BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| SHEBOYGAN EDUCATION ASSOCIATION | |
| and | Case 89 No. 41645 MA-5428 |
| SHEBOYGAN AREA SCHOOL DISTRICT | |

Appearances:
Mr. Charles Garnier, Executive Director, Kettle Moraine UniServ Council, 3841 Kohler Memorial Drive, Sheboygan, Wisconsin 53081, appearing on behalf of the Association.
Mr. Paul C. Hemmer, Mulcahy & Wherry, S.C., 607 Plaza 8, Sheboygan, Wisconsin 53081, appearing on behalf of the District.

ARBITRATION AWARD

The Sheboygan Education Association, hereinafter the Association and the Sheboygan Area School District, hereinafter the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Association, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint an Arbitrator to hear and decide the instant dispute. The Commission appointed Coleen A. Burns, a member of its staff as Arbitrator. Hearing in the matter was held on May 10, 1989 in Sheboygan, Wisconsin. The record was closed upon receipt of post-hearing briefs on August 21, 1989.

ISSUE:

The Association frames the issue as follows:

Did the Sheboygan Area School District violate 4.7 C, 4.7 E, 4.7 F and 4.9 D of the Collective Bargaining Agreement when it involuntarily transferred Larry Batterman from North High School to Urban Middle School effective with the 1988-89 school year?

The District frames the issue as follows:

Did the Sheboygan Area School District violate 4.7 E and F of the labor agreement when it involuntarily transferred Larry Batterman from the North High to the Urban Middle School effective with the 1988-89 school year?

RELEVANT CONTRACT LANGUAGE:

PREAMBLE

The general intent of the Agreement is to further the purpose of the parties in providing maximum educational opportunities for the children of the District.

ARTICLE II - BOARD FUNCTIONS

2.1 Nothing in this Agreement shall interfere with the right of the Employer in accordance with applicable laws, rules and regulations to:

A. Carry out the statutory mandate and goals assigned to the Board of Education utilizing personnel, methods and means in the most appropriate and efficient manner possible.

B. Manage the employees of the Board of Education; to hire, promote, transfer, assign or return employees to positions within the employment of the Board of Education, and in that regard to establish reasonable work rules.

C. Suspend, demote, discharge, non-renew, place upon probation, and take other appropriate disciplinary action against the employee for just cause; to lay off employees pursuant to Article IV, Section 4.8.

2.2 The exercise of the foregoing powers, rights, authority duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and use of judgment and discretion

in connection therewith, shall be limited only the by the specific and express terms hereof and in conformance with the Constitution and laws of the State of Wisconsin.

4.7 Assignment and Transfer

The Board of Education retains the right to make grade, subject, activity assignments and transfers consistent with this article.

A. For the purpose of this article, a vacancy shall be defined as:

Any bargaining unit position previously held by a bargaining unit employee.

Any new bargaining unit position.

B. A transfer shall be defined as the movement of a bargaining unit employee to a different assignment, grade level, subject area or building.

C. Notice - Notice of bargaining unit vacancies shall be published in the "Staff Bulletin" and shall be posted in each building to provide bargaining unit employees an opportunity to request transfer within the time frame set forth in the notice of the vacancy. During the summer months notice shall only be posted in the reception area of the Central Administration Office and a copy shall be sent to the Association.

D. Voluntary Transfers - When a vacant teaching position or reassignment position occurs, bargaining unit employees shall have the opportunity to apply for a transfer to such position.

A bargaining unit employee who wishes to transfer to a vacant teaching position or reassignment position shall file a written application therefore with the Director of Personnel within the time specified in the posted vacancy notice.

Vacant teaching positions and reassignment positions shall be filled by qualified bargaining unit applicants, unless good reason(s) exist to select a non-unit applicant over a bargaining unit applicant. Where two or more qualified bargaining unit employees have applied for a vacant teaching position or reassignment position, the vacancy shall be filled by the bargaining unit applicant based on the criteria in Sec. F.

E. Involuntary Transfers - Employee receiving involuntary transfers shall be given the reasons for such transfers. An administrator will discuss the reasons therefore with the teacher to be transferred and, at the teacher's option, with a representative of the Association Professional Rights and Responsibilities Committee. If the teacher objects to the transfer for the reasons given, the teacher shall reduce his or her objection to writing and the reasons therefore and present same to the Superintendent for consideration. An employee who has been involuntarily transferred shall be given first consideration to return to the school-position from which he/she had been involuntarily transferred when such a vacancy occurs.

No teacher may be involuntarily transferred without good reason(s). When the District determines for good reason(s) to fill a vacant teaching assignment by involuntary transfer, and two or more bargaining unit employees are qualified to fill that teaching assignment, the District shall select that employee with the least qualifications as set forth in Section F.

F. The criteria, not in any particular order, for determining which employee shall fill a vacancy or shall receive an involuntary transfer are as follows:

Certification
Seniority
Co-Curricular
Advanced Education
Evaluations
Experienced teaching in subject of vacancy

G. The above does not create an obligation to fill any vacancy.

H. All transfers within a building (subject to paragraph F) may be made prior to the determination that a vacancy exists.

. . .

D. Method of Layoff: The method of layoff is as follows: An employee who is directly affected by the elimination or reduction of a particular position will be allowed to displace that employee in the district who has the least amount of seniority within the area of certification of the employee directly affected, and who is in a position for which the employee directly affected is certified, provided the displacing employee gives written notice of such displacement within ten (10) calendar days after receiving an initial notice of layoff. The employee so displaced may also, if possible, displace another employee on the above basis, provided such employee gives written notice of such displacement within ten (10) calendar days after receiving his or her notice of layoff. Nothing prevents any employee initially affected by the elimination or reduction of a position or displaced by the above procedure from voluntarily accepting the layoff in lieu of displacing another employee. An employee displacing another employee in an area or subject which he has not taught or worked in within the past five (5) years may be required to take up to six (6) college credits or their equivalent by the Superintendent. If an employee pays tuition for such required credits, the employee will be reimbursed at the rate of $40 per semester credit hour.

ARTICLE VII - GRIEVANCE PROCEDURE

7.1 Definition. A grievance is defined as any alleged violation of a specific provision or provisions of this Agreement between the Association and the Board regarding wages, hours, or conditions of employment. Aggrieved parties may be the Association or any bargaining unit employee.

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7.4 Written Grievance.

A. Grievances shall be filed in writing on the agreed forms, herein included as Appendix E, at Steps One, Two and/or Three of this Article. Such forms shall be filed in duplicate with the appropriate supervisor. The Association shall print and distribute grievance forms.

7.5 Grievance Procedure. Grievances shall be processed in accordance with the following procedure:

A. Step One - Initial Conference

1. Within fourteen (14) calendar days of the time a grievance arises, the employee will present the grievance in writing to his responsible administrator during non-teaching hours. Within seven (7) calendar days after presentation of a grievance, the responsible administrator shall give his answer in writing to the employee. If the grievance continues to Step Two, copies of the decision shall be prepared for the involved parties.

. . .

D.Step Four - Arbitration

. . .

3.. . .

The arbitrator shall have no power or authority to add to, disregard, subtract from, or modify any of the terms of this Agreement or any amendments hereto, or to establish or change any wage or wage structure, nor to change the structure of a classification, nor to interpret an administrator's evaluation of a teacher of guidance counselor.

. . .

5.In rendering a decision, an arbitrator shall give due regard to the responsibility of management and shall so construe the Agreement that there will be no interference with such responsibilities, except as they may be specifically conditioned by this Agreement.

. . .

7.6General Provisions.

A.Time Limits

1.The parties agree to follow each of the foregoing steps in the processing of a grievance. If the Employer fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped.

. . .

ARTICLE VIII - TERM OF AGREEMENT

. . .

8.4 This Agreement reached as a result of collective bargaining represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. It is agreed that any matters relating to the current contract term, whether or not referred to in this Agreement, shall not be open for negotiations except as otherwise provided herein, or as otherwise mutually agreed by the parties. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control, provided, however, that the bargaining agent shall be notified in advance of any changes having a substantial impact on the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter.

. . .

BACKGROUND:

During the 1987-88 school year, Larry Batterman, hereinafter the Grievant, taught auto mechanics at Sheboygan North High School on a full-time basis. During the 1988-89 school year, the Grievant taught Electricity at Sheboygan North High School and seventh and eighth grade Industrial Technology at the Urban Middle School. The Grievant's full-time contract was apportioned forty per cent (40%) to Electricity and sixty per cent (60%) to Industrial Technology.

During the 1987-88 school year, Gregory Ellsworth taught full-time at Sheboygan South High School. During the 1988-89 school year, Ellsworth taught sixth grade Industrial Technology at Urban Middle School and Drafting, including Vocational Drafting, at Sheboygan North High School. Ellsworth's full-time contract was apportioned forty per cent (40%) to Industrial

Technology and sixty per cent (60%) to Drafting. The Grievant was certified to teach the drafting classes taught by Ellsworth at Sheboygan North High School during the 1988-89 school year.

Donald Pangborn, an Industrial Arts teacher at Sheboygan North High School, retired at the end of the 1987-88 school year. At the time of his retirement, Pangborn was a full-time teacher who taught five classes of Drafting, two of which were Vocational Drafting. On August 16, 1988, the Grievant filed a grievance, alleging that the Grievant's involuntary transfer

to Urban Middle School violated Article 4.7 of the collective bargaining agreement. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

The Association

An examination of the original grievance reveals that the Grievant claimed that the District violated Section 4.7, and not merely a portion of Section 4.7, when it involuntarily transferred the Grievant from North High School to Urban Middle School. The Association was not precluded from addressing any subsection of Section 4.7 when it processed the grievance at Step 3 of the grievance procedure. At the start of the Step 3 hearing, the Association clearly indicated that it was claiming that the District had violated Sections 4.7 C and 4.9, as well as 4.7 E and 4.7 F. The parties agreed to adjourn the hearing so that the administration could have an opportunity to study the alleged violations of Section 4.7 C and 4.9. During the hiatus between the two hearings, the Association sent a letter to the District's attorney that was designed to provide further information regarding the Section 4.7 and 4.9 allegations. The School Board's decision to deny the grievance at Step 3 was made after it heard the Association's presentation regarding the grievance in its entirety. There is no merit to the District's contention that the Arbitrator is without jurisdiction to determine whether the District's conduct has violated Sections 4.7 C and 4.9 of the parties' collective bargaining agreement.

The collective bargaining agreement defines a vacancy as "any bargaining unit position previously held by a bargaining unit employee, and/or any new bargaining unit position." During the 1987-88 school year, Donald Pangborn taught five classes of drafting, including two classes of Vocational Drafting. All of the subject area classes previously taught by Pangborn during 1987-88 were again offered in 1988-89. Even though the number of sections previously contained in Pangborn's position have been reduced, Pangborn's position, as far as courses taught, remained intact. Pangborn's retirement created a vacancy which was required to be posted under the provisions of Section 4.7 of the parties' collective bargaining agreement. By failing to post this vacancy, the Grievant was denied the opportunity to be considered for the position before it was assigned to Mr. Ellsworth.

Transfers are "voluntary" when the affected staff person raises no objection to the transfer. Transfers become "involuntary" when the affected staff person renders an objection to the move. Since the Grievant did not learn of the Pangborn vacancy until after Ellsworth had been assigned to fill the position, the Grievant's only recourse was to treat his partial change of location as an involuntary transfer. If the vacancy had been properly posted, thus allowing all interested parties to apply for the same, the provisions of Section 4.7 D, paragraph 3, would have applied. In either a voluntary or an involuntary transfer situation, a dispute over which staff person will be awarded the position would be resolved by using the criteria contained in 4.7 F. Since the Grievant's qualifications for the position are not in dispute, there is no merit to the District's contention that there are no circumstances which would have required the District to assign this position to the Grievant.

This dispute is of particular importance to the Grievant because he did not receive any seniority credit in the "293 Technical Occupation/ Communications" area for the 1988-89 school year. Furthermore, he will never receive such credit unless he teaches at least one course in that area. Consequently, the Grievant "fell behind" Ellsworth in the seniority area because the District violated the collective bargaining agreement. Regardless of whether or not the Grievant is assigned to teach "Vocational Drafting" in 1989-90, the Association contends that he should continue to receive seniority credit in the "293 Technical Occupation/Communications" area. To do otherwise would perpetuate the seniority in equity that the District created when it failed to afford the Grievant the opportunity to apply for Pangborn's position on a timely basis.

Section 4.7 B defines a transfer "... as the movement of a bargaining unit member to a different assignment, grade level, subject area or building." In the instant case, the Grievant's transfer involved a change in grade level and building. Because the Grievant objected to these changes and because another teacher, Gregory Ellsworth, was also qualified to assume this assignment, Section 4.7 F. was used to determine "which employee should fill a vacancy or shall receive an involuntary transfer." The "least qualified candidate" in the majority of the six criteria contained in Section 4.7 F. is the person who is to be subjected to the involuntary transfer. Conversely, the "most qualified" candidate in the majority of the six categories is to remain at North High School to fill the vacancies outlined above. The Grievant objects to his partial transfer to Urban Middle School and wishes to be transferred back to a 100% assignment at North High School. Because "Vocational Auto Mechanics" is no longer offered by the District to students, it will not be possible for the Grievant to be transferred back to all of his 1987-88 subject area assignments. However, the District should be required to provide the Grievant with work within his area of certification that is located

entirely at North High School for the 1988-89 school year. The District and the Association are in agreement that each of the six criteria shall all be given equal weight. The Association maintains that the Grievant and Ellsworth score equally in the certification category and the "curricular" category. With respect to the "advanced education" criteria, the Grievant's advanced education credits make him more qualified to teach full-time at North High School. The Association maintains that the Grievant and Ellsworth score equally in "evaluations" area. The Grievant has greater experience teaching in the subject of the vacancy. There is no merit to the District's argument that more emphasis should be placed on Ellsworth's drafting experience than on Batterman's vocational experience. Neither Ellsworth nor Batterman had any experience teaching "Vocational Drafting." The record does not provide any basis to conclude that Batterman's high school level teaching experience in the vocational area should be given less weight than Ellsworth's one year of drafting experience at the high school level. A substantial part of the position at North High School consists of Pangborn's vocational drafting classes. However, the position also includes the teaching of "electricity." And in that regard, the record is silent as to which candidate is more qualified. Therefore, the Association maintains that the Arbitrator should not place total emphasis on the drafting aspects of the North High School assignment.

There is no merit to the District's claim that the Grievant was guilty of misconduct and insubordination. The District has failed to indicate that the Grievant was certified to teach driver's education, a course of study that is only offered at the High School level. While it is true that the District currently does not offer this course, it is also true that Ellsworth does not hold this certification. The fact that the Grievant does not have elementary industrial art certification is irrelevant. The record is silent as to the value of Ellsworth's special education certification at the high school level. The record is clear, however, that the Grievant has much more high school teaching experience than Ellsworth. The Arbitrator should look beyond a mere tallying of the number of certifications earned by the Grievant and Ellsworth.

There is no merit to the District's argument that it had the right to break "ties" in individual criteria. While it is proper for the Arbitrator to declare a tie in the given criteria, it is improper for the Arbitrator to give the District the right to break a tie in an individual criteria. To hold otherwise, would render the clause of the labor agreement meaningless and would place total authority to make final decisions regarding involuntary transfers to the District.

Assuming arguendo that Pangborn's exact position at North High School did not exist for the 1988-89 school year, it is abundantly clear that a new full-time bargaining unit position had been created. This was the combination drafting and electricity teaching position that Ellsworth was initially assigned to teach at North High School. That there was ultimately only a partial position at North High School due solely to the fact that the Grievant was not certified to teach sixth grade students. This forced the District to partially "flip-flop" the Grievant's and Ellsworth's assignment. Even under Arbitrator Greco's definition that a position entails "all the duties performed by a particular employee", it is clear that the position initially assigned to Ellsworth was not posted by the District.

The District

Section 4.7 E, of the labor agreement sets forth the procedure to be followed when a teacher is involuntarily transferred. When two or more bargaining unit employes are qualified to fill a position, the District is required to select that employe with the least qualifications as set forth in Section F. Section 4.7 F, sets forth six criteria. There is no requirement that the criteria are to be applied in any particular order. All other factors being equal, seniority is not controlling. The Grievant was properly transferred to Urban Middle School on a 60% basis for the 1988-89 school year. Ellsworth has more experience in teaching drafting than does the Grievant. This conclusion is supported by the testimony of Ellsworth that he has taught drafting in the Sheboygan Area School District at all levels. By contrast, the Grievant has taught drafting on only one occasion, i.e., he taught drafting to EEN students, one period a day for approximately six weeks at the Farnsworth Middle School. The Grievant has never taught a complete course in drafting and has no drafting education experience at the High School level. The fact that the Grievant may have taught "vocational" courses in auto mechanics and that he may have drawn plans for his own home does not remedy the deficiency of the Grievant in teaching drafting, particularly at the high school level.

The Grievant was the least qualified with regard to co-curricular assignments. As Principal Erickson stated at the hearing, it is much more convenient and workable to have a member of the North High School faculty assigned to a position such as stage manager. In the spring of 1988, Ellsworth contacted Erickson and requested assignment to the stage manager position at the North High School during the 1988-89 school year. Ellsworth has served eleven years as a wrestling coach, three years as an intramural sports supervisor and noon hour and bus supervisor. By contrast, the Grievant has never held a single co-curricular assignment during his entire career with the Sheboygan Area School District. Long after Ellsworth was assigned to the stage manager position, the Grievant made a verbal comment to Principal Erickson that the Grievant would have applied for the stage manager position had he known that it was available. Ellsworth had requested assignment to the position of stage manager at a time when the position was held by a person who was not a member of the faculty. The Grievant never requested assignment to the stage manager position or to any other co-curricular position at Sheboygan North High School. The Grievant expressed only a passing interest in the stage manager position after the issue of assignment to drafting classes at Sheboygan North High School was raised.

The Grievant was the least qualified on the basis of evaluations. Ellsworth, unlike the Grievant, has received several ratings of S+. The Grievant, unlike Ellsworth, has received many "n/i", "needs improvement" ratings. The narrative comments in the evaluations of Ellsworth are consistently positive and highly complimentary. By contrast, the narrative comments within the evaluations of the Grievant are critical and lukewarm at best. The Grievant, unlike Ellsworth, has consistent deficiencies in the areas of ability to complete administrative responsibilities, relationships with other faculty members, and failure to follow administrative procedures. The criteria "evaluations" can certainly include factors other than formal annual evaluations. Thus, it was appropriate for Principal Erickson to consider recent incidents of conduct on the part of the Grievant, i.e., the Grievant's disclosure of confidential information concerning class enrollments and the Grievant's lack of judgment in attempting the truck-pulling demonstration.

The Grievant was the least qualified on the basis of certification. Ellsworth has six certifications. The Grievant, however, has only three certifications. With additional and specialized certifications, particularly secondary level industrial special education for adaptive classes, Ellsworth is more qualified and capable of a broader range of assignments than the Grievant. The certification of the Grievant gave him limited value at the high school.

The Grievant was less qualified on the basis of Advanced Education. The Grievant has earned 50 graduate credits, while Ellsworth has 55 graduate credits. All of Ellsworth's graduate credits have been in industrial education, while part of the Grievant's graduate work is in the area of media-communications. The labor agreement does not preclude the District from evaluating the teacher's advanced education on the basis of the academic area

in which the teacher will work. The drafting classes at the Sheboygan North High School were industrial arts courses and not media-communication courses.

At hearing, the Association's grievance chairperson, John Harrison, acknowledged that, in the event of a tie as to the issue of qualifications between two faculty members considered for involuntary transfer, the decision as to the transfer would be a matter within the discretion of the school district. This logic is equally applicable to individual criteria under Section 4.7 F of the labor agreement. Thus, if the Arbitrator were to determine that the qualifications of the Grievant and Ellsworth with regard to advanced education were relatively equal, then the decision as to the least qualified candidate on the basis of advanced education, would be a matter within the discretion of the District.

The District did not violate the collective bargaining agreement by failing to post a notice of bargaining unit vacancy. At the Board of Education level grievance hearing, the Grievant, for the first time asserted that the District violated the collective bargaining agreement by failing to provide notice of a bargaining unit vacancy. This claim is barred as it was not presented in a timely manner. Notwithstanding this argument, the position held by Pangborn at the time of his retirement did not exist at commencement of the 1988-89 school year. Prior to his retirement, Pangborn taught five classes of drafting, two of which were vocational. Only three courses in drafting were offered during the 1988-89 school year, which courses would represent only 60% of a full employment contract. In order to offer full-time employment to Ellsworth, the District assigned him additional classes in Industrial Technology at the Urban Middle School. Under Section 4.7. A of the labor agreement, a vacancy is defined as a bargaining unit "position" previously held by a bargaining unit employe or a new bargaining unit "position". The term "position" has previously been construed by Arbitrator Greco who concluded that the term "position" .... by definition entails all the duties performed by a particular employe." There was no drafting "position" to be filled in the 1988-89 school year. Only three classes remained. The collective bargaining agreement does not require the District to provide notice of individual classes which may be available for assignment. Clearly this would be an impossible and unmanageable task. No "position" existed for which a notice of vacancy could be posted. The collective bargaining agreement does not require the District to post as a vacancy the remaining parts of a former position. Inasmuch as the District applied the same criteria in assigning drafting classes to Ellsworth, as would have applied had a vacant position existed, the issue as to notice of vacancy is moot.

The Grievant's claim that the School District violated the collective bargaining through following an "internal bumping procedure" when making 1988-89 teaching assignments is untimely and is unsupported by the record. In the course of the grievance meeting before the Grievance Committee of the Board of Education in November, 1988, the Association attempted to present new claims on behalf of the Grievant. The Association asserted for the first time that Sections 4.7 C and D, of the labor agreement had been violated through failing to post notice of a vacant position and by engaging in an internal administrative bumping procedure, rather than allowing affected employes to displace or bump other employes with less seniority. These new claims were not presented within the contractual time limits set forth in Section 7.6, General Provisions. Accordingly, the Arbitrator is without jurisdiction to decide these claims as set forth in Section 7.6, "grievance is not processed to the next step within the prescribed time limits should be considered dropped."

There is no evidence to establish that the District followed an internal administrative bumping procedure, or that the rights of the Grievant under the collective bargaining agreement were violated as a result." Assuming arguendo, that the Grievant's claim is timely, it must be dismissed because the Association has failed to meet its burden of proof and persuasion on this claim.

Pursuant to the terms of Section 7.5 D.(5), the parties have agreed that in rendering a decision, the arbitrator must give due regard to the responsibility of management and to construe the agreement so that there will be no interference with such responsibilities except as they may be specifically conditioned by the agreement. In managing the School District, District Administrators determined that it was in the best interest of students to assign the 1988-89 drafting classes at Sheboygan North High School to Ellsworth and to partially transfer the Grievant to Urban Middle School. This decision was made pursuant to the recognized authority of the Board of Education to make grade and subject assignments pursuant to Section 4.7; to manage employes of the School District, including assigning employes to positions under Section 2.1, B; and to provide maximum educational opportunities for children of the School District under the labor contract preamble.

While the Association asserts that the Grievant was qualified for assignment to the stage manager position, this assertion has not been proved. Moreover, the potential of the teacher for co-curricular involvement is not the consideration. Rather, it is the actual involvement of the teacher and the importance of this involvement which must be assessed in determining whether or not a teacher should be transferred. The circumstance that the Grievant and

Ellsworth were evaluated by different persons does not provide a basis upon which to discount the evaluations. There is no record evidence to support the Association's claim that Principal Erickson preferred not to have the Grievant on his staff.

DISCUSSION:

Timeliness

On August 16, 1988, the Grievant filed a grievance which stated that the District violated Sec. 4.7 of the collective bargaining agreement by involuntarily transferring the Grievant from North High School to Urban Middle School. The grievance also referenced an "attached letter". The attached letter dated June 10, 1988, was written by Association Representative Richard Terry and states in relevant part as follows:

> Pursuant to Article 4.7.E., Mr. Larry Batterman wishes to object formally to his involuntary transfer from North High School to Urban Middle School.
>
> The reasons for the objection are inter alia, the following:
>
> 1.Article 4.7.E. states that no teacher may be transferred without good cause. While the term "good cause" may be unclear, it is, nonetheless, an obligation which exists in the contract which is placed upon the District to show that it had good cause the transfer. To date, the District has not explained its reason for good cause to Mr. Batterman. Accordingly, would you, on behalf of the District, please explain the reasons for Mr. Batterman's contemplated involuntary transfer and how that satisfies the good cause provisions of the Collective Bargaining Agreement found in Section 4.7.E.
>
> 2.Article 4.7.F. states that the criteria for involuntary transfers are:
>
> Certification, seniority, co-curricular, advanced education, evaluations, experience teaching in subject of vacancy.

At the Step Three grievance meeting, which was held in November, 1988, Association Representative Garnier addressed the issue of whether the District's conduct was in violation of Sec. 4.7 C. and Sec. 4.9 Layoff Procedure, as well as Sec. 4.7 E. and 4.7 F. Administration Representatives objected, arguing that the reference to Sec. 4.7 C. and Sec. 4.9 was an untimely amendment of the grievance. The meeting was adjourned. When the meeting was reconvened at a later date, the Administration again objected to the amendment of the grievance. The Board of Education's Grievance Committee noted the Administration's objection and proceeded with the hearing, permitting the Association to introduce evidence on the allegation that the District violated Article 4.7.C. and Article 4.9, as well as Sec. 4.7 E. and 4.7 F.

On December 9, 1988, the Superintendent of Schools provided the Grievant with the response of the Board's Grievance Committee which stated as follows:

> On Tuesday evening, December 6, 1988, the Board of Education deliberated in closed session following the presentation made by the Association of your grievance. The board reviewed the documents that were presented, the testimony given by the Association and the administration and reviewed the general contract.
>
> The board's grievance committee made the determination that there was no violation of the contract, thus the grievance is denied.
>
> If you should have any questions regarding the action taken by the board's grievance committee, please do not hesitate to contact me.

Thereafter, the Association filed an appeal to arbitration, alleging that the District violated Article 4.7.

Relying upon Sec. 7.5 A, and 7.6 A, the District argues that the Association's Sec. 4.7 C. claim and Sec. 4.9 claim were not filed and/or processed in a timely manner. The provisions of Sec. 7.1 define a grievance as "any alleged violation of a specific provision or provisions of this Agreement . . . ." (Emphasis supplied) Sec. 7.4 requires grievances to be filed "in writing on the agreed forms." The "agreed forms" are a Grievance Form and a Grievance Appeal form. Each form contains a space for identifying the contract provision(s) alleged to have been violated. On August 16, 1988, the Association filed a grievance, on the "agreed form", alleging a violation of

Sec. 4.7. This allegation is of sufficient specificity to comply with the provisions of Sec. 7.1 and preserves the right of the Association to assert any Sec. 4.7 claim at the Third Step of the grievance procedure.

The Board's Grievance Committee accepted evidence on the Sec. 4.9. claim and, thereafter, rendered a general denial of the Grievance. Since the denial was not limited to the Sec. 4.7 claim, the undersigned considers the Board's Grievance Committee to have considered and responded to all of the Association's Sec. 4.7 and 4.9 claims. By such conduct, the Board's Grievance Committee evidenced acceptance of the Association's amendment of the grievance.

When the Association filed the appeal to arbitration on the agreed upon form, the Association alleged a violation of Sec. 4.7. It is evident, however, that the grievance being appealed to arbitration was the grievance which was heard and denied by the Board's grievance committee. For the reasons discussed supra, that grievance included both a Sec. 4.7 claim and a Sec. 4.9 claim. Under the circumstances presented herein, the Arbitrator rejects the District's claim that she is without jurisdiction to hear either the Sec. 4.7 C. or Sec. 4.9 claim raised by the Association.

Section 4.9 Claim:

The provisions of Sec. 4.9 govern layoff. Section 4.9 defines a "laid off employee" as one whose contracted position has been eliminated or reduced. While the Grievant's assignment in 1988-89 was different from his assignment in 1987-88, the Grievant continued to work as a full-time employe. As Association Grievance Chairperson John Harrison acknowledged at hearing, the Grievant was not laid-off, either in full or in part. 1/ There being no lay-off, the Grievant does not have any Sec. 4.9 D. right to "bump." Contrary to the assertion of the Association, the District has not been shown to have violated Sec. 4.9 D.

Section 4.7

At issue is whether the drafting work assigned to Ellsworth was required to be posted as a "vacancy" under the provisions of Sec. 4.7 C., thereby providing the Grievant with the opportunity to exercise "Voluntary Transfer" rights set forth in Sec. 4.7 D. "Vacancy," as that term is used in Sec. 4.7 C., is defined in Sec. 4.7 A. as "Any bargaining unit position previously held by a bargaining unit employee" or "Any new bargaining unit position."

When Donald Pangborn retired at the end of the 1987-88 school year, he was a full-time drafting teacher. Thus, the bargaining unit position previously held by Pangborn is a full-time drafting position. Since the work in dispute is not a full-time drafting position, it is not the bargaining position previously held by Pangborn.

The language of Sec. 4.7 does not require the District to create a "new" bargaining unit position consisting solely of the drafting work in dispute and, indeed, the District did not do so. Consistent with its contractual rights, the District combined the drafting work with 6th grade Industrial Technology to create the position occupied by Ellsworth. It may be that the position created, i.e., 60% drafting and 40% 6th grade Industrial Technology, is a "new bargaining unit position" which is required to be posted under Sec. 4.7 C. However, the drafting work, per se, does not constitute a new bargaining unit position.

In summary, the posting requirements of Sec. 4.7 C. are applicable to "vacancies" as defined by Sec. 4.7 A. Inasmuch as the drafting work in dispute does not fall within the Sec. 4.7 A. definition of a "vacancy," the District did not have a Sec. 4.7 C. obligation to post the disputed drafting work.

Upon review of the language of Sec. 4.7 D., the undersigned is persuaded that the "voluntary transfer" rights provided therein are limited to "vacancies" required to be posted under the provisions of Sec. 4.7 C. For the reasons discussed supra, the District was not required to post the 60% per cent drafting assignment. Thus, the Grievant did not have a Sec. 4.7 D. right to "voluntarily" transfer into this drafting assignment.

Assuming arguendo, that the position occupied by Ellsworth, i.e., 60% drafting and 40% 6th grade Industrial Technology, was a "vacancy" required to be posted under Sec. 4.7 C., the District's failure to post this "vacancy" is not prejudicial to the Grievant. The reason being that the Grievant was not qualified for the vacancy because he was not certified to teach 6th grade Industrial Technology.

Section 4.7 E

Section 4.7. E "Involuntary Transfers" rights, unlike Sec. 4.7 D. "Voluntary Transfer" rights, are not limited to positions which have been posted as "vacancies" pursuant to Sec. 4.7 C. In the present case, the parties

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1/ T. - 23.

are in agreement that the Grievant's 1988-89 assignment involved an "Involuntary Transfer" and, as such, is governed by the provisions of Sec. 4.7 E. and 4.7 F. The work which is the subject of the involuntary transfer is the 7th and 8th grade Industrial Technology assignment at Urban Middle School. The provisions of Sec. 4.7 E. state that "No teacher may be involuntarily transferred without good reason." The Association does not argue that the District was "without good reason" to transfer an employe to teach 7th and 8th grade Industrial Technology at Urban Middle School. Rather, the Association argues that it was Ellsworth and, not the Grievant, who was required to be involuntarily transferred to Urban to teach 7th and 8th grade Industrial Technology.

Section 4.7 E. provides that when two or more bargaining unit employes are qualified to fill the teaching assignment which is the subject of the involuntary transfer, "the District shall select that employee with the least qualifications as set forth in Section F." Each party recognizes that the Grievant and Ellsworth are each "qualified" to teach the 7th and 8th grade Industrial Technology assignment. At issue is which of the two employes has "the least qualifications as set forth in Section F." In determining relative qualifications, the District is required to give consideration to six criteria, i.e., Certification, Seniority, Co-Curricular, Advanced Education, Evaluations, and Experienced teaching in subject of vacancy.

As discussed supra, one considers the six criteria listed in Sec. 4.7 F only when there is more than one bargaining unit employe who is qualified for the assignment which is the subject of the involuntary transfer. While the term "qualified" is not necessarily synonymous with "certified," one may reasonably conclude that an employe who lacks certification to teach the assignment which is the subject of the voluntary transfer is not qualified for the assignment. Inasmuch as "Certification" to teach the 7th and 8th grade Industrial Technology assignment must be given consideration in determining the threshold issue of who is "qualified to fill that teaching assignment," it is reasonable to conclude that the Sec. 4.7 F. criteria of "Certification" encompasses more than certification to teach the assignment which is the subject of the transfer. Thus, in determining relative qualifications, one must consider all of the certifications of each employe. Since the contract language does not indicate that any one "Certification" is to be given greater weight than any other "Certification," each "Certification" is entitled to be given equal weight.

According to the June, 1988 seniority list, Ellsworth and the Grievant had the following certifications:

| Grievant | Ellsworth |
|---|---|
| 220 Industrial Arts | 220 Industrial Arts |
| 293 Technical Occupations/ Communications | 293 Technical Occupations/ Communications |
| 296 Graphics-Vocational | |
| 298 Power Mechanics | |
| 299 Woodworking-Vocational | |
| 450 Driver Education | |
| 864 Industrial Arts/ | Special Education |

Ellsworth's testimony, however, demonstrates that he has six certifications in Industrial Education. 2/ While the Grievant's testimony on this point is not entirely clear, it suggests that he was certified in only four areas and that he did not have certification in the area of 296 Graphics-Vocational. 3/ Assuming arguendo, that the Grievant did possess the five certifications set forth on the seniority list, he would have one less certification than Ellsworth. Given the record presented herein, the undersigned is persuaded that with respect to the criteria of "Certification," the Grievant is less qualified than Ellsworth.

Ellsworth has less seniority than the Grievant. Accordingly, with respect to the criteria of "Seniority," Ellsworth is less qualified than the Grievant.

Neither the Grievant nor Ellsworth were performing any "Co-Curricular" duties during the 1987-88 school year. However, prior to the point in time at which the District finalized its decision to involuntary transfer the Grievant, Ellsworth solicited and received the assignment of Stage Manager at North High for the 1988-89 school year. The Association does not argue and the record does not demonstrate that the assignment of the Stage Manager position to

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2/ To earn seniority in an area of certification, a teacher must meet certain requirements. One such requirement is teaching experience in the area of certification. Accordingly, the fact that the seniority list indicates that Ellsworth has four certifications is not sufficient to rebut his testimony (T-59) that he had six certifications.

3/ See. T. 62, 71-72.

Ellsworth was violative of the collective bargaining agreement. Assuming arguendo, that the Association is correct when it argues that the Grievant was equally qualified to perform the Stage Manager work 4/ such a fact would not, as the Association argues, give rise to a finding that the Grievant and Ellsworth are equal with respect to the criteria of "Co-Curricular." It is the performance of "Co-Curricular" work, rather than the aptitude for "Co-Curricular" work, which is determinative herein. Ellsworth, unlike the Grievant, had a Co-Curricular assignment for the 1988-89 school year, the year the transfer was effectuated. Accordingly, with respect to the criteria of "Co-Curricular," the Grievant was less qualified than Ellsworth.

The Grievant and Ellsworth each have a Bachelor's Degree plus additional credits. At hearing, Ellsworth unequivocally testified to the fact that he had fifty-five credits beyond his Bachelor's Degree. Association Representative Terry's letter of June 10, 1988 indicates that the Grievant had fifty credits beyond his Bachelor's Degree. During his initial testimony at hearing, the Grievant did not dispute the Association's claim that he had a Bachelor's Degree plus 50 credits. However, during rebuttal testimony, the Grievant stated that he "would be willing to bet" that he had more credits than Ellsworth. 5/ The Grievant acknowledged, however, that he could not be sure of his advanced credits without reviewing his transcripts. 6/ The Grievant's testimony is not sufficient to persuade the undersigned that he has more than the 50 credits claimed in Association Representative Terry's letter of June 10, 1988. As with the criteria "Certification" discussed supra, the contract language does not indicate that any one advanced educational credit is to be afforded greater weight than any other advanced educational credit. Given the record presented herein, the undersigned is persuaded that Ellsworth has more "Advanced Education" than the Grievant. Accordingly, with respect to the criteria of "Advanced Education," the Grievant is less qualified than Ellsworth.

The record demonstrates that, at the time the parties negotiated the involuntary transfer language, the District performed annual evaluations of teaching personnel. 7/ District Exhibits #1 and #2 indicate that this practice has continued to the present. Despite the District's arguments to the contrary, the most reasonable interpretation of the criteria "Evaluations" is that it refers to formal evaluations, such as the annual evaluations contained in District Exhibits #1 and #2. An administrative memo, such as District Exhibit #3, which alleges employe misconduct, is not an "Evaluation" within the meaning of Sec. 4.7 F. 8/ Neither the language of the contract, nor any other record evidence, supports the Association's contention that employes are to be considered to be equal in "Evaluations," except and unless the employes can be distinguished on the basis of a disciplinary action.

A review of District Exhibits #1 and #2 reveals that Ellsworth's evaluations are superior to those of the Grievant. Several of the Grievant's most recent evaluations contain ratings of N/I (Needs Improvement) and identify deficiencies, i.e., failure to attend to administrative procedures, lack of neatness and tidiness in the shop area and a need to improve relations with other staff members. Ellsworth's evaluations do not include any N/I ratings, nor do they identify areas of deficiency. Accordingly, with respect to the criteria of "Evaluations," the Grievant is less qualified than Ellsworth.

The Grievant's involuntary transfer was to the 7th and 8th grade Industrial Technology assignment and not to drafting. Accordingly, the District's and Association's arguments concerning relative drafting experience are not persuasive. The record presented herein demonstrates that the Grievant and Ellsworth have taught Industrial Education at the high school and the middle school level. While the evidence concerning their relative teaching experience is not well developed, the evidence contained in the record indicates that Ellsworth has more experience teaching Industrial Education at the Middle School level than does the Grievant. Accordingly, with respect to the criteria of "Experienced teaching in subject of vacancy," the Grievant is less qualified than Ellsworth.

For the reasons discussed supra, the undersigned finds the Grievant to be

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4/ After Ellsworth had solicited and received the Stage Manager position the Grievant evidenced an interest in the position.

5/ T. 174.

6/ Id.

7/ T. p. 169.

8/ While it is evident that Principal Erickson considered the misconduct referred to in District #3, it is not evident that this information was determinative. Accordingly, the District's misapplication of the "Evaluations" criteria is not sufficient to invalidate the District's conclusion that the Grievant is the "least-qualified."

more qualified in the criteria of Seniority, and less qualified in the criteria of Certification, Co-Curricular, Advanced Education, Evaluations, and Experienced Teaching in Subject of Vacancy. Since the Grievant has the least qualifications as set forth in Sec. 4.7 F., the District was contractually entitled to involuntary transfer the Grievant, rather than Ellsworth, to teach the 7th and 8th grade Industrial Education assignment at Urban Middle School.

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

AWARD

1. The District did not violate Sec. 4.7 C., E., or F., or Sec. 4.9 D of the collective bargaining agreement when it involuntarily transferred Larry Batterman from North High School to Urban Middle School, effective with the 1988-89 school year.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 9th day of April, 1990.

By _____
Coleen A. Burns, Arbitrator