria used, all the other social studies teachers were eliminated from consideration for the transfer, leaving only the Grievant to be involuntarily transferred. The Association's argument would also carry more weight if criterion used by one administrator but not by another was shown by the Association to -be an inappropriate consideration that should not have been used by any of the decision makers or to be an essential consideration that should have been used by all of the decision makers. The only showing that was made was that different administrators used some different criteria.

The record shows that in making the decision to transfer the Grievant, the District was not capricious, that it acted on criteria shared with and explained to the Grievant, that the decision was

a reasonable act of judgment, and that the determination, though unliked by the Grievant, was not unfair nor based on any malice toward the Grievant.

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

AWARD

1. That the District did not violate the collective bargaining agreement when it involuntarily transferred the Grievant.

2. That the grievance filed in this matter be, and the same hereby is denied and dismissed.

Dated at Madison, Wisconsin this 5th day of April, 1990.

James W. Engmann, Arbitrator

By _____