

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CHIPPEWA FALLS BOARD OF EDUCATION
EMPLOYEES LOCAL 1241, AFSCME, AFL-CIO

and

CHIPPEWA FALLS BOARD OF EDUCATION
CHIPPEWA, WISCONSIN

Case 117
No. 54184
MA-9579

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 1937, Eau Claire, Wisconsin 54702-1937, for Chippewa Falls Board of Education Employees Local 1241, AFSCME, AFL-CIO, referred to below as the Union.

Mr. Michael D. McCarthy, Membership Consultant, Wisconsin Association of School Boards, Inc., 2005 Highland Avenue, Eau Claire, Wisconsin 54701, for Chippewa Falls Board of Education, Chippewa, Wisconsin, referred to below as the Board or as the Employer.

ARBITRATION AWARD

The Union and the Board are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the Board agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Alice Perry, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on October 30, 1996, in Chippewa Falls, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by December 23, 1996.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate the collective bargaining agreement by disqualifying the Grievant from the Head Cook position at Hillcrest School?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II - RECOGNITION

. . .

Section 4. Management Rights. It is understood and agreed that the Board of Education possesses the sole right to operate the School District so as to carry out statutory mandates and educational goals; however, such rights must be exercised consistently with other provisions of this Agreement.

Management rights include:

- a) The right to utilize personnel . . . in the most appropriate and efficient manner possible;

. . .

ARTICLE III - GRIEVANCE PROCEDURE

. . .

Section 8. Discipline and Discharge. It is the Board's responsibility to offer and provide reasonable training and supervision and to establish reasonable work rules. Disciplinary action may only be imposed on an employee for just cause. Any disciplinary action may be appealed through the grievance procedure.

. . .

The normal procedure for discipline and/or discharge shall include only the following:

- A) Oral Reprimand;
- B) Written Warning;
- C) Suspension;
- D) Discharge.

...

ARTICLE V - SENIORITY

...

Section 4. Posting. When it becomes necessary to fill a vacancy or a new position in the school system, the Board of Education shall bulletin such new position or vacancy . . . The qualified applicant within the system with the longest period of service shall be assigned to the new position or vacancy.

...

Any employee failing, for any reason, to qualify for any job or new position, may return to the job formerly held, or may do so of his/her own volition within the thirty (30) day trial period. Dissatisfied employees may appeal through the grievance procedure.

...

Section 5. Probationary Periods. Employees being promoted, assigned or bumping into a new position shall be granted thirty (30) work days to prove their qualifications, after the employee physically occupies the position.

...

BACKGROUND

The grievance form states the "applicable violation" thus:

Employee unreasonably disqualified. Article 5, section 4 & 5 - and any other violations of the current contract.

The grievance form then states the following remedy: "reinstate employee to posted position - make employee whole."

The Grievant was first employed by the Board as a Food Service Worker in November of 1991. In the Spring of 1996, she posted for the position of Head Cook at the Board's Hillcrest Elementary School. The job description for that position reads thus:

1. Put on hair net and apron. Check in.
2. Wash hands. Wash off all counter surfaces.
3. Check cooler and freezer temperatures and record them.
4. Put away dishes from the day before that were left to air dry.
5. Get all foods out of storeroom and freezer that will be needed for entire day.
6. Check in bread and milk against billing.
7. Order a weeks supply of food for two weeks in advance. Check in food when it is delivered. Be sure frozen foods is (sic) put in freezer as soon as possible.
8. Do monthly inventory by the 25th of each month.
9. Keep daily records unless job is designated to someone else.
10. Have weekly work schedule ready by Monday a.m. Make available to all workers.
11. Do complete inventory in May of all equipment.
12. Give explicit orders and see that they are carried out.
13. It is your responsibility to see that meals are prepared according to menu, and recipe, and is ready on time and served in an attractive manner.
14. Collect time cards and leave on counter for week-end pick up.
15. Smile, be pleasant. Treat all fellow workers and students fairly and equally.
16. Check all equipment at the end of the day. Be sure all doors and windows are locked. Be observant for missing items.
17. You are responsible to your supervisor.
18. Always practice safety and sanitation procedures. Personal hygiene is important.
19. Check out then go to your locker for outer garments.

The Board assigned her to that position on March 12, 1996. 1/ As Head Cook, the Grievant was responsible for the preparation and serving of two hot and two cold lunch entrees.

The move from Food Service Worker to Head Cook increased both her hours and her hourly rate of pay. For the 1995-96 school year, wage rates for these two positions were:

	<u>Start</u>	<u>6 Months</u>	<u>12 Months</u>
Head Cook	9.78	10.02	10.46
Food Service Worker	8.74	9.15	9.78

In a letter dated April 29, Larry Annett, the Board's Superintendent, informed the Grievant that she would not be retained as Head Cook. That letter states:

Due to ongoing difficulties you have had fulfilling your new role as a Cook Manager at Hillcrest Elementary, you are being transferred back to your previous food service position at the Middle School. A dated list of those problems, along with a record of Ms. Kendzior's efforts to remediate the situation, will be provided if you desire.

The notice returning you to the Middle School is within your 30 day probationary period. Please plan on returning to the Middle School on May 1, 1996.

Much of the background to this grievance is disputed. The remaining background will be set forth as an overview of witness testimony. Because the Grievant's testimony responded, in significant part, to deficiencies alleged by management personnel, relevant testimony of Board witnesses is summarized first.

Sylvia Kendzior

Kendzior was first employed by the Board in 1975 as a Cook Manager. She has served as Food Service Director for roughly thirteen years. She oversees the entire food service process,

1/ References to dates are to 1996, unless otherwise noted.

including the supervision and evaluation of food service employes.

Kendzior advised the Grievant of her promotion on March 12. She told the Grievant to report to the Hillcrest kitchen that morning and assume her duties as Head Cook. Then serving as a substitute Head Cook was Karen Moldenhauer. Then serving as Assistant Cook was Irma Blizek. Moldenhauer served as the dishwasher in the Hillcrest kitchen, but had experience as a Head Cook, and served as substitute to fill the vacancy ultimately awarded to the Grievant. Kendzior did not afford any training to the Grievant or to any other employe assuming the role of Head Cook. Rather, the training was to be "hands on," with Moldenhauer assisting the Grievant for her first two days. Kendzior noted that, prior to becoming the Head Cook at Hillcrest, the Grievant had served as an Assistant Cook perhaps six times, and had filled in at the Hillcrest kitchen on perhaps two occasions.

Kendzior felt that she spent more time overseeing the Grievant than she had with any other Head Cook. She did not feel any Head Cook needed extensive training. Rather, she saw her own role to involve affording useful suggestions and evaluating employe performance. She testified that she knew the Grievant saw the Head Cook position as a personal goal, and added that she believed at the start of the Grievant's probation period that the Grievant would achieve that goal. However, she became convinced during the thirty day probation period that the Grievant's job performance was deficient and not improving. Because she did not want to deny the Grievant the position on her opinion alone, she consulted the Principal at Hillcrest, James Dimock. Dimock informed Kendzior that, in his opinion, the Grievant's performance was unsatisfactory and unacceptable. After consulting other administrative personnel, Kendzior approached the Grievant near the end of her probation period to personally inform her that she would not be retained as Head Cook.

After the filing of the grievance, Kendzior prepared the following memo to document her concerns regarding the Grievant's performance as Head Cook:

1. On 3-14 and 3-18 ran out of food. On 3-19 we talked about this, and (the Grievant) was told to prepare more.
2. On 3-20 and 3-21 ran out of food again. On 3-22 I again talked to her about this problem and again told her to make extra.
3. On 3-26 and 3-27 ran out of food once more. Again she was told to prepare extra. I told her I would rather have left overs than run out.
4. Starting April 1 she no longer ran out of food. She started making students wait for more food to be prepared thus the production sheets didn't reflect running out of food.
5. Alice called me at 11:40 A.M. and needed pudding for the next day. She commented "Oh, I won't have enough pizza for

today." I told her to use french bread to fill in. When asked why she replied "that's what I had so rather than order other I used it". Now she would be out of french bread 3 days late (sic) when it was on the menu. After 5 years in food service she should know the difference in pizza. It was very poor judgement in my opinion.

6. I took her pizza. She stood and talked until I finally told her to get her pizza panned and in the oven for the 12:00 serving line. It seems to me she has no concept of time.

7. She is very disorganized. On a regular basis I stop in at 8:45 - 9:00 A.M. and no work is started.
8. She made 1/2 batch of ground beef into taco meat and did not refrigerate for over 2 hours. To save time she should have cooked the whole batch all at once and refrigerated as soon as possible to be used later.
9. Her work schedule is not done one week in advance as requested in her job description.
10. Fresh buns were not ordered for sub sandwiches.

Kendzior testified in some detail regarding these alleged deficiencies. She acknowledged the Grievant had run out of one entree after following her suggestions regarding the amount to order. She also acknowledged that when she documented Item number 9, she was unaware the Grievant could not timely submit her work schedule due to onset of strep throat. She also acknowledged that the Grievant addressed some of the record-keeping deficiencies she observed early in the probationary period.

Kendzior was not, however, willing to acknowledge that the Grievant addressed the problems Kendzior brought to her attention. More specifically, Kendzior noted that although the Grievant's production records indicated she did not run out of entrees, the Grievant continued to run short of food while serving students. She would respond by asking students to wait while she prepared more food. As a result, Kendzior felt the Hillcrest lunch lines did not proceed smoothly. She estimated the Grievant ran out of both entrees perhaps every other day, particularly in March. She acknowledged she received no parent or student complaints regarding the Grievant's performance. She relied heavily on Dimock's assessment of the Grievant's performance.

James Dimock

Dimock has been employed by the Board for twenty-two years. He has served ten of those years as a teacher and the remainder as an administrator. He noted he greets all new employes, and generally oversees the performance of their duties. His oversight focuses mainly on watching the lunch lines move, dismissing the students at the close of the lunch hour and assuring the presence of adequate supervision over the lunchroom.

Dimock testified that he did not feel the Grievant efficiently ran the Hillcrest kitchen. He noted that Kendzior approached him during the Grievant's probation period and advised him that she was considering disqualifying the Grievant as Head Cook. Kendzior asked him to document his observations concerning her work deficiencies. Dimock responded in a letter dated May 7, addressed "To Whom it May Concern" which states:

During (the Grievant's) probationary period at Hillcrest School, I have had the following observations:

1. On more days than not, the serving line was stopped to prepare more food for the children in the last shift. This not only caused long waiting lines, but delayed the cleaning of the gym and thus its use as a phy ed facility in the afternoon. Many time (sic) the lines would stretch to 20-25 children waiting for additional food to be prepared.
2. On one particular occasion, it was reported to my (sic) by a lunch room supervisor, that (the Grievant) heatedly confronted a first grade student about trying to "sneak through the line" twice. The assistant cook felt the child should be served, observing that he had gotten in line behind older kids because he was late to lunch. The situation was then referred to the aide collecting tickets, and (the Grievant) still questioned that this first grade child was trying to pull something.
3. Unauthorized personnel have been reported to be in the kitchen during food preparation and clean up. These people have been identified as (the Grievant's) own children.
4. The staff made several comments about (the Grievant's) demeanor when making requests from the kitchen. They always felt that the cook and kitchen staff were most approachable, but not with (the Grievant). They characterized her as "crabby and uncooperative".

These are the reports and observations I've had during the time that Alice Perry was in the head cook position at Hillcrest School.

Regarding Item 1 of this memo, Dimock testified that the PE class following lunch was delayed roughly one-half of the days the Grievant served as Head Cook. He noted that he did not witness the events noted in Items 2 or 3. Rather, he relied on the account afforded him by Gail O'Connell regarding Item 2 and on the account afforded him by Kendzior regarding Item 3. Regarding Item 4, Dimock noted that the Grievant was always pleasant with him, but that he received complaints from other employes concerning her demeanor.

Irma Blizek

Blizek has been employed by the Board since 1990, and served as Assistant Cook during

the Grievant's tenure as Head Cook. She testified that she felt the Grievant was unorganized as a Head Cook, and that she was constantly concerned food would not be ready for students

or that they would run out of food while serving. She testified that all Head Cooks have a routine to assure food will be prepared by 11:15 a.m. in sufficient quantity to meet or exceed student demand.

She observed the events stated as Item 2 of Dimock's May 7 letter. Blizek testified she knew the child had not been fed, but had gotten in line late. She stated she tried to get the Grievant to feed the child, who she thought was scared by the incident. This was, to Blizek's experience, the first time she observed a Board employee seeking to deny a student lunch. She noted the Grievant cooked food well, but that the Grievant was never sufficiently organized to assure sufficient food was prepared in time for the lunch lines. She could not, however, detail how often or when the Grievant ran out of hot entrees. She noted that she attempted to offer advice to the Grievant, but felt her advice was ignored.

Gail O'Connell

O'Connell has been employed by the Board as an Aide for roughly twenty-two years. She has served as a Lunch Supervisor for about thirteen years. Her duties in this role require her to take lunch tickets, then assure students are properly served and seated. She also oversees the lunch lines.

O'Connell testified that she supplied Dimock the information which became Item 2 of his May 7 letter. She noted that she became involved in a dispute between Blizek and the Grievant concerning whether the first-grade child had been fed. The Grievant ultimately asked O'Connell what should be done, and O'Connell told her to feed the child.

She noted that the Hillcrest kitchen employes, in the past, efficiently moved the lunch lines through the lunch period. She felt the lines moved well, under the Grievant, perhaps once or twice per week. The Grievant "frantically" had to prepare food while the lines were present. These delays posed problems, O'Connell noted, because they would cause students to become irritable and hard to manage. The Grievant's performance was, in O'Connell's estimation, the worst of any Head Cook she ever observed.

Kip Knez

Knez has served as a Physical Education instructor for the Board for roughly seven and one-half years. He testified he had difficulty getting his PE class following lunch started on time due to disorganization in the Grievant's kitchen. Because the gym serves as the lunch room, the cleaning of the room had to be complete before he could start class. He did not have this problem before the Grievant's assumption of Head Cook duties. He noted that the Grievant, unlike prior Head Cooks, permitted her children in the kitchen.

The Grievant

The Grievant testified that she has always wanted to serve as Head Cook, and was pleased to have been offered the position. She learned of this assignment at 9:20 a.m. on March 12, when Kendzior phoned her at home to advise her to report for work as Head Cook that morning.

When the Grievant reported for work at Hillcrest, Kendzior was not there. The dishwasher, Karen Moldenhauer, showed the Grievant how she was performing the duties of Head Cook. Jane Flug was the Grievant's predecessor as Hillcrest Head Cook. Her food inventory records were sketchy, and the Grievant had to rely, initially, on Moldenhauer's records and instruction.

Unsatisfied with the record keeping she first learned, the Grievant consulted the Head Cook at the Middle School, Dolores Barnier. She patterned her own record keeping after Barnier's.

The Grievant testified in some detail concerning the ten items noted in Kendzior's memo. She denied she ever ran out of food. She noted she always had at least one hot entree available for students, and she emphasized that when she first became Head Cook, she understood Board policy to require only that one, not two, hot entrees had to be available to each student. Kendzior did instruct her to have both hot entrees available, even if this led to some waste. Once apprised of this, the Grievant noted she always had two hot entrees available.

Regarding Item 4 of Kendzior's memo, the Grievant stated that she did not change her practices after April 1, and never asked students to wait in line while she prepared food. She acknowledged phoning Kendzior as noted in Item 5 of the memo. She denied, however, that she failed to properly order any food item. While acknowledging the underlying delivery noted in Item 6 of the memo, the Grievant stated that she and Kendzior simply disagreed on the amount of time necessary to get the pizza ready for the noon serving. The Grievant stated that Kendzior rarely stopped by the Hillcrest kitchen, and never appeared "on a regular basis" early in the morning as alleged in Item 7 of Kendzior's memo. The Grievant stated she arrived at work between 8:15 and 8:30 a.m., and started work as soon as she arrived.

She acknowledged she made Taco meat in half batches to speed cooking time when she first arrived at Hillcrest. She stopped doing this when she learned, on her own, how to properly operate the Board's convection oven. Any meat she left out would be left out no more than one hour and was left out to avoid "steaming up" the refrigerator. Her work schedules were prepared over the weekend, she noted, adding that the only untimely schedule she submitted was delayed due to the onset of a strep throat. She noted that she had no recall of the problem listed as Item 10 in Kendzior's memo. She always kept an ample supply of sub buns in the freezer.

The Grievant also testified in some detail concerning Dimock's May 7 memo. Items 2, 3 and 4 were not covered in Kendzior's memo. The Grievant noted that although O'Connell was responsible for policing the lunch lines, she would keep an eye on students to make sure they did not get food they had not paid for. She noticed that a first grader was trying to get in line for a second meal, and she stopped him. She confronted the child, but did nothing to intimidate the child. She simply asked him if he had purchased another ticket, and did nothing to deny him the meal.

Her children did occasionally stop by Hillcrest. She relied on her son for a ride to work. He occasionally would assist her in her more mundane cleanup tasks. Her daughter, on one occasion, helped her count milk tickets. She denied she was cross in dealing with other employees. Rather, she was "always smiling," and courteous to teachers and other employees.

The Grievant testified that she effectively performed each of the duties demanded of her by her job description. At no point in her tenure as Head Cook did Kendzior or Dimock counsel her regarding any alleged deficiency. She was surprised when Kendzior informed her she would not be retained as Head Cook.

Sharon Muenich

Muenich has been employed by the Board since November of 1975. She is a Head Cook at the Senior High School and a Union Steward. She noted that it is not unusual for a Food Service Worker to post into a Head Cook position. She was trained for two days when she became a Head Cook, and she felt that the Board had always provided Head Cooks with two days of training. She did not find it unusual that a Head Cook would permit her children in the kitchen, and she noted Kendzior affirmed to her that the Grievant's preparation and presentation of food was satisfactory.

Gary Leidl

Leidl works as a Custodian at Hillcrest. It is his duty to clean the gym after the lunch period ends, so that PE classes can be conducted. He noted that delayed lunch lines were an intermittent occurrence. He denied there was any pattern to that occurrence which would indicate the Grievant was any less efficient than any other Head Cook. He testified he had observed delayed lines before March of 1996, and continued to periodically see them after the Grievant lost the position of Head Cook. The Grievant was not, in his opinion, crabby or uncooperative.

Leidl affirmed that he was on sick leave from November 15, 1995 through March 1. This absence did not, in his opinion, detract from his ability to discern whether the Grievant's practices

caused any more delays than her predecessor or her successor.

Further facts will be stated in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union generally contends that the Grievant's disqualification was unreasonable. More specifically, the Union argues that the Board failed to live up to its contractual obligation to provide her with any minimum level of training and supervision. Unlike other employees, the Grievant was not afforded "two days of training," and "was on her own" from her first day as Head Cook. Nor can it be reasonably contended that the obligation of Article III, Section 8 is inapplicable to the Grievant. Its placement under the heading "Discipline and Discharge" has no bearing, since Article III governs the grievance procedure which is expressly incorporated into Article V. Beyond this, the Union notes that restricting the training obligation to discipline cases leads to absurd results and violates the "basic tenet of arbitral law that the contract must be viewed as a whole." The Union adds that even if the contract was silent, "the Employer has the duty not to let an employee in a new position just sink or swim."

The Union then contends that the Employer failed, with one minor exception, to notify the Grievant that her performance was deficient. This absence of notice underlies the testimony of each Board witness, and the Union concludes this absence of notice prevented the Grievant from addressing the deficiencies pointed to by the Board to justify the disqualification.

A review of the record establishes that the "Employer allegations of poor performance are inconsistent and false." The Union argues that the Grievant has not been proven to have run out of "both hot food entrees." Beyond this, the Union contends that allegations that the Grievant caused long lines of students are only tenuously supported by the testimony. Similarly, the Union argues that the allegation the Grievant failed to serve one student "was a greatly overblown and exaggerated incident and is indicative of the Employer's weak case." An accusation that the Grievant permitted unauthorized people in the kitchen is no more than anecdotal. The contention that meat was allowed to sit out for over two hours is unproven. Criticisms of the Grievant's organizational skills or her disposition reflect no more than unsubstantiated opinion. The absence of any student or public complaints demonstrate, according to the Union, that the allegations against the Grievant lack substance.

The Union contends that testimony that the Grievant cooked well and performed the duties noted in her position description must be credited over the accusations noted above.

The Union concludes that "the Arbitrator" should "sustain the grievance . . . order the

Employer to reinstate the Grievant to the Head Cook position at Hillcrest School" and make her whole "for any loss of wages, hours, seniority, and benefits."

The Board's Initial Brief

The Board acknowledges that the issues are stipulated, but notes "some reservation" concerning the issue on the merits. Specifically, the Board argues that the issue should focus on Sections 4 and 5 of Article V. Those sections are, the Board asserts, clear and unambiguous.

A review of these sections establishes that its "decision in this case actually requires minimal supporting evidence." More specifically, the Board argues that Article V, Section 4 provides that an employe can fail to qualify for a position "for any reason." This phrase "exempts the Board from having to defend itself against any 'just cause' argument." The provisions of Article II underscore this grant of discretion to the Board. It necessarily follows, according to the Board, that the grievance has "absolutely nothing to do with discipline and discharge" and should be resolved on the basis of the language in Sections 4 and 5 of Article V. The attempt to bring Article III into the grievance is inappropriate and unnecessarily complicates the dispute.

The Board argues that the probationary period established in Article V is to permit a qualified employe an opportunity to prove their qualifications. To bring an obligation to train into this equation "would be a convoluted means of placing the Board on probation rather than the applicant." That employes have used Article V to return to their former positions underscores, to the Board, that no duty to train is involved in the trial period. Those employes unable to prove their qualification did not seek training, but a return to their former position. To conclude Article V affords a minimally qualified applicant with a training period unreasonably strains its language.

The Board then contends that the record demonstrates that the Board had ample reason to conclude the Grievant was not qualified to remain a Head Cook. The Grievant was afforded the same "knowledge and assistance that every other Head Cook - Cook Manager was offered." The Grievant had prior experience at Hillcrest and was afforded more assistance from Kendzior than other applicants. A review of the "credibility" of the witnesses establishes, according to the Board, that Board witnesses more knowledgeably assessed the Grievant's performance than did Union witnesses. A review of that testimony and other relevant evidence establishes, according to the Board, that the Grievant was disorganized, was incapable of handling lunch lines efficiently, failed to observe proper food safety procedures, and did not consistently prepare adequate amounts of food. This directly affected the Board's educational program, since the Physical Education class following the lunch period was often delayed during the Grievant's trial period.

These deficiencies were, the Board argues, "well-documented." Similarly well documented was the Grievant's failure to handle students and fellow employes in a common-sense fashion. The Grievant's refusal to serve lunch to a first grader was ill-advised and unnecessary. A series of Board witnesses affirmed that these deficiencies were not addressed at any point in the Grievant's trial period.

That the District once demoted a non-probationary Head Cook establishes, according to the Board, that the presence of a number of performance problems in a probationary employe affords the Board ample reason to disqualify that employe.

Viewing the record as a whole, the Board concludes that "the grievance should be denied."

The Union's Reply Brief

The Union contends that the Board's evaluation of its contractual discretion is "(n)onsensical rubbish." The contention that the Grievant's prior experience at Hillcrest is comparable to the two days of training afforded other applicants is similarly ill-conceived. The Union points out that the Grievant, on her own, sought help from other employes. That the Board includes the employe who received the position made open through the Grievant's disqualification as a "credible" witness is, according to the Union, inappropriate. Beyond this, the Union notes other "credible" Board witnesses had difficulty recalling specifics or were emotionally too close to allegations made against the Grievant to serve as objective observers. The Union also contends that assertions the Grievant ran out of food are unproven. Assertions that her job performance affected the Board's educational program are overstated and highlight the significance of the Board's failure to document the alleged deficiencies and the absence of documented complaints.

The Union concludes that the following factors establish that the disqualification was unreasonable:

(The Grievant) was not given even minimal training, instruction or supervision. (She) was never told by Management of their alleged concerns. (She) understood that she could not run out of both hot entrees. She never did. (She) performed every requirement of her job description. (She) cooked "beautiful food".

The Board's Reply Brief

The Board begins by emphasizing that the focus of the stipulated issue must be Sections 4 and 5 of Article V. The Union's emphasis on a training requirement strains the clear language of these sections. The link of Article V to Article III is, the Board contends, inappropriate.

Noting that the Union has "the burden of proof when attempting to prove his/her qualifications for a position such as in the instant case," the Board argues that the Union has failed to prove the Grievant was qualified to remain a Head Cook.

Even if a training obligation could be used to meet this burden, the Board argues that "an equal to, or better, level of training and supervision as compared to other probationary Head Cooks" was provided to the Grievant. The evidence shows that the Grievant had experience in the Hillcrest kitchen and had the assistance of a dishwasher "who has substituted as a Head Cook."

The Board contends that the Union's assertion of a training obligation could lead to the absurd result of turning the Article V training period into an instructional period for unqualified applicants. Even if it had a duty to train the Grievant, the Board contends that the assertion that it left the Grievant "on her own" is without any meaningful support in the record. That the Grievant worked in a kitchen with experienced employees and that she failed to consult prior Hillcrest Head Cooks belies, according to the Board, the Union's contention that she faced her probationary period unassisted.

Beyond this, the Board contends that the Grievant did receive two days of training, and that she ignored the advice offered her by fellow employees and supervisors. Even if the prior Head Cook at Hillcrest left poor inventories for the Grievant to follow, the Board argues that the Grievant had only to check either the ongoing menus or production sheets for any inventory information she needed. The Board concludes that the Union's assertion that she was sent into the position "blind" must be rejected:

The grievant was not blind but it could be argued that she was deaf because she just would not listen to either her supervisor or her more experienced colleagues.

Further Union contentions that the Grievant was untrained or that the Board had an obligation to train her misstate either fact or the contract.

The Union should not be permitted to turn a disqualification issue into a disciplinary issue. The Board contends that it was under no duty to notify the Grievant of her work deficiencies, but that if it was it amply did so. Beyond this, the Board argues that a review of the record will provide ample support for the deficiencies it alleges flawed the Grievant's performance as Head Cook. Contentions that the Board failed to have written policies governing the deficiencies in the Grievant's performance establishes less a Board failing than the Grievant's inability to apply common sense practices to her job. The absence of student or public complaints shows, to the Board, only that elementary students are unlikely to complain about adults. The Union's assertion of an absence of public complaints ignores the complaints filed by teachers regarding the Grievant.

That Kendzior noted the Grievant prepared food "beautifully" establishes, according to the Board, only that she succeeded in one aspect of her duties. It cannot obscure the other documented deficiencies in her performance. The Board summarizes its view of the record thus:

(T)he Board's decision to return the grievant to her original position is based on many documented, and testified to, reasons which were not arbitrary or capricious and therefore presented a reasonable conclusion. The Board's decision is supported wholeheartedly by the contract language . . . (T)he grievance should be denied.

DISCUSSION

The issue on the merits of the grievance is stipulated, but the parties' arguments demonstrate that a considerable gulf separates their view on what the focus of the stipulated issue should be. Broadly speaking, the parties dispute whether the thirty day probation period set by Article V, Section 5 should be considered a training or a trial period.

As noted above, the Grievant's assumption of the position of Head Cook brought a substantial increase in her hourly rate and in her hours worked. Her assumption of that position must, then, be considered a "promotion" within the meaning of Article V, Section 5. The parties' dispute focuses on whether the Board could properly disqualify her as Head Cook without notice to her of alleged deficiencies followed by training to address them. The Board would focus the examination of this dispute on Sections 4 and 5 of Article V, while the Union would add the provisions of Article III, Section 8 to the interpretive mix.

Both parties' arguments manifest a certain excess. It is, for example, difficult to square the Board's assertion that the Grievant's disqualification does not pose a disciplinary matter with some of the withering criticism of her performance. On balance, however, the Board's assertion that this dispute is addressed by Sections 4 and 5 of Article V is more on point than is the Union's citation of Article III, Section 8.

Whether or not the provisions of Sections 4 and 5 of Article V can be considered clear and unambiguous, those provisions significantly favor the Board's view over the Union's. Section 4 awards a position to the "qualified" applicant. This does not, standing alone, release the Board from any training duty, but does underscore that an applicant is to be qualified prior to the assumption of the Section 5 probationary period.

The final paragraph of Section 4 affirms that the Board has significant discretion in its evaluation of an applicant's performance. That paragraph notes that an employe "failing, for any reason, to qualify" may be returned to "the job formerly held." It should be stressed that this discretion is not the virtually unlimited discretion pointed to by the Board. This paragraph extends a right to both the employe and to the Board. As the Board points out, the section indicates that an employe's failure to qualify may be "for any reason." However, the section also indicates that an

employee, otherwise qualified for a posted position, may return to their former job "for any reason." The "for any reason" reference thus states a two-sided grant of authority. On one hand, the section grants the Board the authority to revoke a promotion. On the other hand, the section grants an employee the same right to revoke a promotion "of his/her own volition." The authority granted the Board is not, then, unlimited. The section confers a right not restricted to the Board, and it makes Board exercise of authority subject to an "appeal through the grievance procedure" by (d)issatisfied employees."

The last paragraph of Section 4 of Article V does, however, speak directly to this grievance. That an employee, of their own volition, can "for any reason . . . return to the job formerly held," does address the Union's contention that Article III, Section 8 can be considered determinative. Permitting an employee to reject an assigned position "of his/her own volition" effectively shields the employee from a charge of insubordination or from adverse repercussions from refusing to perform assigned work. This lends credence to the Board's contention that the Section 5 Probationary Period is not subject to disciplinary considerations. Rather, the thirty day period appears to be a trial where both the Board and the employee "try the job on for size."

The language of Section 5 of Article IV also favors the Board's interpretation over the Union's. By its terms, the thirty day probationary period "shall be granted" to permit a promoted employee "to prove their qualifications." This language supports the Board's view that the thirty day period is a trial, not a training, period.

This does not mean the Union's citation of Article III, Section 8 is irrelevant. Rather, this underscores that the probationary period which the Grievant served must be first assessed under the terms of the sections specifically dealing with it. Those provisions should not be applied in a fashion which renders other agreement provisions meaningless. This relegates the provisions of Article III to a secondary, not a meaningless, role.

More specifically, the Union persuasively argues that Article III can act as a check on the scope of the Board's authority under Article IV, Sections 4 and 5. The Grievant cannot, as the Union forcefully argues, be left alone to fail. Even without the provisions of Article III, Section 8, such a view would fly in the face of Article IV.

This check does not, however, mean that the Board must meet the just cause standard of Article III, Section 8. The system of progressive discipline established in that section cannot be squared with the non-disciplinary provisions of Article IV.

Article IV, read with or without reference to Article III, required the Board to afford the Grievant a fair opportunity to prove her qualifications as a Head Cook. This does not necessarily specify a level of training, but demands that the Grievant be given a meaningful opportunity to prove herself. To state these considerations as a standard, the Grievant's disqualification, to satisfy the labor agreement, must reflect legitimate business reasons rooted in proven fact.

The evidence, even if not sufficient to meet a just cause standard, is sufficient to meet the standard noted above. It will not support a conclusion that the Grievant was denied a meaningful opportunity to prove herself as a Head Cook.

The Union persuasively notes that a number of the allegations against the Grievant rest on unsupported hearsay and on after-the-fact documentation. It is, for example, impossible to know if the Grievant failed to order "(f)resh buns . . . for sub sandwiches." It is similarly impossible to verify that the Grievant ran out of hot entrees after Kendzior counseled her to over prepare food if necessary to meet demand. The significance of the presence of the Grievant's children in the kitchen is, at best, dubious.

However, the Union's forceful arguments cannot strip away credible testimony concerning the Grievant's efficiency as a Head Cook. Kendzior's testimony was measured, and does not manifest the action of a supervisor turning her back on an employe. She openly admitted the strong parts of the Grievant's job performance. She was, however, no less candid in her assessment of the Grievant's efficiency in running her kitchen. Leidl's testimony concerning the Grievant's performance cannot be dismissed as irrelevant. However, against his contention stands the testimony of two of the Grievant's co-workers. Blizek's and O'Connell's testimony that the lunch lines under the Grievant moved less efficiently than with other Head Cooks is essentially uncontradicted. Dimock's observations confirm their observations. Beyond this, Kenz' testimony on delays in his class is a more reliable guide than Leidl's. This is not because Leidl's testimony is unreliable, but because Kenz, more than Leidl, would be sensitive to the adverse impacts of the lunch hour on PE class time. It was Kenz' PE class which suffered. None of these Board witnesses had any reason to be biased against the Grievant. More significantly, criticism of the Grievant's performance was not restricted to administrators. Unit employes affirmed the adverse opinions of administrators. The Board's conclusion that the Grievant was not efficiently completing lunch lines rests, then, on reliable opinion.

Nor will the record support the assertion that the Grievant was left on her own without meaningful training. Kendzior testified, without contradiction, that the training of Head Cooks is "hands on" and performed by Food Service workers. The Grievant, no less than other Head Cooks, was assisted for her first two days of work. Kendzior did not personally supply this assistance, but she did not train other Head Cooks personally either. That the Grievant was afforded a dishwasher as trainer is unremarkable, given that the position of dishwasher is an entry level position in the District. Moldenhauer had experience as a Head Cook, and there is no reason to conclude she could not properly train the Grievant. Beyond this, it is apparent that the Grievant had at least a passing familiarity with the Hillcrest kitchen when she started. This may not sketch out the best means to train a Head Cook, but the contract does not, as noted above, mandate extensive training. The evidence will support a conclusion that the Grievant was given no less a chance to prove herself than other Head Cooks had been.

It is also worthy of note that the Union's solid contractual contentions lack support in the Grievant's testimony. She did state she felt abandoned at the start of her probation period. The primary thrust of her testimony was not, however, that her performance deficiencies would have been resolved by training. Rather, her testimony was that her performance was not deficient. This view requires more than agreeing with the Union's view of the contract. It requires rejecting the direct observations of her supervisors and co-workers. The record will not support that view.

In sum, Sections 4 and 5 of Article IV, read together and in light of Article III, require that the disqualification reflect a legitimate business reason rooted in proven fact. The Board, which must run its food service to fit into the separate periods of a school day, had a legitimate business interest in having its lunch lines processed efficiently within the specified lunch hour. The observations of Kendzior, Blizek, O'Connell, Dimock and Kenz establish that the Grievant,

unlike other Head Cooks, was unable to consistently do this within her thirty day probationary period. This reflects a legitimate business reason rooted in proven fact, which thus supports the Grievant's disqualification.

This is not to say the Grievant could not or should not have been trained to address this deficiency. The contract does not, however, authorize an arbitrator to undertake that level of scrutiny of the Board's actions.

AWARD

The Employer did not violate the collective bargaining agreement by disqualifying the Grievant from the Head Cook position at Hillcrest School.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 26th day of February, 1997.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator