BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
KENOSHA EDUCATION ASSOCIATION	:	Case 130
	:	No. 46185
and	:	MA-6902
KENOSHA UNIFIED SCHOOL DISTRICT NO. 1	:	

Appearances:
Mr. Michel R. Bernier, Executive Director, Kenosha Education Association, appearing on behalf of the Association.
Mr. Clifford B. Buelow, Davis & Kuelthau, S.C., Attorneys at Law, appearing on behalf of the District.

ARBITRATION AWARD

The Association and the District named above are parties to a 1990-1992 collective bargaining agreement that calls for final and binding arbitration of certain disputes. The Association requested, with the concurrence of the District, that the Wisconsin Employment Relations Commission appoint an arbitrator to hear and resolve a dispute concerning teachers' advancement on salary schedules. The undersigned was appointed and held a hearing in Kenosha, Wisconsin, on November 18, 1991, at which time the parties were given full opportunity to present their evidence and arguments. The parties completed their briefing schedule by February 12, 1992.

ISSUES:

The District raises the following issues:

Was the grievance timely filed?

If so, were teachers newly hired into the District during the 1990-91 school year with prior experience in another district improperly denied advancement on the salary schedule at the beginning of the second semester in violation of Article III-G of the Agreement?

The Association asks:

Did the District violate Article III-G of the Collective Bargaining Agreement at any time; and if so, what shall the remedy be?

The Arbitrator will address the following issues:

Was the grievance timely filed?

Did the District violate Article III-G of the Collective Bargaining Agreement by placing newly hired experienced teachers at a step number equal to their years of prior outside experience?

If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

III. SALARIES

G. Credit for Prior Experience

Any newly employed teacher contracted by the District shall be allowed an increment on the Teachers' Salary Schedule for each full year of full-time prior teaching experience up to and including eight (8) years. If credit for military service is allowed, this credit shall be included in the maximum of eight (8) years allowed for prior experience. Credit for prior teaching experience not claimed at the time of initial employment shall not subsequently be allowed, provided the newly employed teacher was advised of this clause prior to employment.

XVI. GRIEVANCE PROCEDURE

. . .

B. Definitions

3. There shall be no retroactivity prior to the date of the filing of the written grievance except that in the event of a payroll error not occurring as a result of teacher negligence, corrected payment shall be made retroactive to the beginning of the contract year in which the grievance is filed.

4. The President of the Association or any employe covered by this Agreement acting as his/her designee, may file a grievance on behalf of a group of individuals covered by this Agreement, if the issue is common to all the individuals in the group and with the approval of said individuals, or on behalf of an individual covered by the Agreement. Group grievances must be in writing pursuant to subsection B(5) and must

be filed directly with the Superintendent of Schools within twenty (20) school days after the individuals knew or should have known of the condition upon which the grievance is based or it will be deemed waived. Grievances filed on behalf of an individual must be filed directly with the grievant's immediate supervisor pursuant to Step One below. For purposes of this paragraph, "days" shall mean school days during the school year and calendar days during the summer.

. . .

BACKGROUND:

This grievance concerns the placement of teachers on the salary schedule and is limited to teachers who had experience outside of the District when they were hired by the District.

The parties stipulated that Article III-G of the collective bargaining agreement has remained the same for all years that are relevant, and there have not been any proposals or discussions to change Article III-G during negotiations.

The parties further stipulated that the District has always hired teachers with outside experience at a step equal to their years of outside experience. For example, a newly hired teacher with five years outside experience has always been placed at Step 5 of the salary schedule.

In 1984-85, the teachers' salary schedule had 14 steps, from zero or minimum through number 13. This schedule with its numbering system had been in effect for many years.

In 1985-86, the zero or minimum step was deleted, and there were still 14 steps, numbered one through 14. Teachers with zero or one year of teaching experience were placed at Step 1 on this schedule. Also, the increment was frozen, but as the steps were renumbered from 0-13 to 1-14, there was the appearance that teachers were advancing a step.

In 1986-87, the schedule continued to reflect 14 steps numbered one through 14, and teachers with zero, one or two years experience were placed at Step 2. The same structure continued in 1987-88, as well as 1988-89, with 14 steps and the hiring step at Step 2.

In 1989-90, the schedule was changed to 13 steps, numbered one through 13, and the hiring step was Step 1. The parties deleted Step 1, which had not been used for three years as the hiring step was Step 2 during the previous three years, and then renumbered the steps of two to 14 as one through 13. During these negotiations, the Association proposed to identity the salary steps by letters or a system other than the numbers, but no agreement was reached on that proposal.

In 1990-91, the schedule had 13 steps, numbered one through 13, with the hiring step at Step 1, and the increment for the 90-91 school year delayed until the 11th pay period which was January 25, 1991. The District hired teachers with experience outside of the District at a step equal to their years of outside experience (for five years experience, a teacher would be placed on Step 5), and teachers hired with no outside experience were placed at Step 1.

The manipulation of the salary schedule was a joint effort to increase entry level salaries and attract good teachers to the District.

It was traditional for the parties to implement the increment on the first day of school. In the bargaining for the 1990-91 year, the parties agreed to implement the increment for that school year on January 25, 1991. The Association published a notation in its newsletter for teachers to watch for the raise in salary in that pay period, and approximately 60 teachers did not receive it. It became obvious to teachers with experience outside of the District that their experience was being counted differently than teachers with experience inside the District. Teachers whose experience was gained at the District jumped one step ahead on January 25, 1991, to receive their incremental move, while teachers with experience outside the District did not move ahead.

The Executive Director of the Kenosha Education Association, Michel Bernier, was not aware of any dispute regarding placement on the salary schedule until an Association member brought it to his attention around February 14, 1991. Bernier was given a photocopy of a check stub and told that this member did not receive her increment and did not understand why. Bernier initially talked with District personnel. A grievance was signed by Sally Heideman on March 14, 1991, with a cover letter to Superintendent Anthony Bisciglia dated March 15, which was received by the District on March 18, 1991.

THE PARTIES' POSITIONS:

The Association:

The Association asserts that the grievance is timely, in part because the parties cannot establish the first date on which improper placement on the salary schedule occurred. The Association did not purposely ignore or abuse the time limits and filed the grievance within 20 working days of the time it knew of the violation following discovery of the facts upon which the grievance is based. The Association had no knowledge of the District's method of counting experience gained in another district until one teacher complained to an Association representative following the January 25, 1991, payroll. The Association still had no reason to believe that anything greater than a payroll error occurred on one teacher's check until it became clear to the Association that the District was counting service outside the District differently than service inside the District.

The Association further contends that the District's denial of proper placement on the salary schedule constitutes a continuing violation of the contract. The continuing denial of proper salary placement represents a day-to-day violation of the contract. The contract provides in Article XVI that there shall be no retroactivity prior to the date of the filing of a written grievance except in the event of a payroll error, corrected payment shall be

made retroactive to the beginning of the contract year in which the grievance is filed. The language of Article XVI, B, 3 suggests that payroll errors are recognized as continuing grievances, while protecting the District against claims for years of back pay. The Association notes that arbitrators have held improper salary schedule placement to be a continuing violation.

Turning to the merits, the Association notes that 1984-85 was the last year in which the salary schedule was composed of 14 steps numbered 0-13, and it was the standard for the District and set the standard by which the language of Article III-G must be measured. A new teacher without experience was placed at the zero step, which equalled the teacher's years of experience, and the teacher gained one more year of experience through 1988-89 when the step placement continued to equal the employee's years of completed experience. However, in 1989-90, the years of completed experience no longer equalled this employee's step placement, due to the shortening and renumbering of the salary schedule. This employee with five years of completed experience was on the fourth step of the salary schedule. Accordingly, up to that time, the District's longstanding practice of placing teachers on the step equal to their number of years of completed experience worked regardless of where the experience was accrued. This is why both parties can argue past practice and be correct -- the District argues that the applicable past practice dictates placement on the salary schedule at the step equal to an employee's years of completed experience, and the Association argues that years of completed experience being equal to step placement was a mere coincidence.

The Association believes that the practice which controlled for years is that experience, whether accrued in the District or elsewhere, was treated equally. But starting in 1989-90, the practice changed. If two teachers started their careers in 1984-85 -- one in Kenosha and the other in Racine --- they would not be on the same step if the Racine teacher transferred to Kenosha in the 1989-90 school year. The Racine teacher would be one step ahead of the Kenosha teacher. The parties did not intend to create a situation in which prior experience in another district would count for higher placement on the salary schedule, and the bargaining and manipulation of the schedule took place in a joint effort to increase entry level salaries.

The Association traces the careers of teachers starting in the 1985-86 school year when the parties agreed to renumber the salary schedule 1-14 from 0-13. The parties agreed to an increment freeze that year to help increase entry level salaries. Teachers starting their careers in the 1985-86 were put on the same step as those who already had one year of experience. A note on the salary schedule stated: "Steps represent completed years of experience." This note was necessary because the step placement of all continuing employees was equal to their years of completed experience, in spite of the increment freeze, and made it possible to place teachers on their proper step. New teachers were placed at Step 1, which did not represent their years of completed experience, and continuing teachers were placed at a step equal to their years of completed experience.

In 1986-87, teachers who started careers in other districts in 1985-86 and transferred to Kenosha would have placed on Step 1 while Kenosha teachers with exactly the same experience in Kenosha would have been on Step 2. The

Association finds this difference unjustified and asserts that the application of the District's practice not rational. For teachers who started their careers in 1985-86, the issue of which step they should be on becomes academic in the 1989-90 school year when the parties shortened the schedule to 13 steps numbered 1-13. By eliminating Step 1, all the numbers shifted up one notch, Step 2 became Step 1, etc., and this is another reason to use the practice of placing teachers at a step equal to the step of a teacher who started his/her career the same year as the teacher coming in with prior experience.

The Association traces the progression of a teacher starting his/her career in the 1986-87 year. Teachers with no experience were hired at Step 2, as were teachers with one or two years of experience, again as a joint agreement to raise entry level salaries. All other teachers were on a step equal to their years of completed service, as the schedule footnote specifies. Using the District's system of placing teachers new to the District on a step equal to their number of years of completed service, a teacher who started his/her career in Kenosha would be on Step 4 of the schedule in 1988-89, while the teacher with the same amount of experience gained in Racine would be placed on Step 2. In this situation, the prior service in Racine would place this teacher two steps behind his/her Kenosha peer. The number of years of completed service has no rational relationship to proper placement on the salary schedule, since experience in another district should result in schedule placement equal to a Kenosha teacher.

The Association illustrates the progression of a teacher starting in the 1987-88 school year, where the footnote on the salary schedule shows that the hiring step for those with no prior experience in Step 2. The Association contends that it is ludicrous for place a teacher with one year of prior experience at Step 1, when a teacher with no prior experience will be placed at Step 2. One year later, the teacher with two years of service (one outside the District and one inside the District) will be at Step 2 while the Kenosha teacher with the same number of years of experience would be on Step 4. While the District suggests that the footnote stating "Steps represent completed years of service" missing from the 1987-88 schedule was an oversight, the Association contends that the footnote was deleted because it was no longer relevant.

For a teacher starting his/her career in 1988-89, the schedule footnote shows that the hiring step is Step 2, and there is no reference that steps equal the number of years of completed service. The omission of the earlier footnote was necessary since the relationship between the number of years of completed service and proper placement on the salary schedule did not exist.

Finally, the Association looks at the situation that brought the problem to light. Two teachers start their careers, one in Kenosha, one in Racine. One year later, the Racine teacher transfers to Kenosha and is placed at Step 1 the step equal to his/her year of service. Because the parties agreed to implement the increments half way through the school year for 1990-91, the teacher with one year of completed service in Kenosha is also on Step 1. On January 25, 1991, the teacher with one year of service in Kenosha moves to Step 2 while the teacher with same experience in Racine does not advance. This is the event that triggered the Association's knowledge of the District's placement and resulted in the grievance.

In conclusion, the Association asserts that in order to find in favor of the District, the arbitrator must conclude the practice of placing newly employed teachers on a step equal to their completed years of service is the rational result of actions taken by the parties. However, all of the modifications made to the schedule were substantive in one form or another and affected the relationship between the step numbers and years of completed service. Prior to the 1985-86 school year when the first tinkering took place, the relationship between District service and service gained elsewhere was identical. The only past practice that can be shown to be consistent over the years is that service is service regardless of where it is earned.

The Association asks for an award of back pay consistent with Article XVIB,3, which allows retroactivity to the beginning of the school year. The Association requests that employees hired with prior experience for the past seven years be placed on a step equal to the step they would have been at had all their experience been gained in the District. The Association seeks adjustments to the beginning of the 1990-91 year for all hires prior to the 1990-91 school year; to January 25, 1991, for those hired in the 1990-91 year with one year of prior teaching experience; and to the beginning of the 1991-92 school year for all experienced new hires in the 1991-92 school year.

The District:

The District submits that the grievance was not timely filed. Article XVI, B, 4 of the Agreement governs the filing of group grievances such as this, and requires that group grievances be filed within 20 school days after the individuals knew or should have known of the condition upon which the grievance is based or it will be deemed waived. The individuals affected knew or clearly should have known they were denied an increment as of January 25, 1991, and 20 school days from January 25th is February 22nd. The grievance was filed March 18, 1991. While the Association argues that the 20 day period begins to run when the Association knew or should have known of the grievable event, the wording of Article XVI, B, 4 clearly states that the time begins to run when the individuals on whose behalf the group grievance is filed knew or should have known of the grievable event.

The District asserts that even if the time were to run from the point the Association had such knowledge, the grievance still was not timely. The Association knew of the grievance on February 14th, and the deadline for filing the grievance would then be March 13th. Although the grievance is dated March 12th, it was signed by Heideman on March 14th, mailed by the Association on March 15th and received by the District on March 18th. Thus, the grievance was untimely filed no matter whose knowledge is deemed to trigger the time lines.

If the grievance is found to be timely, the District submits that the newly hired experienced teachers were not entitled to the delayed increment. An increment is an annual advancement on the salary schedule granted to those teachers employed from one year to the next who have not reached the maximum step of the salary schedule. In order to receive an annual increment, a teacher must have been employed the prior school year. In this case, the newly hired experienced teachers were by definition not employed by the District the prior

year, and these teachers were no more entitled to an annual increment than teachers newly hired with no prior experience. Article III-G says nothing about annual advancement from one salary step to another, and it does not say that newly hired experienced teachers will receive the annual increment which is provided to teachers employed by the District in the prior year. All Article III-G says is that newly hired experienced teachers will be credited with prior experience, and it deals with the initial placement of an experienced teachers on the salary schedule, not with that teacher's subsequent incremental movement on the schedule.

The District further contends that the newly hired experienced teachers were properly placed on the salary schedule at the time of their hire. Article III-G both governs the placement of newly hired experienced teachers on the schedule and defines the time frame that an experienced teacher must claim credit for his or her prior experience. The last sentence of Article III-G states that credit for prior experience not claimed at the time of initial employment shall not be subsequently allowed, provided the teacher was advised of this clause prior to employment. Article III-G has a shorter dispute resolution deadline than that allowed by the grievance procedure and precludes challenges by a newly hired experienced teacher once that individual becomes an employee. In other words, the contract restricts challenges to a time frame when the individual is merely a job applicant, when one is not eligible to use the grievance procedure. Even if the 20 day deadline for filing grievances applies to disputes under Article III-G, the deadline would have begun to run the date these individuals were hired and placed on the salary schedule, no later than the first day of school. This grievance was filed about seven months later and should be deemed untimely no matter which dispute resolution deadline applies.

While the Association claims that the District improperly placed these teachers at the time of their hire, the District followed the same procedure it has always followed in applying Article III-G. The District placed newly hired experienced teachers at a step number equal to their years of prior outside experience. The parties agree that the District has always followed the same procedure as long as anyone can remember, and this undisputed fact must be deemed determinative unless the Association can produce compelling evidence that the District has been misinterpreting Article III-G all these years. The District asserts that the Association has produced no such evidence. The procedure used for years have never been challenged before and has never been the subject of any negotiations proposals or discussions, as could be expected if the District were not in compliance with Article III-G.

The salary schedule changes made in prior years were not intended to change the placement of experienced teachers under Article III-G. The Association placed heavy emphasis on changes made in the salary schedules over the last several years and argued that the District's application of Article III-G should have changed as a result of those schedule changes. The schedule changes were primarily directed at continuing teachers and new hires with no prior experience, rather than new hires with prior experience, and the disparities between continuing teachers and experienced hires were the direct result of the parties' joint efforts to increase entry level salaries for new teachers with no experience.

In 1985-86 when the parties agreed to freeze the increment but renumbered the steps from 0 to 13 to 1 to 14, one disparity created was to group teachers with 0 and 1 year of experience in the District at Step 1, and another disparity was to place new hires with one year of prior experience at the same step as new hires with no experience. When the hiring step was raised to Step 2 in 1986-87, teachers with 0, 1 and 2 years of experience were all placed at Step 2. For the first time, some newly hired teachers with prior outside experience were placed at the same step as teachers with lesser experience gained in the District. For example, a teacher with two years outside experience was placed at Step 2, the same step as a teacher with one of experience acquired in the District.

The hiring step remained at Step 2 through 1988-89, and during this time, the examples of disparities of teachers with outside experience and teachers with experience acquired solely in the District grew geometrically. But 1988-89, the following disparities could be found: (a) a newly hired teacher with 4 years of outside experience was placed at the same step (Step 4) as a teacher with 2 and 3 years of experience acquired solely within the District; (b) a newly hired teacher with 3 years of outside experience was placed at the same step (Step 3) as a teacher with 1 year of experience acquired solely within the District; (c) a newly hired teacher with 1 or 2 years of outside experience was placed at the same step (Step 2) as a teacher with no experience. Also, a teacher hired with 1 year of outside experience in 1986-87 was at Step 4 in 1988-89 (when the teacher had a total of 3 years of experience), the same step as a teacher hired in 1988-89 with a total of 4 years of outside experience.

The parties then deleted Step 1 from the schedule in 1989-90 and renumbered the remaining steps from 2 to 14 to 1 to 13. For the first time, a newly hired teacher with outside experience could be placed at a higher step than a teacher with an identical number of years of experience acquired solely within the District. For example, a newly hired teacher with 8 years outside experience was placed at Step 8, the same step as a teacher with 9 years of experience acquired solely in the District, and so on with 7, 6, 5, and 4 years of outside experience. The District notes that although these hires with outside experience remain on step ahead of teachers with identical inside experience, the Association wants these hires to advance to another step, putting them two steps ahead of teachers with identical inside experience.

The District points out that by 1989-90, the disparities were so numerous that it would be difficult to find an example of parity, except for a teacher hired with 4 years of outside experience placed at Step 4, the same step as a teacher with 4 years of experience acquired solely in the District. Teachers hired with outside experience of 3 years or less were at a step one less than their counterparts with an identical number of years in the District. The District asserts that the history of disparities growing in geometrical proportions is significant. Whether one calls it untimeliness, laches, sleeping on one's rights, the District submits that if there was ever a contractual basis for challenging the disparities which first arose in 1985-86, the time has long since passed for doing so, both as a legal and as an equitable matter.

The District asserts that there is no merit to the Association's argument that outside experience always used to be treated the same as inside experience

and still should be despite all the changes made to the schedule. The parties never expressly agreed to such a proposition. Beginning in 1985-86 and in 198687, the parties gave "bonus" years of experience to new hires with no experience in order to raise the entry salary level for those teachers. From this point on, inside experience generally was not treated the same as outside experience. The disparities were no accident, but were the product of a preconceived plan to raise the starting salary of teachers with no experience. Thus, the changes to the salary schedule were intended to affect new hires with no experience and not new hires with prior experience brought in under Article III-G. The District concludes that the Association's argument that the salary schedule changes require a change in the District's administration of Article III-G must be rejected because it is untimely and without merit.

In the event the Arbitrator finds a violation of Article III-G, the District asserts that back pay can go back no farther than March 18, 1991, when the grievance was filed, and can be awarded only to those teachers with prior experience who were hired in 1990-91. The contract provides that there shall be no retroactivity prior to the date of the filing of a written grievance except for payroll errors occurring not as the result of teacher negligence, in which case back pay can be award from the start of the school year. The District contends that this dispute is not the product of a payroll error but is the product of a dispute over the proper interpretation of the Agreement, and therefore back pay must be limited to the date the District received the grievance. Article XVI, D, 4, c provides that the Arbitrator "shall have no authority to impose liability upon the employer arising out of acts occurring before the effective date . . . of this Agreement," which took effect with the 1990-91 school year. Therefore, the Arbitrator cannot impose any liability upon the District with respect to experienced teachers hired prior to 1990-91.

The Association's Reply:

While the District has argued that teachers newly employed for the 1990-91 school year were not entitled to an incremental move, the Association asserts that the District has not cited any language, past practice or legal precedent for its position. Article III-G clearly allows for an increment on the schedule for each full year of full-time prior teaching experience up to and including 8 years.

Although the District claims that all teachers should have known of the circumstances giving rise to this grievance through the Association newsletter, the fact is that improper placement of teachers on the salary schedule remained undetected until sometime after the payroll of January 25, 1991. The Association contends that individuals affected by this grievance did not know they were improperly placed on the salary schedule at the time of their initial employment or at any other time until after the District withheld the increment of teachers newly hired for the 1990-91 school year. Moreover, the District should not be absolved of its obligations under the collective bargaining agreement simply because it was able to violate that agreement, undetected, for a given period of time. The only limitation is contained in Article XVI, B, 3, which allows for retroactivity to the beginning of the contract year in the event of a payroll error not occurring as a result of teacher negligence. The violation is that of Article III-G, the result is payroll error, and therefore

retrievable to the beginning of the contract year in which the grievance was filed.

The Association objects to the District's notion that Article III-G may only be grieved up to the date of initial employment. Individuals are not covered by the agreement until employed, the it defies logic to argue that once employed, those employees relinquish or lose their rights under Article III-G.

The Association states that after many years on granting newly employed teachers full credit on the schedule for years of full-time experience outside the District, the District unilaterally changed this practice. As many as 200 teachers have been placed on steps which are not consistent with their peers who gained all their experience as employees of the District. The parties agreed that newly employed teachers with outside experience would be treated as if their experience had been in the District, and that's what Article III-G means.

The Association concludes that the grievance must be sustained, and the District cannot be granted immunity by virtue of the length of time it was able to violate the agreement without being detected. The clear facts are that teaching experience gained outside the District has been treated differently than experience gained within the District, and this violates both the spirit and intent of Article III-G and must be remedied.

The District's Reply:

The District asserts that the Association has significantly changed its theory as to how the District allegedly violated the agreement. In the grievance, the Association asked that all affected teachers be granted an increment, which would have advanced all affected teachers one step on the salary schedule. Now the Association has done a 180 degree turn in its brief and asks that experienced hires be placed on the same step as their counterparts who have gained all their experience in the District, which would require some teachers hired with outside experience to be advanced an increment and many others to be reduced an increment.

The District states that the Association's shift in theories in an admission that its original theory was wrong and the District accepts that admission of error. However, when the arbitration hearing was held, the parties were prepared to present evidence and argue over whether the affected teachers were improperly denied an increment on January 25, 1991, and the parties were able to stipulate to all relevant facts. The Association's new theory is entirely different. The Association now argues that there was a prior agreement between the parties to treat service outside the District the same as service within the District. This is not the theory the District was prepared to answer at the arbitration hearing. As a result, the District asserts that if it had proper notice of the new theory, it would have presented additional evidence showing that over the years, service outside the District was not always treated the same as service inside the District, and that whenever the two have been treated the same, these similarities were not the product of an agreement between the parties to treat them the same. Accordingly, the District objects to the Association's shift in theories on the grounds that it has been untimely raised and has denied the District the ability to present contrary evidence.

The record does not support the Association's claim that the parties agreed to treat outside service the same as District service and the parties never reached such an agreement nor discussed the matter.

While the Association states that the District's application of Article III-G is irrational, illogical and unfair, it begs the question -- has the District violated the Agreement? One could argue that it was irrational or unfair to place teachers with differing years of experience on the same salary step, but that is exactly what the parties did in 1986-87 when they award bonus years of experience to some and placed teachers with 0, 1 or 2 years of experience on Step 2.

The District argues that the remedy now requested by the Association is irrational, illogical and unfair, as some teachers would move down and step and others would move up a step. For example, all teachers hired in 1990-91 with 6, 7, 8, 9, 10 or more years experience would be moved down a step. There is nothing fair about forcing a teacher to take a pay cut when the impetus for that pay cut is an untimely grievance. Similar corrections both up and down would have to be made for all experienced teachers hired in the last several years. The Association's remedy that teachers hired with 4, 5 or 6 years experience in 1990-91 be placed at Step 5 is also irrational and even contrary to the express provisions of Article III-G. The Association's theory also denies those teachers with 7 or 8 years experience an increment for each year, because it would move them down one step. On the other hand, the District's application of Article III-G gives experienced hires an increment for each year of outside experience, because the District placed them on a step number (1 through 8) equal to their years of outside experience. A chart of both parties positions demonstrates that the District has given experienced teachers one increment for each year of prior service up to 8 years as required. While the District's placement of experienced teachers may not be fair to teachers whose experience is solely inside the District, it was what is required by Article III-G.

The District maintains that Article III-G stands on its own, with its own set of rules for placing experienced teachers on the schedule, and these rules have not been changed. If the Association wanted to change how experienced hires were placed on the schedule, it should have proposed to change the language of Article III-G, but it never did. The salary schedule changes had nothing to do with the placement of experienced teachers and were not directed at such teachers.

The fact that the District has long applied Article III-G in the same manner must be given determinative weight. The District entered into the current agreement with the expectation that its application of Article III-G would continue for the life of the Agreement, and to change the application as a result of this grievance would not only be a surprise to the District, but it would also cost the District hundreds of thousands of dollars of unbudgeted funds.

The District recites 14 specific references in the Association's brief which it calls misstatements and restates much of its prior argument. It concludes by noting that the burden of proof is on the Association and contends that the Association has failed to carry its burden of persuasion in this case.

The District asks that the grievance be denied because it is untimely and because there has been no violation of the Agreement.

DISCUSSION:

Timeliness:

A discussion over whether the 20 day limit of the grievance procedure started to run on January 25 or February 14 of 1991 or at the date of initial employment of teachers with outside experience would be pointless, because this grievance has the classic earmarks of a continuing violation.

The doctrine of continuing violation is well-accepted in labor arbitration and is applied to certain types of cases. Arbitrator Seward in Bethlehem Steel Co., 20 LA 76 (1953), stated the following:

> . . . there is a clear distinction between claims which arise from single isolated events and those which are based upon a continuing course of Company action. It would be one thing to hold that when a transaction has been completed a failure to process a claim concerning that transaction within the contractual time limits properly bars its later consideration. It would be quite another thing to hold that when the Company has undertaken a permanent and continuing course of conduct alleged to be in violation of the Agreement a failure to process a grievance within 30 days would be a bar to all future efforts to have that course of conduct corrected.

Arbitrator Feinberg, in Bethlehem Steel Co., 26 LA 550 (1955), explained that a continuing grievance is one where the act complained of may be said to be repeated from day to day, such as the failure to pay appropriate wage rates, but held that a layoff, even in violation of seniority, was not a continuing violation. The purpose of the continuing/recurring grievance or violation rule is to be able to make an equitable adjustment if a violation is found, that there be some remedy and that the employer not be allowed to continue sheltering a violation which occurred some time ago in a manner to erode the bargaining agreement. 1/

Grievances involving wage rates and benefits are often considered to be of a continuing nature, as contract violations remain unremedied each pay period. 2/ Examples of disputes which have been held to be continuing violations include: an employer's method of apply negotiated wage increases, Bethlehem Steel Co., 34 LA 896 (Seward, 1960), and Steel Warehouse Co., 45 LA 357 (Dolnick, 1965); erroneous placement of an employee on a seniority list,

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1/ See Board of Education of Special School District 1, 81 LA 41 (Rotenberg, 1983).

2/ See Neville Chemical Co., 73 LA 405 (Richman, 1979).

American Suppliers' Inc., 28 LA 424 (Warns, 1957); misassignment of work, Copolymer Rubber & Chemical Co., 40 LA 923 (Oppenheim, 1963); reductions of sales commissions, Sears, Roebuck & Co., Inc., 39 LA 567 (Gillingham, 1962); failure to grant merit increases, Taylor-Winfield Corp., 65-2 CCH ARB Para. 8651 (Kates, 1965); transfer of teacher from counselor to classroom, Board of Education of Special School District 1, 81 LA 41 (Rotenberg, 1983); salary increase denial, San Francisco Unified School District, 68 LA 767 (Oestreich, 1977); etc.

This grievance is over the placement of certain teachers on the salary schedule. Although the first alleged violation may have occurred some time ago, the District's method of placing teachers with outside experience on the schedule is a continuing and ongoing course of conduct. The teachers' salaries continue to be affected on an ongoing basis by their placement on certain steps of the salary schedule. Each pay period represents a potential grievance as the schedule placement has a recurring effect. The payment of inappropriate wage rates fall well within arbitral precedent regarding continuing violations, and that is the heart of the issue in this grievance.

Accordingly, the Arbitrator finds that the grievance is timely filed as it represents a continuing violation.

The District raises another matter of timeliness regarding the wording of the last sentence of Article III-G, which states: "Credit for prior teaching experience not claimed at the time of initial employment shall not subsequently be allowed, provided the newly employed teacher was advised of this clause prior to employment." The District believes that this sentence precludes challenges by a newly hired experienced teacher once that individual becomes an employee, and even if the general 20 deadline for filing grievances is applied to Article III-G, the time would have begun to run when those teachers were hired and placed on the salary schedule.

However, the last sentence of Article III-G deals with a different type of claim that the one being asserted in this grievance. The teachers are not asking for credit not claimed at time of initial employment - they are asking to receive the increment for prior teaching experience which they already claimed at the time of initial employment. The last sentence of Article III-G precludes teachers from claiming additional credit beyond what they claimed at the time of initial employment, and there is no evidence on the record that any teachers with outside experience are making a claim for more years of experience now than what they originally claimed when hired. They are asking to receive the increment promised in the first sentence of Article III-G for experience already claimed.

There is nothing in Article III-G that bars this grievance on the grounds of timeliness.

Limitations on the remedy will be discussion in the last portion of this Award.

The Merits:

While the District has framed the issue in a narrow manner and the Association has framed it in a broad manner, the parties agree that if a violation occurred, it is limited to teachers who had experience outside of the District when they were hired by the District. Article III-G governs the placement on the salary schedule of such teachers. The basis of the dispute centers on one of the stipulations in the record -- that the District has always placed teachers with outside experience at a step equal to their years of experience. If a teacher had one year of experience outside of the District, he or she was placed at Step 1 when hired by the District. If a teacher had five years of outside experience, he or she would be placed at Step 5. 3/ Thus, the Arbitrator has framed the issue to reflect the basis of this dispute in the following manner:

> Did the District violate Article III-G of the Collective Bargaining Agreement by placing newly hired experienced teachers at a step number equal to their years of prior outside experience?

In order to answer the question, one has to look at the language of Article III-G in connection with the salary schedules. Article III-G stands on its own, and it is the method for placing newly hired experienced teachers on the schedule, without regard to teachers with experience inside the District. The simple question is -- did the District allow an increment on the salary schedule for each full year of full-time prior teaching experience up to and including eight years when hiring teachers with teaching experience outside of the District? Unfortunately for both the District and many teachers, the answer appears to be no, not when the District kept its formula of placing newly hired experienced teachers at a step number equal to their years of prior outside experience once the zero step was eliminated.

The zero step was the step placement for teachers with no experience. Once it was gone, Step 1 represented no experience. In order to give an increment under Article III-G for one full-year of prior teaching experience in years when Step 1 represented no experience, a teacher would have to be placed on Step 2. If the teacher were placed at Step 1 when that step represented no experience, where was the increment promised in Article III-G? In reality, the District gave no credit for the one year of prior experience to the teacher with outside experience when it placed that teacher on Step 1. The teacher with greater years of experience would continue to lose one increment by the District's method. If a teacher had four years of prior experience when being hired by the District, that teacher would have to be placed on Step 5 in order to receive all the increments promised under Article III-G. When placed at Step 4, the teacher lost one increment which should have been given according to Article III-G.

Going back through the parties' bargaining history, one has to look at each year and what the salary schedule contained that year in order to determine

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3/ TR - pages 4 - 6.

whether an increment was given. In 1984-85, the minimum step was in place. If a teacher with one year of outside experience was hired at Step 1, under the District's consistent formula, that teacher was given one increment for one year's experience.

However, in 1985-86, the minimum step was deleted at the schedule starts at Step 1. If the District now placed a new teacher with one year of outside experience at Step 1, how is the increment promised in Article III-G given to that teacher? This teacher would have had to be placed on Step 2 in order to receive an increment for the one year of outside experience. 4/

In the following three years - 1986-87. 1987-88, and 1988-89 -- the hiring step was Step 2. If the District placed a new teacher with one year of outside experience at Step 2, in accordance with its hiring practice for those three years, it actually gave the teacher the increment for the one year of outside experience. New teachers with no experience were the teachers who gained a bonus year. Article III-G was not intended to address teachers with no experience, only to give credit to teachers with experience. But if a teacher had two years of outside experience and was hired during those years, he or she would have to be placed on Step 3 in order to receive credit for two years of teaching experience.

In 1989-89, the hiring step returned to Step 1, as the parties again revised the schedule by deleting Step 1 and renumbering the steps of 2 through 14 as 1 to 13. Again, if a teacher with one year of outside teaching experience was hired in 1989-90, in order to be given the increment in accordance with Article III-G, that teacher would have to be placed on Step 2. The same holds true to the year of 1990-91.

In short, the system of the step equalling the number of years of experience no longer worked once the zero or minimum step was not in place. Thus, the District's prior formula violated Article III-G by not allowing an increment for prior experience in accordance with Article III-G and in reality with the schedules as they existed since 1985-86.

A few words need to be said about some of the parties arguments, although it is unnecessary to address every single argument. First of all, the Arbitrator rejects the Association's notion that outside experience was always intended to be treated exactly like inside experience. The record reflects otherwise. The tinkering with the starting salaries shows that even inside experience would not be treated the same as inside experience, or that inside experience would not be treated the same as no experience. That was the predictable result of the first deletion of the zero step, as well as the result of the three years of giving a bonus year to teachers without experience.

4/ There is a notation on the bottom of the schedule that says: "Effective the 1985-86 school year, teachers with 0 or 1 year experience will be placed at Step 1." However, the District argues, and the Arbitrator agrees, that Article III-G stands alone and was never intended to be affected by the parties' tinkering with the salary schedule when they made certain efforts beginning in 1985-86 to boost starting salaries.

Therefore, it is inappropriate to track the steps of teachers with outside experience by matching their progress with teachers with inside experience. The sole question is whether teachers with outside experience were given the promised increment(s) in accordance with Article III-G. If they were ever given the correct increment(s), whatever happened to their progress in later years -- when increments were frozen or delayed or teachers moved down (or up, depending on perspective) or stayed on the same step number as steps were renumbered -- is irrelevant, as those changes were part of the bargain once they were on board. Many inequities and disparities were created as part of the parties' bargaining history, and those disparities will not be recognized as part of this Award. The only concern of this grievance is whether there is a violation of Article III-G, and where there is such a violation, it may be remedied to a limited extent.

The District has argued that newly hired experienced teachers were not entitled to the delayed increment, because an increment is an annual advancement granted to those employed from one year to the next. That is essentially correct in the context of a frozen or a delayed increment. However, that argument ignores the basic issue of whether the newly hired experienced teachers were given the proper increment in the first place in accordance with Article III-G. That contract section treats experienced teachers as if they had been employed by the District in the prior year and gives them the same credit as if they had been on staff.

The real question surrounding the delayed increment for 1990-91 is the following -- did the parties intend to delay the increment for ongoing teachers without affecting the increment promised in Article III-G? The Arbitrator believes that the parties most likely intended to delay the increment for ongoing teachers without affecting the increment promised in Article III-G, because the parties have stipulated that they never negotiated over Article IIIG, and never intended to make any changes to Article III-G. As the District has stated, Article III-G stands alone. Therefore, once the District placed newly hired experienced teachers on the schedule, they would not necessarily have been entitled to the delayed increment <u>if</u> they had been given the correct increment in accordance with Article III-G in the first place. However, it was the improper denial of the Article III-G increment in conjunction with the delayed increment which brought the problem to light. For example, Joint Exhibit #21 shows that Kathleen Belshaw was credited with 7 years of outside experience and placed at Step 7 in 1990-91. If Belshaw had been placed at Step 8, in order to receive the 7 years prior experience, she would not be entitled to move to Step 9 in January of 1991. A teacher on staff in 1989-90 ending that school year at Step 7 would have remained on Step 7 for the first portion of the 1990-91 year, and moved to Step 8 in January of 1991, due to the delayed increment.

The District has also argued that the fact that it always followed the same procedure of placing newly hired experienced teachers at a step number equal to their years of prior experience must be deemed to be determinative in resolving this grievance. The Arbitrator disagrees. The fact that the procedure became the incorrect procedure some time along the way does not mean that it should continue to exist. The District asserts that the Association must produce compelling evidence that the District has misinterpreted Article III-G all these years. The compelling evidence is found in the salary schedules

themselves, and the fact that in order to give the increment promised in Article III-G, the District would have had to change its procedure of steps equalling years of experience. The District has failed to show that it was in compliance with Article III-G by its procedure, and it has not demonstrated how it gave newly hired experienced teachers the increment promised in Article III-G by its old formula that worked when there was a zero step but no longer worked once the zero step was eliminated. 5/ The salary schedule changes, while geared to boost starting salaries, demanded a change in procedure to come into compliance with Article III-G.

Accordingly, the Arbitrator finds that the District violated Article IIIG of the collective bargaining agreement by placing newly hired experienced teachers at a step number equal to their years of prior outside experience, and that this violation potentially started occurring in the 1985-86 school year.

The Remedy:

The contract provides for certain limitations on the potential remedy in this case. Article XVI, B-3 provides:

> There shall be no retroactivity prior to the date of the filing of the written grievance except that in the event of a payroll error not occurring as a result of teacher negligence, corrected payment shall be made retroactive to the beginning of the contract year in which the grievance is filed.

There are two issues regarding back pay and its retroactivity. One is the effective date of back pay, the other involves which teachers would be entitled to any back pay.

The District attempts to limit the potential class of teachers eligible for a remedy by pointing to Article XVI, D, 4, c, which states: "The arbitrator shall have no authority to impose liability upon the employer arising out of acts occurring before the effective date or after the termination date of this Agreement." The District believes that such language restricts the Arbitrator from impose any liability upon the District with respect to teachers hired prior to the 1990-91 school year.

The language of Article XVI, D, 4, c, refers to "acts occurring before the effective date or after the termination date of this Agreement." Due to the continuing nature of the violation, the acts are recurring and constitute a continuing course of conduct involving the payment of salaries at every given payroll date during the term of this Agreement with respect to teachers hired

5/ It is perhaps unfortunate that the parties did not agree to the Association's proposal during a round of bargaining that they call the steps something other than numbers, perhaps lettering them A through M. Had they done so, the District would have had to rethink its system of granting increments under Article III-G.

prior to the 1990-91 year. The District has continued through the term of the current contract to place teachers at inappropriate salary steps.

Therefore, the class of teachers eligible for relief includes all teachers hired by the District who had prior teaching experience when hired by the District since 1985-86 and who were potentially misplaced on the schedule. Teachers no longer employed at the time of the filing of the grievance are not entitled to any relief, because this is an ongoing and continuing violation and cannot be considered to be ongoing to them.

As to the effective date of back pay, the issue is whether this violation is a payroll error not occurring as a result of teacher negligence, in accordance with Article XVI, B, 3. If so, the back pay may be made retroactive to the beginning of 1990-91, the contract year in which the grievance was filed. If not, back pay is limited to the date of the filing of the grievance in March of 1991.

The District has argued that this type of violation is not a payroll error contemplated by Article XVI, B, 3, but a dispute over the interpretation of Article III-G. The Association considers this violation a payroll error which may be remedied back to the beginning of 1990-91. The contract language refers to a "payroll error not occurring as a result of teacher negligence." There is no suggestion that the payroll error would have occurred due to teacher negligence, such as a teacher reporting the wrong amount of a reimbursable item. Here, the teachers could not have caused the error because they had no control over their placement on the salary schedule. The question is, then, is this violation the type of payroll error entitled to retroactive relief to the beginning of the contract year?

There is hardly any greater payroll error than to be paid at the wrong salary due to the misplacement on the schedule by the District. The error has not occurred as a result of teacher negligence, but through District error. The language of Article XVI, B, 3, regarding payroll errors at least contemplates situations where someone paid incorrectly through no fault of their own would be made whole to the beginning of the contract year. Whether it is a computer entry error that triggers the wrong salary placement or the District's error in its application of Article III-G, it is still a payroll error when one receives the incorrect salary. The proper period of retroactivity for back pay runs back to the beginning of the contract year of 1990-91 in accordance with the full language of Article XVI, B, 3.

The individual teachers affected by this grievance have not been previously identified except as examples. In order to give a full remedy in this case, the

parties need to jointly take the following actions: 6/

1. The parties shall jointly obtain the names of all teachers hired by the District from 1985-86 through 1990-91 who had teaching experience outside of the District when hired. Teachers who were hired during this period of time but who are no longer employed by the District are not entitled to any relief. Teachers who would not be entitled to any step due to having reached the last step by the beginning of 1990-91 are not entitled to any relief. The parties shall create a list of all teachers potentially entitled to back pay.

2. The parties shall jointly look at each teacher potentially affected and determine the following:

a. The date of hire.
b. The number of years of outside experience claimed by the teacher at the date of hire.
c. The step placement of said teacher.
d. The salary schedule in effect at the time of hire.

3. The parties shall look at the date of hire, the years of outside experience claimed at time of hire, and the step placement of each teacher in conjunction with the salary schedule in effect at the time of hire. The parties shall make efforts to determine what the correct placement of each teacher would have been at the time of hire to conform with the requirements of the increment promised in Article III-G.

4. The parties shall trace the progress of each teacher through the years with the salary changes, including reduction in step numbers or frozen or delayed increments, and determine where each teacher should have been at the beginning of 1990-91.

6/ While the burden in on the District to comply with back pay where necessary, it is incumbent upon the Association to work with the District to develop all the data necessary to do this. The Association has brought this grievance on the behalf of a class of teachers who are not fully identified but who are identifiable through the efforts and resources of both the District and the Association. Furthermore, the Association will not be satisfied that placement of teachers with outside experience is corrected unless it participates in the process in the remedy phase. Thus, the Arbitrator is ordering the parties to jointly participate in the development of the process to achieve the remedy.

5. The parties shall then place each teacher at the appropriate step at the beginning of 1990-91 and determine what, if any, back pay is due to each teacher.

6. The District shall, as soon as possible after the completion of the above steps, pay each teacher entitled to back pay the full amount of said back pay.

A few words of caution -- the parties should disregard the step placement of teachers who experience is solely within the District. As previously noted, Article III-G does not mean that teachers with outside experience have to be placed on the same step as teachers with inside or no experience. The parties should focus on the narrow question of whether the teachers with outside experience were credited with the increments promised in Article III-G when hired. If so, there is no remedy to them. If not, the appropriate remedy is only for back pay to the beginning of the 1990-91 school year, and not for any other years in which teachers may have been placed at the incorrect step of the schedule.

Also, the parties need to be cautious about the three years when the hiring step was Step 2. As noted earlier in this Award, if the District hired teachers with one year of outside experience and placed them on Step 2 during this period of time, the District actually gave them one increment for one year of prior experience. Such placement is proper within Article III-G, despite the advantage that teachers with no experience would gain over them, because the parties bargained to give teachers with no experience the bonus years.

Once properly placed on the schedule, teachers must advance or stay in place with the subsequent schedules as changes occurred over the years. This is why it is necessary to trace the progress through the schedule with the schedule changes, to reflect the renumbering that occurring in 1989-90, as well as the delayed increment in 1990-91, in order to properly determine where teachers should have been at the beginning of the 1990-91 school year.

Finally, the Arbitrator will continue to retain jurisdiction until the parties have completed the process of correcting all potential violations and so notify the Arbitrator that a complete remedy has been achieved. If the parties are unable to resolve any disputes over any group of teachers or any one individuals placement, they should jointly contact the Arbitrator.

AWARD

The grievance is timely because it constitutes a continuing grievance/violation.

The District violated Article III-G of the Collective Bargaining Agreement by placing newly hired experienced teachers at a step number equal to their years of prior outside experience.

As a remedy, the District shall undertake the remedial action noted above in the Remedy section of this Award.

The Arbitrator will retain jurisdiction as noted above.

Dated at Madison, Wisconsin this 11th day of May, 1992.

By _____
Karen J. Mawhinney, Arbitrator

KJM
Kenosha