BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENE GIBSON

and

NEW LISBON SCHOOL DISTRICT

Case 22
No. 44929
MA-6460

Appearances:

Mr. Gerald Roethel, Executive Director, Coulee Region United Educators, on behalf of
Mr. David R. Friedman, Attorney at Law, on behalf of the New Lisbon School District.

ARBITRATION AWARD

Coulee Region United Educators, on behalf of the Grievant, Gene Gibson, requested that the Wisconsin Employment Relations Commission designate a staff arbitrator to hear and decide the instant dispute between the Grievant and the New Lisbon School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The District subsequently concurred in the request and the undersigned was designated to arbitrate in the dispute. A hearing was held before the undersigned on April 15, 1991 in New Lisbon, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by May 23, 1991. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES:

The Grievant would state the issues as follows:

1. Did the School District of New Lisbon violate the collective bargaining agreement when it failed to restore Gene Gibson to the proper experience step on the salary schedule after freezing his step movement for one year? If so, what will the remedy be?

2. Did the School District of New Lisbon violate the collective bargaining agreement when it failed to pay Gene Gibson $60 per credit for graduate credits earned? If so, what shall the remedy be?

The District would state the issues as being:

1. Was Eugene Gibson's grievance on his step placement timely filed?

2. If the grievance was timely filed, is Eugene Gibson's step placement for the 1990-91 school year correct?

1/ The parties agreed to waive the thirty-day time limit for issuing an award.

3. Is Gibson's credit reimbursement grievance barred or has he waived his right to pursue this grievance by his failure to pursue his 1988 grievance on the same subject?

4. If the grievance is not barred or waived, did Eugene Gibson properly raise the issue of credit reimbursement in his grievance filed on September 19, 1990?

    a. If he did, was the grievance timely filed?

The undersigned concludes that the issues to be decided may be stated as follows:

1) Is Gibson's grievance as to his step placement on the salary schedule timely? If so, then

2) Did the District violate the Collective Bargaining Agreement by placing Gibson on BA + 10 Step 6 of the salary schedule for the 1990-91 school year? If so, what is the appropriate remedy?

3) Is the issue of Gibson's credit reimbursement for graduate credits earned in 1988 properly before the Arbitrator? If so, then

4) Did the District violate the Collective Bargaining Agreement when it failed to pay Gibson at the rate of $60.00 per credit for graduate credits earned? If so, what is the appropriate remedy?

<u>CONTRACT PROVISIONS</u>:

The following provisions of the Collective Bargaining Agreement are cited:

ARTICLE XIV
COMPENSATION

A. The compensation schedule for teachers is set forth in Appendices A and B by this reference incorporated herein.

B. All full-time teachers shall be placed on the step of the salary schedule appropriate to their earned degree and verified teaching experience. Teachers entering the New Lisbon School system shall receive a maximum of five (5) years experience credit for teaching outside the New Lisbon system in determining placement on the salary schedule.

C. Credits for reclassification to a higher salary classification for any current school year must be presented by the teacher to the Superintendent with proper verification no later than September 15. Credits earned or reported after September 15 will be

applicable to reclassification on the salary schedule for the next school year.

D. Teachers will be paid sixty dollars ($60.00) per credit for all courses successfully completed which have been approved by the Superintendent or are approved graduate credits in the field of the teacher's assigned teaching responsibility.

. . .

ARTICLE XVII
PROFESSIONAL IMPROVEMENT

A. Teachers holding a Bachelor's Degree must earn a minimum of five (5) semester credits every five (5) years by summer school or extension courses. The five (5) credits must be graduate credits unless otherwise approved by the Superintendent and must be completed prior to the issuance of a contract for the sixth (6th) year. Fulfillment of the professional improvement obligation shall be figured from the date of earning the degree or the date on which the requirement was last met.

B. Teachers holding a Bachelor's Degree plus thirty (30) credits or a Master's Degree are encouraged to continue professional improvement at their discretion.

C. Teachers holding a Bachelor's Degree may use a college-accredited travel course if such travel course is a five (5) credit course to fulfill the five (5) credit requirement. The travel credits must have prior approval of the Superintendent based on his outline of the itinerary. Upon completion of the travel, a brief report will be filed with the Superintendent.

D. Failure to meet the above requirements shall make the teacher ineligible for advancement on the salary schedule but not ineligible for any base raise granted in the schedule.

E. If the Board changes a teacher's job or substantially modifies the teacher's duties with initial agreement so that a different teaching certification is required, the Board will pay for the cost of the college credits needed to meet the requirement of the new certification. The Board will pay up to the actual cost of the credits as charged by the educational institution the teacher attended, but in no event shall the actual Board payment exceed the maximum cost per credit charged by the University of Wisconsin system for a special student. In addition, the Board will reimburse the teacher for the miles traveled to obtain the credits at the mileage rate set forth in Article XVI, Section B.

. . .

ARTICLE XIX
GRIEVANCE PROCEDURE

Definition -- For the purpose of this Agreement, a grievance is defined as a difference of opinion regarding the interpretation or application of this Agreement. Grievances shall be processed in accordance with the following procedure.

Step 1. Within seven (7) calendar days after the occurrence of the incident on which the complaint is based or first becomes known to the grievant, an earnest effort shall be first made to settle the matter informally between the employee and his/her immediate supervisor. The immediate supervisor shall give his/her written answer within seven (7) calendar days of the time the grievance was presented to him/her in writing.

Step 2. If not settled in Step 1, the grievance may within seven (7) calendar days be appealed, in writing, to the Superintendent. The Superintendent shall give a written answer no later than fourteen (14) calendar days after receipt of the appeal.

Step 3. If not settled in Step 2, the grievance may within fourteen (14) calendar days be appealed, in writing to the Board of Education. The Board shall give a written answer within thirty (30) days after receipt of the appeal. The grievant or his representative may present evidence and argument to the Board at the grievance hearing.

Step 4. If not settled in Step 3, Binding Arbitration. In order to process a grievance to binding arbitration, the following must be complied with:

Written notice of such a request for arbitration shall be given to the Board within fourteen (14) calendar days of the receipt of the Board's last answer.

The matter must have been processed through the grievance procedure within the prescribed time limits, or the arbitrator shall have no power or authority with regard to that particular grievance.

Grievances involving the same act or same issue may be consolidated into one (1) proceeding, providing the grievances have been processed through the grievance procedure by the time arbitration is requested.

Within fourteen (14) school days after such written notice of submission to arbitration, the Board and the Professional Rights and Responsibilities committee will jointly file a written request with the Wisconsin Employment Relations Commission to appoint an

arbitrator to determine the matter. The Arbitrator shall meet with the representatives of both parties, hear evidence, and give a decision which will be final and binding on both parties within thirty (30) days of the close of the hearing.

In the event that there is a charge for the services of an arbitrator, including per diem expenses, if any, and/or actual and necessary travel and subsistence expenses, or for a transcript of the proceedings, the parties shall share the expenses equally.

BACKGROUND:

The Grievant has been employed by the District since the 1982-83 school year as a High School Social Studies teacher. The parties' Collective Bargaining Agreement contains Article XVII, Professional Improvement, Section "A", as set forth above. The Grievant did not earn the requisite five credits prior to the start of the 1987-88 school year, however, the District erroneously advanced the Grievant to the sixth step on the salary schedule for the 1987-88 school year, but he was placed on the fifth step for the 1988-89 school year.

During the summer of 1988, the Grievant took two six credit graduate courses at the UW - River Falls -- a Taft seminar and an independent reading history course. The credits were quarter credits as opposed to semester credits. The Grievant received an "A" in both courses; however, due to a mix-up with the professor in the independent reading course, the Grievant received an "incomplete" which was not corrected until April of 1989. The Grievant was reimbursed $240.00 in the fall of 1988 for the Taft seminar and $240.00 in April of 1989 for the independent reading course when the grade was received. The Grievant was placed on the fifth step (BA + 4) for the 1988-89 school year.

In August, 1988, the Grievant filed a grievance with regard to the fact that he was being reimbursed at the rate of $40.00/credit vs. $60.00/credit. By the following letter of September 9, 1988 from the District Administrator, Paul Keeney, the Grievant was advised his grievance was being denied:

Dear Mr. Gibson:

Please accept this letter as a response to your grievance regarding reimbursement for college credits.

The collective bargaining agreement for the 1986-88 school years refers to credits in a number of places. Article XVII (B) refers to credits to advance on the salary schedule. The article specifically calls for the credits to be semester credits. Articles XVII (C), (D) and (E) all refer to the credits, and it is assumed they are the same kind of credits referred to in Article XVII (B), since they also discuss the credits required for advancement on the salary schedule. Article XIV (C) requires that credits for reclassification must be presented by the teacher to the Superintendent with proper verification no later than September 15. This seems to refer to the same kind of credits referred to in Article XVII. Article XIV (D) is the section referring to payment for completed credits. Since it is immediately following

Article XIV (C), it appears to refer to credits in the same manner as all other mentions of credits. The references in Articles XIV and XVII to credits refer to credits needed for advancement on the salary schedule. There appears to be no logical explanation for treatment of credits to be done in any other manner than to treat all credits as semester credits, or their equivalent. This being the case, it is my opinion that quarter credits be given two-thirds the weight of semester credits in both advancement and payment. Your grievance is therefore denied.

Sincerely,

Paul Keeney /s/
Paul Keeney

There is a factual dispute as to whether the Grievant simply let his 1988 grievance die or whether no further action was taken on his part due to representations made to him by Keeney that the matter would be taken care of in-house. The Grievant was placed on the sixth step (BA + 5) of the salary schedule for the 1989-90 school year. No grievance was filed for the 1988-89 school year regarding the District's failure to advance Gibson on the salary schedule, and no grievance was filed in the 1989-90 school year regarding his placement on the salary schedule.

In the summer of 1990, the Grievant took a five credit graduate course at UW - River Falls, which again was a quarter-credit class. The Grievant received reimbursement at the rate of $60.00 per quarter credit for that course. The Grievant was placed on the seventh step (BA + 6) of the salary schedule for the 1990-91 school year.

On September 19, 1990, the Grievant sent the following letter to Keeney and the Board:

September 19, 1990

To: Whom It May Concern

Ref: Step placement, back pay, and tuition reimbursement

Upon receiving my paycheck on September 14, 1990, and multiplying by 24, I find that my salary placement remains, for the THIRD consecutive year, incorrect. I have not agreed to this.

Having followed the normal grievance procedures, it is my intent to pursue other options available to me through legal recourse if this issue is not resolved promptly. Please respond within ten days of receiving this correspondence.

Gene Gibson

Gene Gibson /s/

cc: Ken Adams
    Paul Keeney
    Board Members
    NLEA
    CRUE
    WEAC

The Grievant received the following response from Keeney:

To: Gene Gibson
From: Paul Keeney
Re: Step placement on salary schedule
Date: October 17, 1990

Please accept this as official notification that the Board of Education has reviewed your grievance concerning your step placement on the salary schedule. They were unanimous in their opinion that when a teacher becomes "unfrozen" they advance to the next step on the salary schedule, and proceed to advance one step per year for every satisfactory year of experience after the "unfreezing". Your grievance is therefore denied.

By the following letter of November 6, 1990 to the chairman of the Wisconsin Employment Relations Commission, the parties requested the appointment of an arbitrator to hear the instant grievance:

November 6, 1990

A. Henry Hempe, Chairman
Wisconsin Employment Relations Commission
14 West Mifflin Street, Suite 200
P.O. Box 7870
Madison, WI 53707-7870

Dear Mr. Hempe:

Gene Gibson/New Lisbon Education Association and the New Lisbon School District request the appointment of an arbitrator to resolve a dispute regarding Mr. Gibson's salary schedule placement. This request is made pursuant to an arbitration proceeding contained in the Collective Bargaining Agreement between the New Lisbon School District and the New Lisbon Education Association.

Thank you for your attention to this matter.

Sincerely,

Gerald Roethel /s/
Gerald Roethel, Executive Director
Coulee Region United Educators

Larry J. Willer /s/
Larry Willer, President
New Lisbon School Board

The parties proceeded to arbitration of their dispute before the undersigned.

POSITIONS OF THE PARTIES:

Association:

The Association takes the position that the District violated the Collective Bargaining Agreement first by not paying the Grievant $60 per credit for the courses taken during the Summer of 1988 and secondly by the District's method of "unfreezing" the Grievant. The Association further asserts that the District violated the Agreement when it refused to accept the second set of six credits from the UW-River Falls toward the five semester credits in five years' requirement for the 1988-89 school year and advance him on the salary schedule that year.

With respect to the reimbursement for credits, the Association cites Article XIV, Section D, of the Agreement, which states in part: "Teachers will be paid sixty-dollars ($60) per credit . . . ." and asserts it makes no reference to "semester" credits, and notes there is no formula for converting credits. The District Administrator's response of September 9, 1988, attempts to link various sections of the Agreement, however, that linkage was never written into the Agreement. Some sections contain the word semester before the word credit, such as Article XVII, Section A, however, some sections do not, such as Article XIV, Section D. Thus, the language of the Agreement clearly does not contain a reference to semester credits for payment purposes and therefore requires that the District pay the full $60 per credit.

The Association also asserts that the practice in the District is not uniform. Twice the Grievant's spouse was reimbursed at $60 per quarter credit for classes taken at UW-River Falls and in the Fall of 1990 the Grievant was similarly reimbursed at $60 per quarter credit. The District entered into evidence the cases where prorationed amounts for quarter credit classes were paid. Thus, there has been an uncertain practice with regard to the reimbursement of credits. Since the language of the contract is clear in not requiring semester credits, the uncertain practice can not be used to justify the District's position.

The Association also contends that the principle that to express one thing is to exclude another applies. Article XVII, Section A, of the Agreement, includes the word "semester", while Article XIV, Section D, does not. That being the case, payment for credits must be at the rate of $60 per credit. Finally, in this regard, the Association asserts that the conduct of the District in paying the Grievant at $60 per credit in the Fall of 1990 must be considered. It asserts that since the District paid the Grievant at the rate of $60 for the five quarter credits taken in the Summer of 1990, the District must be in agreement with the Grievant's position or it would not have done so.

The Association makes a number of arguments in support of its position that the District violated the Agreement in the method of "unfreezing" the Grievant on the salary schedule. It asserts that the Agreement must be construed as a whole, and that when read as a whole it requires that the Grievant should have been placed at Level 6 in the 1988-89 school year, Level 7 in 1989-90 and Level 8 in the 1990-91. Essentially, the Association asserts that the levels on the salary schedule are commensurate with the teacher's experience. Article XIV, Section B, refers to initial placement on the salary schedule and places a cap of five years on outside teaching experience, however, within the limits of that cap, teachers are placed on a step commensurate with their experience. When someone does not earn the required five credits every five years, that teacher is barred from advancing on the salary schedule. If the teacher meets the credit requirements for the following year, the teacher is entitled to be restored to his or her experience level on the salary schedule. The District's movement theory invalidates that Step/Experience equation contained in Article XIV, Section B, since the teacher would never regain his or her seniority on the schedule under the District's

logic. Thus, the District's interpretation totally invalidates another portion of the Agreement and cannot be allowed to stand. Another problem with the District's placement of the Grievant on the salary schedule is that the District used the language of Article XIV, Section C, as the dominant language with regard to the reporting of credits. The Association asserts that language refers to "reclassification" and does not require "proper verification" by September 15. Citing the definition of "classification" in Black's Law Dictionary, the Association contends that definition applies to horizontal movement rather than lateral movement on the salary schedule. The Grievant completed 12 quarter credits in the Summer of 1988, but the professor failed to record the grade of the one class and that will now be used by the District to hold the Grievant on a step for an additional year. The Association asserts that is a "very harsh interpretation" when looking at the cumulative impact of freezing movement. The Grievant loses not only the one increment by virtue of the college's error, but also loses ten additional increments for the remaining ten years of advancement left on the salary schedule. This is an accumulative effect of over $5,000. Harsh and absurd results are to be avoided. Finally, the Association asserts that the bargaining history provides guidance in this case. The District sought in bargaining to obtain its position with respect to the unfreezing of teachers, however, the Association did not agree and took the position that the steps corresponded to years of experience. The Agreement was not changed and this conduct, along with the District's proposal, must now be considered and provides strong support for the Association's interpretation.

In summary, the Association concludes that the impact of the frozen advancement for failing to earn the five credits every five years is the penalty and that penalty should not be accumulative. Further, with regard to the credit reimbursement the Association concludes that the contract language provides for $60 per credit for completed course work and the District has paid $60 to other individuals for quarter credit classes. The Association also contends that the earlier grievance has never been resolved or withdrawn and the parties need a final resolution to their dispute.

District:

The District first takes the position that the grievance on step placement was not timely filed and that the issue has not been waived by the District. Article XIX, Grievance Procedure, at Step 1 states that: "Within five (5) days of the occurrence of the incident on which the complaint is based or first becomes known to the Grievant, an earnest effort shall be made to settle the matter informally between employee and his/her immediate supervisor . . . ." Step 4, paragraph 3, of the Grievance Procedure states that: "The matter must have been processed through the grievance procedure within the prescribed time limits, or the Arbitrator shall have no power or authority with regard to that particular grievance." The District notes that in his September 19, 1990 letter, the Grievant indicated that this was the "third consecutive year" that his pay was incorrect. While the Grievant's testimony was somewhat contradictory as to which three years he was referring, he later clarified his testimony to indicate he was referring to the 1987-88, 1988-89 and 1989-90 school years. The Grievant chose not to file grievances over his salary schedule placement until now even though he was aware of the problem for a number of years. The District asserts that the parties' Agreement has in essence incorporated the concept of the statute of limitations by specifying timelines and the lack of authority for the arbitrator to hear a grievance outside of those timelines. It further asserts that the Grievant presented no reasons or mitigating circumstances that would justify his waiting for the third consecutive year in which his pay was inaccurate to grieve. The District further asserts that the policy reasons that underlie the theory of a continuing grievance do not apply, since the Grievant believed he had been improperly paid for a number of years. Under that theory, the grievance would

end at any given school year.

With regard to the placement of the Grievant on the salary schedule, the District asserts that Article XVII is silent on the issue of step advancement once the person completes the credit obligation requirement. The parties have not chosen to negotiate specific language on that matter. Hence, the best that can be done is to look at what happened to other employes in that situation. The District asserts that only one other employe has been frozen, Kopplin. In a review of the evidence, it indicates that he was moved from Step 10 back to Step 4 after the error with respect to his earning credits had been discovered. Kopplin advanced one step at a time from where he was frozen, contrary to the Association's theory that when a teacher starts to move again after being froze, the teacher's years' of employment experience correlates to step placement. Thus, the experience with Kopplin rebuts the Association's theory.

The District asserts that contrary to the Association's assumption and the Grievant's testimony that he obtained 12 credits in the Summer of 1988, there is no evidence that the Grievant applied for those courses as required under Article XVII, nor is there any indication when, if ever, those credits were approved under either Article XVII or XIV, Sections C and D. The evidence indicates that in order to apply for credits an application has to be completed, and in order to receive payment and advancement on the salary schedule another form has to be completed. No documentation was presented to show that the Grievant applied for those courses and that the credits were approved, although such documentation was provided for the Grievant's spouse. The District asserts that an adverse inference can be drawn from that lack of documentation on behalf of the Grievant. The District also asserts that there is no documentation that the Grievant took the courses. The letter from E. M. Peterson (Association Exhibit 3) is hearsay and irrelevant. Further, there is no transcript, grade report or other similar documentation from the University indicating that the Grievant had taken any of the courses. The Grievant has the burden to prove that he in fact took the courses that would advance him on the salary schedule and he has not done so. It is asserted that the Arbitrator must rule on the evidence before him and cannot speculate as to what the parties have done. The District next asserts that the Grievant must first show that he applied for and had the credit approved, and that no evidence was provided of that. Secondly, he has to show that the contract language supports his position and clearly he cannot do so. At best he can only show that the contract is silent and there is nothing in the bargaining history to support his position. However, the District has presented evidence with regard to practice to support its position. Further, the concept of the salary schedule not representing years of experience for frozen people is fortified by that practice, the concept of freezing a teacher on step for failing to meet the credit requirement and the five-year cap for credit for prior experience in Article XIV, Sec. "B". Thus, the parties have recognized that a year of experience does not correlate one to one with placement on the salary schedule steps. Also, the salary schedule itself rebuts the notion of years' of experience relating to step placement. Teachers in the District continue through the salary schedule until they advance to Step 15. There is no advancement beyond that step and therefore the parties have recognized that full credit is not given for all years of teaching experience.

With regard to the credit reimbursement grievance, the District asserts that the Grievant filed the grievance regarding credit reimbursement in September of 1988, and chose not to pursue that grievance. That was not because of what the Board did, but due to the Grievant's own reluctance or unwillingness to press the grievance. The Grievant alleged that Keeney told him that he would take care of the matter in-house, however, the District questions why, when nothing happened, did the Grievant wait for three years to do something. It asserts that no rational explanation was offered by the

Grievant. While the concept of waiver is not to be lightly inferred, the equities in this case clearly support the District. A quick resolution would have benefited both the Grievant and the District and the matter potentially affected other people, as well. The Grievant's failure to process the grievance reinforced the District's belief that it was properly granting quarter credits at two-thirds the value of semester credits. The District questions whether all the other people affected are now going to grieve. The District cites Elkouri & Elkouri, How Arbitration Works, as to the application of the theory of "acquiescence" and asserts that waiting since September, 1988 to raise the issue is unreasonable and should bar the action in this case.

Next, the District asserts that the issue of credit reimbursement was not properly raised in this grievance. It asserts that nothing in the present grievance pertains to the quarter credit reimbursement and that even though the issue was litigated at hearing the initial grievance does not raise the issue. Fundamental fairness and due process requires that an employer being charged with violating the collective bargaining agreement at least know what is being alleged. No such notice was given in this case other than through the Association's statement of the issues. Given the Grievant's pattern of raising issues and dropping them for a number of years and the District's reliance upon that lack of action, the Grievant is not deserving of any compassion in this regard. Thus, his failure to pursue the 1988 grievance reinforces the position that the grievance should be barred.

The District also questions whether the credit reimbursement grievance was timely filed, and asserts that nothing in the record makes clear which credits and years are under discussion. No documentation was presented to show that the Grievant was denied credits, the time frame of the denial or the courses involved. The Grievant must prove his case and has failed to do so in this regard.

With regard to the actual merits of the credit reimbursement issue, the District asserts that Article XVII requires that teachers must earn a minimum of five semester credits every five years and that those credits may be used for salary schedule movement under Article XIV, Section C, and may be reimbursed under Article XIV, Section D. Since the credits under Article XVII are also usable under Article XIV, it is the Board's position that semester credits are paid at the rate of $60 per credit and quarter credits are valued at two-thirds of a semester credit. The District asserts that it is not clear whether the Grievant is grieving the fact that he was not paid $60 per credit or that the District reduced the value of the quarter credit to two-thirds that of a semester credit. It concedes that the Grievant's spouse received quarter credits that were not reduced in value and which were reimbursed at the rate of $60 per credit, however, the other examples presented by the Association, Hall and Thiede, are not born out by the evidence as no documentation was presented in that regard. On the other hand, the District presented documentation with regard to Evans which clearly indicates six quarter hours were converted to four semester hours and paid at $60 per hour, consistent with the District's interpretation. Similarly, Moothart's credits were reimbursed in that manner and in fact it appears that Moothart made those calculations himself. That same method was also used in reimbursing Kososki from 1984 through 1987. While the pattern has not been entirely consistent with the reimbursement of quarter credits, clearly the overwhelming pattern is that quarter credits are paid for at a reduced value.

DISCUSSION:

Issue (1)

The District contends that the grievance as to step placement is untimely

since by Gibson's own admission this was the third year he felt his step placement was incorrect. Contrary to the District's argument, this case presents the classic situation that many arbitrators have held to constitute a "continuing violation", i.e., the alleged violation occurs each time the employe is paid at the wrong rate. 2/ The remedy, so to speak, for the Grievant's sitting on his/her rights is to limit relief to prospective from the time of the filing of the grievance. In this case, the Grievant filed his grievance after receiving his first paycheck for the 1990-91 school year. On that basis, it is concluded that the grievance as to Gibson's placement on the salary schedule for the 1990-91 school year is appropriately before the Arbitrator. In addition to asserting his placement on the salary schedule should correspond to his years of experience, the Grievant also asserts he should have not remained frozen in 1988-89 and should have been advanced to Step 6, where he would have been had he not been frozen in 1987-88. However, whether the Grievant appropriately remained frozen in 1988-89 is not appropriately an issue before the Arbitrator, since two years had passed and the time for grieving that action was long past in September, 1990. It is noted that the Grievant's basic premise does not rely on what happened in 1988-89, as he contends that once unfrozen his placement on the steps of the schedule should correspond directly to his years of teaching experience.

Issue (2)

The evidence indicates that the Grievant was froze on Step 4 (fifth step) on the salary schedule for 1987-88, because he failed to obtain the five graduate credits during his first five years in the District as required for advancement on the salary schedule under Article XVII, Section "D", of the Agreement. The propriety of freezing the Grievant on the schedule for 1987-88 is not in issue; however, where the grievant was to be placed after satisfying the credit requirement is in dispute.

The relevant contractual language is contained in Article XVII, Sections A and D, of the Agreement, which provide as follows:

ARTICLE XVII
PROFESSIONAL IMPROVEMENT

> A. Teachers holding a Bachelor's Degree must earn a minimum of five (5) semester credits every five (5) years by summer school or extension courses. The five (5) credits must be graduate credits unless otherwise approved by the Superintendent and must be completed prior to the issuance of a contract for the sixth (6th) year. Fulfillment of the professional improvement obligation shall be figured from the date of earning the degree or the date on which the requirement was last met.
>
> . . .
>
> D. Failure to meet the above requirements shall make the teacher ineligible for advancement on the salary schedule but not ineligible for any base raise granted in the schedule.

2/ Elkouri and Elkouri, How Arbitration Works, 3rd ed., pp. 152-53.

The above wording is Section "D" is ambiguous on the point in question. The District asserts there is a past practice consistent with its interpretation, citing the instance involving Kopplin. While the treatment of Kopplin is consistent with the manner in which the Grievant was treated, there is no indication in the evidence that the Association was ever made aware of how Kopplin was treated and agreed, tacitly or otherwise, with that application of the Agreement. Hence, there is no binding practice in this regard.

The Association asserts that to accept the District's interpretation would invalidate the "step/experience equation" contained in Article XIV, Sec. B, of the Agreement. That argument is not persuasive since, as the Association concedes, that provision applies to initial placement of new teachers on the salary schedule. Further, that provision caps credit for prior teaching experience for salary schedule placement purposes at five years. Thus, there is not necessarily a one-to-one correlation between years of teaching experience and placement on the salary schedule. Moreover, while Article XVII, Section D is somewhat ambiguous, by providing that a teacher is ineligible for advancement if the credit requirement is not met, it necessarily infers that the teacher is again eligible to advance once the requirement is met. In the absence of evidence to the contrary, it is assumed that is advancement to the next step.

The Arbitrator is also not persuaded in light of the existing dispute that the District's failed attempt in bargaining to clarify the Agreement to expressly state the District's interpretation necessarily buttresses the Association's interpretation. 3/ It simply indicates that the District

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3/ See Elkouri and Elkouri, pp. 314-315:

> However, where a proposal in bargaining is made for the purpose of clarifying the contract, the matter may be

attempted to obtain its interpretation in express terms and that both parties chose to maintain their respective positions on how the provision is to be interpreted.

From the foregoing it is concluded that the Grievant has not established that the District violated the Collective Bargaining Agreement by its placement of him on the salary schedule for the 1990-91 school year.

Issue (3)

The Grievant also asserts as part of his grievance that the reimbursement of the quarter graduate credits he earned in the summer of 1988 at the rate of $40.00 per credit, as opposed to $60.00 per credit, violated Article XIV, Section D of the Agreement. The District asserts the Grievant is estopped from

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viewed in a different light. Arbitrator Sidney A. Wolff explains:

"* * * (I)t is fundamental that it is not for the Labor Arbitrator to grant a party that which it could not obtain in bargaining.

"This restriction, however, has its limitations. If, in fact the parties were in dispute, on the proper interpretation of a contract clause and one of them unsuccessfully sought in collective bargaining to obtain clarification, it would not necessarily follow that the interpretation sought by the unsuccessful party was wrong."

Then, too, a party's unsuccessful attempt to obtain a clause severely restricting the other party does not compel the conclusion that a limited restriction does not inhere in the contract. (Footnotes omitted)

raising the issue since he grieved the matter in 1988 and then let the matter die after his grievance was denied. The Association asserts the 1988 grievance was never resolved and that the issue needs to be decided.

The Grievant asserts he did not move on his 1988 grievance because the District Administrator suggested that they take care of the matter "in-house". It is noted that while the Grievant was reimbursed at the rate of $40.00 per quarter credit in 1988, he was later reimbursed at the rate of $60.00 per quarter credit for classes he took in 1990, and did not raise at that time the issue of what he asserts was his pending 1988 grievance. Rather, the Grievant waited until now to again raise the issue of the credit reimbursement he received in the fall of 1988. While some confusion with regard to the District Administrator's alleged suggestion might be understandable, the Grievant's waiting two years to again raise the issue leads the Arbitrator to believe that the Grievant had indeed let the matter drop and has now added it to the present grievance as an afterthought. Therefore, it is concluded that the issue of the amount of the credit reimbursement for the graduate quarter credits earned in the summer of 1988 is not properly before the Arbitrator, the Grievant having let the matter drop in 1988.

Based on the above and foregoing, the evidence and the arguments of the parties, the Arbitrator makes and issues the following

AWARD

1. The grievance is timely as to the Grievant's placement on the salary schedule for the 1990-91 school year.

2. The grievance, in so far as it goes to the Grievant's placement on the salary schedule for the 1990-91 school year, is denied.

3. The grievance, in so far as it goes to the issue of the Grievant's reimbursement for the graduate quarter credits earned in 1988, is not properly before the Arbitrator.

Dated at Madison, Wisconsin this 25th day of October, 1991.

By ______________________________
David E. Shaw, Arbitrator

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