

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 WHEATLAND CENTER EDUCATION ASSOCIATION : Case 12
 : No. 42959
 and : MA-5860
 :
 WHEATLAND CENTER SCHOOL DISTRICT :
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Appearances:

Mr. Barry Forbes, Staff Counsel, Wisconsin Association of School Boards, Inc., Room 500, 122 West Washington Avenue, Madison, Wisconsin 53703, appearing on behalf of the Wheatland Center School District.
Ms. Esther Thronson, Executive Director, Southern Lakes United Educators, WEAC UniServ Council #26, 124 South Dodge Street, Burlington, Wisconsin 53105, appearing on behalf of the Wheatland Center Education Association.

ARBITRATION AWARD

The Wheatland Center Education Association, hereinafter referred to as the Association, and the Wheatland Center School District, hereinafter referred to as the District, are parties to a collective bargaining agreement, effective August 15, 1987 through August 15, 1989, which provides for final and binding arbitration of grievances. Pursuant to a request for grievance arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the involuntary assignment of a teacher. Hearing on the matter was held in the District's offices, Burlington, Wisconsin on May 8, 1990. A stenographic transcript of the proceedings was prepared and received by the undersigned on June 7, 1990. Post-hearing arguments and reply briefs were received by the undersigned by July 31, 1990. Full consideration has been given to the evidence, arguments and testimony in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

Did the District violate the Collective Bargaining Agreement, Article VI, Section 14, when Irene Dohse was assigned Reading Coordinator for the 1989/90 school year? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE VI
 Teaching & Curriculum

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H. Teaching Assignment

No teacher may be assigned to a subject area or grade level which is outside the teacher's area of certification or license, except as is allowed by the laws of the State of Wisconsin and the regulations of the Department of Public Instruction. The teacher's assignment including, but not limited to, grade and subject shall be listed on the teacher's individual contract. This provision does not limit the right of the District to make changes in teacher assignment within the teacher's area of certification.

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ARTICLE X
 Compensation

J. Credit Requirement and Payment for Continuing Education

The school shall require a teacher to complete a minimum of six credits within the following five years for advancement on the salary schedule. The teacher's salary shall be frozen for the entire school year if at

the end of a five year period the 6 credits haven't been earned. Upon gaining the necessary credits, the teacher will again advance on the salary schedule the next year but will remain 1 year behind, (1970-71 or following initial teaching). Such credits may be approved college courses or C.E.U.'s (continuing education units: 30 C.E.U.'s = 1 credit). The six required credits may also be meaningful teacher developed endeavor beyond normal teaching assignments that will aid the educational effectiveness of the school. Credits for these endeavors must be given approval by the Administrator prior to the project initiation. The Administrator will determine number of credits given and placement on salary schedule for such endeavors according to approximate time and effort in relation to a similar college course or project for following year's contract placement. The School Board or Administrator shall recommend or approve credits in the teacher's contract area for teaching improvement or for an agreed projected assignment. Request forms for approval and salary schedule advancement shall be submitted at the beginning of the course. Forms are attached to this agreement. Approval or denial will be made in writing within 5 days. If approval for payment is denied by the Administrator, the teacher making the request may appeal to an Appeal Board made up of one (1) Administrator and one (1) person chosen by the Board and two (2) teachers chosen by the Association to review the decision. If the request is not decided satisfactorily, the teacher who was denied approval for payment may appeal to the School Board for a final decision. The school shall reimburse a teacher for up to 12 college credits at the rate of \$50.00/undergraduate credit and \$65.00/graduate credit within the following five years. (1971-72 or following initial teaching).

Payment shall be made during the first week of teaching or at the conclusion of the course within a school term. Maximum payments shall be for 6/yr, 3/yr credits at any time within the 5 year period. Where a teacher is requested by the Board or the Administrator to take credits, such teacher shall be paid the full tuition for credits taken.

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BACKGROUND

The District has employed Irene Dohse, hereinafter referred to as the Grievant, as a teacher since 1973. From her initial employment until June of 1989 she has taught 7th and 8th grade English, Language Arts, and Reading. The Grievant has a Department of Public Instruction (DPI) license, 316 Reading Teacher. The Grievant, while she has been employed by the District, continued to take education courses. When the Grievant reached the Bachelor of Arts plus 24 credits on the salary schedule of the collective bargaining agreement the Grievant became aware that there was not a graduate program available to her. After discussions with an advisor at U.W. - Whitewater, the Grievant determined to get a Masters Degree as a Reading Specialist, (DPI license No. 317). On September 29, 1989 the District was informed by U.W. - Whitewater that the Grievant had completed an approved program in Reading and was eligible for the University's endorsement for a license as a Reading Specialist. The Grievant did receive from the District four (4) payments of \$195.00 towards payment for credits in accordance with the parties collective bargaining agreement. After completion of her course requirements the Grievant was placed in the Master lane of the salary schedule.

The instant matter arose as a result of the District's desire to have a full-time Reading Specialist. During the 1987-1988 school year the District employed Mary York in a full-time position consisting of 25 percent reading specialist duties and 75 percent learning disabilities duties. During the 1988-1989 school year York's duties changed to 50 percent in each area. In January 1989, Superintendent C. Scott Huth recommended to the school board that the reading specialist position be increased to 100 percent. Huth discussed such a position with the Grievant and she declined it. In March and April 1989 Huth again discussed the matter with the Grievant and she again declined it. Thereafter, the District posted the position and, after receiving no internal applicants, advertised the position. The District received four (4) applicants, two (2) of whom were rejected by the Superintendent because they did not have the required certification. The two (2) finalists were rejected by the Superintendent based upon interviews and reference calls. Thereafter

the Superintendent involuntarily transferred the Grievant to the "Reading Coordinator" position. The instant grievance was then filed and processed to arbitration in accordance with the parties grievance procedure.

ASSOCIATION POSITION

The Association contends the language of Article VI, Section H, is clear and unambiguous and is supported by the parties bargaining history. The District can assign employes duties within their certification/license. An employe can refuse an assignment for which they are not certified. The Association argues that as the Grievant is not certified/licensed for the Reading Specialist job and as the District has not sought a provisional license under DPI rules the District has violated Article VI, Section H.

The Association points out employes are required to take six (6) credits in every five (5) year period. These required credits are partially reimbursed pursuant to the parties' agreement. In addition, credits must be in the teacher's contract area for teaching improvements or for an agreed project assignment. The Grievant's credits were in her contract area for teaching improvement and she has been reimbursed by the District \$780.00 of the \$3,133.80 she has spent on tuition. The Grievant has not entered into any agreed project assignment with the District.

The Association also points to testimony from DPI consultant Sue Harris to demonstrate the Grievant does not have a 317 license necessary in order to serve as a Reading Coordinator and to demonstrate that there is no evidence the District sought a special license from DPI. The Association further points out it is necessary that an employe countersign a request for a temporary license. The Association concludes the District violated the clear and unambiguous language of the agreement when it assigned the Grievant to an area outside her certification/license.

The Association argues the District went out of its way to give the Grievant a disagreeable assignment hoping to remove a strong leader in the Junior High Department or to have her leave the District in dissatisfaction. The Association points out there is clear evidence the Grievant did not want the assignment and questions the District's judgement in insisting she take the job. The Association argues the District could have posted the position until it received qualified candidates. The Association contends that when the Grievant resisted the reassignment the Superintendent took it to be a challenge to his authority and the Superintendent did everything, including violating the agreement, to have his way.

The Association also argues that the District's inability to locate and employ a fully licensed individual was based upon a half-hearted effort at posting the position, not even identifying in the posting a 317 license was required. The Association also points out that the District overlooked York for the position, even though she possessed the necessary license.

DISTRICT POSITION

The District contends the Association has failed to establish a violation of Article VI, Section H. The District argues there is no practice of allowing involuntarily transferred teachers to transfer back to their previous position after one (1) year. The District also contends it acted in a fair and reasonable manner in transferring the Grievant to the Reading Coordinator position. 1/

In support of its position the District points to Section 121 of the Wisconsin statutes. 2/ The District argues that its actions are in conformance

1/ The District also raised an argument contending that as the Wisconsin Employment Relations Commission has held that a proposal limiting a District's ability to assign teachers to only the teacher's area of certification is permissive, and as Article VI, Section H allows all transfers allowed by law, that the Grievant's transfer does not violate the agreement. The undersigned has found this theory to be irrelevant as the undersigned's responsibility is to interpret the agreement. The question of whether the parties agreement includes a permissive subject of bargaining has no bearing on the instant matter.

2/ Section 118.19(1) Wis. Stat.

Any person seeking to teach in a public school or in a school or institution operated by a county or the state shall first procure a certificate or license from the department.

118.21 Wis. Stat.

(1) The school board shall contract in writing with qualified

with the statute, in particular, it has demanded the Grievant to provide the District with proof of certification. Having made such a demand the District argues its actions are in conformance with the statutes and DPI rules. The District also argues that it is unnecessary to go through the charade of requesting DPI for a temporary license as the Grievant is fully qualified for the position.

The District also asserts that the Association has failed to establish the existence of a past practice requiring the District to allow the Grievant to return to her former position after one (1) year at her option. The District acknowledges that it entered into a specific agreement with the Association in 1989 concerning one teacher, Jeanette Hanson, allowing Hanson to return to her former duties, at her option, after one (1) year. The District points out that this option was not granted to all teachers, but was limited to Hanson. Further, the District asserts, at least five (5) other teachers were transferred when the Grievant was, none of whom are receiving the benefit the Association seeks for the Grievant. The District argues that had the parties wanted to allow teachers to return to their former positions after one (1) year they would have modified Article VI, Section H. The District concludes there is no unequivocal, known, and accepted practice between the parties of allowing teachers to transfer back to their former positions after being involuntarily transferred to a new position.

The District also argues it acted in a fair and reasonable manner in transferring the Grievant to the Reading Specialist position. The District argues that Huth believed at the time of the assignment, and still believes, that the Grievant is the right person for the job. The District points out that when the Grievant declined the job, Huth posted the position. No qualified candidate responded. The District argues a qualified candidate must have experience in order for experienced teachers to follow the directions of the Reading Specialist. The District asserts that when the market failed to produce a qualified candidate, the needs of the District required the Grievant to become the Reading Specialist.

ASSOCIATION'S REPLY BRIEF

The Association makes the following assertions in its reply brief. First, that the District did not act in a fair and reasonable manner. The Association argues the District ignored the parties bargaining history and collective bargaining agreement. That Huth did not give York sufficient time as Reading Specialist, yet increased her workload from twenty-five (25) to fifty (50) percent. Further, that Huth thought the Grievant was best at interaction with staff and parents, while at the same time noting the Grievant's problems with the prior reading consultant and a problem with being "bossy." The Association also points out that Huth never performed a formal evaluation of either the Grievant or York and that Huth's opinion takes into consideration the opinions of teachers Kojis and Hewitt and there is no evidence these two (2) teachers have the knowledge, training and skills for evaluation of professional personnel. The Association further points out the Grievant has no experience working with primary age children.

The Association also argues that the statutes speak to a situation where an employe is seeking work and therefore the employe contracts with a district and promises to provide proof of license within then (10) days. The Association argues the Grievant is not legally authorized to teach the subject in dispute and therefore her contract should be void. Further, because the

teachers. The contract, with a copy of the teacher's authority to teach attached, shall be filed with the school district clerk. Such contract, in addition to fixing the teacher's wages, may provide for compensating the teacher for necessary travel expense. A teaching contract with any person not legally authorized to teach the named subject or at the named school shall be void. All teaching contracts shall terminate if, and when, the authority to teach terminates.

(2) Any person who contracts to teach in any public school shall file in the office of the school district administrator, within 10 days after entering into such a contract, a statement showing the date of expiration and the grade and character of certificate or license held. In any school district not having a school district clerk. Teachers employed by a cooperative educational service agency shall file the stated in the office of the agency coordinator. No order or warrant may be issued by the school district clerk in payment of the salary of any teacher, unless the teacher has complied with this section.

Section 121.02(1) (a) Wis. Stat.

(a) Ensure that every teacher, supervisor, administrator and professional staff member holds a certificate, license or permit to teach issued by the department before entering on duties for such position.

District is aware the Grievant will not get a license, they could terminate the Grievant's employment.

The Association does concur with the District's reasoning that it is a teacher's obligation to obtain necessary certification. However, the Association cannot comprehend a system that would require a teacher to be licensed in areas they choose not to be licensed. The Association concludes the Grievant should be returned to her previous assignment and that the District should seek another candidate for the Reading Coordinator position.

DISTRICT'S REPLY BRIEF

The District argues that the Association has failed to address the point of this case. The District argues the collective bargaining agreement permits the District to assign teachers to duties within their certification and to any other assignment allowed under state law. The District argues that if the Grievant's assignment is consistent with state law, then it is consistent with the collective bargaining agreement. The District contends the Association has conceded this point by not addressing it in their initial arguments.

The District argues that the Grievant's displeasure with the assignment, the District's inadequacy of looking for alternatives to the Grievant's position, and the District's evaluations of York and the Grievant are arguments not relevant to the issue. Further, given the Association's assertion that the language in question is clear and unambiguous, there is no need to look at bargaining history as the Association argues. The District contends the statutes clearly place the burden of getting a license on the teacher. If the District has the right to assign the Grievant the Reading Specialist position, then it is up to the Grievant to obtain the necessary license to comply with the statute.

The District concludes that the Association has failed to prove a violation of the collective bargaining agreement and would have the undersigned deny the grievance.

DISCUSSION

The burden herein is on the Association to demonstrate the District's action of transferring the Grievant to the Reading Coordinator position violated Article VI, Section H. This provision limits the District's authority to assign teachers duties. Both parties have argued the language is clear and unambiguous, however, the parties place different interpretations upon this language. The undersigned agrees that the language is clear and unambiguous. Clearly a teacher cannot be assigned to a subject area or grade level which is outside the teachers area of certification or license, except as allowed by the statutes and DPI regulations. Thus the Association must demonstrate that both the state law and DPI regulations have been violated by the District's actions. Herein, if the statute has been violated, it is because the Grievant has failed to seek certification in a field for which she is qualified even though the statute places the burden on the Grievant to seek such a certification. Section 118.21(1) of the Wisconsin Statutes clearly allows the District to contract with qualified teachers. There has been no evidence presented by the Association to demonstrate the Grievant to be unqualified for the Reading Coordinator position.

The undersigned is aware through the evidence presented at the hearing that the DPI levies a fee for the certification process. However, the agreement is silent concerning whether the District is responsible for the payment of such a fee. However, if the District is required by the parties' past practice to pay for the certification fee, if any, in emergency licensing procedures, the undersigned would find such a practice controlling when the District involuntarily reassigns a teacher to an area for which the teacher is qualified to teach but does not have a license to teach the subject area.

The undersigned does find that the District's actions are not in violation of the statute because the Grievant is qualified to be the Reading Coordinator. If, after the assignment is made as is the instant matter, the teacher fails to seek certification, when it is the teacher's burden to do so, it is the teacher who is violating the statute. Such a violation cannot be used as a defense to negate the District's ability to make assignments. Thus, if DPI regulations are not being adhered to in the instant matter, the burden falls on the Grievant, for it is her responsibility to seek certification.

Herein, had the language in question been limited to only certification the remedy sought by the Association would have resulted. However, Sec. 118.21(1) makes a distinction between teachers who are qualified to teach and their "authority to teach," i.e., license or certification. As this section of the statute allows the District to contract with a qualified teacher it is not necessary for the teacher to have the license or certification necessary to teach the subject area at the time the assignment is made. It is necessary for the teacher to seek the certification required to teach the

subject area after the assignment is made.

The undersigned also finds that Article VI, Section H is silent concerning any requirement that the District post a position prior to involuntarily assigning a teacher to a new subject area. The District did take such actions in the instant matter. Only when the District found no qualified applicants did it reassign the Grievant. Such actions the District undertook in this matter were neither arbitrary, capricious nor discriminatory. Further, as the agreement between the parties does not require the District to open the position to outside candidates prior to involuntarily assigning a teacher a new position, the undersigned finds the District's actions did not violate the agreement even though there may have been more fruitful methods of recruitment the District could have used or there may have been less senior employees in the District qualified for the position.

While the undersigned is sympathetic to the Grievant's plight herein, the Grievant's desires cannot be taken into consideration. It is clear from the evidence and testimony presented at the hearing that the Grievant was not only well suited for her former duties but that she continued to improve her skills during her seventeen (17) years of employment with the District. It is also evident that she is an exceptionally capable teacher and that she had no desire to make a change in assignments. However, the undersigned is bound by the clear terms of the agreement. By virtue of her Master's Degree in Reading Specialist she is clearly qualified to be the Reading Coordinator. As such, her reassignment is allowed by the laws of the State of Wisconsin. As her reassignment is allowable, there is no contract violation.

The undersigned also finds no merit in the Association contention that York should have been allowed to transfer or assigned to the Reading Coordinator position. While Huth's decision that York was a better Learning Disabilities teacher than a Reading Specialist may not be very scientific, it was based upon input from other teachers and his own observations. The discretion he exercised was not arbitrary, capricious or discriminatory. Therefore, there is no violation of Article VI, Section H.

Based upon the above and foregoing and the evidence arguments and testimony presented, the undersigned concludes the District did not violate the agreement, Article VI, Section H, when it assigned the Grievant the Reading Coordinator position for the 1989-1990 school year. The grievance is therefore denied.

AWARD

The District did not violate Article VI, Section H, when it assigned Irene Dohse to the Reading Coordinator position for the 1989-1990 school year. The grievance is denied.

Dated at Madison, Wisconsin this 26th day of October, 1990.

By _____
Edmond J. Bielarczyk, Jr., Arbitrator