BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
NORTHWEST UNITED EDUCATORS	:	Case 30 No. 50487 MA-8270
and	:	
LADYSMITH-HAWKINS SCHOOL DISTRICT	:	

Appearances:

Mr. Alan Manson, Executive Director, Northwest United Educators, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Stephen Weld, on behalf of the District.

ARBITRATION AWARD

Pursuant to a request by Northwest United Educators, herein the Union, and the subsequent concurrence by Ladysmith-Hawkins School District, herein the District, the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission on February 25, 1994 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on April 12, 1994 at Ladysmith, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on May 10, 1994.

After considering the entire record, I issue the following decision and Award.

ISSUES:

> Did the District violate the terms of the collective bargaining agreement (specifically Articles VIII-D and/or XVII) by the manner in which it found Todd Novakofski to be not qualified, after his position was eliminated, to either replace a less senior teacher in a position for which Novakofski was DPI certified or fill a vacancy for which Novakofski was DPI certified? And, if so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE XVII
STAFF REDUCTION

Section A

If the teaching staff is decreased, teachers shall be laid off, in whole or in part, in the inverse order of their initial employment. A teacher whose position is eliminated shall either:

1. Be transferred to a vacant position for which s/he is qualified; or
2. Replace the teacher with the lowest seniority anywhere within the school system in the area in which said laid-off teacher is qualified. Staff members will be notified of layoff by June 1.

When seniority for any two or more qualified teachers is equal, then other factors will be used by the School District in determining the individuals to be laid off. The specific rationale for choice shall be written and furnished to the affected individuals and NUE within five days of said decision.

Negotiated insurance programs paid by the School District may be continued by the laid-off teacher for a period not to exceed 18 months; however, teachers shall be responsible for all costs which were normally paid by the Employer.

In the event a teacher accepts a position with the School District outside of the professional bargaining unit, s/he shall retain the unit seniority rights s/he had accrued at the time of accepting such position. Teachers on laid-off status shall be given the first opportunity to be placed on the substitute list, or in the event of rehiring, the laid-off teacher will get first chance at the vacancy for a 1 year period.

DISCUSSION:

The Union argues that the District violated Article XVII entitled "Staff Reduction" by the manner in which it found the grievant, Todd Novakofski, not qualified, after his position was eliminated, to fill two positions for which he was DPI certified. The District maintains that it did not violate said contractual provision by its actions.

The crux of this dispute is over the meaning of the word "qualified" in Section A of Article XVII. The Union argues that it "means DPI certified or DPI licensed, and that it does not mean anything else." The District, on the other hand, argues that "qualified" is not limited to DPI certification, rather "several factors figure into a determination of whether a teacher is 'qualified' to fill a position." The District asserts it has the

discretion to determine those factors.

Contrary to the District's position, the contract is not clear as to the meaning and application of the word "qualified." As the District points out on page 11 of its brief "qualifications" may include a number of things in addition to certification in a particular field and/or grade level" including educational background, training, successful teaching experience in a particular field, years of experience, ability to communicate, etc." Since the contract language is ambiguous and does not define the term or its application, the Arbitrator may look to bargaining history to interpret same.

Bargaining history clearly supports the Union's position. In this regard, the Arbitrator notes that the record indicates that the layoff clause was first included in the collective bargaining agreement in 1975. There have been no modifications in the 1975 layoff article language to the present related to the term "qualified" or the seniority-based transfer/bumping procedure within the layoff article. In the negotiations for the 1975-76 agreement the District was represented by Superintendent Harold Billings and a bargaining team whose chair was School Board member Donna Ermer. The chair of the 1975 Union bargaining team was Clem Hoesly; Dave Schmidt was also on the Union bargaining team that year, and has served on all Union teacher bargaining teams since 1975. Ermer, 1/ Hoesly and Schmidt all testified in an uncontested manner that the meaning of the word "qualified" in the layoff clause meant, when it was proposed by the Union and agreed to by the District in 1975, DPI certified, and nothing else.

The District cites a number of arbitral guidelines and arbitration awards in support of its arguments for a different interpretation. The Arbitrator certainly has no quarrel with the validity of the cited arbitral guidelines. However, the Arbitrator has applied the particular arbitral guidelines he feels are appropriate to the facts of this case in order to reach the result noted above.

Similarly, the Arbitrator rejects the District's reliance on several arbitration awards because they are distinguishable from

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1/ The District argues that Ermer's testimony actually supports its position. In this regard, the District notes Ermer's testimony that "the administration dealt with 'any other demands or qualifications that he (Superintendent Billings) felt . . . was needed.'" (emphasis supplied). It is not clear from Ermer's testimony at what point she felt the District Superintendent got involved in determining "qualifications." However, in light of her clear and emphatic testimony that "qualified" means DPI certified and nothing more, she may have been talking about the Superintendent's role as described in paragraph two of Article XVII, Section A.

the instant dispute. In Ashland School District, Case 62, No. 41226, MA-5327 (Burns, 10/13/89) the arbitrator relied on the "plain" language of the entire transfer rights provision to determine that "qualifications" and "certification" were not synonymous. The arbitrator also found that bargaining history and past practice did not alter her conclusion that the District therein did not violate the collective bargaining agreement when it denied a teacher's transfer request. In the present case, unlike Ashland School District, the disputed contract language is not clear as to its meaning while bargaining history provides meaning to said ambiguous contract language and leads clearly to the instant result. In Wisconsin Indianhead Vocational, Technical and Adult Education District, Case 36, No. 39705, MA-4889 (Gratz, 8/29/88), the arbitrator found contract language provided "on its face" that an employe facing layoff could bump a less senior employe based on certification while an employe's right to be recalled from layoff to vacancies was contingent on both certification and qualifications. The arbitrator also noted that "it would take very strong

extrinsic evidence to persuasively establish" that the parties intended "certified" and "qualified" to mean the same thing when they were obviously used for different purposes in the same contract clause. As noted previously, unclear contract language and strong bargaining history lead to a different result herein. Finally, in Monroe County, Case XLII (2/2/82) Arbitrator Crowley was presented with the question of whether the County was required to award the grievant a posted position simply because the only stated qualification for the position was State Certification. The grievant possessed that certification. The Union argued that because the grievant met the qualifications as stated in the job posting -- "passed the state examination for a Social Worker I position and be certified . . ." -- the County was obligated to award her that position. In rejecting this argument, the arbitrator stated:

> . . . the issue to be determined is whether the grievant met the qualifications for the position inasmuch as she was the only employe who posted for it. The Employer contends that the mere fact that the grievant passed the DHSS examination does not mean she is qualified for the job. The undersigned agrees. Had she failed the exam, she would not be qualified; on the other hand, mere passage of it does not mean that she is automatically qualified. (Emphasis supplied)

However, the arbitrator's conclusions were arrived at in the context of interpreting a "modified seniority clause" over a dispute involving a promotion. In the instant case, the District and Union have agreed to a seniority-based system of preference for layoff and recall and bumping. In addition, the record is clear as to what the parties meant by including the word "qualified" in Article XVII. Monroe County is inapplicable to the instant dispute.

The District concedes that management possesses the inherent authority to determine the job qualifications required for a position and whether an applicant or employe possesses those qualifications except where limited by contract. As noted above, Article XVII limits the District's right to determine job "qualifications" in the instant case.

The record is undisputed that the grievant had valid DPI certification to teach the assignment by a less senior teacher, and also to teach the assignment for which a new employe was hired. The record is also clear that the District denied the grievant's requests to fill the disputed positions because of other criteria or "qualifications" it sought to enforce. Based on same, and all of the foregoing, the Arbitrator finds that the District violated Article XVII by denying the grievant's request to transfer into a position held by a less senior teacher and by

denying the grievant's request to be assigned to a vacant position.

The Union requests for a remedy "that Todd Novakofski be offered a regular full-time teaching contract for 1994-95 with a teaching assignment within his area of certification, and that he lose no accumulated benefits, including seniority, as a result of his not being employed by the District for the 1993-94 school year." The District does not argue, nor does the record contain, any persuasive evidence that this would not be an appropriate remedy especially since "there is no request for any backpay or make-whole monetary amount."

In view of all of the foregoing, it is my

AWARD

That the grievance is sustained and the District is ordered to offer the grievant a regular full-time teaching position for the 1994-95 school year as noted above.

Dated at Madison, Wisconsin this 20th day of May, 1994.

By Dennis P. McGilligan /s/

Dennis P. McGilligan, Arbitrator