BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
CHIPPEWA FALLS FEDERATION OF TEACHERS, LOCAL 1907, WFT, AFT, AFL-CIO	:	Case 102 No. 48152 MA-7523
and	:	
CHIPPEWA FALLS AREA SCHOOL DISTRICT	:	

Appearances:

Ms. Patricia Underwood, Representative, Wisconsin Federation of Teachers, on behalf of the Chippewa Falls Federation of Teachers, Local 1907, WFT, AFT, AFL-CIO.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. James M. Ward, on behalf of the Chippewa Falls Area School District.

ARBITRATION AWARD

The Chippewa Falls Federation of Teachers, Local 1907, WFT, AFT, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Chippewa Falls Area School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on March 2, 1993 in Chippewa Falls, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by May 18, 1993. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated to the following statement of the issues to be decided:

> Did the Employer violate Article V, Section D, of the Master Agreement by not allowing the Grievant to post into the .25 time Adaptive Physical Education position?
> If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1990-92 Master Agreement are cited:

ARTICLE IV
Grievance Procedure

. . .

Section C. Procedure for Adjustment of Grievance

. . .

Step IV

. . .

2. Nothing in the foregoing shall be construed to empower the arbitrator to make any decision amending, changing, subtracting from, or adding to the provisions of this agreement. The decision of the arbitrator shall be final to the dispute and both will abide by it.

ARTICLE V
Working Conditions

. . .

Section D. Voluntary and Involuntary Transfers

1. Voluntary Transfer

a. A list of all known vacancies shall be posted in each school and in the Board office as they become known to the administration. A list of any existing vacancies shall be posted in the Chippewa Herald Telegram on each Monday throughout the summer months, and application for such vacancies must be received in the Board office by noon of the following Friday. Vacancies of less than one (1) semester need not be posted.

b. Requests for transfers shall be submitted in writing to the

Superintendent within five (5) calendar days after the posting of the vacancy.

c. Such requests shall be granted on the basis of:

1. Training, certification, and experience of the teacher in relationship to the requested position.

2. All factors being equal, district seniority in the school system.

3. Priority of request in the case of tied district seniority shall be determined by the Superintendent.

d. Notice of all positions shall clearly set forth the qualifications for the position or positions.

e. Where requests for transfer have been approved, notification shall be given to all applicants for said positions within five (5) calendar days. New teachers will not be hired to fill a position until teachers already in the system have had an opportunity to apply.

f. Applicants not employed in the system shall not be hired until teachers in the system have had an opportunity to apply for the position according to the procedure outlined above.

Notice of transfer shall be given to the teacher no later than the end of the school term, except if the vacancy should occur after that date.

g. If a teacher in the system does not receive the position, that teacher, upon request, shall be notified in writing of the reasons for not receiving that position.

. . .

APPENDIX D

Management Rights

The Board, unless otherwise herein provided, hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right:

1. To the executive management and administrative control of the school system and its properties and facilities.

2. To hire all employees and, subject to the provisions of law, to determine their qualification and the conditions for their continued employment.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgement and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes: 111.70, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin and the Constitution and laws of the United States.

BACKGROUND

The Grievant, Terri Weichel, has been regularly employed by the District on a part-time basis since the beginning of the 1991-92 school year as an Elementary Physical Education teacher at Korger-Chestnut Elementary School. Prior to that, the Grievant

had been employed by the District as a long-term substitute in Physical Education over a span of several years. The long-term substitute positions included teaching three months in 1990 in K-5 Physical Education and Practical Living Skills. The latter area involved working with students who are cognitively delayed and also have motoric problems. From September, 1988 to May, 1989 she was a long-term substitute for Debbie Erb at the Middle School in Physical Education, part of which was working with individuals that were cognitively disabled and individuals with motoric problems in an aquatic program and the gym. From January, 1986 to January, 1987, the Grievant was a long-term substitute for the instructor for Physical Education in the Mentally Retarded Program working with individuals up to age 21 in the aquatic program and the gym. The Grievant also was a long-term substitute for two months in 1984 in Chaska, Minnesota in Physical Education and worked with students with cerebral palsy and muscular dystrophy. During 1983 and 1984 the Grievant also was a substitute teacher in a number of area school districts.

In the spring of 1992, the Grievant was granted an "860 license" to teach in the Adaptive Physical Education area. It was also sometime in early 1992 that the State began requiring an 860 license to teach in that area.

Debbie Erb was a full-time teacher in the District, .25 of her position being Adaptive Physical Education in the elementary and .75 being regular Physical Education at the Middle School. A need developed for an additional .25 regular Physical Education position at the Middle School and Erb posted into that position, making her full-time at the Middle School and leaving the .25 Adaptive Physical Education position vacant. Erb had informed the Grievant she was leaving the .25 Adaptive Physical Education position and the Grievant sent the District's Superintendent, Dr. Annett, the following letter indicating her interest in the position:

> Dear Dr. Annett:
>
> This letter is in regard to the Specially Designed Physical Education position that is currently open in the Elementary Program. I am currently returning for my second year at Korger-Chestnut Elementary in Physical Education. I would like to at this time be considered for the additional position. I have completed my 860 certification from the University of Wisconsin-Eau Claire as of May.

I have been in contact with Ron Krueger in regard to this position. George Pehler has assured me that flexibility at Korger-Chestnut would make room for this program. If there is any further information needed please feel free to contact me at [phone number].

Thank you for your time and I look forward to hearing from you.

Sincerely,

Terri L. Weichel /s/
Terri L. Weichel

The .25 Adaptive Physical Education position was both posted and listed in the local newspaper as follows:

CHIPPEWA FALLS AREA SCHOOL DISTRICT

NOTICE OF VACANCY
FOR UNION PERSONNEL

POSTING DATE:	June 14, 1992
POSTING DEADLINE:	June 18, 1992
CLASSIFICATION:	Teacher (.25 Position)
PROGRAM AREA:	Specially Designed Physical Education
LOCATION:	District wide
LENGTH OF CONTRACT:	Beginning 1992/93 School Year
SALARY:	As per Master Contract
FORMER EMPLOYEE:	New (D. Erb)
	VACANCY #: 111
QUALIFICATIONS:	Adaptive Phy. Ed. Certification (860)

> By the last date of posting, a letter of intent to transfer into this position must be received in the Administration Office. Send the letter to Dr. Larry Annett, Chippewa Falls School District, 1130 Miles Street, Chippewa Falls, WI 54729

On June 24, 1992, Dr. Annett sent the Grievant the following letter:

> Dear Terri:
>
> We will be posting the special designed Physical Education (.25) position in the placement bulletins. I will consider your letter to me as your official application and will be happy to interview you along with other potential candidates for the job as soon as the posting closes, which will be no sooner than July 10th.
>
> Sincerely,
>
> Larry D. Annett /s/
> Larry D. Annett
> Superintendent of Schools

The Grievant was the only internal applicant for the position. Apparently questioning the need to compete with other applicants for the position, the Union's Grievance Chairperson, Donna Martin, met with Dr. Annett on July 1, 1992, and was advised the Grievant could apply for the position and compete with other applicants, but could not post into the position while retaining her .20 position. By letter of July 10, 1992, Martin advised Annett that it was the Union's position that a teacher could hold two positions at the same time and that the Grievant's seniority gave her the right to post into the .25 position. The dispute was processed through the grievance procedure. With the grievance pending the District filled the .25 position with a long-term substitute teacher and ended the regular hiring process for the position. That substitute did not have 860 licensure at the time he was hired, but upon the District's application in December of 1992, was granted an emergency license in January of 1993 for the 1992-93 school year. The Grievant contacted Dr. Annett approximately two weeks before the start of the 1992-93 school year to discuss the matter and asked why she had not been interviewed. The Grievant testified Annett told her she would receive an interview if she had the Union drop the grievance. Dr.

Annett testified he told the Grievant that the hiring process had been stopped and that they were not going to fill the position in the midst of a grievance.

The parties were unable to resolve their dispute and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the Grievant had the right under the Agreement to post into the .25 Adaptive Physical Education position and could do so without relinquishing her .20 position. In support of its position, the Union asserts that the language of Article V, Section D,1,C, of the Agreement is clear and unambiguous that there are three criteria for employe transfers: (1) the training, certification and experience of the teacher in relationship to the requested position; (2) if all factors are equal, district seniority; and (3) priority of the request in the case of tied district seniority is determined by the Superintendent. The Grievant testified she had obtained her 860 license and had relevant work experience. Since the Grievant was the only bargaining unit member to apply for the position, the second and third criteria do not apply.

The Grievant also testified that she was not interviewed for the .25 Adaptive Physical Education position and that when she asked the Superintendent about it, he stated she would be granted an interview if she had the Union drop the grievance. That testimony was supported by the Superintendent's testimony as to their conversation. The Union concludes that, given the Grievant's training, certification, seniority, and experience, she should have been awarded the position, and since the District denied her an interview for the position based on her grievance, the District violated the Agreement in failing to award her the position.

With regard to the Superintendent's testimony that he feels that teachers with less than .50 status should not have posting rights to jobs of greater status, the District included language to that effect in its preliminary final offers, demonstrating that while the District preferred such a restriction, the Agreement does not contain it. The District's proposed language was not agreed to by the parties, nor was it discussed in any of the joint bargaining sessions. The Agreement would have to be amended to include language similar to the District's proposal in order for it to prevail in this case.

The Union notes that the District filled the .25 position with an outside applicant who was not certified in the area. The District later requested an emergency license for the long-term substitute it hired in place of the Grievant. That request was

subsequently granted by the State Department of Public Instruction (DPI), however, the District had failed to mention in its request that it had a fully-licensed and experienced candidate who had applied for the job.

In its reply brief, the Union notes the District's reference to possible scheduling conflicts if the Grievant were to hold both her present position and the .25 Adaptive Physical Education position, and asserts no such conflicts were presented. In response to the District's contention that a position that is considerably less than .50 time attracts only marginally qualified candidates, the Union asserts no evidence was presented to show this was the case when the Grievant was hired for her current position or that the Grievant is not completely fulfilling her current duties. As to the District's decision not to enter into a contract with anyone to fill the .25 position pending the outcome of this arbitration, the Union asserts that is in violation of Article V, Section D, and also appears to be retaliation against the Grievant for filing the grievance.

The Union concludes that the District did not have the right to deny the Grievant the .25 Adaptive Physical Education position on the basis she was seeking a cross-certification transfer or because she was seeking to "add-on" one position to another. The Union requests a finding that the Grievant should have been offered the position and an order that the Grievant be made whole for any lost wages or benefits as a result of not being offered the position.

District

The District takes the position it did not violate Article V, Section D, of the Agreement. Article V, Section D, subsection 1, Voluntary Transfers, by its literal terms and by its title, pertains to a "transfer". The District notes the Grievant is not attempting to move from one position to another; rather, she is attempting to add the .25 Adaptive Physical Education position to her current .20 position. The District asserts that unless the Grievant vacates her current position to move to the .25 position, there is no "transfer". In support of its contention, the District cites the following definition of the term "transfer":

> "TRANSFER. Shift of an employee from one job to another within a Company. A lateral transfer is a change in an employee's job within a department, to another machine or to very similar duties." 1/

1/ Elkouri and Elkouri, How Arbitration Works, 4th Ed. (BNA, 1985), p. 562.

The District also cites an examiner's decision in a prohibited practices case involving interpretation of a contract clause where the examiner found "transfer" to refer to substituting one position for another. 2/ There is nothing in the wording of Article V, Section D, that implies that it relates to anything other than that universally-understood meaning of the term "transfer". Thus, Article V, Section D does not apply in this case, as the element of a "transfer" is absent.

Regarding the three instances where the Union alleged teachers were allowed to "add on" under Article V, Section D, the District contends that only two of the three actually involve a part-time teacher going to full-time. Erb was already full-time and exchanged or "transferred" from one .25 position to another .25 position. The other two involved teachers with a .50 kindergarten teaching position adding a second .50 kindergarten position when an additional kindergarten class was added in each instance. The District notes that in each of those instances, the teacher had been hired to teach kindergarten and that there was not, and could not be, any scheduling conflicts in adding the position. In this case, the Grievant was hired to teach regular Physical Education, not Adaptive Physical Education, and it is possible that scheduling conflicts could arise due to changing needs in the Adaptive Physical Education program. Further, in the case of Jenneman, she had been laid off previously, going from full-time to .50, and therefore had recall rights to the .50 kindergarten position. There is nothing in the record to indicate in either of the two instances that the District's action in awarding the additional .50 positions was taken pursuant to Article V, Section D. Thus, there is no past practice supporting the Grievant's position.

With regard to bargaining history, the District contends that the "post-grievance bargaining history" offered by the Union does not support its case. The Union's witness, Gary Hjelm, conceded that there was no discussion of the District's proposal. Therefore, the Union can only guess at the District's objective in proposing the additional wording in Article V, Section D. The proposal was not made in response to this grievance. Dr. Annett testified that the proposed language was the same as that which he informally submitted in a preliminary draft to the Union's then-representative long before the instant grievance arose. Dr. Annett further testified that the proposed language was intended to address the situation where a part-time teacher was willing to vacate one position in order to assume another position of greater stature, i.e., a "transfer" under Article V, Section D. Thus, it had no bearing on the Grievant's situation.

2/ Northland Pines School District, Dec. No. 26096-B (Buffett, 4/90).

Lastly, the District asserts that a finding that Article V, Section D, of the Agreement permits the additional assignment sought by the Grievant would go beyond interpreting the contract and would constitute "legislation" in violation of the express prohibition in Article IV, Section C, Step IV, paragraph A. That provision prohibits the arbitrator from "amending, changing, subtracting from, or adding to the provisions of this agreement." The District cites Elkouri and Elkouri for the principle that arbitrators properly refuse to fill "gaps" in a contract, as that would constitute "contract-making", rather than interpretation or application, and that should be resolved by the parties in negotiations. 3/ In following that principle, arbitrators have spoken in terms of there being "no meeting of the minds". 4/ The "meetings of the minds" is the standard to be applied and that standard cannot be met in this case. There must at least be some tenable basis for a conclusion that had the parties envisioned the situation that has arisen, they would have reached essentially the same accommodation the Grievant now requests. The evidence indicates that is not the case. The District's initial proposal (Union Exhibit No. 1) included a proposal under Article V, Section D, to take the teacher's "present assignment" into account. That was a reflection of Dr. Annett's antipathy for cross-certification transfer requests, which are presently permitted by the Agreement. The District's subsequent proposals (Union Exhibits 2-4) reflected Dr. Annett's questioning the wisdom of allowing a part-time teacher to obtain a greater or even full-time position through the transfer provisions. Dr. Annett explained his attitude is based on the candidates that usually apply for positions of substantially less than half-time usually being lesser in number and qualifications. In this case, the Grievant was hired for a .20 position and is now seeking to obtain both a cross-certification transfer and to more than double her employment status. Given the District's view of these matters, as well as the potential scheduling conflicts if the Grievant was allowed to add the position, there is no reason to believe the District would have agreed to resolve the situation as the Grievant now requests. Further, Appendix "D", Management Rights, of the Agreement, provides that the Board retains the right "to hire all employees and, subject to the provisions of law, to determine their qualification and the conditions for their continued employment." limited only by "the specific and express terms of this agreement. . ." Article V, Section D, contains no such specific or express limitation of the District's rights in this regard.

In its reply brief, the District reiterates its assertion that the threshold issue in this case is whether the adding of the

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3/ How Arbitration Works, at pp. 347-348.

4/ Ibid.

.25 Adaptive Physical Education position involves a "transfer", and its conclusion that it does not. The District responds to the claim of retaliation against the Grievant, asserting it did not interview her because it made no sense to continue the hiring process with the grievance pending. Further, refusal to interview does not violate Article V, Section D in this case as no "transfer" was involved. If the Union feels the Grievant was unlawfully discriminated against, the proper forum would be under Sec. 111.70, Stats. As to bargaining history, the District reiterates that its proposal did not address this situation where an "add-on" is being attempted. Finally, as to the District's seeking an emergency license for the long-term substitute it hired in the position, it asserts that the qualifications of the candidates was not, and is not, an issue in this case.

DISCUSSION

The issue to be decided in this case is whether the District violated Article V, Section D, Voluntary and Involuntary Transfers, of the parties' Agreement by not permitting the Grievant to post into the .25 Adaptive Physical Education position while retaining her .20 regular Physical Education position.

As the District contends, both the title of Article V, Section D, and the wording of subsection 1 of that provision, Voluntary Transfer, establish that the provision applies only in the case of a "transfer". The term "transfer" is defined in Roberts' Dictionary of Industrial Relations as follows:

> **Transfer** - The shifting or movement of an employee from one job to another. Generally the new assignment carries the same pay and privileges as the old. Transfers may be on a temporary basis, as when work is in short supply, or on a permanent basis when an individual seeks a job in another department or operation of the plant. 5/

(Emphasis added) Similarly, the standard dictionary definition of "transfer" demonstrates that the term indicates the movement or conveyance from some thing, place, or person to another:

> **1.** To convey or shift from one person or place to another. **2.** To make over the possession or legal title of to another. **3.** To convey (a drawing, pattern, mural or design) from one surface to another. - intr. **1.** To move oneself, as from one location, job,

5/ Harold S. Roberts (Washington, D.C.: BNA 1966) at p. 425.

> or school to another. **2.** To change from one train, airplane, bus, or other carrier to another. - See Synonyms at **convey**. 6/

It is a recognized principle of contract interpretation that words are to be given their "ordinary and popularly accepted meanings" absent evidence indicating the parties intended otherwise. 7/ Absent a showing that the parties had a mutual understanding to the contrary, the ordinary definition of terms as defined by a reliable dictionary usually govern. 8/ Based upon the foregoing, it is concluded that Article V, Section D, 1, of the Agreement, clearly applies only to "transfers", as that term is normally used. It is also clear that in this case the Grievant is not seeking to move from one position to another, i.e., transfer, rather, she seeks to add the .25 Adaptive Physical Education position to her current .20 regular Physical Education position.

The bargaining history cited by the Union does not serve to make Article V, Section D, ambiguous as to its application. Dr. Annett's unrebutted testimony was that the wording of the District's proposal was similar to that which he had submitted to the Union's then-representative prior to the instant situation arising. More importantly, it appears to address a part-time teacher's attempt to increase his/her FTE status by transferring from a lesser part-time position to a greater part-time or full-time position.

As to the three instances cited by the Union in support of its contention that Article V, Section D, requires that the Grievant be awarded the .25 position as an add-on to her current position, it is noted that only one of the instances involved an "add-on". Erb's case involved her vacating one .25 position and moving to another. Jenneman's case appears to have involved recall rights to the .50 position, as she had been partially laid off from full-time to .50 time in the same area. Only Keegan's case appears to have involved an "add-on" and the Union's witness conceded he did not know whether she applied for the additional position or was awarded it pursuant to Article V, Section D, of the Agreement. Hence, a practice has not been sufficiently proved.

It is concluded that Article V, Section D, 1, of the

6/ The American Heritage Dictionary of the English Language, Wm. Morris, ed., (Houghton Mifflin Co., 1981), at p. 1363. See also, Webster's New World Dictionary of the American Language, 2nd Ed. (World Publishing Co., 1970), at p. 1509.

7/ How Arbitration Works, at pp. 350-351.

8/ Ibid., at p. 352.

Agreement applies only to "transfers", and therefore does not apply in this case where the Grievant seeks an "add-on". It is therefore concluded that the District did not violate Article V, Section D, of the parties' Agreement by not allowing the Grievant to post into the .25 Adaptive Physical Education position while retaining her .20 regular Physical Education position.

Based upon the foregoing, the record, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 11th day of August, 1993.

By David E. Shaw /s/
David E. Shaw, Arbitrator