

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WEST DEPERE EDUCATION ASSOCIATION

and

WEST DEPERE SCHOOL DISTRICT

Case 28
No. 44409
MA-6298

Appearances:

United Northeast Educators, 1136 N. Military Avenue, Green Bay, Wisconsin 54303, by
Mr. Lawrence J. Gerue, Program Director, appearing on behalf of the West DePere Education Association.

Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, Suite 600, Green Bay, Wisconsin 54307-3067, by Mr. Dennis W. Rader, appearing on behalf of the West DePere School District.

ARBITRATION AWARD

Pursuant to the provisions of Article 7 of the collective bargaining agreement between the parties for the school years' 1989-91, the West DePere Education Association (hereinafter referred to as the Association) and the Board of Education of the West DePere Public Schools (hereinafter referred to as the District) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute, concerning the posting of the Gifted and Talented Coordinator's job. Daniel Nielsen was so designated. A hearing was held in DePere, Wisconsin on October 3, 1990, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made of the hearing and a transcript was received by the undersigned on October 6th. The parties submitted post-hearing briefs which were exchanged on November 3rd, at which time the record was closed.

Now, having considered the evidence, the arguments of the parties and the record as a whole, the undersigned makes the following arbitration award.

ISSUE

The parties stipulated the following issue was to be determined herein:

Is the District required to offer to the most senior teacher on layoff status (or next in order if the Gifted and Talented Coordinator's job is refused by the most senior teacher on layoff status) the Gifted and Talented Coordinator position pursuant to the provisions of the collective bargaining agreement? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE I - RECOGNITION

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ARTICLE II - MANAGEMENT RIGHTS

- A. The Board retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin and of the United States, including, but without limiting the generality of the foregoing, the right:
 1. To the executive management and to the administrative control of the school system and its properties and facilities, and the duties and responsibilities of its teachers.
 2. To hire all teachers and subject to the provisions of law, to determine their qualifications and conditions for their continued employment, or their dismissal or demotion, and to promote, and transfer all such teachers.
 3. To establish or eliminate grades and courses of instruction, including special programs, and to provide for athletic, recreational and social events for students all as deemed necessary or advisable by the Board.
 4. To decide upon the means and methods of instruction, the selection of textbooks and other teaching material, and the use of teaching aids for

every kind and nature.

5. To determine class schedules, the hours of instruction, and the duties, responsibilities, and assignments of teachers with respect thereto, and with respect to administrative and non teaching activities, and the terms of employment.
- B. The exercise of the foregoing power, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules and regulations, and practices in furtherance thereof and the use of judgment and discretion in connection therewith shall be limited only the specific and express terms of this agreement and Wisconsin Statutes Section 111.70 and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

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ARTICLE VII - GRIEVANCE PROCEDURES

- A. Definition: a grievance shall be defined as a claim by the bargaining unit representative of a teacher or teachers regarding the interpretation or application of hours, wages, and working conditions as stated by any provision of this Agreement.

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5. If the grievance is not resolved in Step 3 of the grievance procedure, the Board and the grievant(s) will agree upon a mutually acceptable arbitrator and will obtain a commitment from said arbitrator to serve. If the parties are unable to agree upon an arbitrator, or to obtain such a commitment within ten (10) days, either party shall file a written request with the Wisconsin Employment Relations Commission to appoint a member of its staff to act as an arbitrator. The arbitrator so selected will confer with representatives of the Board and the grievant(s)

and hold hearings promptly and will issue his decision on a timely basis. The arbitrator's decision will be in writing and will set forth his findings of fact, reasoning and conclusions of the issues submitted. The arbitrator will be without power or authority to make any decision which requires the commission of any act prohibited by law or which is in violation of the terms of this Agreement....

ARTICLE XV - ASSIGNMENTS, TRANSFERS REASSIGNMENTS, AND STAFF REDUCTION

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B. Voluntary Transfer and Reassignment

1. Teachers who desire a change in grade and/or subject assignments, or who desire a transfer to another building may file a written request of such desire with the Superintendent not later than February 15. Such statement will include grade and/or subject to which the teacher desires to be assigned and/or the school to which he desires to be transferred.
2. In acting on the request for voluntary reassignment and/or transfer, the following criteria will be applied, not necessarily in the order listed:
 - a. Reason for request
 - b. Existence of vacancies
 - c. Teacher's value to the students of the school district in the present position
 - d. Instructional requirements
 - e. Individual competencies
 - f. Staff availability and teaching experience mix

C. Involuntary Transfer and Reassignment

1. Where an involuntary transfer or reassignment is necessary, the teacher(s) involved will be given an opportunity to meet with the Superintendent or his delegate and be given reasons for his transfer or reassignment.
2. When an involuntary transfer or reassignment is necessary, a teacher's area of competence, major or minor field of study, length of continuous service in the District, length of service in the building, grade or subject from which transfer or reassignment is contemplated, and other relevant factors will be considered in determining which teacher is to be transferred or reassigned.
3. Notice of intent of involuntary transfer or reassignment will be given to the teacher(s) prior to the end of the present school term except in cases of emergency.

D. Staff Reduction

1. Whenever a reduction in teachers is deemed necessary by the Board due to reasons such as decrease in enrollment, educational program changes and budgetary or financial limitations, the Board will first determine the number of teachers to be laid off and then, in consultation with the superintendent and such other administrator as may be appropriate, will determine the individual teachers to be laid off in accordance with the following:
 - a. Normal attrition resulting from teachers' retiring or resigning will be relied upon to the extent it is administratively feasible.
 - b. The remaining teachers to be laid off will be selected by the Board, taking into account, both on an individual basis and in comparison to other teachers, factors such as

the individual teacher's length of service in the District, overall teaching experience, academic training, ability and performance as a teacher in the District as previously and currently evaluated by the appropriate administrators, assignment to co-curricular and other special activities and past and potential contribution to the educational program of the District.

- c. A teacher whose position is eliminated shall either be transferred to an open position for which he is certified (if more than one such position exists he shall be given his choice) or replace the teacher with the lowest seniority anywhere within the District in which said laid off teacher is certified.
2. After the number and names of the teachers to be laid off has been determined by the Board, it will provide the Association and each such teacher with a written explanation as to the basis upon which that teacher was selected to be laid off.
3. The laid off teacher shall be notified by May 1st. The teacher shall not be precluded from securing other employment during such teacher's re-employment rights period.
4. If, within a teacher's re-employment rights period, the District has a vacant teaching position available for which that teacher is deemed qualified by the Board, the teacher shall be notified of such position and offered employment in that position, commencing as of the date specified in such notice. Under this paragraph, teachers on lay off will be contracted (sic) in reverse order of their lay off with respect to a position for which they are so qualified. In the event two (2) or more teachers who are so qualified were laid off on the same date, the Board shall select which teacher shall be first contacted, taking into account the factors set forth in (b) of

paragraph 1 above. A returning teacher will receive all benefits to which the teacher was entitled at the time of release including but not limited to incremental steps on the salary schedule, accumulated sick leave shall be restored in full upon re-employment within the recall period.

5. Within ten (10) days after the postmark date of a notice pursuant to paragraph 4, the teacher must advise the Board in writing that the teacher accepts the position offered by such notice and will be able to commence employment on the date specified therein. Any notice pursuant to paragraph 4 shall be mailed, registered- return receipt requested, to the last known address of the teacher in question as shown on the Board's records. It shall be the responsibility of each teacher on lay-off to keep the Board advised of his/her current whereabouts.
6. Any and all re-employment rights granted to a teacher on lay off pursuant to this article shall terminate upon the expiration of such teacher's re-employment rights period or such teacher's failure to accept within ten (10) days any position offered to him as provided in paragraphs 4 and 5, whichever occurs the earlier. For purposes of the article, the term "teacher's re- employment rights period" means the period of time that is equal to the teacher's employment time in the District but not to exceed two (2) years.
7. The provisions of this article are only applicable to a reduction in teachers as signified in D-1.

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ARTICLE XVII - VACANCIES

- A. The Superintendent's office shall announce via personal memo teaching positions and co-curricular vacancies to qualified teachers within the school system thereby allowing them to make application for such vacancy and have first

consideration. Application for vacancies must be made in writing within three (3) school days of notification. (Seven (7) days during summer).

- B. Qualified teachers will be given an equal opportunity for extra pay assignments during the school year. Qualified teachers of the local school district will be given first consideration for summer employment.
- C. The Superintendent may post as a temporary vacancy, co-curricular positions of employees who are on an extended sick leave of less than six weeks. The Superintendent shall post as a temporary vacancy, co-curricular positions of employees who will be on an extended sick leave of six consecutive weeks/or more in duration. The teacher who assumes those duties will be reimbursed on a prorated basis.

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BACKGROUND - FACTS

The District operates K-12 schools in DePere, Wisconsin. The Association is the exclusive bargaining representative for the school's professional staff. The instant grievance was filed on behalf of teachers who were on layoff status during the 1990-91 school year.

On May 1, 1990, the District posted for the position of Gifted and Talented Coordinator;

In accordance with Article XVII of the Master Agreement, please be advised of the following vacancy:

I. Grades 7-12 Gifted and Talented Coordinator

30% position (2 class periods fall semester and 1 class period spring) Secondary certification is required

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Interested staff should apply in writing to Mr. Freese by 4:00 p.m. Monday, May 7, 1990.

COORDINATOR OF THE GIFTED AND TALENTED 7-12 PROGRAMS

QUALIFICATIONS:

1. Knowledge and/or training in gifted and talented education.
2. Demonstrated leadership, experience, and performance in areas of Gifted and Talented.
3. Graduate level coursework and preparation in gifted education.

REPORTS TO: Curriculum Coordinator

JOB GOAL:

- A 7-12 coordinator will
 1. Insure the philosophy and goals are being met
 2. Insure continuity of 7-12 programs
 3. Develop credibility for the 7-12 programs
 4. Give direction to the 7-12 program

PERFORMANCE RESPONSIBILITIES:

- I. Program
 - A. With the K-12 coordinator, carry out the identification of 7-12 students
 - B. With the K-12 coordinator, develop the 7-12 programs
- II. Communication
 - A. Enhance relations between 7-12 staff and parents
 - B. Inform 7-12 staff and students of outside opportunities
- III. Evaluation
 - A. With the K-12 coordinator, help prepare annual report for the Board of Education
 - B. Continuously evaluate 7-12 program effectiveness

IV. Integration

- A. Serve as a resource for 7-12 teachers
- B. Arrange inservice education for teachers and parents

V. Budget

- A. Submit to K-12 coordinator a 7-12 budget
- B. Inventory future 7-12 budgetary needs

TERMS OF EMPLOYMENT: School Term - part time

EVALUATION: Performance of this job will be evaluated annually by the 7-12 administrative staff.

In response to this posting, teachers Dennis Kostac, Jayne Feldhausen, Robert Wolslegel, and Richard Visintainer applied for the position. The four were interviewed by the superintendent, who determined that all but Wolslegel met the minimum qualifications for the posting. Wolslegel was excluded because, in the superintendent's judgment, he lacked "demonstrated leadership, experience, and performance in areas of Gifted and Talented", the second area of qualifications listed on the posting. At the time, Wolslegel was on a reduced work load and was working 25.71 % of a full-time position. The vacancy was awarded to Feldhausen, who was not on laid off or reduced status. The instant grievance was thereafter filed, contending that laid off faculty members should have been given the opportunity to exercise their recall rights to fill the vacancy, rather than utilizing the posting procedure.

Additional facts as necessary will be set forth below.

POSITIONS OF THE PARTIES

The Position of the Association

The Association takes the position that the District violated the collective bargaining agreement when it failed to offer the vacant Gifted and Talented Coordinator position to teachers on layoff status. Section D (1) c. of Article XV specifically states that any teacher on staff reduction status shall be given the opportunity to accept any openings of which that teacher is certified. The District admitted that the only certification requirement necessary for the Gifted and Talented Coordinator position was a general teaching certificate. All of the teachers on layoff status at the time of the opening had such a certificate. These teachers should have been allowed exercise their recall rights under Section D (4) of Article XV.

The Association acknowledges that the School District may well have preferred some other

employee in this particular job. Vindication of seniority rights, however, cannot be achieved without some costs to junior employees and management. The basic purpose of seniority is to preserve job security. Inasmuch as any certified member of the teaching staff, including all of the teachers on layoff, would meet the minimum qualifications for the Gifted and Talented Coordinator's position, the District's preference for a junior employee must give way to the seniority rights of the senior laid off employees.

For the foregoing reasons the Association asks that the arbitrator find a violation of the contract, order the School District to offer the position of Gifted and Talented Coordinator to the most senior staff person on reduced contract or full layoff (or, if that person declines the position, the next most senior in order) and make the successful applicant whole for lost compensation.

The Position of the District

The District takes the position that there was no contract violation in the filling of the Gifted and Talented Coordinator's job. Article XV, Section D (1) b. establishes the criteria to be used by the Board in selecting teachers for layoff. Section D (1) c. speaks to the bumping rights of teachers at the time of layoff. Those rights may be exercised to claim open positions, or bump junior employees from positions, for which the senior employee is certified. The position of Gifted and Talented Coordinator was not in existence at the time of the layoffs in question, and thus no bumping could have been accomplished to claim that position. The dispute in this case is instead governed by Article XV, Section D (4) which deals with recall rights. Under that provision, employees have a right to be recalled to positions for which they are "deemed qualified by the Board". This is significantly more restrictive than the certification requirement under the bumping provision. Wolslegel, the lone laid off employee who applied for the vacant position, was not contacted or offered employment in the position because he was not "deemed qualified". As explained by the District Administrator: "It was my opinion under qualification No. 2 he hadn't been involved or demonstrated any leadership or had any experience or had performed in the area Gifted and Talented education." Since he was not deemed qualified for the position, Wolslegel had no right to claim it under the recall provisions of the contract.

The District posted the vacant position in accordance with Article XVII, Section A. That provision specifies that vacancies will be announced to "qualified teachers within the school system" and that, upon application, they will receive "first consideration". "Qualifications" go well beyond "certifications", and include the teacher's value to the students, instructional requirements, individual competencies and teaching experience. 1/ There is simply no language in the contract giving teachers on layoff the right to claim vacant positions solely on the basis of seniority and certification. Instead, the District asserts, qualifications govern the right to claim vacancies. As the School Board did not judge the laid off teachers to be qualified for the Gifted

1/ These criteria are expressly listed in the contract at Article XV, Section B (1) and (2) as factors for consideration in granting or denying a voluntary reassignment and/or transfer.

and Talented Coordinator's position, it had no obligation to offer that position to any of them.

The District notes that several past instances in which vacancies have been posted without first offering positions to senior teachers on layoff have not been grieved by the Association. In at least two instances over the past year, the District has followed the same procedure as it has in this case without challenge by the Association. This failure to grieve suggests that the Association understands the contract's requirements to be consistent with the actions of the District.

For the foregoing reasons, the District asks that the grievance be denied.

DISCUSSION

From a review of the grievance filed in this matter and the superintendent's response, it is apparent the two central questions must be addressed in order to resolve the grievance. The first issue is whether the filling of the Gifted and Talented Coordinator's position was governed by the bumping provisions, the recall provisions or the job posting provisions of the contract. The second and related question is whether holding the required teaching certification for a position sufficiently qualifies the laid off employee to claim that position as a matter of right.

Which Contract Provision Controls?

Article XV, Section D governs faculty staff reductions. Subsection 1 (c) gives teachers whose position is eliminated the right to either transfer into an open position (for which he is certified) or to replace the teacher having the lowest seniority within the District in a position for which the laid off teacher is certified. This section of the contract is part of the procedure for determining which specific individuals will be subject to a layoff, with identity of the teachers actually to be laid off known only after bumping rights have been exercised. Once this procedure has been completed, the contract requires the written notice of the identity of the employees to be laid off and the reason for layoff be provided to the Association and the individual teachers.

Article XV, Section D (4) sets forth the rights of teachers after they have been laid off but prior to the termination of their re-employment rights period. Under this section, should a vacant teaching position become available, teachers on layoff "shall be notified of such position and offered employment in that position" if they are "deemed qualified by the Board". The right to such a vacancy is in reverse order of layoff.

Finally, Article XVIII covers posting for vacant teaching positions. The superintendent announces such vacancies to "qualified teachers within the school system" who then have the right to have "first consideration" for the job.

The inclusion of the bumping procedure as part of the process for determining who will be laid off and a specification of a separate recall provision clearly indicates that the choice of which

set of rights a teacher may exercise - bumping or recall - depends upon which point in time a teacher seeks to claim a job. The position of Gifted and Talented Coordinator was created after the process of bumping was completed and the grievants had been laid off. If the teachers could now again exercise rights under the bumping provision to claim a job, the separate recall procedure would be mere surplusage. Parties are presumed to have intended each provision of the contract to have independent meaning, and thus the undersigned concludes that the bumping rights of these teachers must give way to their distinct rights under the recall provision.

For the same reason, the undersigned concludes that the recall provision must be the first point of reference for filling vacancies when laid off workers retain re-employment rights, rather than the posting provision as urged by the District. Article XVIII (a) and Article XV (d) 4 speak to filling "vacant" positions and could, on the face of them, both apply to the same vacancy. The District's suggestion that it need refer only to Article XVIII would effectively invest it with the unilateral right to terminate re-employment rights under Article XV and, like the Association's appeal to the bumping rights' provision, render the recall provision inoperative. The principles of contract interpretation instead dictate that the two provisions be harmonized. The appropriate accommodation of both Articles is suggested by the mandatory language of Article XV;

If, within a teacher's re-employment rights period, the District has a vacant teaching position available for which the teacher is deemed qualified by the Board, the teacher shall be notified of such position and offered employment in that position.

The directive that qualified teachers on layoff "shall be . . . offered employment" contrasts with the milder command of Article XVIII that qualified teachers within the school system be given "first consideration" for postings. Both Articles may be given meaning by an interpretation that requires District to first determine whether any of the teachers on layoff are qualified for the position. If so, the District is obligated to notify the teachers and offer the position. If none of the teachers on layoff are deemed qualified, or if none accept the job, the position may be filled through the posting procedure.

"Certified" vs. "Qualified"

There remains the question of whether a teacher on layoff may claim a job through the recall provisions solely on the basis of certification, or whether a higher standard of qualification must be met. While the Association repeatedly equates "qualified" with "certified", the terms of the collective bargaining agreement refute this interpretation. Bumping rights may be exercised for position for which the teacher is "certified". Recall rights may be asserted over positions for which the teacher is "deemed qualified by the Board". One fundamental principle of construction is that the parties use the same word to communicate the same thought and different terms to convey different thoughts. In common usage, "certification" is one element of the more general standard of "qualification" and the use of the term in this contract bears out this distinction. Were

the two terms intended to bear identical meanings, the phrase "deemed qualified by the Board" would make no sense. "Deemed" connotes judgment and discretion. A teacher either possesses a certification or he does not, and there is no judgment to exercise in making that determination. If, on the other hand, "qualified" is interpreted as a bundling of characteristics, including certification, the recall rights provision as written makes perfect sense.

Neither the commonly understood meanings of the terms "certified" and "qualified" nor the contexts in which they are used in a collective bargaining agreement allows them to be interpreted as synonymous. The determination of whether a person is qualified for the position must, presumably, include a determination of whether they possess require certification, but will also require weighing the teacher's professional experience and background against the requirements established for the available job. This weighing is, under the terms of Article XV (d) 4, within the province of the Board.

Application of the Contract Standard to the Case

As noted, Article XV requires that the position of Gifted and Talented Coordinator be offered to qualified teachers on layoff before being posted for the faculty in general. Qualifications under Article XV go beyond certification, and whether a teacher possesses the qualifications for a position is determined by the Board, presumably after making reference to the qualifications listed in the job description. In the instant case, the Board posted the position and rejected the one application it received from a laid off teacher because he did not meet the requirement of previous experience or involvement with Gifted and Talented program. With respect to this applicant, Wolslegel, the substance of Article XV has been complied with in that the Board in the person of its agent, Superintendent Randy Freese, considered his qualifications and deemed him not to be qualified. The record is devoid, however, of any evidence that the Board ever considered the question of whether other teachers on layoff status were qualified for the Coordinator's job. It is likewise silent on what the qualifications of those laid off teachers might in fact be. On the state of this record it can be concluded that the District failed to follow the proper procedure under the recall provisions in filling the Gifted and Talented Coordinator's position. In following the posting procedure of Article XVIII, rather than the recall provisions of Article XV the Board violated the collective bargaining agreement.

The conclusion that the Board has violated the collective bargaining agreement does not, however, lead to the conclusion that the rights of any individual teacher have been violated. The Association's claim that certification triggers the right to secure a vacant position has been dismissed. The threshold question is instead whether, after a review of the qualifications of the laid off faculty members, the Board deems any of them to be qualified for the position. If so, that individual must be offered the position and, if he or she accepts it, may be entitled to back pay. If none of the laid off faculty members are deemed qualified for the vacancy, or if none accept the vacancy when offered, the incumbent chosen through the posting procedure will retain the position.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The District is required to consider the qualifications of teachers on layoff status for the Gifted and Talented Coordinator's job. If one or more of the teachers on layoff are deemed qualified for the vacancy, the teacher(s) shall be offered the position in the order dictated by Article XV (d) 4 of the collective bargaining agreement.

The undersigned will retain jurisdiction over this grievance for the period of 30 days following the date of this award.

Signed this 6th day of February, 1991 at Racine, Wisconsin.

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator