BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MENOMINEE TEACHERS EDUCATION ASSOCIATION

and

MENOMINEE INDIAN SCHOOL DISTRICT

Case 40
No. 51401
MA-8592

Appearances:

Mr. James A. Blank, Executive Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303, appearing on behalf of the Association.

Mr. Robert W. Burns, Godfrey & Kahn, S.C., 333 Main Street, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to a request by Menominee Teachers Education Association, hereinafter referred to as the Association, and the subsequent concurrence by the Menominee Indian School District, hereinafter referred to as the District, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission 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 October 26, 1994, at Keshena, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on January 18, 1995.

ISSUES:

The parties were unable to jointly stipulate as to the issues. The Association frames the issues as follows:

> Did the District violate Article VII, Assignments and Transfers, Sections B and E, of the collective bargaining agreement when it involuntarily transferred the most senior physical education and health teacher from teaching primarily senior high health and junior high physical education to teaching all junior high health classes? And if so, what is the appropriate remedy?

The District, on the other hand, initially raises an issue regarding the arbitrability (the grievant's arguments based on Article VII, Section B are untimely and should be disregarded) of anything other than an alleged violation of Article VII, Section E of the agreement. The District next raises an issue as to whether its limiting of the grievant's course assignments for the 1994-95 school year to Junior High Health classes was an assignment rather than a transfer. Finally, the District states that if this were viewed as a transfer Article VII, Section E is the only applicable contractual provision at issue.

Based on the entire record, the Arbitrator frames the issues in the following manner:

1. Is the Association's allegation that the District violated Article VII, Section B of the agreement arbitrable?

2. If not, did the District violate Article VII, Section E of the agreement when it reassigned the grievant from Senior High School Health and Physical Education classes to Junior High School Health classes for the 1994-95 school year?

3. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

Mary Arnold, hereinafter the grievant, has been employed by the District for over 17 years. She is licensed to teach Physical Education and Health at the elementary and secondary levels, and has taught both types of classes at both levels during her tenure with the District.

On June 1, 1994, the District notified the grievant that her teaching assignment for the 1994-95 school year would be grades 7 and 8 Health and Human Growth and Development.

The grievant quickly made it known to the District that she disagreed with the reassignment, considering it an "involuntary transfer." At the grievant's request, the District met with her on more than one occasion to convey to her the reasons for the assignment. They included:

1. The District considered the grievant to be the best-qualified teacher to teach its expanded Junior High Health curriculum emphasizing health-related problems and behaviors common in the community.

2. The District liked the grievant's initiative and energy in getting health curriculum into the District through obtaining health-related grants for the District and her work with the Health

Curriculum Committee.

3. The grievant was the only teacher in the District certified to teach Junior High Health -- John Lund, also certified for Physical Education, was not certified for health.

4. At that point, there were no other full-time positions open to the grievant at the Junior High or Senior High levels in Health and Physical Education.

On June 3, 1994, Kathi Taylor, the Association's grievance chairperson, wrote a memo on the grievant's behalf to Principals Marilyn Meisenheimer and Mark Fry in accordance with Step 2 of the grievance procedure. The grievance states the reasons which were discussed with the aforesaid principals as to why the grievant should retain the high school portion of her workload. Among other items, the greater District seniority of the grievant and Lund's experience in Junior High health were noted. The grievance stated:

. . .

> This transfer is an involuntary transfer. Ms. Arnold was informed of the intent to make this transfer and she, in turn, made it known that this was contrary to her wishes. Article VII, E of the Collective Bargaining Agreement states that "the wishes of the teacher will be considered." The following items were presented in discussion as reasons why Ms. Arnold should maintain her high school teaching assignment:

. . .

The grievance asserted Lund should remain at the junior high level and teach health and human growth classes. As a remedy, the grievance requested that the grievant not be involuntarily transferred from Senior High school to Junior High school.

Meisenheimer and Fry responded to the grievance on June 7, 1994. They reiterated their reasons for reassigning the grievant and denied the grievance.

On June 10, 1994, Taylor forwarded a slightly-modified version of her previous memo to John Rothlisberg, District Superintendent. Again, Taylor stated the Association's belief that the District had violated Article VII, Section E of the agreement. Taylor also added some comments rejecting the District's argument "that Ms. Arnold's assignment is not a transfer, but merely a 'modification' in her assignment."

Rothlisberg responded on June 15, 1994, denying the grievance and noting that the District

had complied fully with Section E:

. . .

> It is clear from the grievance that Ms. Arnold was informed of the rationale for the transfer (cert. experience, expertise in field).
>
> Ms. Arnold's wishes were considered and are well known to administration. . . .
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> However, the needs of the district have changed. Based on Ms. Arnold's qualifications and dedication to quality health education she was reassigned.
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> Administration has the right to reassign teachers based on need. We have chosen to exercise that right.

The Association appealed the matter to the Board on June 23, 1994.

Thereafter, by letter dated June 29, 1994, James Blank, Executive Director of United Northeast Educators, informed Rothlisberg that the grievant was grieving her reassignment on the basis of Article VII, Section E and Article VII, Section B. That letter states, in material part, the following:

> I talked with Mary Arnold today concerning her grievance over the involuntary transfer she received near the end of the school year. I spoke to Mary concerning the issue in Article VII, Section E you requested through Attorney Burns for me to discuss with her. As I pointed out to Attorney Burns, the grievance involves more than Section E. It involves an allegation that the District also violated Section B of Article VII which states that transfers will be based primarily on seniority.
>
> While there may be some confusion relative to what section Ms. Arnold was grieving, let the record be made clear prior to the Board's hearing of the grievance that the Association is amending its grievance to include both Sections B and E of Article VII.

On July 11, 1994, Rothlisberg notified Blank that the Board hearing was scheduled for July 27, 1994. Rothlisberg also stated: "Please be advised that the District does not waive any timeliness objection it may have to matters being raised in addition to those referenced in the actual

grievance."

After the hearing, the District Board of Education denied the grievance. In its written notice to the grievant dated August 1, 1994, the Board concluded that the District did not violate Article VII, Section E of the agreement by reassigning the grievant to fill a District need:

> . . . That administration was aware of the wishes of the teacher and considered them, met with the teacher to give the teacher reasons for the transfer, that the teacher had representation at the meeting. Article VII (E) on which this grievance was based was followed.

The Board also noted that it "listened to the seniority issue Article VII (B) which was not part of the original grievance out of courtesy to the" grievant but was denying the grievance "as untimely with respect to issues other than Article VII (E)."

The matter then proceeded to hearing before the Arbitrator as noted above.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE II
Management Rights

> Management retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions during the term of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly and equivocally restricted by the express terms of the Agreement. These rights include, but are not limited by enumeration to the following rights:
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> . . .
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> 2. To hire, promote, transfer, schedule, and assign employees to positions with the school system;
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> . . .
>
> 4. To maintain efficiency of school system operations;
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> . . .
>
> 6. To determine the methods, means and personnel by which

school system operations are to be conducted.

. . .

ARTICLE VII
Assignment and Transfers

A. Assignments to subject areas or grades will be made by June 1st of each year.

B. Transfers will be based primarily on seniority followed by other criteria or professional training, experience, specific achievements and teacher qualifications.

. . .

E. In making voluntary assignments and transfers, the wishes of the teacher will be considered. A teacher may be involuntarily transferred or reassigned only after a meeting between the teacher and the principal(s), at which time, the teacher will be given the reason(s) for the transfer. The teacher may have an Association representative at the meeting.

ARTICLE VIII
Grievance Procedure

A. Purpose - The purpose of this procedure is to provide an orderly method of resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any such difference through the use of the grievance procedure.

B. Definition - For the purpose of the Agreement, a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this Agreement.

C. Procedure -

1. Within five (5) days of the event upon which the grievance is based, unless mutually agreed upon to extend, the grievant shall take the matter up before his/her immediate supervisor. . . .

2. If the matter is not resolved in Step 1, the grievance

shall be presented by the teacher to the immediate supervisor within ten (10) days. The written statement shall include the statement of provision of contract alleged to be violated, the issues involved and specific remedies sought. The immediate supervisor shall give his/her written answer within ten (10) days of the time the grievance was presented to him/her in writing.

3. If the grievance is not resolved in Step 2, it may be appealed to the superintendent within five (5) days. . . .

4. If the grievance is not resolved in Step 3, it may be appealed to the Board within ten (10) days. . . .

5. If the grievance is not resolved in Step 4, either party, or jointly, may, within fifteen (15) days, submit a request to the Wisconsin Employment Relations Commission to appoint a commissioner or staff member to serve as arbitrator. . . .

D. The parties agree to follow each of the foregoing steps in the processing of a grievance. . . .

PARTIES' POSITIONS:

The Association initially argues that the District's arbitrability and timeliness objection is unsupported by the record because the District was made aware of the issue of seniority (the grievant's greater District seniority and Lund's experience), i.e., Article VII, Section B, both at the outset of the grievance and throughout the processing of the grievance and, consequently, later actual listing of Section B as part of the grievance prior to the Board hearing is not a material change in the Association's position nor a matter of surprise to the District making it "difficult or impossible to present its case." The Association warns the Arbitrator that it is against arbitrable principles to require "formal and concise pleadings."

The Association next argues that modification of the grievant's work location and significant change in the subject matter taught -- the grievant has been transferred to the junior high school for her full workload whereas in the 1993-94 second semester the majority of her workload had been in the high school -- constitutes a transfer, not a change in assignment; and pursuant to Article VII, Section B which lists seniority as the primary factor in transfers the grievant who had the most seniority in the instant case and is opposed to her change in assignment

should not have been transferred against her wishes.

For a remedy, the Association requests that the grievance be upheld and that the grievant be given Lund's position.

The District, on the other hand, first maintains that the grievant's arguments based on Article VII, Section B of the agreement should be disregarded because the grievant failed to comply with the express requirement of Step 2 of the grievance procedure to submit a specific statement of the provision of the agreement alleged to be violated in the written grievance presented to her immediate supervisor.

Secondly, the District maintains it did not violate the agreement by its reassignment of the grievant. In support thereof, the District relies on Article II, "Management Rights," for its authority to act herein. The District next argues the grievant was reassigned, not transferred, so Section B does not apply. The District points out as soon as the grievant made it known that she opposed the reassignment, the District immediately complied with Article VII, Section E of the agreement regarding involuntary reassignments by meeting with her and informing her of the reasons for the reassignment which is the only action it must take with regard to involuntary reassignments and transfers under said Section. (Emphasis supplied) Finally, the District argues that even if the grievant's assignment is characterized as a "transfer," the District still complied with Section B because, contrary to the Association's position, seniority is not an overriding or dispositive criterion but only one issue which can be overridden by the other criteria and the District's needs.

Based on all the foregoing, the District requests that the grievance be denied and the matter be dismissed.

DISCUSSION:

The District raises a threshold issue regarding the arbitrability of the Association's claim the District violated Article VII, Section B of the agreement by its transfer of the grievant. The District argues because the Association failed to include said claim in the written grievance it is not properly before the Arbitrator. The Association takes the opposite position.

For the reasons discussed below, the Arbitrator agrees with the District's arbitrability objection. Step 2 of the grievance procedure clearly requires the written grievance when it is initially filed to "include the statement of provision of contract alleged to be violated." The disputed grievance contains no express reference to an alleged violation of Article VII, Section B. And while it is true, as pointed out by the Association, that said grievance presented as reasons why the grievant should maintain her high school teaching assignment, "the seniority of the Grievant and Mr. Lund's experience," they were offered in the context of a claim that the District violated Article VII, Section E because the District acted contrary to the grievant's "wishes" in

making the reassignment, not a complaint the District violated Article VII, Section B by its actions. Nor does the grievance, on its face, provide any language or discussion which can reasonably be interpreted to allege a specific violation of Article VII, Section B of the agreement.

The Association also argues that its representatives discussed the issue of "seniority-based transfers" with Principal Marilyn Meisenheimer during the initial stages of the grievance procedure. However, the record does not support a finding regarding same. To the contrary, Association witness Kathi Taylor, Grievance Chairperson admitted "seniority has been alluded to but never stated directly" prior to amending the grievance. 1/ Taylor also acknowledged that seniority was only brought up in the context of the District's obligation to consider the grievant's wishes in making the assignment 2/ i.e., a claim that the District violated Article VII, Section E, not Section B, by its actions.

