

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :

of a Dispute Between :

:

NORTHWEST UNITED EDUCATORS : Case 24

: No. 49750

and : MA-8051

:

UNITY SCHOOL DISTRICT :

:

Appearances:

Mr. Kenneth J. Berg, Executive Director, Northwest United Educators, appearing on behalf of the Union.
Weld, Riley, Prenn & Ricci, by Ms. Kathryn J. Prenn, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-94 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the transfer grievance of Merrilyne Haugen.

The undersigned was appointed and held a hearing on December 6, 1993 in Balsam Lake, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on February 8, 1994.

ISSUES:

The Union proposes the following

1. Did the District violate any part of Article XIV-B when it involuntarily transferred the grievant, Ms. Haugen, from the third grade to the fifth grade?
2. If so, what is the appropriate remedy?

The District proposes the following

1. Did the District violate the collective bargaining agreement when it reassigned Merrilyne Haugen from grade three to grade five, effective with the 1993-94 school year?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE VI - MANAGEMENT RIGHTS

The Board, on its own behalf, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules and regulations to establish the framework of school policies and projects including, but without limitations because of enumeration, the right:

1. To the executive management and administrative control of the school system and its properties, programs and activities.
2. To employ and reemploy all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or their dismissal or demotion, their promotion, and their work assignments.
3. To establish and supervise the program of instruction and to make the necessary assignments for all programs of an extracurricular nature, that in the opinion of the Board benefit students.
4. To determine means and methods of instruction, authorization to purchase textbooks and other teaching materials, the use of teaching aids, class schedules, and the terms and conditions of employment.
5. The parties hereto recognize that the Board is legally charged with the responsibility of, and the legal right to, the establishment and enacting of policies governing the operation of the school district.
6. To determine the management organization of the district and the selection of persons for appointment to supervisory and management positions.

7. To determine the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees and establishment of quality standards and judgment of employee performance.
8. To create, combine, modify or eliminate teaching positions deemed necessary by the Board.
9. To establish reasonable work rules and schedules of work.
10. Take whatever reasonable action that is necessary to carry out the functions of the District in situations of emergency.

Except as limited by this agreement, the Board shall continue to have the right to contract or subcontract for work. 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 judgment and discretion in connection therewith shall be limited only to the specific and express terms of this Agreement.

Foregoing rights shall be subject to the laws of the State of Wisconsin and the Constitution of the United States of America.

. . .

ARTICLE X - TEACHER DISCIPLINE

- A. All teachers new to the school system shall serve a probationary period of six (6) semesters. During this probationary period, said teachers may be suspended, discharged, or nonrenewed for any reason related to the teacher's classroom and/or said teacher's teaching effectiveness as determined by his/her immediate supervisor, without recourse to the grievance procedure.
- B. No teacher shall be disciplined or reduced in compensation without just cause, nor after the completion of the

probationary period, nonrenewed,
discharged or suspended without just
cause.

. . .

ARTICLE XIV-B - Vacancies, Transfers and Reassignments

- A. Notices of vacancies will be posted on Unity staff bulletin boards. Teachers who have taught within the discipline posted in the last five years shall be given just consideration for vacancies; and in the event that more than one teacher expresses interest, seniority in the particular discipline shall prevail.
- B. Teachers wishing reassignment or transfer shall notify the Administration as soon as possible, or by February 1 of each school year to be considered for the following year.
- C. Through the year, openings will be opened to seniority choices beginning with the next school year, subject to certification.
- D. Where management has good reason to think that factors other than seniority are involved, and those prevail, management shall notify the teacher immediately.
- E. If it is necessary to make involuntary transfers or reassignments, seniority shall prevail and the reassignments and transfers shall only be made for just cause.

DISCUSSION:

In a case in which no less than fourteen witnesses testified as to a continuing series of disputes and arguments, it is relatively unusual to find that the facts which matter are undisputed. Nevertheless, that is my conclusion here; and the testimony will therefore be referred to only as necessary.

In the 1992-93 school year, and for some years previously, the District employed four teachers in the third grade. These were Donna Twining, with approximately nineteen years' seniority; Grievant Merrilyne Haugen, with approximately twelve years' seniority; Susan Peterson, with approximately six years' seniority; and Jolayne Nelson, with three years of employment

behind her. The four teachers were expected to teach as a team, but there is little doubt on this record that the team did not function as such, and that disagreements were rife, particularly between Merrilyne Haugen and Susan Peterson. While the District presented witnesses to testify to the effect that this was largely due to Haugen's teaching style, the District simultaneously averred that the resulting actions were not acts of discipline. Also, there was essentially un rebutted testimony to the effect that Haugen had a teaching style that was compatible with Twining's, and the Union presented witnesses to the effect that Haugen was a good teacher. In view of the clear fact that disputes existed within the third grade which reduced the group to something less than a team, and the simultaneous fact that the District has stated that it is not trying a discipline case here, it is pointless to delve further into the many examples given of how and why the team did not function as such.

The 1992-93 school year was Bob Appelholm's first year as elementary principal. During the course of this year, Appelholm became dissatisfied with the third grade arrangements, and decided that it was necessary to reassign staff at the end of the year. There is no dispute that Appelholm discussed voluntary transfers with several members of the group, was rebuffed by each, and then transferred Haugen and Peterson to other assignments. Haugen was transferred from grade three to grade five effective with the beginning of the 1993-94 school year. Haugen grieved the transfer, resulting in this arbitration proceeding.

The Union argues in essence that Article XIV-B, Section E is the section which controls the disposition of this grievance, and that the District clearly violated Section E by transferring the grievant without regard to seniority and without just cause. The Union contends that the testimony offered by the District's witnesses to the effect that transfers had been made previously in the absence of a volunteer, outside of seniority order, and with no grievances being filed, should be disregarded as irrelevant in the face of clear contract language.

The Employer's essential contention is that Article XIV-B, Section D "provides a safety valve" applicable to this case in which there are legitimate and good reasons for seniority not to be the predominant factor in a transfer or reassignment of staff.

The District contends that Section D provides that seniority shall rule with respect to reassignments and involuntary transfers unless 1/ the District can demonstrate that there is good reason to believe that factors other than seniority are involved. The District argues that extensive testimony in the record demonstrated that there was good reason to believe that factors other than seniority were involved, and that the reassignment of the grievant to the fifth grade was an effective strategy for restoring harmony in the team setting required in the third grade.

1/ District's emphasis.

I do not reach the bulk of the evidence presented by the District, or the rebuttal evidence provided by the Union, or a number of the arguments involved, because I find that there is only one way to interpret Article XIV-B that does not reduce sections of that article to a conflict resulting in a nullity. If the District's interpretation were upheld, in any situation in which management decided to make a different assignment contrary to the employe's wishes, two directly contrary provisions would apply. On the one hand, Section E would specify that "seniority shall prevail," a classically clear phrase in labor relations. Section E would further require that such changes be made only for just cause, also a commonly understood phrase and therefore not in and of itself susceptible to much doubt. But at the same time, Section D would allow management to have "factors other than seniority" "prevail," subject only to management's having "good reason to think" so, and a requirement to notify the teacher immediately.

It is axiomatic in arbitration that an interpretation should be sought which gives effect to all clauses and words, and avoids nullities. In this instance, there is only one such interpretation, and I find it both logical and applicable to the situation at hand. That interpretation is that most of Article XIV-B, and specifically Sections A, B, C and D, are directed toward the most common and most desirable situation, namely that openings occur in which it is possible to invite application from teachers generally, and the position is awarded based on seniority unless the standards specified in Section D are met. Section E, however, exists for those situations in which "it is necessary" to make an involuntary transfer or reassignment. None of the first four sections of Article XIV-B refers by its terms to an involuntary transfer or reassignment.

Thus Section E clearly has a discrete function within Article XIV-B. Since it has a separate function, the task of an arbitrator in a proceeding such as this is to determine whether that function applies to the existing circumstances, and if so, whether the requirements of Section E were met.

Despite the District's hesitancy to describe Ms. Haugen's move to the fifth grade as an involuntary transfer, the District did describe this as a reassignment, and it is a distinction without a difference in view of the articulated reference to both transfers and reassignments in Section E. Simultaneously, there is no doubt from the record that Haugen denied a request to move voluntarily, and grieved the resulting move, whether that be defined as a transfer or a reassignment. To describe her move in either terms as anything other than involuntary would be ludicrous. It follows that the specific language of Section E applies to this case.

Three tests are required by that language. First, the transfer or reassignment must be "necessary." Second, it can only be made for just cause. And third, "seniority shall prevail." The Union has argued that other steps might have been taken to redress the lack of a team spirit, but the testimony of all the witnesses taken together demonstrates that the failure to function as a team was of long standing, and there is reason to doubt that anything less than a separation between the employees involved would have done the job. Furthermore, it is clear that a diffident and volunteer-oriented approach by Principal Appelholm was attempted, but failed. Thus, I conclude that the "necessary" standard was met. The District has strenuously maintained that the transfer which was made was not for disciplinary purposes, but rather to solve a continuing problem. The use of the phrase "just cause" in Section E raises the question whether that phrase is intended to imply that the specific individual to be transferred should in some way have been responsible for the situation requiring the transfer; or whether the situation inherently should demonstrate just cause for an action being taken, without any implication of fault on the part of any individual in particular.

I conclude that the second meaning is more probable, both because there is no reference to reassignment or transfer in the contract's discipline clause, and because this meaning is consistent with the "necessary" test also included within Section E. The District is therefore required by Section E to demonstrate that there was just cause for moving someone out of the third grade teaching environment; and for the same reasons as it demonstrated that a necessity existed, the District has also met this test. The third requirement, however, is that seniority shall prevail. In this instance, the District left in place the least senior teacher, and moved the next two teachers in seniority, leaving in place also the most senior teacher. The

evidence in the record was to the effect that the grievant and Twining worked quite satisfactorily together. Therefore, it was not "necessary" to transfer Haugen away from Twining, nor was there "just cause" for a transfer for that purpose. And clearly, if two teachers had to be moved, there was nothing to prevent the District from moving Nelson and Peterson, which would both have separated the teachers identified by the District's witnesses as the cause of the lack of teamwork, and have been consistent with the

requirement that "seniority shall prevail." The District, however, left the junior teacher in place, and moved a more senior teacher against her wishes. This clearly did not follow the rule that "seniority shall prevail," and therefore violated Article XIV-B, Section E of the agreement. 2/

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the District violated Article XIV-B, Section E by involuntarily transferring and reassigning grievant Merrilynne Haugen from the third to the fifth grade for the 1993-94 school year.
2. That as remedy, the District shall, upon written request from the grievant, to be received by the District no later than thirty (30) days from the date of this award, transfer and reassign grievant Haugen to teaching the third grade, effective with the start of the 1994-95 school year.

Dated at Madison, Wisconsin this 18th day of May, 1994.

By Christopher Honeyman /s/

Christopher Honeyman, Arbitrator

2/ I make no finding with respect to what the District's proper course of conduct would be either if misconduct by a teacher were proven as the cause of the lack of teamwork, or if no combination of teachers could be found who could work as a team in teaching the third grade if the grievant was not moved, since the District has not chosen to make either contention.