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I. Discipline of Professional Staff

Complaints, regarding a teacher, which may have an effect on his/her evaluation or his/her continued employment, that are made to the administration by any parent, student, or other person shall be in writing and a copy shall be delivered to the teacher within five working days. Said teacher shall have five working days to return to the administration a written response regarding the complaint. The response will be reviewed by the administration and attached to the filed complaint. Complaints not called to the attention of the employee may not be used as the basis for disciplinary action against said teacher.

New employees to the District shall serve a two-year probationary period after which no employee shall be disciplined (including reduction in rank) or nonrenewed without just cause. Any such discipline shall be subject to the grievance procedure. The specific grounds forming the basis for disciplinary action will be available to the employee and the MEA in writing.

An employee shall be entitled to have present a representative of the MEA during any disciplinary action when such action will become part of the employee's personnel file. When a request for such representation is made no action shall be taken with respect to the employee until such a representative of the MEA is present. Further, in the event a disciplinary action is to be taken, the employee shall be advised of the right to representation under this provision of the Master Agreement prior to the action being taken.

BACKGROUND:

This grievance is about the transfer of two teachers, Charles Gretzlock and James Wiener. Gretzlock started his teaching career in 1964, and taught grades 5th through 8th for one year, and then taught grades 5th and 6th for two years before coming to the District in 1967, where he has taught grades 6th, 7th, 8th and high school math. Wiener started with the District in 1980 as a part-time guidance counselor and part-time junior high teacher. For the last four years, he has taught full-time at the junior high level. He had no prior experience with 4th or 5th grades before his transfer to that level. Both teachers have several years of satisfactory evaluations from supervisors who observed their classes.

The District Administrator, Richard Stokes, came to the District in 1992 when a number of changes were occurring in the school system. The District was involved in a construction project. Enrollment was dwindling, so some classes were combined, and before the 1993-94 school year began, three elementary teachers were laid off. Out of 12 full-time positions remaining, seven teachers -- including Grievants Gretzlock and Wiener -- taught different positions in the '92-93 year than in '93-94.

The previous District Administrator, Sally Sarnstrom, had started a middle school concept, which includes grades 6, 7, and 8 instead of a 7th and 8th grade junior high concept. The middle school concept also involves more

team teaching, more common planning, and more sharing of students. Stokes wanted to put together a team for the middle school and spoke with Gretzlock and Wiener about it.

Stokes had a meeting with Wiener on April 2, 1993. Stokes testified that it was his intent to have a general conversation regarding the possibilities of moving to the middle school concept and moving staff, as well as his reasoning. Stokes told Wiener that people tell a new superintendent a lot of things, such as concerns about the junior high program. Stokes did not recall being specific about whether Wiener could function in a middle school.

Wiener recalled that Stokes told him at this meeting that the present personnel were unacceptable, and that this was the first time he heard that he and Gretzlock were to be removed. Wiener testified that Stokes told him that staff, the community, and the Board did not like what he was doing, or his material, and that he was going to be pulled out and put somewhere else. According to Wiener, Stokes said he was getting complaints and that he had to do something. Stokes told him that he was not flexible enough to make the switch into the middle school team.

A few days later, on April 7th, Stokes had a similar meeting with Gretzlock. Gretzlock took notes of the April 7th meeting, and on April 13th, sent Stokes the following letter:

During the meeting, which you called on Wednesday, April 7, 1993 from approximately 9:00 - 9:30 a.m., you discussed with me, but not necessarily limited to, the following subject matters:

(1). Staff, community and Board's unhappiness with the junior high school. You stated that this attitude had been conveyed to you by members of the above mentioned groups.

(2). Changes are necessary at the junior high school level. You stated that it was unacceptable to change only the program and not the personnel. You added that this change (program) had already been proposed and it had been rejected.

(3). My teaching performance. You stated that you were/are unfamiliar with my teaching performance citing the fact that you have not been around long enough to make the necessary evaluations.

(4). Criteria for change. You stated that the changes must be based upon what you have been presented with, "They are not happy!" and further more adding that you must do something just to satisfy these pressures.

(5). Changing the junior high concept. You stated that the junior high concept was going to change drastically and you felt that I was not flexible enough to accept these changes.

(6). The community's perception. You stated that you are bothered by a "who's being picked on next" public attitude but that there is no support for the present program and added that "the People are not happy." You said that this was not a battle or war on staff members but instead just the community's perception, adding that this community's perception is "one to blame." You also stated that your solution could not be to "fire everyone."

(7). Academic performance of my students. You stated that the academic performance at this level was "O.K.," but that I was not flexible enough to meet the demands of this group of students. You cited one complaint as being, if students didn't perform perfectly, they did not meet my standards.

(8). Time remaining before retirement. You asked me how much time I had before retirement. I informed you that I had seven years before I could retire.

(9). Teaching assignment for the 1993-94 school year. You offered me a choice as to my 1993-94 teaching assignment. The choices offered were a 4-5'th grade position or a 5'th grade assignment. I informed you that I did not wish to have the 4-5'th assignment.

If you do not agree with my interpretation of our meeting held on April 7, 1993, please let me know by Tuesday, April 27, 1993.

Stokes acknowledged that Gretzlock's notes were good notes of their meeting. Stokes said he was unhappy with the junior high concept, that it may be perceived as going through the motions if personnel were not changed, that he had to deal with perceptions as well as reality. Stokes testified that he wanted to make it clear that he had not been around long enough to base any decision on performance, and that he had to deal with seven different staff members. Stokes also testified that he asked everyone about being flexible enough to make changes, and that he felt that Gretzlock may not be flexible enough. Stokes testified that he did not want to train someone who would retire in a year or two for middle school, and that is why he asked Gretzlock how long he had to work before retirement. Gretzlock said that this was not the first time that Stokes asked him when he was retiring, and that Stokes did not say why he was asking this question. While Stokes stated that he asked everyone about retirement plans, Wiener stated that he was never asked about how many years he had to go before retiring.

Before these meetings, neither Wiener nor Gretzlock had been told that there were any complaints regarding their performance or teaching.

Stokes did not discuss the matter of discipline in his meetings with Gretzlock or Wiener. He did not say that they were being reprimanded or warned or disciplined. He did not put any documentation in their personnel files regarding these meetings. Stokes has never evaluated either Gretzlock or Wiener. He does not have any concerns about their teaching abilities.

In early April, Stokes made a chart of all reassignment, and held several meetings with teachers. Bill Plizka was being moved from 3rd grade to 6th grade, pursuant to an agreement reached between the District and the Association in a prior arbitration proceeding. Kathy Kretzschmar moved from kindergarten to 7th grade, Dale Neibauer moved from 6th to 8th grade, Lois Tanula from 1st to kindergarten, and Ruth Mueller changed from 2nd to a 2nd/3rd combination. Gretzlock was moved from junior high to 5th, and Wiener from junior high to 4th/5th grades. Stokes had discussed with Wiener the option of Wiener being a guidance counselor, but Wiener strongly objected to that assignment. Stokes considered none of these transfers, including those of the Grievants, to be disciplinary.

Stokes sent a memo to Board members regarding elementary staffing for

1993-94 on April 15th, which included, in part, the following:

After discussions with staff, board, and community members I have come up with a staffing plan for 93/94.

Let me explain the reasons for doing it this way, while at the same time reminding you that there are as many ways to do this as there are staff members, Board Members, and Administrators.

First and foremost on my mind is the middle school concept. That is to place the sixth, seventh, and eighth graders into a program designed to meet the needs of the 1990s young teen. There isn't one model for this, but there are many models in place around Wisconsin and the country.

The current Junior High School does not address the needs of all the students, thus not preparing all for High School. Why that is may never be known. It's main flaw is in the concept that 7th and 8th graders are just small High School Kids. That is not so! They need special attention and direction during the years their bodies and minds are going through great changes.

This takes a program of understanding and compassion tied to meaningful curriculums.

To change from Junior High to Middle School, staff and program changes need to take place. It takes a special teaching personality to deal with this age child. After talking with those directly involved with this, I feel now is the time to lay the ground work for such a change. The staff has to be rearranged anyway and doing it all in one move will place teachers in the right positions.

I believe the team of Reithel (Carol), Kurtz, Malovrh, and Radke is a good combination of teaching styles. While at the same time I feel that, Mr. Gretzlock will be well suited for a self-contained elementary classroom. Also Mr. Wiener's background in guidance will be valuable in the combination classes. Both are licensed for the positions and with proper inservice should do well in these new positions.

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Stokes stated that Board members did not participate in making the decision of who would teach what. It was his opinion that staff had to be changed to make the change to the middle school concept, due to the perceptions of the community, Board and staff. While he testified that he did not discuss specific employees with people in the community, others did voice their opinions regarding personnel to him. It is common for citizens to tell an administrator that a certain person should not be teaching a certain grade.

Kurtz and Reithel resigned after being transferred to teach 7th grade. They were both long term employees and were teaching 5th grade in 1992-93. Neibauer and Kretzschmar, who had been laid off, were recalled in the summer of 1993 to replace Kurtz and Reithel. Kretzschmar taught early childhood one year with CESA, and the 1993-94 year was her second full year of teaching. Stokes could have placed Kretzschmar in 4th or 5th grades, as her license is K-8. He

also could have placed Neibauer in a lower grade and put Gretzlock and Wiener in the 7th or 8th grades. However, Stokes never considered putting Gretzlock and Wiener back to 7th and 8th grades, and placed Neibauer and Kretzschmar in the 7th and 8th grades, replacing Kurtz and Reithel.

Altogether, there were ten teachers in the junior high program in a full-time or part-time capacity. The Grievants were the only ones transferred from that program. When Stokes asked teachers to sign up for their teaching preferences in the spring of 1993, Gretzlock and Wiener were the only ones who chose 7th and 8th grades. Stokes told Wiener that Gretzlock was assigned to teach the 5th grade straight while Wiener got the 4th-5th split because Gretzlock had more seniority.

Both Gretzlock and Wiener feel that the transfers have been disciplinary, and that they would not have been transferred but for the complaints Stokes received from the community, staff and Board members. While both enjoy their new assignments to a certain extent, both of them are more comfortable teaching 7th or 8th grade students and have a lot of experience with the age group. Both have had to do a lot of extra work in preparing classes in their new assignments, and have spent considerable time on weekends and evenings in preparation time, due to their lack of experience in grades 4 and 5. Gretzlock noted that at the April 7th meeting with Stokes, he felt he was being reprimanded, that Stokes did not want input from him, that the decision had already been made, and that Gretzlock had no other choice. Wiener felt that the previous administrator, Sarnstrom, had been placing him in a position to work in a middle school concept, and to be transferred by Stokes upset him. Wiener believes that Stokes could have kept him in 7th or 8th grades, but what tipped the scales were the complaints that he allegedly got from the community, staff and Board members.

Stokes has used the collective bargaining agreement's procedure on complaints in the past, including twice with Plizka and twice with Gretzlock. In both instances involving Gretzlock, the complaints were resolved. Stokes was also aware that if he were to hold a meeting which could affect the Grievants' evaluations or employment, he would have to give them the opportunity to have representation present.

THE PARTIES' POSITIONS:

The Association:

The Union asserts that the arbitrator must determine the credibility of the witnesses, since the Grievants testified that Stokes told them they were transferred because of complaints he received, while Stokes testified that there were no complaints concerning the Grievants and the transfers were not made because of complaints and/or for disciplinary reasons. While Stokes testified that he had not yet made a decision to transfer the Grievants when he met with them on April 2nd and 7th, both Grievants testified that they were told they would not be teaching the 7th and 8th grades, and that it was not an option for them.

The Union notes that Wiener testified that Stokes said that complaints from the staff, community, and Board members were what tipped the scales in Stokes' evaluation of whether or not he and Gretzlock would be transferred. Gretzlock testified that Stokes clearly stated that staff, community members and Board members were dissatisfied with Gretzlock's teaching performance. Stokes told Gretzlock he proposed just changing the program but that idea had been rejected, which shows that Stokes did not observe any wrong doing by the Grievants. Therefore, it appears that the Board determined that the Grievants had to be transferred, and the Board must have had some complaints about their work.

Stokes repeatedly told the Grievants that the community, staff members and Board members were not happy with their job performances, and that he was bothered by who was going to be picked on next by the public and that he would not fire anyone due to the community's perception. Yet Stokes takes the irrational position that community perceptions of poor performances of the Grievants presented to him are not complaints against the Grievants. The Union argues that there is no difference between a community member stating to Stokes that his/her perception is that the Grievants' performances are unacceptable and complaining that their performances are unacceptable.

The Union asks why were the Grievants singled out for transfers out of junior high while eight other part-time junior high teachers were not transferred out of junior high? The answer is that Stokes received complaints about the Grievants, and he transferred them to satisfy the complainers. The Union also attacks Stokes' credibility, where Stokes testified that he did not look at the Grievants' files or evaluations before making the transfers, but also testified that there was nothing in those files to indicate that they were better or worse teachers than any one else. Stokes had no reason to transfer the Grievants other than the complaints (or perceptions) he received from the community, staff and Board members.

The fact that Stokes transferred two elementary teachers to junior high, even though those teachers did not want such an assignment, and then after they resigned, assigned two other elementary teachers who were recalled from lay-off to junior high instead of the Grievants, shows that the Grievants were not allowed to teach junior high because of the complaints against them. It was not because of lay-offs, or because there were other teachers who were better 7th and 8th grade teachers, or because the Grievants were doing a poor job. It was because Stokes simply wanted to appease the complainers.

The Union points out that there is no doubt that the administration received complaints about the Grievants, and the collective bargaining agreement requires the District to get those complaints in writing with a copy to the teacher. None of the complaints was placed in writing, as required by contract. The Grievants had no opportunity to reply to the complaints before they were transferred. The Union contends that the Grievants' rights under the contract were grossly violated. Thus, the contract does not allow the District to transfer or discipline the Grievants because the complaint procedure was not followed. The District cannot take disciplinary action against a teacher when complaints are not called to the attention of the teacher.

While the District says the transfers are not disciplinary, both Grievants testified that the tone of their meetings with Stokes and their understandings of what took place led them to conclude that they were being transferred as a discipline. The fact that Stokes never said they were being disciplined or reprimanded has no bearing on whether in fact they were being disciplined. Transferring an employee to a position that he/she does not want has been considered a form of discipline throughout the ages. When employees are transferred to positions they do not like or where they have little chance of success, they are forced to resign or be fired later on.

The Union claims that the transfers had a negative impact on the Grievants on a professional and personal level. While the Grievants had over 20 years each of experience in 7th and 8th grade levels, they have no experience when working with 4th and 5th grade levels, which results in higher stress levels, more work, and a lesser quality of work from them. The new assignments also require them to prepare and teach two to five times more classes than before, and their personal lives are consumed with preparing for the increased class

load. Both loved teaching 7th and 8th grades and both felt they had a better rapport with 7th and 8th graders, and this was taken away from them.

The Union states that just cause is meaningless if an employee can be disciplined when unsubstantiated complaints are made, without any supporting evidence, with no notice to the employee of what he is doing wrong, without an investigation which includes getting the employee's side of the story.

The Union asks that complaints which the District may use against the Grievants in the future be put in writing and the Grievants be given the opportunity to respond to them. The Union further asks that the Grievants be allowed to transfer back to the 7th and 8th grade level at either the beginning of the 1994-95 school year or the beginning of the 1995-96 year should they still feel unsuccessful or uncomfortable with their current 4th or 5th grade assignments.

The District:

The District states that the collective bargaining agreement does not contain a transfer provision or any job posting language, and the transfers of the Grievants were consistent with its management rights. While the Grievants are less comfortable with their new assignments, the contract does not impose a "comfort level" test on the District's decisions regarding assignment of staff. Article IV, Section B, specifies the information which must be in the teacher's individual contract, and there is no statement regarding a teaching assignment. Although the contract's layoff clause protects teachers with seniority, it does not contain a bumping provision. The management rights clause of Article II provides express authority for the Board to assign work and determine job content. The only restriction on the District's authority to assign current staff members was the side letter of agreement whereby the District agreed to transfer Plizka to 6th grade. No other teacher in the District has a guarantee to a particular teaching assignment.

The District argues that the transfers of the Grievants were not disciplinary actions. Stokes never made any reference to the word "discipline" or "reprimand" or "warning" or "caution." There is no evidence that the transfers have had any impact on the evaluation or continued employment of either Grievant. There were no personnel file documents, notes or other records of the meetings between Stokes and the Grievants. Stokes had no complaints on which he wanted to take any disciplinary action, and therefore, there were no written complaints to provide to the Grievants. Stokes has not evaluated either of them and has intentionally avoided evaluating them in the 1993-94 year because he did not want to put any pressure on them in their new teaching assignments.

The District further asserts that the transfers have had no impact on the continued employment of the Grievants. In fact, the transfers can never impact on the evaluation or continued employment of the Grievants, as the District

cannot go in the record and state that the transfers were not disciplinary actions, but turn around in the future and argue that the transfers were a step in the progressive discipline leading to termination. The District cannot have it both ways.

The fact that a teacher has been transferred does not confirm a disciplinary action. At least five other teachers were also transferred at the same time. While Gretzlock may have felt that he was being reprimanded, the District was not reprimanding him. The burden is on the employer to state that a disciplinary action is being taken and to document it. If the District were ever to call the April 7th meeting with Gretzlock a disciplinary meeting, Gretzlock could deny it and he would be right. The District points out that if there had been complaints against the Grievants which warranted discipline, Stokes would have followed the Article IV procedures. He was familiar with those procedures and used them three or four times during his brief tenure with the District, including twice with Gretzlock.

The District asserts that it wants the middle school concept to succeed, and Stokes was concerned that a change in the program without a change in personnel would be viewed by the public as just going through the motions. Stokes told Gretzlock that, and that he wanted to avoid the community's tendency to blame a person rather than the program. A lot of factors determined the 1993-94 staffing plan, and Stokes treated teachers as a pool of all qualified and certified teachers to various positions. It was his professional judgment to staff the school as he did. He did not review personnel files or make prior evaluations part of the decision. Stokes honored Wiener's request that he not be transferred to the guidance position, even though the Union has asserted in another grievance that Wiener should be transferred to that position. Stokes gave Gretzlock the 5th grade straight and Wiener the 4/5 split because of Gretzlock's greater seniority, even though he was not obligated to consider seniority.

The District contends that the Union wants a just cause standard applied to transfers or to have all transfers be voluntary. If the Union wants such a restriction, it must get it at the bargaining table.

Further, the District maintains that the Union's remedy is beyond the scope of the arbitrator's authority when it asks that complaints received by the District concerning the Grievant be placed in writing with copies to the Grievants. The contract sets forth the procedures to be followed when processing complaints and taking disciplinary action against teachers. The Union now wants an additional provision to apply to Wiener and Gretzlock, and such a request to add a provision to the bargaining agreement is beyond the scope of the arbitrator's authority.

The Parties' Replies:

The Union notes that while the District has argued that it has the right to transfer teachers, Article IV(I) restricts management from transferring teachers when such transfers are based upon complaints and there is no just cause for discipline. The Union also believes that the District is using smoke and mirrors to show why the Grievants were transferred. There is nothing in the record to suggest why three fewer elementary positions had anything to do with the transfers, and the positions which were eliminated were not at the junior high level. There is also nothing in the record that indicates that the Grievants cannot or will not work well within the middle school concept.

The Union is not requesting that a new provision be added to the contract which applies only to the two Grievants. The Union is asking that if the District wants to use the complaints it received against the Grievants for

discipline in the future, the complaints must be placed in writing and the Grievants must have the opportunity to respond pursuant to the terms of the contract. The Union is also asking that the arbitrator make the Grievants whole by allowing them to transfer back to the 7th and 8th grades at the end of this year or the end of next year.

The District points out that the Union fails to accurately cite the contractual provision upon which it relies, omitting the relevant language that complaints "which may have an effect on his/her evaluation or his/her continued employment" shall be in writing, etc. Article IV, Section I is not triggered each time a student or parent complains about a teacher. The contract provides a fair and orderly procedure for processing serious complaints which have the potential to affect a teacher's evaluation or continued employment.

Contrary to the Union's assertion, there is no evidence that the Board made the determination that the Grievants should be transferred. Stokes made the decision, and the District asks the arbitrator to note the memorandum to the Board, Exhibit #7. The District notes there is no precedent cited to support the Union's contention that involuntary transfers are disciplinary actions. The Union is attempting to create a de facto prohibition against involuntary transfers when no such prohibition exists in the contract.

If the arbitrator were to rule in favor of the Grievants, the District asks how long would Wiener and Gretzlock be guaranteed those positions? The contract contains no guarantee for any teacher, and a guarantee to Wiener and Gretzlock would be beyond the arbitrator's authority.

DISCUSSION:

The basic question before the Arbitrator is whether the involuntary transfers of Gretzlock and Wiener constitute discipline. It is admitted that the District did not follow the procedures for handling complaints stated in Article IV, Section I. If the transfers are found to be disciplinary transfers, the District would have violated the collective bargaining agreement by disciplining the Grievants without using the procedures in Article IV, Section I.

Even where management has no restriction on the right to transfer employees, management still has an obligation in most cases to discipline only for just or proper cause, and it may not use the right to transfer to discipline and evade its responsibilities to discipline for just cause. It is therefore an arbitrator's duty to review the transfer and the reasons for it to determine whether the transfer is disciplinary in nature or not.

Arbitrator Sembower noted in Area Education Agency 12, (1979), that:

Among the implied power of any management is the right to discipline "for just cause," or words to that effect, but universally it is the holding of arbitrators and the courts that an involuntary transfer to a less desirable place of work is not a proper exercise of disciplinary prerogative.

Also, an employer may not violate one section of the contract to carry out its rights under another section of the contract, as Arbitrator Montgomery noted in Allegheny Ludlum Steel Corp., (1956):

Although the right of transfer rests with the Company generally, it should not in good conscience be

permitted to invoke one provision of the contract to support its action and at the same time violate another clause, particularly where the facts do not justify its use of the first provision. National Carbon Co., 23 LA 263 and South Western Bell, 23 LA 609.

Disciplinary actions may also be viewed in light of whether they are intended to be punitive (an employee is being punished for wrongdoing or misconduct), rehabilitative (the action taken is meant to help the employee correct his/her behavior), or preventative (the action taken prevents the employee from repeating the undesired behavior).

Therefore, in analyzing whether the transfers of Gretzlock and Wiener were disciplinary, the Arbitrator will review:

1. Were the transfers to less desirable work or were they intended to be so undesirable as to constitute discipline?
2. Did the transfers, albeit within the management rights, violate another section of the contract, namely Article IV, Section I?
3. Were the transfers intended to have any punitive, rehabilitative or preventative effects?

Less Desirable Work:

These were lateral transfers, with no loss in seniority or money. However, that fact alone is insufficient to determine whether the transfers were disciplinary, because an employer could force an employee to take a lateral transfer, with full knowledge that the transfer would force the employee to resign, and in effect, constructively discharge the employee without ever using the procedure for discharge. Such a result should not be condoned.

In certain cases, it is obvious to anyone why a transfer is a transfer to less desirable work. Working conditions become severely worsened due to particular places of work, which are affected by weather or their state of cleanliness or safety. The problem with transfers in this professional field is that the work looks the same, but the employee may view it as odious as an office worker who is transferred to work in the sewer would view that transfer.

While both Gretzlock and Wiener may view their transfers as transfers to less desirable work, the standard must be more of an objective one than a subjective one. Otherwise, an employee's preference for a particular assignment would obliterate management's right to assign duties. One teacher might have such a strong preference for a certain grade that he or she would move according to work available teaching only that grade. Another teacher may make a choice to stay in the same community for a variety of reasons, and accept the transfer, no matter how undesirable to him or her personally.

One of the questions presented here is whether the transfers of the two teachers were disciplinary because they had to do more preparation work and had more stress in teaching children of younger ages and subjects unfamiliar to them. Both Gretzlock and Wiener have a lot of experience in teaching 7th and 8th grades, and they both enjoyed teaching those grades. Both of them were forced to work more hours in preparing for their new assignments to the lower grades of 4th/5th and 5th grades.

The fact that the transfers have increased the work loads of the Grievants is due in part to their lack of familiarity with the subject matter and their lack of knowledge of students of lower ages. This is a problem that teachers face when given new assignments, and it does not necessarily amount to less desirable work in the objective standard. The amount of preparation time spent by the Grievants is a function of any new assignment given to teachers. They may have had extra preparation time if they had stayed in their old assignments but the District switched to the middle school program. The preparation time will not be constant in future years as the Grievants gain knowledge of their subject matter. The extra work which has initially burdened the two teachers does not force a conclusion that the transfers were to less desirable work.

Also inconclusive is the grade level to which they were transferred. While Wiener in particular feels he has better rapport with students of middle or junior high age, all teachers seem to find a niche and an age level they prefer. An individual's preference to teach a certain age group does not mean that transferring that individual to another age group is a transfer to less desirable work, or the individual's preference would never allow the District to use its right to transfer teachers to any other class assignment.

The employer's knowledge that the new assignments are less desirable is a relevant factor, however, because the employer may not use a transfer as a subterfuge for discipline. Stokes knew that neither teacher wanted the transfer, and he also knew that Wiener absolutely did not want to be transferred to the position of guidance counselor. Stokes did not transfer Wiener to guidance counseling. Stokes also gave Gretzlock his preference of 5th grade straight over the other option of 4th-5th combination, based on his greater seniority over Wiener. Stokes knew or should have known that both Gretzlock and Wiener would have an increased work load, but every teacher being reassigned would have had such an increase in work load. I cannot conclude that Stokes knew that the transfers of Gretzlock and Wiener would be so undesirable as to constitute disciplinary action or that the transfers were intended to be disciplinary. There is no evidence on the record that Stokes used the transfers in any effort to get the Grievants to resign.

There is nothing that demonstrates that the transfers were to less desirable work in an objective standard.

Evading One Contract Section by Using Another:

In Article II, the District does not need to establish a reason to assign work or determine job content. The District does not need to show that a teacher is doing a bad job at one grade level in order to transfer the teacher to another grade level. However, if the transfers were done solely on an arbitrary and capricious whim of the administrator or without supporting rationale, the transfers would have a tendency to look as if they had a disciplinary aspect to them, particularly if the transfers were intended to get around the requirements of Article IV, Section I, the requirement that complaints be in writing or not used as discipline. In such an instance, the District could have violated Article IV while being within its right to involuntarily transfer employees.

Gretzlock and Wiener were not the only teachers transferred in the 1993-94 year. Seven out of twelve teachers were transferred. Stokes had decided upon a major reorganization, and the Grievants were not singled out for transfers. It is unlikely that Stokes would have transferred all these teachers if he wanted to remove only Gretzlock and Wiener -- it would have taken only two more transfers to switch places with them. (Of course, that is only one of the headaches with transfers -- when you transfer one employee into another's position, the person being put out and moved somewhere else complains, etc., etc.)

The District presents valid reasons for its transfers as a general matter. There were a number of changes occurring in the District, including the elimination of some positions and layoffs, the combination of classes, as well as the development of the middle school concept. Therefore, the District has used its rights in Article II in an appropriate manner, and the facts would justify the use of one provision of the contract, Article II. While the Union points out that the Grievants were the only teachers removed from the junior high program and others stayed in it, the record does not adequately show whether the other teachers taught specialty areas such as music, art, etc. The next question, however, is whether the use of the management rights, although justified, violates another section of the contract or was intended to evade the meaning of Article IV, Section I.

There is no doubt but that there were complaints. Stokes received complaints about the junior high program. Association Exhibit #6 is a good example of the discussion held between Stokes and Gretzlock, as Gretzlock wrote shortly after the conversation and Stokes agreed that the letter was substantially correct. The first, fourth and sixth paragraphs in particular show that there were complaints about the current program in the junior high school.

Stokes testified that he viewed the complaints as general discussions, and that people tell a new superintendent a lot of things. He did not ask anyone to put any complaint in writing, although he was familiar with the procedure for written complaints under Article IV. Board members as well as community members feel free to voice their opinions about who should teach what. In the end, Stokes felt that the staff had to be changed in order to make the change to the middle school concept. His opinion was based on the perceptions of the community, the concepts needed for a middle school, and the history of it all. There was a community perception conveyed to Stokes that the District was not meeting the needs of students in the middle school ages, and that the program was not working. Stokes testified that he never came to the conclusion of whether the program was not working or the staff was not working. He admitted that his decision to put together a different team for the middle school that did not involve Gretzlock or Wiener was strictly a judgment call, and that he did not have any evidence of why they should not be

in that team or why anyone else should be placed there.

Stokes showed a rather dogged determination to keep Gretzlock and Wiener out of the middle school team. After no one expressed an interest for those grades (except Plizka who already had a separate side agreement to teach 6th grade), Stokes transferred Kurtz and Reithel to the positions held by Gretzlock and Wiener. Then, when Kurtz and Reithel resigned after being assigned to those grades, Stokes did not use the opportunity to put Gretzlock and Wiener back in that program, but selected two teachers who were recalled from layoffs and put them in those positions, despite their lack of experience with those grades. These facts can only lead to the conclusion that Stokes was determined to remove Gretzlock and Wiener from junior high or middle high teaching, and since he had no personal knowledge of their teaching abilities, his decision must have been based on information he gained from others.

However, a plain reading of Article IV, Section I, shows that the only complaints that need to be put in writing and brought to the attention of the teacher are those that affect evaluations or continued employment. The first sentence states:

Complaints, regarding a teacher, which may have an effect on his/her evaluation or his/her continued employment, that are made to the administration by any parent, student, or other person shall be in writing and a copy shall be delivered to the teacher within five working days.

The complaints had an impact on the Grievants' teaching assignments. However, they did not necessarily have any effect on their evaluations or their continued employment. Nothing was placed in personnel files regarding any complaints about their teaching or the junior high program. The District has no documentation by which it could base any disciplinary action, now or in the future, in regard to these transfers. Nor have the complaints affected the Grievants' continued employment. Their jobs were not put in jeopardy, although their preferred assignments certainly were. However, the District needs to keep in mind the purpose of such language. It is not just the occasional student or parent complaining about a grade, a paper, a project that alone trigger Article IV, Section I. It is complaints which may lead to severe and adverse personnel actions -- affecting evaluations or continued employment. While community members will always be free to criticize teachers, the District needs to be sensitive to the language requiring documentation and the opportunity to respond before taking personnel actions based on complaints.

To have vague complaints form part of the basis for involuntary transfers may be demoralizing to staff members, and if that is so, the District may pay the ultimate price. However, the Arbitrator is confined to determining whether or not the collective bargaining agreement has been violated and fashioning an appropriate remedy if there is a violation. There is no evidence that in the use of its rights under Article II, the District violated Article IV, Section I, by the transfers of Gretzlock and Wiener. Further, there is no evidence on the record that the transfers were intended to evade the disciplinary procedures, thereby evading Article IV, Section I, based on the following reasons.

Other Disciplinary Motives:

If the transfers have aspects to them that appear to be punitive, they could be disciplinary in fact. There was no reason to punish the Grievants for any misconduct, however, as they were not guilty of any misconduct or wrongdoing. The Grievants were in fact satisfactory teachers with long track

records of good evaluations. Stokes would have had no reason to punish the Grievants for any conduct.

Discipline may be designed to motivate an employee to change certain conduct or unacceptable behavior and have a rehabilitative effect. However, the Grievants were not being transferred in order to change their teaching methods or to correct any behavior. There is no evidence that the District was trying to rehabilitate them by changing their teaching assignments. The District seems to have no concerns with the Grievants' teaching abilities, and while it offered inservice opportunities to the Grievants for their new assignments, there were no other special instructions or plans to change their teaching methods.

If the real reason for a transfer is to prevent a repeat of unsatisfactory conduct, the transfer could be construed as being discipline. There is no evidence that the transfers were meant to have this function of preventing a repetition of unsatisfactory performance. As far as the administration was concerned, all teachers in the District were acceptable teachers and could teach within their certifications. There were no negative evaluations in the Grievant's personnel files, and Stokes had no actual knowledge of their teaching skills since he had not observed them. The Grievants were not transferred to prevent a repeat of their teaching performances.

In sum, I do not find that the transfers of Gretzlock and Wiener were disciplinary. There are a couple of other factors that militate against a finding that the transfers were disciplinary or that they were intended to have such an effect. Stokes did not assign Wiener to guidance counseling, as Wiener requested, and gave Gretzlock the 5th grade assignment over the 4th-5th combination, as Gretzlock requested. Stokes sought some accommodation, albeit a minor one, to ease the Grievants through the process. The District has not set the teachers up to fail at their new assignments. Also, Stokes knew that he would have to give the Grievants the chance to have Union representation present at any disciplinary meeting, which was not done at the April meetings. Finally, there is nothing on the record that indicates that Stokes or the Board had any motive or reason to discipline the Grievants.

Based on the record as a whole and the discussion above, I conclude that the transfers of Gretzlock and Wiener are not disciplinary transfers. They were not intended to be used as discipline, and may not be used in the future as a basis for disciplinary action. Accordingly, there is no violation of the collective bargaining agreement.

AWARD

The grievances are denied.

Dated this 6th day of May, 1994, at Elkhorn, Wisconsin.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