The Association does point out correctly that it amended the grievance prior to the Board hearing on the matter to include a claimed violation of Article VII, Section B. However, the contractual grievance procedure does not expressly provide for such an amendment. Nor was the Association able to cite past practice or bargaining history in support of such an approach. In addition, the District in its response to the amendment preserved its right to present its procedural objection to the Arbitrator: "Please also be advised that the District does not waive any timeliness objection it may have to matters being raised in addition to those referenced in the actual grievance." 3/ Finally, the Board in denying the grievance reiterated its objection to this new claim: "Mr. Waubanascum made the motion to deny this grievance as untimely with respect to issues other than Article VII (E) . . ." 4/

The Association further argues that "the District's attempt to limit the grievance to specific subparagraphs is illogical." However, the parties themselves agreed to the language in Step 2 which requires a written grievance to "include the statement of provision of contract alleged to be violated." The parties also agreed to the language of Section A of the grievance procedure which provides "The purpose of this procedure is to provide an orderly method of resolving differences arising during the term of this Agreement." In Section D of the grievance procedure, the parties agreed "to follow each of the foregoing steps in the processing of a grievance." Absent a practice that the parties have failed to strictly adhere to the requirements of the grievance procedure in the past or bargaining history leading to a different interpretation of the disputed language, there is nothing "illogical" in the Arbitrator's opinion about the District's insistence that the plain language

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1/ Tr. at 34.

2/ Tr. at 33.

3/ Jt. Exh. No. 2G.

4/ Jt. Exh. No. 2H.

of Step 2 be enforced as part of the aforestated grievance procedure. Article VIII (the grievance procedure) read in its entirety requires such a result.

The Association cites several arbitration awards in support of its position that the Article VII, Section B claim is properly before the Arbitrator. However, those cases are distinguishable from the instant dispute. In V.A. Medical Center, 91 LA 801 (1988), Arbitrator J.C. Fogelberg rejected a federal agency's arbitrability argument on the basis that the employer had knowledge of the subject matter and, additionally, that the employer did not state its procedural objection with specificity. However, unlike the instant case, 5/ the parties' agreement in V.A. Medical Center, supra, at 803, provides for a broad definition of a grievance or complaint to include "any complaint concerning 'any matter relating to employment' over the 'interpretation or application' of not only the Master Contract and any of its supplements, but also '. . . any claimed violation, misinterpretation, or misapplication of law, rule, or regulation affecting conditions of employment.' Such a far-reaching and general definition of a grievance leaves little room for exclusion. . . ." Also, unlike V.A. Medical Center the District herein was very clear as to its procedural objection at each step of the grievance procedure following the Association's amendment.

Arbitrator Barry J. Baroni in City of Jacksonville, Fla., 92 LA 397 (1989), found the employer's arbitrability argument "spurious", in part, because the disputed grievance included "a two page type written narrative which detailed the time, place and date of each of the events; the specific contract article violated; and, the reasons the Union believed that the referenced articles were violated. This attached narrative clearly satisfied both the first requirement and the second one too, calling for 'the section or sections of (the) Agreement claimed to have been violated.'" (Emphasis added) In the instant case, the Association did not include a specific reference to the contract article violated in its grievance at any time material herein.

Arbitrator Colleen A. Burns in a grievance involving the Sheboygan Area School District, Case 89, No. 41645, MA-5428 (4/90) "was faced with a timeliness issue similar to the one here" according to the Association. "In that case, the Board permitted the Association to introduce evidence on an amended grievance over the objection of the administration. The Board subsequently denied the grievance . . . . At arbitration, the Sheboygan Board, like the District in the instant matter, argued" certain Association claims were not timely filed. The Association claims Arbitrator Burns agreed with the Association that its claims were timely for the following reason:

5/ The parties' agreement herein defines a grievance much more narrowly to include only a "complaint regarding . . . a specific provision of this Agreement." (Emphasis added)

> The Board's Grievance Committee accepted evidence on the Sec. 4.9. claim and, thereafter, rendered a general denial of the Grievance. Since the denial was not limited to the Sec. 4.7 claim, the undersigned considers the Board's grievance Committee to have considered and responded to all of the Association's Sec. 4.7 and 4.9 claims. By such conduct, the Board's Grievance Committee evidenced acceptance of the Association's amendment of the grievance. (Emphasis added)
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> When the Association filed the appeal to arbitration on the agreed upon form, the Association alleged a violation of Sec. 4.7 It is evident, however, that the grievance being appealed to arbitration was the grievance which was heard and denied by the Board's grievance committee. For the reasons discussed supra, that grievance included both a Sec. 4.7 claim and a Sec. 4.9 claim. Under the circumstances presented herein, the Arbitrator rejects the District's claim that she is without jurisdiction to hear either the Sec. 4.7 C. or Sec. 4.9 claim raised by the Association. (Sheboygan Area School District, supra, at pg. 11)

However, in the instant case neither the administration nor Board ever agreed to waive the timeliness objection and consider the merits of the Association's claim that there was an Article VII, Section B violation. Nor did the Board "consider and respond" to the Association's evidence of a Section B violation in deciding to deny the grievance. The Board made it very clear that it was only "listening" to the grievant's concerns in this area as a matter of courtesy but was denying the claim as untimely. Finally, the grievance procedure herein is very clear that a grievance must refer to a specific provision of the agreement alleged to have been violated. The Association's reliance on the Sheboygan Area School District case makes no claim to any such requirement in that case.

The Association next argues that the District cannot be allowed to use untimeliness as a basis for denying the grievance because it was well aware of the issues in advance of the Board hearing. However, the Association cannot ignore the clear language of Step 2 which requires it to grieve a specific "provision of contract alleged to be violated." So, while the Board may have had knowledge of all issues the grievant wished to raise prior to the Board meeting as pointed out by the Association it expressly retained its right to enforce the requirements of Step 2 at all times material herein.

In addition, the Association argues the issue of seniority is a closely related element of the original issue and should be heard by the Arbitrator citing Elkouri & Elkouri, How Arbitration Works, Fourth Edition, p. 234 (1985) in support thereof. The Arbitrator does not agree. Although the seniority issue (Section B) and Section E are both found in Article VII entitled "Assignments and Transfers," they are very different sections with respect to, among other things, the District's discretion to act when making assignments and transfers. As a consequence, both sections raise different issues. Therefore, the Arbitrator also rejects this claim of the Association.

Finally, the Association argues that formal and concise pleadings are not required in arbitration citing Arbitrator Marion Beatty, Armour & Co., 39 LA 1226, (1963) in support thereof. Arbitrator Beatty provides a statement of this view when he opines:

> Employees or their Union officers cannot be expected to draw their grievances artfully. If they have sufficiently apprised the Company of the nature of their complaint and if it is found that the Company has violated any portion of the contract, the employees, in my opinion, are entitled to relief. Armour & Co., supra, at 1230.

It is well settled that the arbitration process is often less formal than the adjudication of disputes in other forums. And, in the absence of contractual or other requirements, arbitrators generally will not require grievances to be precisely drawn. However, where as here, the contract requires the grievance to include the "provision of contract alleged to be violated," the Arbitrator will enforce the clear terms of the agreement. 6/

Based on all of the above, the Arbitrator finds that the answer to the issue as framed by the undersigned is NO, the Association's claim that the District violated Article VII, Section B of the agreement is not arbitrable. The Arbitrator next turns his attention to the second issue, whether the District violated Article VII, Section E of the agreement when it reassigned the grievant from Senior High School Health and Physical Education classes to Junior High School Health classes for the 1994-95 school year.

6/ Charles Eneu Johnson Co., 17 LA 125, 129 (1950).

There is no dispute that this was an "involuntary" transfer or assignment. Therefore, the District was not required to consider the wishes of the grievant as alleged by the Association since that requirement only applies to "voluntary assignments and transfers" according to the language of sentence one of Article VII, Section E. The second sentence of said section provides; "A teacher may be involuntarily transferred or reassigned only after a meeting between the teacher and the principal(s), at which time, the teacher will be given the reason(s) for the transfer." (Emphasis added) The parties spend a great deal of effort arguing over whether the grievant was transferred or assigned. For the purpose of Section E, sentence two, it doesn't matter. Whether the grievant was transferred, as argued by the Association, or reassigned, as argued by the District, since the action was "involuntary" the only restriction on the District's discretion in this area is that before taking such action the District must first meet with the affected teacher and give the reasons for the assignment/transfer. It is undisputed that the District did this. 7/

Finally, the Association argues that the Administration was out to "get" the grievant for her vocal opposition to the implementation of the year-long Health, Human Growth and Development Curriculum at the Junior High School. "As further evidence of the District's punitive action toward the Grievant," the Association claims the District has denied all her requests to transfer out of her current assignment. However, contrary to the Association's assertions, the record does not support a finding regarding same.

In view of the foregoing, the Arbitrator finds that the answer to the second issue, as framed by the undersigned, is NO, the District did not violate Article VII, Section E of the agreement when it reassigned the grievant from Senior High School Health and Physical Education classes to Junior High School Health classes for the 1994-95 school year, and it is my

AWARD

The instant grievance is denied and the matter is dismissed.

Dated at Madison, Wisconsin this 14th day of March, 1995.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

7/ The grievant admitted same. Tr. at 100-101.