

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

NORTHWEST UNITED EDUCATORS

and

CUMBERLAND SCHOOL BOARD,
CUMBERLAND SCHOOL DISTRICT,
CUMBERLAND, WISCONSIN

Case 28
No. 54473
MA-9695

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, for Northwest United Educators, referred to below as NUE.

Mr. Brian H. Wright, Weld, Riley, Prens & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, for the Cumberland School Board, Cumberland School District, Cumberland, Wisconsin, referred to below as the Board or as the District.

ARBITRATION AWARD

NUE 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Cy Lepak. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on December 19, 1996, in Cumberland, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by March 6, 1997.

ISSUES

The parties stipulated the following issues for decision:

Did the District violate Article XIII of the collective bargaining agreement by denying the transfer request of Cy Lepak to fill a High School Social Studies position which had been posted?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE V - BOARD FUNCTIONS

- A. The Board, on behalf of the District, hereby retains and reserves unto itself all powers, rights, authority, and duties and responsibilities conferred upon and vested in it by applicable law except where modified by or where it is inconsistent with provisions of this Agreement.
- B. It is expressly recognized that the Board's operational and managerial responsibilities include such things as the following:

. . .

- 6. The direction and arrangement of the teaching staff, including the right to hire, suspend, discharge, discipline or transfer teachers.
- 7. To create, combine, modify or eliminate teaching positions.
- 8. To determine the size of the teaching staff, the allocation and assignment of work to teachers and the determination of policies affecting the selection of teachers and the establishment of standards for judging teacher performance.

. . .

ARTICLE XIII - VACANCIES, TRANSFERS AND REASSIGNMENTS

- A. The Board shall make grade, subject and activity assignments and make transfers between schools which it deems to be in the best interest of the school district.
- B. Notices of teaching vacancies will be placed in all the teachers' mail boxes as soon as the vacancy is noted which will describe the position and the qualifications desired.
- C. Teachers who are interested in a vacancy will so advise the Administrator by written reply to the notice within 15 school

days. The Administration will interview all qualified candidates for any teaching position.

- D. In making assignments and transfers, the Administration will take into consideration the professional training, experience and service to the District of the candidate, as well as the wishes and convenience of the teacher requesting the transfer or reassignment. However, the desire or convenience of the teacher will not be considered to the extent that they conflict with the instructional requirements and best interests of the students in the system. Assignments and transfers will not be made without prior discussion with the teacher. The Administration will make a reasonable effort to transfer and assign a qualified teacher who desires a given position.
- E. The Administrator may deny requests for reassignment or transfer after interviewing the teacher.

. . .

BACKGROUND

In April of 1996, the Board posted a vacant position in the Social Studies Department of its High School. Lepak, then serving as a Mathematics/Science teacher at the Board's Middle School, applied for the position. In a letter dated May 2, William Fisher, the High School Principal, acknowledged Lepak's expression of interest thus:

I am delighted to inform you that you have been selected as a finalist for the 9-12 social studies opening at Cumberland High School.

As per our conversation, your interview has been scheduled for May 15th at 6:40 p.m. in the high school library . . .

I am looking forward to learning more about your ideas on the teaching/learning process.

Lepak was the sole internal applicant for the posted position. On May 15, the Board interviewed Lepak and four other applicants. The following day, Lepak learned that he had not been selected

for the posted position.

Fisher oversaw the hiring process. He reviewed over one hundred resumes received by the Board. He also attended a job fair and talked to roughly fifty interested applicants. From these contacts, he determined the five finalists noted in the May 2 letter.

After consulting with Superintendent Thomas Simonson, Fisher set up a screening committee, referred to below as the Committee, to evaluate the qualifications of the finalists. The Committee consisted of Fisher, Elizabeth Rhyner, Carol Curtis, Melissa Ewer, Dan Hopkins and Jerry Johnson. Rhyner is the Board's Middle School Principal. Curtis is the parent of two Cumberland High School students. Ewer is a Cumberland High School student, then ranked at or near the top of her class. Hopkins and Johnson are Cumberland High School teachers. Fisher asked each Committee member to submit a list of written questions each thought essential to the assessment of the applicants' qualifications. Fisher then culled the questions to two from each Committee member.

Fisher prepared a printed form for the Committee's use in the interview process. The form listed ten areas for discussion drawn from the questions Fisher secured from Committee members. The ten areas for discussion were:

1. Discuss your strengths you feel you can bring to our Social Studies program at Cumberland High School.
2. From your student teaching experience, discuss your approach to classroom management.
3. What qualities do you possess that will allow you to work efficiently with other staff members?
4. What are some of the things that you would try to do in your first few years of teaching to help refine education?
5. How do you plan to keep students' interest and involvement in the classroom with different levels of student ability?
6. What is an ideal day in the classroom?
7. How would you teach a section on the Civil War?
 - A. Worksheets from the book.
 - B. A video.
 - C. Class activity (Example: Reenacting)
8. What are your feelings on group activities?
9. Discuss the purpose of studying social studies.
10. Based on this philosophy, describe what you believe about the method and sequence of accomplishing that goal.

Each form stated a numerical scale from 1 through 5 to the right of each of the ten areas to be

covered in each interview. Committee members were to rank each applicant's response from 1 to 5 with 1 denoting the poorest score and 5 the best.

Fisher made the first item of discussion turn on the applicant's experience to put each applicant at ease for the balance of the interview. The interview of each applicant was designed to be of the same length. Committee members were not forbidden to ask questions of their own and each applicant was afforded the opportunity to ask questions of the Committee. Prior to the actual interview, Fisher told Committee members to take whatever notes they deemed necessary and to refrain from discussing any of the applicants until after the final interview. Fisher also provided the Committee with a copy of each applicant's resume.

The Committee interviewed the finalists on May 15 between 5:00 and 9:00 p.m. After the final interview, Fisher opened discussion among the Committee. He perceived his role to be that of a facilitator. He assured that each applicant was considered, but he attempted to avoid steering the Committee toward any of the finalists. His goal was to steer the Committee toward consensus.

The pursuit of consensus did not prove difficult. Each Committee member had ranked the same applicant, Kelly Beglinger, as the best of the finalists. Lepak ranked as one Committee member's second choice. Two other Committee members ranked Lepak as their fourth choice, with the remaining three Committee members ranking Lepak as their fifth choice. Fisher noted that the Committee felt that if Beglinger would not accept a job offer, the selection process should be reopened. Once consensus had been reached, Fisher saw his role to be ministerial. He was responsible for checking Beglinger's references and for notifying the applicants and the Board of the Committee's choice.

The resume submitted by Lepak to Fisher reads thus:

Education

Master of Education Degree in Social Sciences, University of
Minnesota, 1989

Bachelor of Science Degrees in Elementary Education, Broad Area
Social Sciences, and History, University of Wisconsin -
River Falls, 1983

Graduate and undergraduate course work also
obtained from UW -
BCC, UW - Madison,
UW - Eau Claire, UW
- Stevens Point, UW -
River Falls, UM -
Minneapolis, and

Northland College
Trees For Tomorrow, Eagle River Station, Barron County ASCS
scholarship
Sigurd Olson Environmental Center, Northland College, Great
Lakes Resource Protection scholarship
Science World, UW - Pigeon Lake Field Station, candidate
selection by UW - Madison

Honors

Dean's List, UW - River Falls and Barron County Campus
Junior and Senior Honors, UW - River Falls
High Honors Graduate, AS Degree, UW - BCC

Professional Experience

Teacher, Cumberland Middle School Science, Math, and Social
Studies, 1990 to present
Teacher, Cumberland High School Social Studies, one/third time,
1993-94 and 1994-95
Instructor, Magnetism and Electricity, Science World, UW-Pigeon
Lake Field Station, Summer 1995.
Invited to co-direct Teacher Science World, 1996
Teacher, Cumberland Elementary School, Grade 6, 1983-1989
Student Teacher, River Falls High School, 1982
Student Teacher, Hilltop Elementary School, Rice Lake, 1982

SEC Evaluator

Greenwood School District, Elementary Language Arts
Ashland School District, Elementary and Middle School Social
Studies
Viroqua School District, entire science curriculum

Curriculum Committee Service

Library / Media, Math, Science (2 rounds), and Social Studies

Environmental Liaison

District Environmental Education Liaison since inception

Extra-curricular Assignments

Pom Pon Advisor
Elementary and Middle School wrestling coach
Middle School Volleyball coach

Professional Memberships

Wisconsin Society of Science Teachers
National Science Teachers Association
Wisconsin Association of Middle Level Educators

Employment Experience

State Welfare Investigator, 1974 - 1978
Driver License Examiner, 1969 - 1974
Supreme Court Marshal, 1966 - 1969
State Trooper, 1961 - 1965. Governor's Bodyguard and Aid
concurrent with State Patrol Service
U.S. Marine Corps, 1953 - 1958
Etc.

Personal

A River Falls professor gave my graduating class a charge to guide our futures in education. She stated: "Teachers should be interested and interesting people. Accordingly, each year we ought to do something new and different, then reflect upon the activity, write about it, and finally, share the experience with a friend." I accepted that challenge, and since becoming a teacher I have:

Skied the Birkebeiner (7 times)
Visited Ellis Island, and found a great uncle's name
Visited the Viet Nam Memorial, a sacred experience
Learned to fly an airplane
Participated in a play, "The Sting", as Curly Jackson
Drove the Alaskan Highway in a junker car.
Ran and biked the Rutabaga races
Sailed an eleven meter boat, La Plogeon (The Loon) on Lake Superior
Biked the Firehouse 50
Bummed from Minneapolis to New York, to Washington, D.C.
Rode the WILD THING, Valley Fair

All these activities were enriching experiences that have influenced my teaching, and I expect to continue such activities for my lifetime.

Family

Married thirty - nine years to Pat, eight adult children (two are teachers), four grandchildren

Hobbies

Hiking, cross country skiing, hunting, fishing, reading, and harvesting maple syrup

References

Credentials and references will be furnished upon request

RESUME ADDENDUM

OTHER POSITIONS AND EXPERIENCE

President, State Patrol Association
President, Cumberland Youth Hockey Association, coach, referee
Assessor, Pleasant Springs Township, Dane County
Director, Religious Education Office, Cumberland Area Catholic
Community
Religious Education Teacher
Member, Cumberland Area Catholic Community Church Council
Chief Steward, Division of Motor Vehicles, Department of
Transportation
Project Leader, Barron County 4-H
Judge, Barron County Land Conservation Speaking Contest
Judge, Miss Barron County Contest
Member, Impact - 7 Housing Rehabilitation Commission
Owner - Operator, Silver Lake Resort

Fisher did not supply the Committee with any information from Lepak's personnel file. He did not review that file prior to the Committee's interview of Lepak because he did not want to bias himself or the Committee in any fashion. The Committee did not discuss the labor agreement between NUE and the Board.

Lepak was surprised by the interview process. He believed the Board was required to consider internal applicants before considering external applicants. He based this belief on prior experience as a teacher and as a Board member.

Lepak was hired by the Board in 1983 to teach first grade. Within his first week on the job, he was transferred to fill a sixth grade opening. He taught sixth grade until 1990. In September of 1990, he transferred into a Middle School Mathematics/Science position. He applied for this transfer, and was interviewed by the then-incumbent Middle School Principal, John Banks. He was the only candidate interviewed, and he received the transfer. In the 1993-94 school year, Robert Nugent, then the High School Principal, asked Lepak to teach Social Studies at the High School as one-third of his teaching load. After an interview with Nugent, Lepak agreed to assume this assignment, and did so for two school years.

Lepak served on the School Board for the District from 1976 through 1982. He served on the Board's negotiating team, including a temporary role as Chief Spokesman, when the transfer language of Article XIII was added to the parties' labor agreement. He recalled the negotiation of that provision to have been prompted by the confluence of declining District enrollment and increasing pressure on the District to expand extra-curricular offerings to female students. Increasing District flexibility regarding transfers was perceived by the parties as a way to meet expanded extra-curricular offerings without unnecessarily adding or laying off staff. The then-incumbent Superintendent wanted to preserve District oversight over transfer requests and NUE wanted to avoid teacher layoffs to the fullest extent possible. The primary concern of the parties was extra-curricular assignments.

Simonson became the Board's Superintendent in July of 1994. He has altered the District's hiring procedures, devolving significant control over the hiring process to Principals. Simonson encourages the use of committees for hiring, and requires a Principal to justify candidates for hire before the District's Council of Administrators. Any hiring decision must be worked into the Council's ongoing review of District goals. In Simonson's tenure, nineteen employees have been hired. A committee has been used to fill each vacancy, and NUE has not, until Lepak's transfer request, challenged the procedure.

Both Rhyner and Fisher use committees to fill vacant positions. Rhyner estimated she has filled twelve staff vacancies using a committee selection process similar to that used by Fisher. Rhyner viewed Lepak as a "very good" teacher. She noted she ranked him last of the five applicants interviewed by the Committee. She did not, however, view the ranking as significant in itself, since she viewed Beglinger as the clear favorite and placed little emphasis on the other rankings.

Fisher noted he has used the committee process to fill each vacancy within his tenure, whether the vacancy was for a certified teaching position or not. Two vacancies, beyond that posed here, involved certified teaching positions. Fisher used a committee process in each instance, although one of those vacancies was not filled by the highest rated applicant interviewed by the then-incumbent committee. In that case, Fisher attempted to implement the committee's choice, but found that one of the references of the highest rated applicant did not favorably recommend the applicant. Time precluded Fisher from reforming a screening committee to make another choice.

Lepak filed a written grievance, dated June 3, 1996, with Fisher. 1/ The grievance states:

. . .

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

The issue of this grievance is contained in Article XIII, C and D of the Agreement between the Cumberland Board of Education and Northwest United Educators.

Paragraph C provides in part that "The Administration will interview all qualified candidates for any teaching position." This interview did not take place. Instead, all applicants, whether or not covered by the agreement, were rated in the same way without regard to status.

It is also alleged that Paragraph D was violated in that neither you nor the rating panel . . . "took into consideration the professional training, experience and service to the District, or the candidate's wishes and convenience" . . . when filling the position. There was no indication that . . . "a reasonable effort to transfer and assign a qualified teacher who desires a given position" . . . was made. Finally, you gave no justification for how my transfer to the vacancy would . . . conflict with the instructional requirements and best interests of the students in the system." In the absence of such justification the wishes and convenience of the teacher, the professional training, the experience and service to the District must prevail.

The relief I seek is transfer to the Cumberland High School Social Studies Department as a full time teacher.

Fisher responded in a letter to Lepak dated June 4, which states:

. . .

2. The interviewing committee unanimously selected the candidate that it felt would **best meet the instructional requirements and best interests of the students** in the high school social studies program. (Refer to Page 10, Paragraph D of the NUE contract.)
3. Your experience and teaching philosophy was clearly communicated as you responded to the committee's questions. The NUE contract does not require the administration to hire a candidate solely on the basis of years

of experience in the Cumberland School District.

4. The fact that you were granted an interview is a "reasonable effort" by the district to meet your wishes. To

say that the interviewing committee did not take your "professional training, experience and years of service" into consideration is simply not accurate.

...

Lepak advanced the grievance to Step II through a letter to Simonson dated June 17. Simonson responded in a letter dated June 25, which states:

...

Concerning Paragraph D, Article XIII and its interpretation in which you allege Mr. Fisher rejected your professional training experience and service to the district. I would respond that if he indeed rejected those qualifications by my standards, you wouldn't have received an interview. I believe you have improperly used the word reject. I believe your qualifications were considered and prioritized with all of the other candidates. As far as assuming what someone's response is, it is at best/worst your assumption.

It is my opinion that Mr. Fisher properly interpreted the second sentence of Paragraph D, the instructional requirements and best interests of the students. I will respond to the desire or convenience of the teacher in my summary paragraph of this entire response.

...

In summary, the gist of your entire grievance, in my opinion, has to do with Article XIII Paragraph D Sentence one and two. What you are asking that we do is, in fact, to take into consideration your wishes, desire, and convenience, in addition to your professional training, experience, and service to the district to the extent that they make you the best qualified candidate for the high school social studies position. I consider that request to be in conflict with the intent of the language in the master contract, in particular Article XIII, Paragraph D and E. Therefore, I am denying your request to be assigned the position of full-time high school social studies teacher for the 1996-97 school year.

In a Step III response dated September 12, Simonson elaborated on the contractual basis of the

grievance thus:

. . .

We do not agree with your position that Article XIII, Section D precludes the Administration from conducting interviews of external candidates, along with internal candidates, to fill an open teaching position whenever an internal candidate who is qualified for the open position happens to desire the position. The best interests of the students in the District require the Administration to attempt to select the highest ranked candidates for open teaching positions. The Administration's approach in this case was in keeping with the best interests of the students. All of the candidates were asked the same questions during the interviewing process. On the basis of the answers the candidates provided, the interviewing committee ranked the candidates. The highest ranked candidate was selected for the social studies position.

We direct your attention to Article XIII, Section E. The language in this provision gives the Administration the authority to deny a teacher's request for a transfer after the teacher is interviewed. That is precisely what occurred in this case.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

NUE's Initial Brief

After a review of the evidentiary background, NUE notes that it "strongly disagrees" with the Board's view that "the simple granting of an interview to an internal candidate seeking a vacancy meets all of the District's obligations under Article XIII-D." That provision, NUE contends, requires the Board to grant "some meaningful preference to internal candidates."

Article XIII does not establish clear or unambiguous guidelines regarding all requested reassignments, and the terms of Section D must be considered "subject to good-faith interpretation." However, bargaining history is uniquely available as guidance for the interpretation of Section XIII, D. Lepak's testimony establishes a "classic tradeoff" underlying the creation of Section XIII, D. The Board received "the clear right to make involuntary assignments between grade subject and activities and involuntary transfers between schools." NUE "obtained the right of current qualified teachers to be able to request a transfer or reassignment to a vacancy

with the expectation that the requested transfer or reassignment would be granted if the teacher were qualified."

The Board failed to recognize any obligation toward Lepak under Article XIII beyond the granting of an interview. This falls far short of the "reasonable effort" Section D imposes on it. That this case involves a vacancy which demanded the hiring of a new teacher underscores how far short of compliance the Board's conduct is. Lepak's placement at the High School would have required the Board to do no more than fill the position he vacated. Unless there is some reason to believe Lepak could not perform at the High School level, there was no reason not to offer him the transfer he sought.

Article XIII, NUE argues, "puts a burden on the District." It may refuse the request of "a qualified teacher" for a transfer if granting the request would "conflict with the instructional requirements and best interests of the students in the system." The only reason proffered by the Board for denying Lepak's request, however, is that he was not the most highly rated of the candidates subject to the Board's interview process. That reason is, however, "simplistic." More specifically, NUE argues that the Board's selection process cannot be presumed to "unerringly select the most highly qualified professional staff candidate." Beyond this, the Board's selection process made no effort to assess the "training, experience and service to the District" of any of the candidates. Rather, the Board simply assumed that treating each candidate equally fully addressed any burden placed on it.

None of the Board's administrators attempted to assess the impact of Article XIII on the selection process Fisher implemented. Fisher in fact "knowingly and deliberately avoided reviewing the work and service experience record of Cy Lepak." That Lepak has experience teaching High School within the District makes the Board's oversight egregious.

NUE acknowledges that Article XIII is "challenging," and may fail to set "absolutely clear standards." This cannot obscure, however, that "there is a vital difference between the absence of exact standards and the absence of standards all together." The Board's conduct must, NUE argues, meet the "tests of reasonableness" in light of relevant contract language, bargaining history and past practice.

As the remedy appropriate to the Board's violation, NUE requests that "the District be ordered to immediately transfer Mr. Cy Lepak to the Cumberland High School Social Studies Department as a full-time teacher."

The Board's Initial Brief

After a review of the evidentiary background, the Board argues that the labor agreement does not preclude its consideration of external applicants when filling teacher vacancies. When it

determines to consider external applicants, the Board is bound by Article V, not Article XIII. The selection committee process used by the Board to fill teaching vacancies conforms to Article V, Section B "unless the selection committee process arbitrarily or capriciously prevents a bargaining unit member from having the same opportunity to achieve the highest ranking as external candidates."

The bargaining history underlying Article XIII underscores its inapplicability to the vacancy at issue here. Article XIII was negotiated "to meet the District's need to make transfers and assignments." The provision was prompted by declining enrollments which occurred at the same time the District became legally obligated to expand its extracurricular offerings to afford equality between programs offered male and female students. The focus of the bargaining and the resulting focus of Article XIII was on filling vacancies from a pool restricted to internal applicants.

The Board then contends that the language of Article XIII does not support the assertion that an internal applicant is entitled to "priority consideration" whenever the applicant is qualified for the position. The language of Article XIII cannot be read to mandate that the Board offer the High School position to Lepak and then fill whatever vacancy remains after any other teacher preference is honored. Article XIII, Section D must be read, according to the Board, as "a relative ability clause that applies only when the District fills a position internally," not as a "sufficient ability clause." When the Board chose to use the committee selection procedure, Article XIII became inapplicable.

Use of the committee selection process is well established in the District. Rhyner has used the process twelve times over the past five years. Fisher used the process twice before employing it to fill the position claimed by Lepak. Even if Article XIII was read to govern the committee selection process, there has been no violation. In granting Lepak an interview, the Board "made a reasonable effort" to honor his desire for a transfer. That each candidate was asked about prior experience establishes that Lepak's personal training, experience and service to the District was considered by the selection committee. To accept the NUE view of Article XIII would deny the Board's authority to determine the "instructional requirements and best interests of the students in the system," by hiring the best qualified candidate.

Since the Board "has retained the right to determine the respective abilities and qualifications of candidates who apply for teaching vacancies," its determination that Beglinger is the best qualified applicant can be overturned "only if found to be arbitrary, capricious, discriminatory or made in bad faith." A review of the testimony regarding the selection process shows, according to the Board, only that its selection procedures were impartial and fair. That Lepak is a "valued member of the Cumberland School District teaching staff" should not obscure that the Board's selection of Beglinger for the vacancy at the High School conforms to the requirements of Article V and Article XIII.

NUE Reply Brief

NUE points out that Rhyner's past use of the selection committee process affords no guidance in this case. Whether her use of the process parallels Fisher's is speculative and ignores that whatever she may have done has not been subject to the challenge requiring determination here. Similar attempts to equate the process used by Fisher to prior procedures are no less speculative.

By its terms, Article V is subject to Article XIII. It cannot be used, as the Board attempts, to supersede Section XIII, D. A contrary conclusion could eviscerate the agreement. Nor does NUE seek to use Article XIII to mandate a separate interview for internal applicants. Rather, NUE contends that Article XIII requires that any interview of an internal candidate "must be structured in a manner that will appropriately take into consideration the professional training, experience and service to the District of the candidate." Whether this interview takes place before, during or after the interviewing of external candidates, the interview must conform to Article XIII.

The claim that Article XIII does not apply if the Board chooses to employ the committee selection process ignores the labor agreement and affords some indication that the Board failed to consider the impact of the agreement on its hiring process. That Lepak was permitted to provide a resume to the Committee and was afforded one question concerning his background is insufficient, NUE argues, to establish compliance with Article XIII. Whether the Committee selected the best qualified applicant is speculative. Even if the process was impartial, "it was fatally flawed." NUE puts the point thus:

Treating all candidates equally while there is an outstanding legal obligation to provide preference for one of the candidates necessarily means that there is a conflict between the concept of equal treatment and contractual obligations.

For the District to fail to inform the members of the Committee of the obligations of Article XIII dooms the contractual validity of its conclusions.

The Board's Reply Brief

The Board contends that the labor agreement cannot be read to obligate it "to undertake an analysis of whether an internal candidate is likely to do as good or better a job in the posted vacancy than in his or her current position." Nor can the agreement be read to obligate the Board to provide "specific reasons why the transfer would not be in the best interests of the students," or to establish a "sufficient ability clause." Its conduct in filling teaching vacancies has been

consistent over time and has not been challenged by NUE until this grievance.

Beyond this, the Board argues that a review of the evidence will not support the assertion that it failed to take Lepak's "professional training, experience and service to the District" into account. The assertion that the Committee relied on subjective considerations belies that the underlying process was impartial and governed by objective rules equally applied to each applicant. The Committee represented a cross-section of the community and arrived at a unanimous decision. An assessment of the record as a whole establishes, the Board concludes, that the "grievance must be dismissed."

DISCUSSION

The stipulated issue focuses on Article XIII, but the parties' arguments question the relationship of Article XIII and Article V. The Board contends that Article XIII cannot be applied to the grievance without reference to Subsections 6, 7 and 8 of Article V, Section B.

The dispute ultimately turns on Subsection V, B, 8 and Section XIII, D. Subsections V, B, 6 and 7 refer to broad Board powers to hire into or to alter teaching positions, and form general background to the issue posed here. Subsection V, B, 8 specifically addresses hiring procedures, and thus that provision is the contractual core of the Board's case. The first, second and fourth sentences of Article XIII, Section D form the core of NUE's case. The remaining sections of Article XIII serve as general background.

Threshold to the application of Article XIII is the Board's contention that Subsection V, B, 8 precludes the operation of Article XIII to cases in which it chooses to interview internal and external applicants for a teaching position. This contention is not reconcilable to the terms of either Article V or Article XIII. Section A of Article V provides that the Board's authority is "modified by" and must not be "inconsistent with" the "provisions of this Agreement."

Article V, Subsection B, 8 cannot, however, be read to the exclusion of Article XIII. The parties' conduct and the correspondence underlying the grievance establish that neither the District nor NUE read Article V, B, 8 to preclude the operation of Article XIII. An examination of the two articles confirms that they must be read together.

Article XIII governs "VACANCIES, TRANSFERS AND REASSIGNMENTS." It is not apparent how the filling of the High School Social Science position can be considered outside the scope of this provision. Beyond this, each of the first four sections of Article XIII state mandates through the use of the term "will" or the term "shall." Each section states its mandate broadly. Section A covers "grade, subject and activity assignments" as well as "transfers between schools." It is not apparent how Beglinger's placement in the High School Social Studies position can be considered anything other than a "grade" or "subject" assignment. Nor is it clear how Lepak's expression of interest in the position can be considered anything other than a request for an

"assignment" or for a "transfer between schools." Similarly, Section B refers to "teaching vacancies" generally. Presumably, its broad mandate accounts for the notice of the High School Social Studies position placed in Lepak's and all other teachers' mailboxes. Similarly, the final sentence of Section C mandates an "Administration . . . interview" of "all qualified candidates for any teaching position." The breadth of the mandate is apparent. Section D states a mandate broadly addressed to "assignments and transfers." The assertion that Subsection V, B, 8 precludes the operation of these sections reads their broad mandates out of existence. This view cannot be squared with the provisions of Article V, Section A.

Determination of the stipulated issue arguably turns on whether the committee selection process authorized in Article V, Section B, 8 is reconcilable to the requirements of Article XIII.

However, since NUE does not challenge the Board's authority to employ a committee to interview both internal and external applicants, the issue turns on whether the actions of the Committee can be reconciled with the requirements of Article XIII, Section D.

The language of Article XIII, Section D is, by design, neither clear nor unambiguous. The first two sentences of the section state the opposed scales of a weighing process to effect an "assignment" or a "transfer." Because the weighing process inevitably varies from case to case, the language does not clearly or unambiguously determine any particular transfer or assignment. The guidance afforded for the weighing process is given in the fourth sentence of Section D, which mandates that the "Administration will make a reasonable effort to transfer and assign a qualified teacher who desires a given position." There is no dispute Lepak is "a qualified teacher who desires" the High School Social Studies position. Thus, the stipulated issue requires a determination whether the Board made a reasonable effort to transfer him.

The evidence establishes that the Board has not met the "reasonable effort" standard established in Article XIII, Section D. The evidence does not establish that the Board failed to meet this standard. Rather, the evidence establishes that the Board did not recognize the duty to perform the weighing process established by Article XIII, and this precluded its performance of a "reasonable effort to transfer" Lepak.

The first sentence of Article XIII, Section D requires the Board's "Administration" to consider "the professional training, experience and service to the District" of "the teacher requesting the transfer." The evidence will not support the assertion that this was done. Fisher chose not to review Lepak's personnel file, and Simonson defended his choice. Each viewed such a review as a potential source of bias. The difficulty with this view is not that it manifests flawed educational philosophy. Rather, the difficulty is that the purported "bias" is a significant part of the mandate of the first sentence of Section D.

The Board contends that this mandate was met by the interview process. It notes Lepak was permitted to submit a resume and allowed to respond to questions which afforded him the opportunity to speak about his experience. The first paragraph of Simonson's June 25 letter, for example, placed the responsibility to supply relevant background information on Lepak. The difficulty with this defense is that the Section XIII, D mandates "the Administration" to "take into consideration" Lepak's "professional training, experience and service to the District." Simonson's letter reverses this responsibility. The contract, however, states the authority governing this point. Assuming the authority of the "Administration" to consider these factors can be delegated to the Committee does not address the point. The administration did not supply the required information to the Committee for its consideration. The points of consideration mandated in the first sentence of Section D were, at most, incidentally considered by Fisher, Simonson and the Committee.

Nor did granting Lepak the same interview as other applicants meet the requirements of Article XIII, Section D. Fisher and Simonson viewed Lepak as a "qualified" applicant because he

is certified to teach High School Social Studies and has satisfactorily performed as a teacher. This cursory evaluation does not, however, comport with a requirement to "take into consideration the professional training, experience and service to the District of the candidate." Each of these factors will vary from teacher to teacher. Fisher's and Simonson's consideration of the point was generic in nature. Lepak's personal strengths and weaknesses were not considered. This is, however, the case-by-case evaluation mandated in Section D.

The first sentence of Article XIII, Section D requires "the Administration" to "take into consideration . . . the wishes and convenience of the teacher requesting the reassignment." There is no evidence that the Committee, Fisher or Simonson meaningfully considered these factors.

The Board treated Lepak as it treated each "off the street" applicant. As the Board notes, this arguably enhances the impartiality of the process. It also, however, establishes the Board did not undertake the weighing process mandated by Article XIII. Fisher did not seek to provide the Committee with any information relevant to the factors noted in Article XIII, Section D. Not surprisingly, he failed to receive any question from Committee members focusing on those factors. The form he developed thus did not expressly "take into consideration" any factor listed in Article XIII. Beyond this, the listed areas for discussion arguably point the interview toward outside applicants. The second and fourth areas, for example, presume the absence of "experience and service to the District of the candidate." The arguable impartiality of the items for discussion cannot obscure the arguable inclination of those items toward non-District experience.

Section E of Article XIII grants the Board the authority to deny a transfer request and Section D permits the Board to reject the "desire or convenience of the teacher" where it would "conflict with the instructional requirements and best interests of students in the system." Both, however, presume the weighing process mandated in Section D has been undertaken. The rejection of the request must come after review of the factors the Administration "will take into consideration." Lepak never received a statement from the Board regarding how his "professional training, experience and service" or his "wishes and convenience" conflicted with "the instructional requirements and best interests" of District students. This manifests that no such weighing process was ever undertaken. Rather, the Board implemented an interview process and relied on it to divine the best teacher. Lepak was rejected because he was not the applicant selected through that process.

By not undertaking the weighing process mandated by Article XIII, Section D, either by itself or through the Committee, the Board's Administration failed to "make a reasonable effort to transfer" Lepak. The interview process initiated by Fisher was not unreasonable as a matter of educational policy, but failed to undertake the considered evaluation mandated by Article XIII. The failure to make that evaluation precludes concluding the Board made a reasonable effort to transfer Lepak. By failing to evaluate Lepak's transfer request as required in Article XIII, Section D, the Board's selection of Beglinger violated the contract.

Before addressing the issue of remedy, it is appropriate to tie this conclusion more tightly to the parties' arguments. The Board forcefully argues that Article XIII cannot be read to deny its authority to consider both internal and external applicants. NUE does not challenge this authority here, although it appeared to do so during the processing of the grievance. In any event, Article V, Section B, 8 is sufficiently broad to grant this authority, and it cannot be said that Article XIII clearly precludes it. The point here is that the simultaneous interviewing of internal and external applicants must account for the requirements of Section D of Article XIII concerning, at a minimum, internal applicants.

That the Board's administration includes devoted supporters of the committee consensus interview process is apparent in the testimony of Simonson, Fisher and Rhyner. Nothing stated above should be read to undercut their advocacy of that process or of Beglinger's selection as a High School Social Studies teacher. The issue posed here is one of contract interpretation, not educational policy. My review begins and ends with the language of Articles V and XIII. The goal of that review is not the establishment of educational policy, but the determination of the bargaining parties' intent in creating those provisions. Whether Lepak or Beglinger is the best choice for the position is not an issue for this forum. The issue for this forum is whether the contract has been honored in the Board's preference of Beglinger over Lepak's transfer request.

Just as the conclusions stated above should not be read to invalidate the committee selection process, that process should not be applied to the exclusion of the labor agreement. Fisher noted that he overturned the selection of a committee regarding a vacancy for an instructor of Spanish when the highest ranked applicant's references did not supply the recommendation he had anticipated. The demands of a collectively bargained agreement cannot be considered less compelling than the opinion of a third party reference.

Article XIII demands a case-by-case evaluation of transfer requests, and it is important to restrict the conclusion stated above to the facts posed here. Whether Article XIII, Section D should be characterized as a "sufficient ability" clause or a "relative ability" clause is an academic issue. What level of "preference" an internal applicant may enjoy over an outside applicant under Article XIII is similarly academic in nature. The provision requires that an individual teacher's request be evaluated on its specific merit under the factors listed in Section D. This applies no less to competition between internal applicants than to competition between internal and external applicants. In either event, a transfer request, once properly evaluated, can be rejected under other factors listed in Section D. An internal applicant is thus not granted a preference under the provision if "preference" connotes a guarantee of a position. The only guarantee is of the "reasonable effort" reflected in the weighing process discussed above. Article XIII grants a "preference" only to the extent the good faith application of the factors listed in Article XIII are so considered. Put another way, the Board's violation is not reducible to its failure to grant Lepak the transfer. Rather, its failure to grant the transfer is the manifestation of its contract violation. The violation is that it failed to evaluate his request as Article XIII demands.

Typically, bargaining history and past practice afford the most persuasive guidance to the interpretation of ambiguous contract language. Those guides are of no assistance in this grievance. The ambiguity in the application of Article XIII is not traceable to a lack of clarity in its underlying language. Rather, the lack of clarity reflects that the contract mandates a case-by-case evaluation of teacher qualifications and desires against student and instructional demands. Past practice and bargaining history shed no light on the application of those standards to the facts of the grievance.

Even if past practice or bargaining history is considered, the evidence posed here is troublesome in its application to the grievance. Article XIII was negotiated, in significant part, to address the impact of extra-curricular assignments on teaching positions. This case concerns a transfer between full-time positions. That Lepak received one-on-one interviews preceding transfers in the past does not, in itself, establish a practice limiting the Board to that process. The essence of the binding force of past practice is the agreement manifested by the bargaining parties' conduct. The language of Articles V and XIII is broad and the fact that prior administrations considered a one-on-one interview the best means to effect a transfer does not connote mutual agreement that it is the only means to do so. Simonson's June 25 letter underscores this by noting his unwillingness to be bound by that prior practice. Simonson's disavowal of the prior procedure cannot obscure, however, that any interviewing procedure must comply with Articles V and XIII.

That the Board has employed the committee process to fill prior vacancies can be granted. This does not, however, establish that NUE, by practice, waived its right to enforce Article XIII. How, if at all, the procedures of the Committee are similar to prior committees is not apparent. That the use of a committee, standing alone, does not constitute a violation of Article XIII precludes the conclusion that the failure to challenge prior committee action dooms the challenge posed here.

I have not detailed a remedy in the Award stated below. Rather, I have retained jurisdiction over the matter to permit the parties to address the point. This reflects that the parties attempted, at some length, to stipulate the remedy at hearing, and asserted that a post-hearing stipulation on the point may be possible. What considerations motivated these discussions are apparent only to the parties, but highlight that the issue of remedy should be afforded due consideration. Even in the absence of the parties' discussion of the point at the hearing, potential changes in course structure or offerings may have impacted the position Lepak sought to transfer to. In any event, the issue has been addressed only in passing in the parties' briefs. Rather than speculate on this point, I have retained jurisdiction. If the parties cannot mutually agree on a remedy, my own consideration of the issue can only profit from their express consideration of it.

AWARD

The District did violate Article XIII of the collective bargaining agreement by denying the transfer request of Cy Lepak to fill a High School Social Studies position which had been posted.

As the remedy appropriate to the District's violation of Article XIII, the parties shall attempt to stipulate the appropriate remedy. I will retain jurisdiction over the grievance for not less than forty five days from the date of this Award for the purpose of resolving any dispute between the parties on how to remedy the District's breach of Article XIII.

Dated at Madison, Wisconsin, this 4th day of June, 1997.

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