

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

WEST DePERE EDUCATION ASSOCIATION

and

WEST DePERE SCHOOL DISTRICT

Case 38  
No. 53050  
MA-9213

Appearances:

Mr. Gordon E. McQuillen, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of the West DePere Education Association.

Mr. Dennis W. Rader, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, Suite 600, Green Bay, Wisconsin 54307-3067, appearing on behalf of the West DePere School District.

ARBITRATION AWARD

The West DePere Education Association, hereafter Association, and the West DePere School District, hereafter Employer or District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as impartial arbitrator to hear and decide the instant grievance. The undersigned was so designated. Hearing was held in West DePere, Wisconsin, on February 1, 1996. The hearing was transcribed, the parties filed post-hearing briefs and the record was closed on March 27, 1996.

ISSUE:

The parties stipulated to the following statement of the issue:

Did the District violate the contract by not selecting Toni Etter for the second grade position for the 1995-96 school year?

If so, what is the remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE II - MANAGEMENT RIGHTS

- A. The Board retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin and of the United States, including, but without limiting the generality of the foregoing, the right:

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2. To hire all teachers and subject to the provisions of law, to determine their qualifications and conditions for their continued employment, or their dismissal or demotion, and to promote, and transfer all such teachers.

...

- B. The exercise of the foregoing power, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules and regulations, and practices in furtherance thereof and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes Section 111.70 and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

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ARTICLE XV - ASSIGNMENTS, TRANSFERS,  
REASSIGNMENTS, AND STAFF REDUCTION

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- B. Voluntary Transfer and Reassignment

1. Teachers who desire a change in grade and/or subject assignments, or who desire a transfer to another building may file a written request of such desire with the Superintendent not later than February 15. Such statement will include grade and/or subject to which the teacher desires to be assigned and/or the school to which he/she desires to be transferred.
2. In acting on the request for voluntary reassignment and/or transfer, the following criteria will be applied, not necessarily in the order listed:
  - a. Reason for request
  - b. Existence of vacancies
  - c. Teacher's value to the students of the school district in the present position
  - d. Instructional requirements
  - e. Individual competencies
  - f. Staff availability and teaching experience mix.

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#### ARTICLE XVII - VACANCIES

- A. The Superintendent's office shall announce via personal memo teaching positions and co-curricular vacancies to qualified teachers within the school system thereby allowing them to make application for such vacancy and have first consideration. Application for vacancies must be made in writing within three (3) school days of notification. (Seven (7) days during summer)

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#### BACKGROUND:

On February 15, 1995, Antoinette (Toni) Etter, hereafter Grievant, submitted the

following letter to Superintendent Freese:

Per our telephone conversation and according to Article XV, Section B, Item 1, I am requesting consideration for an optional voluntary transfer. I request that the following options be considered and that I be consulted prior to a final placement for the 1995-1996 school year. This is the second year scheduled as a Special Education teacher in both Lincoln and W. DePere Middle School. The caseload with both combinations has been consistently high and out of proportion to like teachers with less seniority. Mr. Rittenhouse had approximately eight students last year and nine this year while at only one school. Mr. Rittenhouse's and Mrs. Gulseth's caseloads combined for 1993-1994 was approximately fourteen total for two teachers in one building and for 1994-1995 the approximate total is twenty-two total for two teachers and one building. My caseload last year reached twenty-six students and so far is at twenty-two students in two buildings. There are difficulties in terms of continuity of programming in addition to some students who are not given any assistance in areas where they should be receiving programming. It was my understanding if given two schools the testing load would be delegated to others. The amount of IEPs for a caseload this high coupled with evaluations, re-evaluations, M-Teams, and multiple building meetings is a scheduling nightmare.

Options that could be considered would be: rotate the traveling position yearly so one teacher would not continually have the full burden ( ex. (sic) Sixth grade has the highest caseload, therefore, Special Education teacher would not travel.) The Lincoln position would be comprised of a one half day instructional period and a one half day as program support/testing position that could possibly be flexible depending on the needs of the students.

I have also considered the full time regular first grade position when Donna Diamond retires or a full-time regular sixth grade position which I'm willing to get the required certification. ( It (sic) appears they made a mistake on my certification and I'm trying to correct this.)

If you have any further questions, please feel free to contact me anytime.



On March 27, 1995, the District posted a Notice of Vacancy in a second grade regular education position. On March 30, 1995, the Grievant submitted the following letter to Superintendent Freese:

I am applying for the Second Grade position recently posted. I have both regular education and special education experience. In addition to this, my nineteen years of teaching the kindergarten through second grade curriculum gives me a definite advantage. Since you already have a collection of my letters, I will make this letter brief. I am enclosing two which I recently received from Ms. Paluch which outline my strengths.

You also have on file my request for a voluntary transfer. It is felt that being in one building would allow me to serve student needs more effectively. Mr. Culver has indicated this is not a possibility at the Middle School. Should Heidi be given a full-time position, then I would prefer my present A.M. position at Lincoln with the half-time position in Kindergarten since I have previous experience in this area also. This would keep me in the same building so I could hopefully maintain a better perspective on their needs.

I would be happy to furnish you with a resume or any other information you require.

Two candidates were interviewed for the 1995-96 Grade Two vacancy, the Grievant and Heide Diekvoss. At the time of the posting, Ms. Diekvoss was a half-time Kindergarten teacher who was in her first year of teaching with the District.

On May 23, 1995, Superintendent Freese sent the Grievant the following letter:

Just a short note thanking you for your interest in the Grade 2 vacancy we recently discussed. I found the time we spent together to be interesting and helpful in program development, and thank you for the assistance.

As you are aware, we have extended the position to Heide Diekvoss. While I know this may be disappointing to you, I trust you will do your best to assist Heide as she addresses her new challenge.

Thank you again for your interest.

On May 17, 1995, the Grievant filed a grievance which stated as follows:

Mrs. Etter applied for and was interviewed for the 2nd grade position. Ms. Heide Diekvos was given the position. Mrs. Etter had advanced education and experience in this area. She should have been able to exercise her voluntary transfer rights under the Master Agreement.

Mrs. Etter requested a Voluntary Transfer in February under terms of the contract. She has requested this transfer several times and given reasonable reasons for a transfer. These reasons have been ignored.

The Grievant alleged that the District had violated the following contractual provisions: Article XV - Assignments, Transfers, Reassignments, and Staff Reduction, Section B, 1 and 2; Article XVII - Vacancies, Section A; and Article II - Management Rights, Section B. The relief sought by the Grievant was "just resolve and teaching assignment for 1995-96 school year." Thereafter, the grievance was denied and submitted to arbitration.

#### POSITIONS OF THE PARTIES:

##### Grievant

The plain meaning of the disputed provisions of the agreement, when applied to the facts in this case, demonstrates that the District violated the agreement. Inasmuch as the case decided by Arbitrator Gallagher involved involuntary transfers, it provides little, if any, guidance in this matter.

It is axiomatic that a municipal employer may not conduct its affairs in an arbitrary and capricious manner. This is so even in the absence of any specific language in a collective bargaining agreement limiting the authority of an employer.

In the present case, the language on voluntary transfers specifically limits the District's authority in this matter. This contract language sets forth six criteria which "will be applied" when the administration acts upon the request for voluntary reassignments or transfers. As a review of the record evidence demonstrates, the District made no effort to consider any of these criteria when it chose Ms. Diekvoss over the Grievant for the existing second grade vacancy.

The casual attitude of the Superintendent toward the agreement, perhaps, is explained by

the prior business relationship between Ms. Diekvoss' mother and Superintendent Freese. The District's failure to consider the contractually mandated criteria compels the conclusion that the District violated the collective bargaining agreement.

The Superintendent confirmed that the Grievant did not receive the second grade job because she did poorly on the interview questions. There is nothing in the agreement which authorizes the District to employ such a screening test as a sole basis, or any other basis, for denying a senior teacher's application to transfer to a vacant position for which she is otherwise qualified.

The District's argument concerning the relevant competency of the two candidates is unsupported in the record. While the District argues that it used a nationally validated test for the hiring process, there is little evidence on the record to support such an argument. Even if there were, the modifications made by the District; the temporal distance between the administration of the test to Etter and to Ms. Diekvoss; the more "social" nature of Ms. Diekvoss' interview; and the use of an untrained examiner, all combined to undermine any claim by the District that the test, as used here, is objective.

The Grievant has been a thorn in the District's side for many years. There may be some temptation on the part of the arbitrator to remand the case to the District for a reassessment of the six criteria that the District should have applied to the two transfer applications. To remand the case now, with negative prejudice already shown by the administration to the Grievant's application, would be unfair. In addition, Ms. Diekvoss would have the advantage of incumbency which would again alter the process inappropriately.

The arbitrator should find that the District violated the agreement and should sustain the grievance. The Grievant should be transferred to the second grade position now held by Ms. Diekvoss or a similar position should one become vacant for the 1996-97 school year.

#### District

The District is not claiming that the Grievant is unqualified. The District is claiming, however, that Article II, Management Rights, provides the District with the right to determine qualifications and to hire the more qualified applicant.

The District fairly and objectively evaluated the abilities of the two internal applicants and selected the more qualified applicant. The District complied with Article XV, Section B, 2 (a through f), when it selected Ms. Diekvoss for the second grade position.

It is well recognized that testing is an appropriate tool for determining qualifications. In the present case, the District used an objective, nationally validated test. The test results



objectively establish that Ms. Diekvoss is more qualified than the Grievant.

The fact that Ms. Diekvoss' mother was Superintendent Freese's administrative assistant when he was employed by another district has no bearing on the District's selection decision.

Principal Paluch was involved in the screening of applicants for the kindergarten position when Ms. Diekvoss was hired in 1994; Superintendent Freese was not. Paluch was not even aware that Ms. Diekvoss' mother had been Superintendent Freese's administrative assistant.

The Grievant's claim that Ms. Diekvoss' interview was less social in nature is probably true, but for a very good reason. When Ms. Diekvoss was interviewed in 1995, she was responding to seven specialty questions which focused on the needs of the second grade teaching position.

The District's exercise of discretion in determining employe qualifications may not be overturned by an arbitrator unless it is arbitrary and capricious. The arbitrator should dismiss the grievance and find that the District did not violate the collective bargaining agreement by not granting the Grievant the second grade teaching position.

## DISCUSSION

Article XV, B, provides a procedure by which teachers "who desire a change in grade and/or subject assignments, or who desire a transfer to another building" may request such a change. The request for such a change is to be filed with the Superintendent "not later than February 15" and "will include grade and/or subject to which the teacher desires to be assigned and/or the school to which he/she desires to be transferred."

On February 15, 1995, the Grievant filed a request for a change in her assignment. In this request, the Grievant suggested alternative methods of staffing special education programs and indicated that she would consider a full-time regular first grade position or a full-time regular sixth grade position. The Grievant, however, did not indicate any interest in being assigned to a second grade position.

It is true that the Grievant's March 30, 1995 letter to Superintendent Freese references her request for voluntary transfer. However, the March 30, 1995 indication of interest in a second grade position does not meet the timelines of Article XV, B. Since the Grievant did not file a timely request for a voluntary transfer to the second grade position, the provisions of Article XV, B, relied upon by the Grievant, are not controlling.

The position in dispute was posted as a vacancy in accordance with Article XVII of the collective bargaining agreement. Article XVII allows qualified teachers within the school system to apply for a vacancy and to be given first consideration.

At the time of the vacancy, the Grievant and Ms. Diekvoss were both from within the school system. The parties do not argue, and the record does not demonstrate, that either was not qualified for the second grade position. Thus, under the terms of Article XVII, each had the same

right to apply and to be considered for the second grade vacancy.

Article XVII, unlike Article XV, B, does not require the District to apply any specific criteria when selecting among qualified internal applicants. The undersigned concludes, therefore, that the District may exercise its management discretion to select the more qualified applicant.

Article II, Management Rights, A (2), expressly provides the District with the right to determine the qualifications of teachers. Implicit in the right to determine the qualifications of teachers is the right to determine the method by which qualifications are evaluated.

In summary, in the present case, the District has the management right to determine the qualifications of the two applicants for the second grade position and to select the more qualified applicant. As the District argues, the undersigned must defer to the District's exercise of these management rights, unless the exercise of such rights is arbitrary or capricious. 1/

The District argues that Ms. Diekvoss was awarded the second grade position because she was more qualified than the Grievant. The testimony of Superintendent Freese establishes that the Grievant was determined to be less qualified than Ms. Diekvoss because the Grievant did not score as well as Ms. Diekvoss on the structured interview.

The structured interview consisted of questions designed by "Ventures for Excellence," hereafter referred to as "screener" questions, and "specialty" questions designed by District administrative staff. According to Superintendent Freese, responses to the "screener" questions are scored on the basis of "listen fors" and that these "listen fors" are indicators of the applicant's suitability for a teaching position. The record does not demonstrate otherwise.

Superintendent Freese testified that he had been trained in the "Ventures for Excellence" interview process and had used this interview process on hundreds of occasions in the District. Principal Paluch testified that Superintendent Freese had trained her to use the "Ventures for Excellence" process and that she has used this process to fill approximately twenty positions at the District. 2/ The record does not demonstrate otherwise.

Having no reasonable basis to discredit the testimony of Superintendent Freese and Principal Paluch, the undersigned is persuaded that the "Ventures for Excellence" interview process measures an applicant's suitability for a teaching position and that Superintendent Freese

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1/ In written argument, the Grievant recognizes that, in the absence of any specific contract language limiting the authority of an employer, employer conduct may not be arbitrary or capricious.

2/ T. at 82.

and Principal Paluch are qualified to administer and score the "Ventures for Excellence"

interviews. Accordingly, the District's decision to use the "Ventures for Excellence" interview process to determine qualifications for the second grade vacancy is neither arbitrary nor capricious. 3/

As discussed above, in addition to the "screener" questions designed by "Ventures for Excellence," the structured interview process relied upon by the District included "specialty" questions designed by District administrative staff. Since the "specialty" questions used to interview the Grievant and Diekvoss are reasonably related to the second grade position, the undersigned does not consider the District's decision to use the "specialty" questions to determine qualifications for the second grade vacancy to be arbitrary or capricious.

In summary, the District's decision to use the structured interview process, comprised of the "screener" questions and the "specialty" questions, to determine qualifications for the second grade position is neither arbitrary, nor capricious. Having reached this conclusion, the undersigned turns to the question of whether or not the structured interview process was applied to the Grievant in an arbitrary or capricious manner.

At hearing, Superintendent Freese testified that the Grievant and Ms. Diekvoss were given the same seven initial "screener" questions and the same twenty-two follow-up "screener" questions. However, other record evidence demonstrates that, while Ms. Diekvoss was asked twenty-two follow-up "screener" questions, the Grievant was asked nineteen follow-up "screener" questions.

Given Superintendent Freese's testimony that "squiggles" indicate that a question was not asked, it is evident that Ms. Diekvoss, but not the Grievant, was asked Questions 25, 10 and 26. Other than general testimony that sometimes you forget a question, Superintendent Freese did not explain why the Grievant was not asked Questions 25, 10, and 26. 4/

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3/ The "Ventures for Excellence" screener questions are used repeatedly by the District when making hiring decisions. Thus, the District has a legitimate interest in maintaining the confidentiality of the "screener" questions. Since the Grievant and Diekvoss were both interviewed, the Grievant has access to information concerning the nature of the interview questions and may use that information to challenge the validity of the interview process. In the present case, the Grievant did not claim that the interview questions were problematic or unrelated to the job. Rather, the focus of the Grievant's objection is that there are more valid means of testing qualifications, such as experience with the District and prior performance evaluations.

4/ According to Superintendent Freese, if a candidate is doing poorly, the interviewers may shorten the interview, but that this was not done in this case.

The District argues that scoring on the basis of percentages negates the variation in the number of questions. The Grievant received a score of 51.5% and Ms. Diekvoss received a score of 66%. If Questions 10, 25 and 26 had not been asked of Ms. Diekvoss, then she still would have received a score of 66%. The variation in the number of "screeener" questions asked does not change the Grievant's relative position *vis-a-vis* Ms. Diekvoss, i.e., the Grievant's score remains lower than that of Ms. Diekvoss. 5/

The record demonstrates that Ms. Diekvoss was asked additional "specialty" questions which were not asked of the Grievant. The record fails to reveal why Ms. Diekvoss was asked these additional "specialty" questions. It is evident, however, that these additional "specialty" questions were not used to determine Ms. Diekvoss' score. Thus, the variation in the number of "specialty" questions does not change the Grievant's relative position *vis-a-vis* Ms. Diekvoss, i.e., the Grievant's score remains lower than that of Ms. Diekvoss.

The record demonstrates that the Grievant's interview was shorter than that of Ms. Diekvoss. 6/ The record further demonstrates that the variation in the length of the interview was primarily due to the fact that Ms. Diekvoss had been given the "screeener" portion of the structured interview in July of 1994, when she first applied for employment with the District. Given the structured nature of the "screeener" interview process 7/ and the fact that it had been less than one year since Ms. Diekvoss' "screeener" interview, it was reasonable for the District to rely upon Ms. Diekvoss' July, 1994 "screeener" interview when scoring the structured interview. Indeed, one may reasonably argue that it would have given Ms. Diekvoss an unfair advantage to have been allowed to "retest" within such a short time period. 8/

As the Grievant argues, Ms. Diekvoss' mother had been Superintendent Freese's Administrative Assistant at another district. However, any inference that Superintendent Freese's prior connection to Ms. Diekvoss' mother influenced the scoring of the structured interview process is rebutted by the evidence that Principal Paluch, who was unaware of the connection between Ms. Diekvoss' mother and Superintendent Freese, agreed that Ms. Diekvoss scored higher in the structured interview than the Grievant.

It is clear that, prior to the instant grievance, the structured interview process has been

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- 5/ The record establishes that with the exception of these three questions, the Grievant and Ms. Diekvoss were given the same "screeener" questions.
- 6/ However, the record does not demonstrate that the Grievant's interview was less social.
- 7/ Interviewees are given the question. The interviewer may repeat the question, but is not allowed to clarify the question or provide any other feedback to the question.
- 8/ Ms. Diekvoss was given the "specialty" question interview on May 4, 1995.

used to evaluate qualifications of applicants for District positions. It is not clear that any prior vacancy has been filled solely on the basis of structured interview scores. The contract, however, does not limit the District to one method of evaluating qualifications. Thus, assuming arguendo, that the instant evaluation procedure differed from prior evaluation procedures, such a fact would not, in and of itself, demonstrate that the District has acted in an arbitrary or capricious manner when it determined qualifications for the second grade vacancy on the basis of the structured interview scores.

In summary, it is not evident that the structured interview process used to determine the Grievant's qualifications differed materially from the structured interview process used to determine Ms. Diekvoss' qualifications. Nor is it evident that the scoring of the two structured interviews was based upon any factor other than individual responses to the structured interview questions. The record does not establish that the structured interview process was applied to the Grievant in an arbitrary or capricious manner.

### Summary

Article II provides the District with the management right to determine the qualifications of applicants for vacancies under Article XVII. It is not evident that the District's decision to use the structured interview process to determine qualifications of candidates for the Second Grade position, or the District's application of the structured interview process to the candidates for the Second Grade position is arbitrary or capricious.

The record demonstrates that Ms. Diekvoss scored higher on the structured interview than did the Grievant. The District's decision to award the Second Grade vacancy to Ms. Diekvoss on the basis that she was more qualified than the Grievant involved a legitimate exercise of the District's Article II management rights.

### AWARD

1. The District did not violate the contract by not selecting Toni Etter for the second grade position for the 1995-96 school year.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 16th day of August, 1996.

By Coleen A. Burns /s/

Coleen A. Burns, Arbitrator