BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

THE WAUPUN SCHOOL DISTRICT

and

THE WAUPUN EDUCATION ASSOCIATION

Case 33
No. 54085
MA-9545

Appearances:
Mr. Mark L. Olson, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202,
Mr. Armin Blaufuss, Executive Director, Winnebagoland UniServ Unit-South, P.O. Box 1195, Fond du Lac, Wisconsin 54936-1195.

ARBITRATION AWARD

On May 14, 1996, the Waupun Education Association and Waupun School District filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. The Commission, on May 29, 1996, appointed the undersigned to hear and decide the matter. A hearing was conducted on July 31, 1996, in Waupun, Wisconsin. The proceedings were not transcribed. The parties submitted post-hearing briefs which were received and exchanged by September 24, 1996.

This dispute involves the appropriate rate of pay for Richard Collins, a bargaining unit member who returned to the District following a six-year leave of absence.

BACKGROUND AND FACTS

Richard Collins, the grievant, was hired on March 1, 1972, and was employed by the Waupun School District as a classroom teacher since that time. Mr. Collins was elected president of the Wisconsin Education Association Council. He requested, and was granted, a series of leaves of absence which began on June 30, 1989. His tenure as president of the WEAC began on August 1, 1989. Mr. Collins was re-elected twice, and ultimately took three two-year leaves of absence. The first covered the 1989-1990 and 1990-91 school years. The second covered the 1991-92 and 1992-93 school years. The third leave covered the 1993-94 and 1994-95 school years. At the time of the initiation of his first leave (6/30/89), Mr. Collins had 17 and 1/2 years service with the Waupun system.

Upon his return to the Waupun School District, Mr. Collins was placed at Step G-11 of the

salary schedule. Collins regarded that as an inappropriate placement and filed a grievance. His grievance led to this proceeding.

When Collins left the District the Waupun Schools had a traditional teacher grid system which compensated both education and experience. The salary schedule in place in 1989 had 16 steps, including Step "0" for new hires, at the Master's level. At the time, Collins was at Step 15, one step short of the top of the schedule.

In negotiations leading to a 1989-92 collective bargaining agreement, the Association proposed and the District ultimately agreed to a consolidation and shortening of the salary schedule. At the Master's level, the 16 steps were reduced in number to 13.

In the course of those negotiations, the parties agreed to reallocate teachers so as to make the shortened schedule rational and affordable. In order to do so, teachers were backed up on the schedule to a lower-numbered step. William Zeininger, the District Business Manager, and Richard Lila, Chief Negotiator for the Association, did the actual teacher placement. It was their testimony that they operated under two criteria: one, that there be no windfalls, for example, placement was done to avoid the prospect of a teacher receiving the equivalent of three years raises due to the consolidation. The second criteria was that the average bargaining unit raise was to equal $1900. One consequence of the placements applying these criteria was that the actual years experience did not equal the years reflected in placement on the new schedule.

A substantial number of teachers (approximately 50) were moved back. There were 10 active teachers at Range G-15, the range Mr. Collins was on at the time he left the system. All range G-15 teachers were moved back to Range G-11. The parties agree that had Collins been working during this time period, he would have been moved back to Range G-11. However, Mr. Collins was not there, he was on leave. All parties stipulate that his particular situation was never discussed. It is also the case that the working documents that Lila and Zeininger used did not have Collins listed.

While on leave, Mr. Collins did not have District-paid benefits. There was an arrangement entered into with respect to retirement reimbursement. Collins performed no work for the Waupun School District. Collins was not advised of the change in salary schedule, its impact on him, or any other matter arising out of the change in schedule. He did not grieve prior to the initiation of the grievance leading to this proceeding. While on leave, Collins retained, but did not accrue, additional benefits.

The collective bargaining agreement has a leave provision. Mr. Collins' leave does not conform to the specific provisions of the parties' collective bargaining agreement. The kind and character of his leave(s) are somewhat unique in the experience and history of the district. However, it was the testimony of all parties that employes on leave of absence do not accrue salary schedule seniority while on such leave.

Teachers hired after the 1989-90 school year are credited with actual number of years experience. Unlike the teachers who were employed during the 1989-90 year in which the modified schedule was created, more recently hired teachers are placed on the salary schedule in an experience lane which does correspond to actual years experience. Some teachers, new to the system, bring experience with them, and are credited with that experience on the salary schedule. One consequence of that is that a teacher hired after the 1989-90 year with less actual experience than Mr. Collins possesses earns more than does Mr. Collins placed where the District places him. There are teachers who were in the system prior to 1989-90 who have continued to advance on the schedule, and who possess the same or less experience than does Mr. Collins who are at the top of the existing schedule.

The District introduced evidence with respect to the placement of an employe, Steve Prust, a high school science teacher who was on leave of absence when the 1989-90 contract was negotiated. Upon his return, Mr. Prust was placed in a manner consistent with the school board's placement of Collins; i.e., he was backed up. Prust's placement did not reflect his actual years' service. Mr. Prust, who is no longer with the District, did not grieve his placement. The Association introduced testimony that it was not aware of Mr. Prust's treatment.

ISSUE

The parties were unable to stipulate the issue. The Association proposes the following:

> Did the Waupun School District violate the Master Contract when, at the beginning of the 1995-96 school year, it placed Dick Collins at Step 11, Master's degree, on the salary schedule, rather than Step 12, Master's degree, upon his return from a leave of absence? If so, what shall the remedy be?

The District proposes the following:

> Did the District violate the provisions of Article VII, Section 6(A) of the 1992-95 collective bargaining agreement with the Waupun Education Association when it placed grievant Richard Collins at Step G-11 of the 1994-95 salary schedule upon his return from a six-year leave of absence at the commencement of the 1995-96 school year?

These proposes issues are substantively close to one another. I believe the Discussion and Award that follows addresses both proposed issues.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE II

RECOGNITION

The Board recognizes the Association, under Wisconsin Statute 111.70, as the exclusive bargaining representative on wages, hours, and conditions of employment for all full-time and regular part-time employes of the District engaged in professional educational responsibilities, including classroom teachers, Chapter I teachers, librarians, guidance counselors, speech clinicians, psychologists, social workers, A-B directors, reading specialists, and school age parent teachers, but excluding administrators, reading specialists/director of staff development, and principals who teach less than 50% of their time.

. . .

ARTICLE VII

PROFESSIONAL BENEFITS AND COMPENSATION

A. General: The salary shall be that as outlined under "Teacher's Salary Schedule" (attached), except that each teacher (other than those teachers who have reached the final increment in the lane defining their educational achievements) shall be advanced one increment beyond the salary paid in the previous year. (Note: the procedure described herein will not be applicable for 1989-90, as a result of the adoption of a revised salary schedule. The revised schedule and the placement of teachers on this schedule is as agreed to by representatives of the two parties.) It is further agreed between the parties that, if teachers are moved back on the schedule as a result of this settlement, such teachers shall be eligible for no more than one increment per year in succeeding school years if such teachers are eligible for increments after relocation on the revised salary schedule.

. . .

D. Teachers New To The District: When hiring a teacher with five (5) or less years of full-time teaching experience, the Board shall place him/her on the salary schedule step which reflects his/her actual full-time years of teaching experience outside of the Waupun School District.

When hiring a teacher with more than five (5), but less than eleven (11) years of full-time teaching experience, the Board shall place him/her on a salary schedule step which reflects at least five (5) years of full-time teaching experience, but not more than the teacher's actual years of experience, with actual placement within these limits at the discretion of the Board and administration.

When hiring a teacher with more than ten (10) years of full-time teaching experience, the Board shall place him/her on a salary schedule step which reflects no less than five (5) years less than his/her actual years of full-time teaching experience, but no more than his/her actual years of full-time teaching experience, with actual placement within these limits at the discretion of the Board and administration.

A teacher new to the District who has part-time teaching experience in other districts will be credited with the number of years experience calculated in the following manner:
Any year during which the teacher taught half-time or less will be counted as a half-year of experience;
Any year during which the teacher taught more than half-time will be counted as a full year. The teacher will then be placed on the salary schedule according to the above paragraphs.

. . .

ARTICLE VII

GRIEVANCE PROCEDURE

2. Definitions:

A. Grievance: A grievance shall be defined as any

dispute involving interpretation, application, or enforcement of the terms and provisions of the Master Agreement existing between the parties. . .

. . .

3. Steps of Procedure:

. . .

Step 2.

C. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The Arbitrator shall not modify, add to, or delete from the express terms of this agreement. The decision of the Arbitrator, when within the scope of his/her authority under this agreement, shall be final and binding upon the parties.

POSITIONS OF THE PARTIES

It is the position of the Association that the WEA and the District's re-positioning of the 1989-90 bargaining unit members was done to prevent those teachers from receiving a windfall due to the restructuring of the salary schedule. The Association contends that Dick Collins was not a bargaining unit member in 1989-90 and thus was not subject to repositioning. The Association notes that the exhibit from which the placement was done does not contain Collins' name. The Association points to all record testimony to the effect that Collins' placement was not discussed. The Association subsequently concludes that Collins was not a bargaining unit member in 1989-90, that he was not employed by the District, and such is true of any other teacher on a leave of absence.

The Association points to the Recognition clause and contends that to be a bargaining unit member, an individual must be a full-time or regular part-time employe of the District engaged in professional educational responsibilities. By virtue of this definition, Collins was not a bargaining unit member during the 1989-90 school year, and as such, he was not an employe of the District.

The Association acknowledges the treatment of employe Steve Prust. However, the Association contends that the District acted unilaterally with respect to Prust, that its actions were

unknown to the Association, and thus that incident has no bearing on this grievance.

The Association contends that the Master Agreement does not deny Collins the advances he had earned on the salary schedule due to his teaching experience prior to the 1989-90 school year. A review of Article VII, Paragraph 6(A) leads the Association to the following conclusion: 1) the parties did not agree to reposition Collins on their revised schedule; 2) prior to 1989-90, Collins had 17 1/3 years teaching experience in the District; 3) upon his return from leave of absence, Collins still had 17 1/3 years teaching experience in the District; 4) Article VII, 6(A), does not deny Collins the right to placement on the 1995-96 salary schedule based on his 17 1/3 years of teaching experience in the District; 5) Collins appropriate placement for the 1995-96 school year is Step 12 of the Master's degree column (G).

The Association attached an arbitration award, authored by Zel S. Rice II involving the School District of Hudson (5-6-93). In that case, Arbitrator Rice sustained the right of an employe returning from a leave of absence to receive an increment for experience gained prior to the year in which he took a leave. The Association argues that that case mirrors the facts presented in this matter. That is allegedly the case because neither the contract in that dispute nor the Agreement here take away from Collins' advancement on the salary schedule for teaching experience gained prior to the 1989-90 school year. Collins does not claim experience increments for the years he was on leave of absence; he only claims the years of experience he had prior to 1989-90.

The Association contends that teachers not employed during the 1989-90 school year have not been repositioned on the salary schedule. The Association points to an employe, Kampka, who was granted 13 years of prior teaching experience by the District, and placed at Step 12 of the salary schedule, when she was initially hired for the 1995-96 school year. This results in Ms. Kampka, with less actual experience than is possessed by Collins, placed higher on the salary schedule. The consequence is to reward teachers who have taught fewer years in the District and altogether, than has Collins.

The Association contends that no matter how Collins is treated, there will be two categories of employes in the District: 1) those who taught in Waupun during the 1989-90 school year and were repositioned on the restructured salary schedule, and 2) those who were not teaching in Waupun during the 1989-90 school year and were not repositioned on the salary schedule. The Association contends that Collins belongs in the latter category.

It is the Association's contention that the District's violation of the Master Agreement occurred when it placed Collins at Step 11 when it issued him a 1995-96 individual teaching contract. The first notice that Collins had of his repositioning was when he received his 1995-96 individual teaching contract. The Association learned of the repositioning when brought to its attention by Collins. There is nothing in the record to suggest that the parties ever addressed Collins' pay on the merits prior to this time.

It is the District's position that it was the proposal of the Waupun Education Association to shorten the 15 step salary schedule in 1989; consequently, any dispute as to the application of the schedule must be interpreted against the position of the WEA and grievant. The District notes that at the time of the placement of teachers on the newly-created schedule, all teachers situated similarly to Collins were placed at Step G-11 of the newly-negotiated salary schedule. The District objects to the grievant coming forward now and claiming to be treated differently from all other teachers similarly situated at the time.

The Board contends that it and the Association specifically agreed, as a part of the 1989-92 settlement, that some teachers would be moved back on the salary schedule as a result of this settlement. The Board points to Article VII, 6(A) and concludes that it is abundantly clear that the movement of the grievant from Step G-15 to G-11, as a part of the 1989-92 settlement, was specifically contemplated, and was specifically agreed upon, during the course of the negotiations which resulted in the 1989-92 contract, and the succeeding 1992-95 contract.

The District contends that there is no correlation, as a result of the 1990 settlement, between placement on the salary schedule and years of service to the District; employes were moved back from the maximum step on the salary schedule. The District notes that at least ten teachers, including the grievant, were moved from Step G-15 to Step G-11 on the revised salary schedule as a result of the 1989-92 settlement. The District goes on to point out that at least 50 teachers in the District, including the grievant, were moved back on the salary schedule as a result of the 1989-92 agreement between the District and the Association.

The District notes that no grievances were filed in 1990, or in any year thereafter, by grievant, by the WEA, or by any teacher who had been moved backwards on the salary schedule as a result of the January 10-11, 1990 settlement. Given the passage of time, it is the position of the District that the WEA and the grievant have waived the right to challenge grievant's placement on the salary schedule. That is, the matter which the grievant is challenging, namely his movement back on the salary schedule, goes back to the 1989-92 settlement, a period of six years. Given the passage of time, and the number of teachers moved, the District objects to the Association coming forward six years after the fact to grieve.

The District contends that the language of the 1992-95 collective bargaining agreement, and past practice between the parties, determine that teachers shall only be eligible for incremental movement on the salary schedule when the increment has been earned by the teacher as a result of one year of service to the school district. The District notes that Step G-11 is the step upon which all teachers who had previously been at Step G-15 on the 1987-89 15-step salary schedule, had been placed following the January 10-11, 1990 mediated settlement. The grievant was on a leave of absence at the time and consequently, his placement on Step G-11 could not occur until the 1995-96 school year, the first year in which he worked in the District following his six-year leave of absence.

The District goes on to offer that the contract provides explicitly that the only way in which an increment on the salary schedule is earned is through a year of service to the school district. The grievant seeks placement on Step G-12, despite the fact that he did not teach one year in order to earn that increment.

The District points to the specifics of the Steve Prust placement and contends that Prust was treated in the same fashion as was the grievant in two respects: first, he was moved back on the salary schedule in the "G" lane as a result of the 1989-90 tentative agreement. Second, he was not granted an increment following his return from a leave of absence, as a result of his not having worked for one year in the District in order to earn the incremental movement.

The fact that some teachers who have less experience in the District than the grievant will advance to Step G-12, while grievant is at Step G-11 in 1995-96 is not relevant to this grievance and is fully consistent with the terms of the January 10-11, 1990 mediated settlement. The Association's contention to the contrary seeks to superimpose upon the relationship between the parties a condition which is nowhere stated in the collective bargaining agreement and which is nowhere found in any practice between the parties. Namely, grievant would have the Arbitrator determine that a teacher cannot be placed at a step, on the salary schedule, which causes him to be paid less, or placed lower, than other teachers who have taught for fewer years in the District than has the grievant. However, the grievance fails to cite any provision of the collective bargaining agreement, which would give support to this assertion.

DISCUSSION

I believe this grievance is timely filed. Collins can not be held to have grieved earlier. All record testimony is to the effect that Collins' name was not on the administrative documents used by the parties to do their placements. All record testimony is to the effect that Collins did not receive actual notice as to the consequences of shortening the salary schedule. Six years is an unusually long period of time to pass between the date upon which a cause of action is based and a collective bargaining agreement's willingness to tolerate a grievance. However, Collins had no cause of action until he was actually placed on Step G-11. He had no actual knowledge that he would be placed on G-11 until that event occurred. Once he became advised of his salary schedule placement, and its consequences on his income, he proceeded to file a grievance promptly.

Similarly, the Association cannot be held to have grieved Mr. Collins' circumstances in 1989-90. In the preparation of pay documents, Collins' name was not listed, and never arose. At the time Collins was on a leave that was scheduled to extend for an uncertain duration, and which was unusual as between these parties. Requiring the Association to file a grievance in 1990 would obligate that body to file a grievance over Mr. Collins' placement, prior to the time Collins was placed.

I believe that Collins was at all times an employe of the District. As such, his terms and

conditions of employment were regulated by the negotiations that transpired between the Association and the District. The Association appears to argue to the contrary. It points to the recognition clause and contends that a literal reading of that clause excludes Collins from its scope. In essence, as I understand the Association's position it is that Collins was not a full or regular part-time employe engaged in professional educational responsibilities. Collins had been employed in such a capacity for many years. All parties believe that Collins would ultimately return and be similarly engaged in those activities. During the term of his leave, Mr. Collins certainly maintained some sort of relationship with both the District and with the Association. I suspect Mr. Collins very strongly believed that he had restoration rights at the end of his various leaves of absence. I further believe that he assumed and understood that those rights were enforceable. I read this clause as being broad enough to encompass those who are on authorized leaves, and who have an understanding that they will be returning. I do not read the clause to require employes to be actively engaged in teaching on a full or part-time basis at all moments in order to be considered bargaining unit members. Carrying the Association's argument to its logical conclusion, the District would have few, if any employes during the summer and other break periods.

As a practical matter, I believe my construction of the recognition clause is consistent with the working practice of both parties. As a part of the processing of its grievance in this matter, the Association, on October 13, 1995 (Joint Exhibit No. 4) indicates as follows:

> "Dick Collins was on a leave of absence and still continues to be a District employe."

Similarly, in responding to the grievance, the District treated him as having employe status in its answer:

> "3. Even though Mr. Collins was not an 'active' member of the WEA at the time of his leave, the Association did in fact negotiate and accept the bargain Ex-Persona". (Joint Exhibit No. 6, 10-22-95).

Had Collins been on the payroll in 1989-90 he most certainly would have been moved back. The fact that he was not moved back is a consequence of the fact that his name ceased to appear on the payroll than it is a conscious decision to exempt him from an otherwise uniform application of the newly-negotiated pay plan. I do not believe that there is any merit to the contention that Collins was not moved back because he was not an employe of the employer.

Mr. Collins did not perform work for the school district until his return for the 1995-96 school year. Accepting the Union's contentions, for the purpose of argument, that Collins was never moved back, that raises the question as to the appropriate step to which Collins should be assigned upon his return. At the time he left, Mr. Collins was at Step 15, a step which no longer

exists, because these parties in their 1989-90 negotiations eliminated that step. The Association contends that Mr. Collins should simply be assigned to the highest step that exists supported by his years of teaching experience. While there is a certain logic to that approach, it ignores the entirety of the bargain entered into by these same parties in 1989-90. One facet of that bargain was to divorce actual years work from salary schedule placement for purposes of pay. In 1989, Mr. Collins was one step from the top of the schedule. What the parties did with all other teachers similarly situated was to move them to Step 11, one step from the top of the newly-created schedule. What the parties further required of those teachers was that they work one more year to reach the newly-created top. To the extent the District's action can be characterized as moving Collins back a step in 1995 I believe that that action is entirely warranted by the history of the provisions at play. When he left, Mr. Collins was one step below the top of the schedule. When upon his return he continued to find himself one step below the top of the schedule. His treatment parallels that afforded his colleagues. I am not willing to treat Mr. Collins as newly-hired under Section 6(D). For the reasons set forth above, I do not believe him to be "new" to the District, or to be "hired".

I do not believe the Prust matter to be particularly persuasive. While I understand that the facts strongly parallel the facts of this dispute, the record also supports a finding that the Association was not aware of the Prust circumstances. One incident, standing alone, does not in my mind establish a binding practice on these parties. The fact that the Union was unaware of it also diminishes its value as precedent-setting. However, I do believe the Prust matter indicates the District's state of mind with respect to the treatment of this matter, and that has remained consistent with the passage of time.

This is a somewhat anomalous situation. Mr. Collins took a leave of absence for six years. Nothing on the face of this contract suggests that such a leave has been reasonably anticipated by these parties. His leave happened to coincide with a dramatic restructuring of the salary schedule, one component of which caused teachers to be moved back on the schedule. Their movement was governed by two criteria: one, that the 1989-90 settlement average $1900 per returning teacher; and two, that no teacher receive a windfall as a consequence of the new schedule. The relevance of these two criteria given the passage of six years, is hard to measure.

The Association complains that there are teachers with less experience than Mr. Collins who will be paid more. This is a valid complaint. However, this nuance is a by-product of the six year leave, the timing of the leave and salary schedule modifications, and the separate salary schedule treatment of old vs. new employes. These various interacting factors explain the pay relationship between Collins and Kampka. Had Mr. Collins stayed and continued to work for the District he would have been at the top long ago.

The Association claims that Collins' placement is inappropriate. While there are certainly inequities present, such inequities inevitably arise out of dramatic changes in salary schedules. People's salary placement change vis-a-vis one another, inevitably leave some to believe that they have been treated inequitably. However, there are no provisions of this contract that the Employer

has violated. It is particularly difficult to contemplate overturning this decision where Collins has received the same treatment as was afforded his salary schedule peers.

The Union cites an arbitration award involving the School District of Hudson. I believe that case to be distinguishable. In that case, there was no changed salary schedule causing employes to move backward. That is a significant distinction in that the language I believe controls this dispute was not present in Hudson. In the Hudson case, a teacher took a leave of absence which coincided with a year in which the salary schedule was frozen. The District believed that the teacher should not only be frozen, but should also return one step behind his former colleagues. The Association, and ultimately the Arbitrator, believed that the freeze should coincide with the lack of step movement attendant to a leave of absence. I believe Hudson is a very different case from that presented here.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 27th day of December, 1996.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator