BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
NORTHEAST WISCONSIN TECHNICAL COLLEGE FACULTY ASSOCIATION	Case 80 No. 49776 MA-8058
and	
NORTHEAST WISCONSIN TECHNICAL COLLEGE	

Appearances:
Mr. Dennis W. Muehl, Executive Director, Bayland Teachers United, on behalf of the Northeast Wisconsin Technical College Faculty Association.
Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Robert W. Burns, on behalf of the Northeast Wisconsin Technical College.

ARBITRATION AWARD

The Northeast Wisconsin Technical College Faculty Association, hereinafter the Association, and the Northeast Wisconsin Technical College, hereinafter the Employer, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the Employer, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 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 December 16, 1993 and February 24, 1994, in Green Bay, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by May 31, 1994. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the substantive issues and have left it to the Arbitrator to frame the issues to be decided.

The Association would state the issues as follows:

> Did the Employer violate the collective bargaining agreement, specifically Article IV (B)(1), as clarified by the Memorandum of Agreement dated November 12, 1980, when it denied the grievant's preferences in teaching assignments for the first semester of the 1993-94 school year? If so what is the appropriate remedy?

The Employer proposes the following statement of the issues:

> Did the District violate Article IV of the collective bargaining agreement as clarified by the Memorandum of Agreement of November 12, 1980, by virtue of the final teaching assignment of the grievant for the first semester of the 1993-94 school year? If so, what is the appropriate remedy?

The Arbitrator concludes that the issues to be decided are properly stated as follows:

> Did the Employer violate Article IV, Section B, of the

parties' Collective Bargaining Agreement, as clarified by the Memorandum of Agreement of November 12, 1980, by virtue of the final teaching assignment of the Grievant for the first semester of the 1993-1994 school year? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1992-1994 Collective Bargaining Agreement are cited:

ARTICLE IV. CONDITIONS APPLICABLE TO TEACHING DUTIES

. . .

1. For the purpose of this contract, seniority is defined as the length of continuous service in the bargaining unit.

2. A list shall be maintained by the Director showing seniority of each member of the bargaining unit, and a copy shall be forwarded to the bargaining representative. Such a list shall include names, addresses, and area of teaching.

SECTION B. PROGRAM ASSIGNMENT

1. Teachers will express in writing to their school administrators their positive preferences in teaching and extracurricular assignments. Such requests must be submitted at least three months prior to the beginning of the semester for which the requests are made. Qualifications being equal, seniority shall prevail; and seniority shall prevail on selection of shifts due to extended work day or extension of week. The right to request teaching and extra-curricular assignments does not extend to teachers on probationary status.

. . .

4. No teacher shall be subject to assignments other than those specified in his/her area of certification except by mutual consent.

. . .

ARTICLE VII. GRIEVANCE PROCEDURES

. . .

SECTION B.

. . .

5. No decision or adjustment of a grievance shall be contrary to any provision of this agreement existing between the parties hereto.

SECTION C. PROCEDURE FOR ADJUSTMENT OF GRIEVANCE

. . .

Step 3

. . .

c. 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.

. . .

Also cited is the following Memorandum of Agreement of November 12, 1980:

MEMORANDUM OF AGREEMENT

In the effort to meet the intent of language of Article IV, the parties agree that verification of all assignments shall be made seven weeks prior to the semester. It is understood that enrollments have a major influence on final course offerings and because of the elements of enrollments, assignments may need to be amended to meet requirements of the working agreement pertaining to work span, workload, and preparations, conflicts or cancellations. In cases where a teacher desires schedule adjustment, they shall have an opportunity to make such adjustment on a seniority basis, during the five (5) working days and three (3) working days of the seventh week prior to the first and second semester respectively. Adjustments must meet the working agreement requirements previously outlined and stated preferences. Such adjustments may be made by an instructor on a teaching course basis except that rooms, days, or time of meeting cannot be changed. However, if a junior person has an entire schedule which better meets the preferences of the senior person, the senior person can substitute the entire schedule.

Upon cancellation of classes which may include combining similar courses, the senior person has the right to retain an assigned class, accept additional teaching assignments, or contract for a special assignment.

BACKGROUND

The Grievant, Neil Olsen, has been employed at NWTC as an instructor since 1974. The Grievant was originally employed as a Mathematics teacher, but in 1984 applied for, and received, the position of Data Processing Instructor. Mathematics and Data Processing are separate areas of teaching assignments. Paul Toneys is a Data Processing teacher employed at NWTC and has less seniority than the Grievant.

In September of 1980 a grievance was filed by the Grievant in this case, Neil Olsen, who was the Association's Grievance Chair at the time. The grievance was filed on behalf of a number of faculty who felt that the administration had not followed seniority in assigning courses for which those faculty had indicated a preference. The grievance alleged a violation of Article IV, Section B, paragraphs 1 and 2 of the Agreement, which were worded essentially the same as in the parties' present Agreement. Olsen, on behalf of the Association, and the Employer's representative at the time, Donald VanderKelen, subsequently worked out a rough draft of a memorandum of agreement to clarify Article IV, Section B, 1, and resolve the grievance. The result of their efforts was submitted to the respective parties for review; the Association's bargaining team reviewing the proposal for the Association. The chair of the Association's bargaining team at the time was Mel Jennings. The Chief Negotiator for the Employer at the time was Allen Ellingson and the Employer's Personnel Administrator was William Evans. In November of 1980, Jennings signed the finalized version of the Memorandum of Agreement on behalf of the Association and Evans and Ellingson signed on behalf of the Employer. The final version of the Memorandum, unlike the rough draft, contained the wording permitting a senior person to substitute the entire schedule of a junior person.

In February of 1993, the Grievant submitted the following teaching preference request:

NWTC FACULTY ASSOCIATION
INSTRUCTOR COURSE REQUEST FORM

INSTRUCTOR Neil E. Olsen

SEMESTER Fall term 1993 - 1994 academic year

TIME SPAN REQUESTED Span ends no later than 4:30 pm

COURSE NUMBER	COURSE NAME
107-130	Computer Programming 3
107-110	Computer Programming 1
107-141	Advanced Programming

Procedures

107-1xx Core courses in the CIS Programmer/Analyst associate degree program

OTHER

I request that my assignment be at least 75% in core courses for the CIS Programmer/Analyst associate degree program. In the even [sic] that mathematics courses are needed to fill my schedule, I request only those mathematics courses for the CIS Programmer/Analyst degree program.

Neil E. Olsen — INSTRUCTOR SIGNATURE
Ki Jack - 2/18/93 — INSTRUCTIONAL SER/DATE

Subsequently, the Associate Dean responsible for the Grievant's teaching areas, Fred Manley, developed proposed teaching schedules for those areas for the first semester of the 1993-94 school year. The schedule proposed for the Grievant had him teaching two courses listed amongst his preferences, but also had him teaching evening courses three nights a week. The proposed schedule for Paul Toneys, a less senior instructor in the Data Processing department, listed two courses the Grievant had indicated among his preferences and also ended no later than 4:30 p.m.

By the following memorandum of May 11, 1993, the Association's Grievance Representative for the Grievant's area, Rita DuFour, advised Manley of the Grievant's desire to be assigned Toneys' schedule:

TO: Fred Manley
FROM: Rita Dufour, Grievance Representative
RE: Neil Olsen's teaching schedule, fall 1993
DATE: May 11, 1993

Neil Olsen wishes to exercise his seniority rights regarding the teaching schedule assigned to him for the fall 1993 term.

Paul Toneys' schedule best meets the preferences made by Neil Olsen, who is more senior. Neil, therefore, wishes to substitute the schedule assigned to him with Paul's schedule.

By the following Memorandum, Manley responded to DuFour's Memorandum:

May 13, 1993

To: Rita Dufour, Grievance Representative

Fred Manley, Don Bressler, Jan Campbell

Neil Olsen's Teaching Schedule, Fall 1993

* *
We have met and discussed your memo. We find that

> although Neil Olsen has seniority in choosing which schedule he prefers, it is our understanding that in substituting this schedule, Paul Toneys must then be assigned Neil's schedule; however, this is an unacceptable solution as Paul Toneys is not certified to teach course #804-151.

DuFour, in turn, responded to Manley's May 13 memorandum with the following memorandum, which, in relevant part, read:

> **MEMO**
>
> **TO:** Fred Manley, Jan Campbell, Don Bressler
> **FROM:** Rita Dufour, Grievance Representative
> **RE:** Neil Olsen's teaching schedule, fall 1993
> **DATE:** May 14, 1993
>
> I received your memo of May 13, 1993 denying the FA request assigning Neil Olsen the schedule of Paul Toneys.
>
> You state in your memo that it is your understanding that in substituting this schedule, Paul Toneys must then be assigned Neil's schedule. This is incorrect. According to the agreement between the FA and the District, dated November 12, 1980, a senior person can **SUBSTITUTE** an entire schedule assigned to someone less senior. The intent, according to Mel Jennings, the faculty spokesperson, who helped draft and signed this agreement, was **NEVER** to imply that schedules had to be exchanged. The only stipulation in the agreement is that rooms, times and days cannot be changed. We have not done this.
>
> You indicate that in your memo that the FA solution is unacceptable because Paul Toneys is not certified to teach course #804-151. Although it is not our responsibility to provide schedules for people affected by the substitution, we are willing to do this in order to resolve informally this issue now.
>
> Attached are copies of schedules for Neil Olsen, Paul Toneys, and Fred Janusek, who would prefer course #804-151 and has agreed to a schedule change. Since an ad hoc instructor will be needed to teach math classes in the fall, course #804-356 which is now part of Fred's schedule, could be handled by a part-time instructor. Please note all classes have been assigned to people who are certified to teach them. These schedules not only provide a workable solution to this problem, but also uphold the contractual rights of all individuals.
>
> Please let the record show that Paul Toneys was asked to actively participate in the process of looking at and assigning schedules. He did not want to be involved. If Paul is unhappy with his assigned schedule, he may exercise his seniority rights and request substitution.
>
> There is no viable reason for this request to be denied. We are, however, willing to meet with all parties involved in the resolution of this issue. We

> are also willing to explore other options that allow Neil, as the most senior member of the department, to work a primarily day schedule and to teach classes that are in his program.
>
> . . .

Manley responded to DuFour's memorandum on May 19 with a memorandum that read, in relevant part, as follows:

> We have received and discussed your May 14, 1993 memo regarding Neil Olsen's teaching schedule, Fall 1993.
>
> It is our understanding that the option proposed would result in our having to hire an Ad Hoc faculty member to teach the course that is now part of Fred Janusek's present schedule. This option will incur additional instructional costs over the schedules originally proposed and, therefore, this is an unacceptable solution.
>
> We acknowledge and accept the invitation to meet and explore other options, but we also understand that you may want to pursue other contractual options.

Also on May 19, 1993 there was a meeting between representatives of the Grievance Committee and the administration at which the Association indicated that it did not feel its proposed solution would incur an additional cost to the Employer. On May 21, 1993, DuFour submitted a grievance on Olsen's behalf which stated, in relevant part:

> **GRIEVANT EXPLANATION OF ALLEGED VIOLATION:** The district intentionally failed to honor Neil Olsen's bid for shift and course preference consistent with his seniority rights.
>
> **RELIEF REQUESTED:** Compliance with FA memos of May 11, 1993 and May 14, 1993, regarding the schedule for Neil Olsen, Paul Toneys and Fred Janusek. Further, the district agrees to work with the FA to prevent scheduling which inhibits an employee's seniority rights to shift and course preference.

The grievance was left pending until the fall schedules of 1993 were issued. On or about July 12th, the fall schedules were issued. The fall schedule for the Grievant again had him teaching three evenings a week and Toneys' schedule was the same as had been proposed in the spring. By memorandum of July 14th, the Grievant again requested that he be assigned Toneys' schedule. Jon Paque, the individual with the responsibility for scheduling, responded on July 21 denying the Grievant's request. Attached to Paque's memorandum to the Grievant was a memorandum of July 19 from Evans to Paque which reads, in relevant part, as follows:

> Jon, I have your request for information regarding assignment options as they relate to Neil Olsen's request. There appears to be a significant number of direct and related issues at hand.
>
> First and foremost, I think the department and Instructional Services have been involved in a major effort to improve retention and general student success and satisfaction with the program. To that end, I know

> they have been attempting to assign what they view as the most qualified instructors to each individual course with an eye to the impact of that instructor on the student individually and program impact in toto. These efforts are, in my view, supported by existing contract language.
>
> With regard to the micro view of individual course requests, there is a long-standing memorandum of agreement, a copy of which is attached. All other factors being equal, that is, qualifications, an individual could either bump on a course by course basis or could bump entire schedules. In the former case, an individual would have had to have stated in a timely manner a preference for the individual course; in the latter, the existing work force would have to be qualified to do the existing work. In this latter case, that means that the instructors who were originally provided the schedules when bumping or exchanging schedules would have to do the activity without bringing in any other salaried or call staff or rearranging any other schedules.
>
> Thus, we do not have a process whereby an instructor or the Faculty Association can restructure multiple schedules, but, rather, one where Instructional Services sets the schedules up and those schedules remain firm as to time, location and rooms, as well as with regard to the need to restructure between multiple staff or as to "new" preferences.
>
> Thus, with regard to your questions, it does not appear that there is a contractual obligation to restructure as requested. Of the two factors considered, I would personally hold the first, qualifications to meet student needs, to be the most important.

Ultimately, the Monday night class was removed from the Grievant's schedule since it caused an overload, however, he still had evening classes on Tuesdays and Thursdays.

In addition to the foregoing, the parties submitted the following stipulation as Joint Exhibit No. 4:

1. The grievance before the Arbitrator was timely filed and is procedurally before the Arbitrator.

2. Neil Olsen is senior to Paul Toneys.

3. Neil Olsen and Paul Toneys are certified to teach all the classes in Toneys' 1993-94 1st semester teaching schedule.

4. Paul Toneys is not certified to teach mathematics courses.

5. Neil Olsen is certified to teach data processing and mathematics courses.

6. Neil Olsen submitted his teaching preference request in the spring of 1993 for 1993-94 courses on a timely basis.

7. Paul Toneys did not submit a teaching preference request in the spring of 1993 for 1993-94 teaching assignments.

8. Fred Janusek is certified to teach math, but not data processing.

9. Fred Janusek is more senior than Neil Olsen and Paul Toneys.

The parties proceeded to arbitration on their dispute before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association takes the position that the Employer violated Article IV, Section B, 1, of the Agreement, as clarified by the Memorandum of Agreement, when it refused to honor the Grievant's request to substitute the schedule of Paul Toneys in place of the schedule he was assigned for the fall semester of 1993. In support of its position, the Association asserts that the language of the Memorandum of Agreement is clear and unambiguous. The testimony at hearing established that the parties agree that the purpose of the Memorandum of Agreement was to clarify Article IV, B, 1 of the Master Agreement. That provision provided teachers with the right to express preferences in teaching and extra-curricular assignments with the proviso that, "qualifications being equal, seniority shall prevail; and seniority shall prevail on selection of shifts due to extended work day or extension of week." The language of the Memorandum is clear and it is a well-established principle of arbitration that an arbitrator cannot disavow clear and unambiguous language in the Agreement. Although the parties dispute the interpretation of the word "substitute" as it used in the Memorandum, there is arbitral precedent for the proposition that the fact that the parties do not agree on the meaning of the language in question does not render it ambiguous.

If the language is found not to be clear and unambiguous, it is an arbitral practice to then examine other factors to interpret the language in question, i.e., bargaining history and past practice. The testimony indicates that neither party could recall a situation in which a senior instructor exercised his/her right to substitute the schedule of a junior teacher for his/her schedule. Thus, past practice does not provide any guidance. Both parties also presented evidence regarding their "intent" in drafting the Memorandum. The Grievant testified that the Memorandum was the result of a grievance he had filed as grievance chair at the time and that it was his understanding the Memorandum does not require that the senior and junior instructor "exchange" schedules. This was corroborated by the testimony of Neil Jennings, the Association's chief negotiator at the time. The Employer's negotiations chairman at the time testified that he interpreted the language to mean that entire schedules could only be adjusted if both the senior and junior instructors were able to "exchange" schedules. The only conclusion that can be drawn from the testimony is that the parties differ as to their interpretations of the last sentence of the first paragraph of the Memorandum, particularly the word "substitute". Further, it appears that the parties never discussed circumstances such as those present in this case, during the negotiations leading to the Memorandum.

The Association cites arbitral precedent for the proposition that when there is no guidance available from bargaining history or past practice, the specific language must be interpreted as written without reference to background. In this case, the plain language of the Memorandum unequivocally

states the conditions under which a senior instructor may substitute his/her schedule for the entire schedule of a junior instructor: (a) the request must be made during seventh week prior to the semester in question; (b) adjustments must meet the working agreement requirements; (c) adjustments must meet the senior instructors' previously-stated preferences; and (d) rooms, days, and course times cannot be changed. The Employer wants to alter the last sentence of the Memorandum to, in effect, add: "Provided the junior instructor is qualified to teach all of the courses on the original schedule of the displacing senior instructor." Article VII(C), Step 3(C), of the Agreement prohibits the Arbitrator from adding to the Agreement. The Memorandum, while not incorporated into the Master Agreement, is a document of agreement between the parties and, as such, is subject to the grievance procedure outlined in the Agreement. 1/ The Association cites an award where the arbitrator rejected attempts to read a new qualification into an agreement the parties had, relying on a prohibition in the contract similar to that contained in these parties' Agreement and holding that, although the prohibition referred to the collective bargaining agreement, it must be presumed to include any document of agreement between the parties the arbitrator is called upon to interpret. The arbitrator also went on to state:

> I therefore have no right to add to the agreement between the parties, much as I believe that such addition would result in a much more fair and reasonable result. Having negotiated the agreement between them, the parties must be presumed to have intended the meaning given by the plain language chosen, regardless of the fact that, in practice, such meaning gives rise to an unrealistic result. (Emphasis added)

While the scheduling process may be further complicated by adjustments resulting from the Memorandum, that does not give the Employer the right to circumvent the rights provided by the plain language of that document. The Association cites arbitral precedent for the principle that clear language must be adhered to regardless of the consequences, even if one of the parties never intended to agree to that result.

Regarding the meaning of the word "substitute", the Association cites Evans' memorandum of July 19, 1993 to Paque and Bressler and asserts Evans used the words "bump" and "exchange" synonymously with the term "substitute." Evans' memo makes it clear that the Employer is placing additional restrictions on employes that are not contained in the clear language of the Memorandum. The Association cites arbitral precedent that employers must abide by unambiguous contract language pertaining to the rights of senior employes to bump, select or switch positions or shifts with junior employes, regardless of the hardship on the employer. The wording of the Memorandum is clear, however, it is silent as to a requirement that the junior instructor be qualified to teach the schedule originally assigned to the senior instructor. The Grievant timely submitted his teaching preference request for the 1993-94 courses and Toneys is less senior than the Grievant. Therefore, given the Grievant's assertion that Toneys' schedule better met his stated preferences than the schedule he was assigned, the Employer should have honored the Grievant's request to be assigned Toneys' schedule. Any disruption in the scheduling process that might result is irrelevant.

Next, the Association notes that Article IV, B, 1 of the Agreement, also

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1/ Article VII, Section A, subsection 1, defines a grievance as a "complaint by an employee in the bargaining unit, or the Association, where. . .there has been a violation, misinterpretation or misapplication of any provision of any Agreement existing between the parties hereto."

provides: "Qualifications being equal, seniority shall prevail; and seniority shall prevail on selection of shifts due to extended work day or extension of week." In requesting Toneys' schedule the Grievant sought not only to alter his courses, but more importantly, the shift or span that he would teach. The Grievant requested a span that, "ends no later than 4:30 p.m." The Grievant testified that he advised Manley that his preference for a day schedule had priority over any of his individual course preferences. Since the Grievant was assigned evening classes, contrary to his request, he was unable to bid for extra contractual courses on Tuesday and Thursday evenings. That time conflict would not have occurred had the Employer honored the Grievant's original preference for courses ending no later than 4:30 or his subsequent request to adjust his schedule.

Regarding the right to select a shift by seniority, the Association contends that the terms "span" and "shift" are synonymous. Article IV(I), 4, of the Master Agreement specifies that, "A teacher's regular work day shall not span more than 8 continuous hours and shall include a full hour for lunch break which shall not normally be allowed during the 5th or 6th hour after work begins; any deviations shall be subject to seniority preference and mutual agreement." (Emphasis added). As shown by the testimony from both parties' witnesses, a shift is generally considered to be any continuous eight hour span. The language of the Master Agreement is straightforward that instructors have the right to select shifts based on seniority. The Grievant not only made a written request for a span ending before 4:30 p.m., but also made clear to his supervisor that his span request was of higher priority than his course preferences. The Employer, however, assigned the Grievant night course two nights a week, and refused his request for schedule adjustments.

The Association also asserts that the Employer's actions in this case were arbitrary and capricious. The Employer continually refused to honor the Grievant's seniority rights, first, by ignoring his teaching and shift preferences and, subsequently, by, declining his request to be assigned Toneys' schedule which better met his preferences. The evidence indicates that early in the scheduling process for the 1993 fall term, Manley distributed a document to the instructors in the Data Processing program which listed their proposed teaching assignments. Because the proposed schedule only minimally met his preferences, the Grievant requested to be assigned Toneys' schedule. That request was denied on the basis that Toneys was not qualified to teach all of the Grievant's assigned courses. The Grievant's request was renewed on May 14, 1993, and the Association went so far as to present a proposal for adjusting schedules so as to provide an instructor for each course in question, but the proposed adjusted schedules were rejected by Manley in his May 19, 1993 memo. DuFour testified that Manley had called in each of the individual members of the Data Processing Program, and stated to them that they might also want to have union representation at a meeting where he would propose some options to help the Data Processing Program, one of which was to specifically assign instructors courses, and that the Association had indicated at that point that would violate the Agreement because of the contractual seniority right to request and state preferences for courses they would like to teach. Manley had responded that this was what management was looking at. The testimony, along with Manley's May 19, 1993, memorandum, suggests that the Employer had predetermined which courses each instructor in the Data Processing Program would teach without giving consideration to the scheduling preferences or seniority rights. That conclusion is supported by Evans' July 19, 1993, memo which states, in relevant part:

> [I] know they have been attempting to assign what they view as the most qualified instructors to each individual course with an eye to the impact of that instructor on the student individually and program impact in toto. These efforts are, in my view, supported by the existing contract language." (Emphasis

supplied)

Although the Employer twice referred to qualifications as grounds for rejecting the Grievant's request, and as justification for assigning instructors to courses, it presented no evidence to substantiate its claim that the Grievant was less qualified than Toneys to teach the courses in question. Further, the evidence shows that between 1982 and 1992, the Grievant consistently received evaluations which indicated, "competency evident."

Anticipating that the Employer will argue that it has the right to assign instructors to courses under its Management Rights Reserved provision, the Association cites a 1975 arbitration award involving the parties wherein the Employer had denied an instructor's request to teach a specific course on the basis of seniority. Ruling in favor of the Grievant, the arbitrator stated:

> The Management Rights Reserved clause of the contract reserves to the District the right:
>
> 6. To establish and/or regulate class schedules, hours of instruction, and the duties, responsibilities and assignments of teachers and other employees with respect thereto.
>
> subject to only the "specific and express terms" of the collective bargaining agreement. Were the contract silent but for the aforesaid language, the undersigned would agree with the District that the instant grievance is without merit. However, the contract makes specific provision for the manner in which program and teacher assignments are to be made. Thus, the District has thereby relinquished much the discretion it would otherwise have in dealing with these matters. (Ux 1, p. 6)

The language of that Management Rights Reserved clause has not been altered since the rendering of that award. Thus, the Employer's right to assign teachers "duties, responsibilities and assignments" is restricted not only by the specific provisions of the contract related to program and teacher assignments, but also by the Memorandum created to clarify those provisions. The Association cites additional excerpts from the 1975 award as an indication that the Employer's ability to dictate teaching assignments is conditioned first by stated preferences and second, by relative seniority. The Employer recognized the appropriate order in which those restrictions must be applied as evidenced by a grievance response in 1989 from Evans in which a senior person's request for a schedule adjustment was denied because he had failed to submit course preferences. Evans' testimony at hearing verified that the expression of preferences is the key to accessing rights under Article IV, B, 1 and the Memorandum. Since the parties stipulated that the Grievant is senior to Toneys and that he submitted his teaching preference request on a timely basis, and that Toneys did not submit any preference request, there can be little doubt that the Grievant's request was legitimate and that the Employer was obligated to honor it. The Association also asserts that in light of the testimony of the person in charge of scheduling for the Employer, Jon Paque, the Employer's adherence to its contractual obligations in the scheduling process is questionable. Paque's testimony demonstrates that he does not understand the importance stated preferences play in the assignment of courses and schedules.

Lastly, the Association notes that the Grievant's initial request to be assigned Toneys schedule was made on May 11, 1993, and that a period of over two months elapsed between his first request and the final schedule he received. During that time, the Association attempted to solve the dispute

informally, but those attempts were rejected. Contrary to the testimony of the Employer's witness that the Employer attempts to work situations out informally, it chose to litigate this dispute, and, "administer the contract through the courts."

In its reply brief, the Association disputes the Employer's contention that the rights provided by Article IV, A, B, 1 and the Memorandum are restricted by Subsection B, 4, arguing that is an attempt to have the Arbitrator alter the Memorandum. In addition to the prohibition in the Agreement regarding adding to either the Agreement or the Memorandum, the Employer failed to present any evidence linking subsections 1 and 4 of Article IV, B. Without such evidence, one cannot automatically infer that the two subsections are related to the extent that subsection 4 places restrictions on subsection 1. Subsection 4 was designed to prevent the Employer from assigning instructors courses for which they are not certified and was not created to provide protection for junior teachers being displaced by senior teachers exercising their rights under subsection 1.

The Association also disputes the Employer's reliance upon dictionary definitions of the word "substitute" and "exchange". Simply because the word "substitute" is used in the definition of the word "exchange" does not make the two words synonymous. Citing Roget's Thesaurus, (1972), the Association asserts that neither word is listed as a synonym for the other. The Association then surveys a number of dictionaries and concludes that the common theme among the definition of the term "substitute" is that "something (a) takes the place of another thing (b)." In contrast, an "exchange" takes place when "(a) takes the place of (b) and in turn (b) takes the place of (a), i.e., two substitutions are required for an exchange."

The Association also questions the Employer's reliance upon Ellingson's testimony regarding the Employer's intent during negotiations leading up to the Memorandum. On cross-examination Ellingson admitted that he could not recall any discussions of the word "exchange" and testified that he thought Evans was President of the Association at the time, when in fact he was a representative of the Employer. The Association also cites Employer Exhibit No. 4, the Association newsletter, The Advocate, of September, 1980, which clearly stated the Association's position during the grievance which lead to the creation of the Memorandum. The Grievant was the author of the article, and it demonstrates that his interpretation of the Memorandum has been consistent throughout.

The Association notes the Employer's agreement that instructors are not required to submit preferences, but that "only those instructors who do, however, have their requests considered." However, Paque testified that during the scheduling process, he relies heavily on the input of associate deans who, "know what their faculty need or want." Also, contrary to the Employer's claim, neither the Grievant nor the Association contend that "all" preferences of senior instructors must be met. In this case the Grievant was only seeking to obtain a schedule that better matched his request for shift and courses. Under the Memorandum, the judgment as to whether an instructor's stated preferences could be "better" met through the schedule adjustments rests with the instructor. The Grievant believed that Toneys' schedule provided a much better match of his stated preferences than did his own assigned course load, but it did not match all of his preferences. Further, the Grievant's "top preference" was for a shift ending no later than 4:30 p.m. The Employer conceded that the terms "time span" and "shift" have the same meaning, but has refused to acknowledge the Grievant's contractual right to select a shift based on seniority. As a result, the Grievant suffered probable monetary loss because the night courses he was assigned hindered his ability to bid on extra-contractual courses offered at the same time as his assigned courses.

The Association also disputes the Employer's claim that the "course

scheduling system urged by Olsen would result in administrative chaos, potential layoffs, and unnecessary expense for the District." While the language in question is clear, and, therefore, the parties must live with the result of its application, the schedule adjustments proposed by the Association would have resulted in the coverage of all the courses without any additional cost to the Employer.

The Association also asserts that the Employer's arguments regarding the "rights" of students are not germane. The Employer is not obligated to provide students with the exact courses, meeting times and days, and instructors for which they enrolled. The College's Timetable lists the course offerings for the upcoming semester and warns students that changes may occur. It is not uncommon for the Employer to make changes in courses after the Timetable has been distributed. Second, the Association questions how the "rights" of students are better served if instructors are permitted to "swap" schedules, as the Employer claims, but not "bump" schedules. The outcome is the same, as far as the student is concerned. Third, the Employer acknowledges that instructors have exercised their rights under the Memorandum in the past to adjust schedules on a course-by-course basis, with a similar impact on students. Finally, the scheduling process takes into account the contractual rights of instructors to make schedule adjustments. The Association questions why, if the Employer was truly concerned that the rights of students would be impinged if instructors were bumped from courses the students had chose, the Employer agreed to a schedule adjustment period that takes place after registration for the students. However, had the Employer honored the Grievant's initial request to be assigned Toneys' schedule in a timely manner, the necessary adjustments could have been made prior to the printing of the Timetable and student registration, thus voiding the "chaotic nightmare" described by the Employer.

Employer

The Employer first asserts that the language of the Agreement and the Memorandum is clear and is inconsistent with the interpretation urged by the Grievant. Article IV of the Agreement and the Memorandum together state that "seniority shall prevail" and therefore a senior instructor may "substitute (an) entire schedule" with a less senior instructor. Article IV, B, 4 provides that no instructor can be assigned classes for which the instructor is not certified. The implication of these provisions is clear: an instructor may "substitute" i.e., exchange or swap, schedules with a less senior instructor, as long as the less senior instructor is certified to teach all of the senior instructor's courses. This interpretation of "substitute" comports with the dictionary definition of the word. "Substitute" is defined as "to put or use in the place of another" and the word "exchange" is defined as "the act of substituting one thing for another." Citing, Webster's Dictionary, 9th Edition (1990). Hence, "substitute" and "exchange" are synonymous. Contrary to the Grievant's assertion, "substitute" is not synonymous with "bump" or "displace".

The Employer also asserts that the bargaining history regarding Article IV and the Memorandum is clear, and that its position is consistent with that bargaining history. In the September, 1980 issue of The Advocate, the Association stated its position that senior instructors should be allowed to "bump" the schedules of less senior instructors. The Association did not define the word "bump", but did expressly state that its position was not that "all" seniority preferences should be met. The Grievant drafted that article for the Association, however, he now urges a position entirely contrary to the position he expressed in 1980 and the current position of the Association. The Employer characterizes the Grievant's current position as being that senior instructors' preferences would be met in all instances, regardless of the effect their actions had on scheduling, on other instructors (who may not be certified to teach the senior instructors' courses in violation of B, 4) on the school, or on students. The Memorandum is a contract between the Association

and the Employer and the Association's interpretation takes precedence over the Grievant's new position. Therefore, the Memorandum must be interpreted as providing that not all preferences will be met, and that instructors have only the right to substitute, i.e., exchange, or swap, their schedules with the schedules of less-senior instructors. That interpretation of the Memorandum is consistent with the Employer's recollection of the bargaining history, as testified to by Ellingson, the former Chairperson of its negotiating team. Conversely, the Grievant's position is inconsistent with the language of the Agreement, the language of the Memorandum, and the bargaining history of the Memorandum.

The Employer next contends that the Grievant's position should be rejected because its application would result in "administrative chaos, potential layoffs, and unnecessary expenses for the District." Paque testified that the Grievant's position would be impossible to achieve since there are too many faculty with too many individual preferences and too many students with individual preferences to allow one-way bumping. This was demonstrated when the Grievant's system was attempted prior to his filing the grievance. He proposed to solve the problem by splitting his original course load among Toneys and another instructor, Janusek, suggesting that the latter's original schedule could in turn be assigned to an ad hoc instructor the school would have to hire. The Grievant suggested that Toneys could also "exercise his seniority rights" and bump someone else. Hence, even this single instance would have required, at a minimum that three schedules be adjusted. The disruptions would increase exponentially if the ad hoc instructor was not certified to teach Janusek's courses, or if Toneys decided to bump as well. Since instructors may also state preferences for certain work shifts, certain classrooms and certain equipment, the chaos would not be limited merely to courses. The Employer would be forced to juggle the panoply of stated preferences of all the instructors as well as attempt to reconcile the possibly endless number of preferences stated by an individual instructor. Citing the principle that when one interpretation of a contract would lead to an absurd result, while an alternative interpretation would lead to reasonable result, the latter should be selected. Elkouri and Elkouri, How Arbitration Works (2nd Edition, 1973) at page 309. Another potential result of the Grievant's position is that if one or more instructors "bumped" schedules of a less senior instructor, the less senior instructor potentially could be left with only classes he was not certified to teach, thus resulting in being laid off. While the Grievant contends that he did not believe that could happen under his current interpretation of the language, the spokesperson for the Association's bargaining team in 1980, Jennings, conceded that the Grievant's position could result in layoffs. The Grievant's position could also result in the Employer having to incur greater expense through the necessity of having to hire ad hoc instructors while under the current "swapping" system that expense is avoided.

Another potential ramification of the Grievant's position is that the rights of students could be abrogated. Students have preferences as to whose classes they take, and it is unfair to require them to wait while a "bumping" process proceeds through the staff until possibly the courses in which they are enrolled are cancelled because the Employer cannot provide anyone certified to teach them. Under the current system, such disruption is kept to a minimum.

The Employer concludes that the Grievant is attempting in his grievance to transform what was intended to be a relatively expedient way for instructors to state their preferences into a system where senior instructors' preferences are absolute rights. That interpretation is inconsistent with the language of the Agreement and the Memorandum and with the bargaining history.

In its reply brief, the Employer notes the Association's citation of arbitral precedent regarding clear and unambiguous contract language and asserts it applies just as well to the Employer's position, since it too argues that the contractual language in question is clear and unambiguous. The

Association's citation of authority for the proposition that disagreement between the parties as to the meaning of certain language does not render that language ambiguous is inapposite, since neither party here argues the language is ambiguous. The citation of arbitral precedent regarding employers who have attempted to evade contractual language giving employes bumping rights are also wholly distinguishable. Those cases involved employer arguments that, despite clear contract language giving employes bumping rights, the employer should not be required to heed those rights. Here, the Employer argues that the contractual language clearly does not provide those rights. The Employer concedes that if the Arbitrator accepts the Grievant's position, it will be forced to follow the results of that system.

The Employer also asserts that there are two possible explanations for the fact that the contractual language in question is interpreted so differently by the Grievant and the Employer, i.e., either the Grievant intentionally is misinterpreting the language to suit his present purposes, or the language is ambiguous. Regardless, the Employer's position should still prevail. The evidence shows that the Grievant, having been involved in the inception of the language in question, knew then, and now, that under the clear and unambiguous meaning of the language, only entire schedules could be exchanged. The Grievant is attempting to convert a preference into a right in order to get what he wants. Even if it is concluded that the language is ambiguous, utilizing traditional methods of contract interpretation to resolve the dispute, i.e., an examination of bargaining history and past practice in order to determine intent, results in the Employer prevailing. Contrary to the assertion that past practice provides little guidance, the fact that the system for which the Grievant argues has not been attempted in the past is strong evidence that the system he argues for is not what was intended by the parties. The Grievant's system is so advantageous to senior instructors that it surely would have been employed repeatedly in the 14 years since the language has existed. The fact that many senior instructors do not even state preferences demonstrates that the system is not as the Grievant contends.

Finally, the Employer asserts that the contract must be read as a whole. It is axiomatic that individual provisions are not to be read in a vacuum, rather, contracts must be read as a whole. Citing, Elkouri and Elkouri, (4th Ed.) at pages 352-53. While the Memorandum may be silent as to the junior instructor having to be qualified to teach the schedule originally assigned to the senior instructor, Article IV, B, 4 in the Agreement, with which the Memorandum must be read, is not. That subsection provides that: "No teacher shall be subject to assignments other than those specified in his/her area of certification except by mutual consent." Additional language in the Memorandum was not needed in light of that requirement and the use of the term "substitute" to mean "exchange" in their entirety. Reading the Memorandum together with Subsection B, 4, is an accepted method of contract interpretation and is not "altering" the language of the Memorandum, as claimed by the Association. The Employer also disputes the Association's characterization of Evans' memo of July 19, 1993, and asserts that read as a whole, the memo is consistent with both the Employer's position and the treatment by the parties over the years.

DISCUSSION

There are a number of issues subsumed within the primary issue before the Arbitrator. The parties note that a significant part of the dispute is the meaning of the word "substitute" in the 1980 Memorandum of Agreement. The Arbitrator finds, contrary to the claims of both parties, that the wording of the Memorandum - "the senior person can substitute the entire schedule," is anything but clear as to the question of whether "substitute" means "exchange" or "take". The word substitute, by itself, provides little guidance as both parties are able to cite dictionary definitions of the word to support their respective positions. Further, the witnesses, in describing how the Memorandum

was to operate, used the terms "bump", "take", "displace", "substitute", "swap" and "exchange".

There is also little guidance provided by the bargaining history. The wording in question came into being with the creation of the Memorandum in 1980. The evidence indicates that the Grievant and the Employer's outside labor relations representative at the time worked out a rough draft of the Memorandum. That draft, however, did not contain the wording in question, and it is unclear who drafted the final version of the Memorandum containing the language allowing a senior instructor to substitute the entire schedule of a junior instructor. It is also not clear whether the parties ever discussed the final wording in each other's presence.

As to past practice, it does not appear that anyone has attempted to utilize the language permitting the substitution of an entire schedule prior to this instance. Based upon the testimony of Evans and Ellingson, there does appear to be a practice as to adjustments on a course basis being done on an exchange basis. That is also borne out by the Association's memorandum to staff for the first semester of the 1981-82 school year, where it described adjustments "such as switching courses between instructors." (Association Exhibit 16). That lends some support to the contention that the substitution of an entire schedule was intended to operate in a similar manner.

It is, however, for the most part due to the potential results under the Association's interpretation that the Arbitrator concludes the term "substitute", as used in the Memorandum, means an exchange of schedules between the two instructors. Under the Association's interpretation, 2/ the instructor takes the less senior person's entire schedule, and if the less senior person is not qualified to teach all of the senior instructor's courses, he/she can then exercise their seniority and take courses from a less senior instructor. Both Jennings and DuFour testified it was possible under the Association's interpretation that less senior instructors could be placed in a layoff situation due to their not being qualified to teach the remaining courses. Thus, creating a layoff situation based upon an instructor's preference to teach certain courses, rather than a lack of work. While both DuFour and Jennings testified that it was not their intent to create such a situation, and the Grievant testified that it would not happen because instructors would not exercise the right to substitute unless it could be arranged that all the work is covered and there is work for everyone, they could not point to any such limitation in the wording of Article IV, B, 1 or the Memorandum. In other words, it would be a self-imposed or presumed limitation based upon the Association's sense of reasonableness. That is not a persuasive basis for finding the interpretation reasonable. Moreover, even the Association's witnesses could not agree on how the provision would operate under its interpretation beyond the senior instructor taking the junior person's schedule, e.g., would the junior person then have the right to take courses from other less senior instructors if the junior person had not submitted preferences. 3/ Also, while there are inevitably some changes made in the schedules, under the Association's interpretation, it could be necessary to reconfigure the schedules of numerous instructors in a very short time span, especially if there was a substantial number of more senior instructors who exercised that claimed right. Those problems with the operation of the provision and the Memorandum do not arise under the Employer's interpretation of "substitute" to mean a direct exchange of entire schedules between the two instructors. It is a principle of contract construction that

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2/ Contrary to the Employer's claim, there is no evidence that the Association and the Grievant presently differ in their interpretation of the Memorandum.

3/ See Jennings' testimony answering in the negative, contrary to that of DuFour and the Grievant.

> When one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used. 4/

On that basis, the Employer's interpretation regarding the word "substitute" in the Memorandum of Agreement is favored.

The Association also asserts, however, that the Employer not only violated the Grievant's rights under Article IV, B, 1 and the Memorandum by not permitting him to substitute Toneys' schedule for his own, but also by arbitrarily and capriciously ignoring his preferences in the first place and by ignoring his right to select a shift based upon seniority.

The Employer asserts that the right to file preferences does not require that the instructor be assigned those courses, i.e., it is not an absolute right. The Arbitrator agrees to the extent that the wording of Article IV, B, 1 speaks of expressing preferences and sets no minimum number that must be met and the wording of the Memorandum recognizes that there are other factors considered in making up an instructor's schedule. However, Article IV, B, 1 of the Agreement also provides that "Qualifications being equal, seniority shall prevail; and seniority shall prevail on selection of shifts due to extended work day. . ." The testimony of both parties' witnesses indicates the Memorandum was created to clarify what an instructor's rights are under Article IV, B, 1. The Memorandum then provides that instructors (who filed preferences) "shall have the opportunity" to make adjustments on a seniority basis to the schedules they receive, either on a teaching course basis or by substituting the entire schedule of a junior person. It is in that manner that an instructor's rights are exercised as to his/her preferences under Article IV, B, 1. In other words, the Employer attempts to address educational needs, available staff, etc., as well as the preferences submitted by instructors, in formulating instructors' course assignments. 5/ Then, if an instructor feels his/her preferences can be better met by making the adjustments, either on a teaching course basis or by substituting the entire schedule of a junior person, within the stated requirements and qualifications being equal, that is the instructor's right. This interpretation is in fact consistent with a July 10, 1985 Memorandum from the Association to Ellingson explaining the Association's position on the mechanics of the preference rights:

> I would like to clarify the FA's position on the mechanics of our present course preference rights based on questions that surfaced at our last bargaining session.
>
> 1. The district has the right and obligation to set the schedule of classes and faculty to make sure all assignments are covered within the working agreement constraints. Faculty have the right to submit preference requests to administration for courses.
>
> 2. Once the semester schedules are

4/ Elkouri and Elkouri, How Arbitration Works, (4th Ed.) at p. 354.

5/ There was no evidence presented that the course assignments for the Grievant were not based on bona fide educational considerations and the availability of qualified staff for the scheduled courses, so that the Employer could be found to have arbitrarily scheduled the Grievant for the night courses.

established, faculty may request and be granted changes subject to the following constraints.

- no classes need be changed with respect to time, place.

- the senior instructor change request must be reflected in his/her initial preference request.

- no contract provision may be violated by the change.

- the requesting instructor shall receive no salary differentials based on increased preparation.

- the requesting instructor cannot increase his/her workload nor the other affected workload beyond 100% or beyond what was initially assigned if originally over 100%.

In this case, the Grievant attempted to exercise his rights under Article IV, B, 1, by substituting Toneys' schedule for his. As discussed previously, substitute means an exchange of schedules between the two instructors. Since Toneys was not qualified to teach all of the courses on the Grievant's schedule, the schedules could not be exchanged. The Grievant still had the option of making adjustments on a teaching course basis, but chose not to exercise that option, standing instead on his claimed right to substitute Toneys' schedule for his under his interpretation of the term substitute. Therefore, it is concluded that the Employer did not violate the Grievant's rights under Article IV, B, 1 of the Agreement as clarified by the November 12, 1980, Memorandum of Agreement, by virtue of the Grievant's final assignment for the first semester of the 1993-94 school year.

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

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 16th day of September, 1994.

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