

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CHIPPEWA VALLEY TECHNICAL COLLEGE
TEACHERS' UNION, WEAC, NEA**

and

CHIPPEWA VALLEY TECHNICAL COLLEGE DISTRICT BOARD

Case 187

No. 56715

MA-10389

(L. Lapp Grievance)

Appearances:

Ms. Leigh Barker, WTCS Consultant, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, for Chippewa Valley Technical College Teachers' Union, WEAC, NEA, referred to below as the Union.

Weld, Riley, Prens & Ricci, S.C., by **Attorney Stevens L. Riley**, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for Chippewa Valley Technical College District Board, 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute filed on behalf of Larry Lapp, who is 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 22, 1998, in Eau Claire, Wisconsin. A transcript of the hearing was filed with the Commission on December 1, 1998, and the parties filed briefs and a reply brief or a waiver of a reply brief by March 4, 1999.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate the collective bargaining agreement when it did not allow the Grievant to transfer into the Wood Technics opening in the Fall of 1997 but chose instead to post it?

If so, what remedy is appropriate?

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

Section A

The Board shall have the right to direct all teachers in the performance of necessary work functions. This power shall not be exercised in a manner which will defeat the specific provisions or basic purposes of this agreement. The powers or authority which the Board has not officially abridged, delegated, or modified by this agreement are retained by the Board. . . .

ARTICLE V – WORKING CONDITIONS

. . .

Section B – Transfer Procedure

1. A list of anticipated vacancies for the coming school year shall be posted in each school and on file in the Board office, and a copy shall be sent to a designee of the Union.
2. If vacancies occur at any time other than during the 34 weeks of the regular school year, the Board shall mail a copy of the list of vacancies to each member of the bargaining unit.
3. Whenever a new school is opened, the number of vacancies at each level or in each classification shall be posted in like manner.
4. Requests for transfer shall be submitted in writing to the College President.
5. Transfer requests should show preference of school, department, and subject.
6. Such requests shall be granted on the basis of seniority, all other factors being equal; provided, however, that transfer requests may be denied if the granting thereof would materially affect the implementation of the Hours and Loads Committee standards.

7. If a teacher does not receive the position requested, he/she shall be notified of the reasons.
8. A list of all transfer requests which have been approved shall be on file in the Board office, and a copy shall be sent to a designee of the Union.

Section C – Promotion Procedure

Employee promotions shall be accomplished by the following specific steps herein agreed to:

1. Administration shall post forthcoming promotions and other vacancies, including the required qualifications, and forward a copy of said posting to the Union designated representative when the vacancy occurs. If vacancies occur at any time other than during the 34 weeks of the regular school year, the Board shall mail a copy of the list of vacancies, including the required qualifications, to each member of the bargaining unit.
2. Qualified employees may apply in writing for the promotion or other vacancies.
3. Employees with senior time in service shall be given preference, all other factors being equal.
4. All applicants within the bargaining unit shall be interviewed and their qualifications reviewed, but the administration shall be free to interview applicants outside the system. All other factors being equal, first preference shall be given to presently employed personnel.
5. Upon selection of an applicant for promotion, the name of the person selected shall be posted on the employees' bulletin board, and on file in the Board office, and a copy shall be sent to a designee of the Union. If an unsuccessful member of the bargaining unit wishes, he/she may contact the College President for an appointment to discuss the selection; and where said member of the bargaining unit failed to qualify for selection, the College President shall give said employee information which could help him/her grow in professional competence so that he/she may be eligible for selection at a future time.

...

CHIPPEWA VALLEY TECHNICAL COLLEGE
MEMO OF UNDERSTANDING ON SCHEDULING ISSUES
November 5, 1996

There is no language in the contract or side agreements that supports the statement that Chippewa Falls, Menomonie or any other location are campus site assignments. The administration has the right and responsibility to post assignments in the most cost effective manner. These assignments should be made available to all instructors, in the instructional area, by seniority and qualification, without regard to prior assignment location. This should be made available to all qualified instructors in an instructional area each semester and summer session.

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BACKGROUND

The grievance form states the Grievant's "concern" which prompted the grievance thus: "Requested assignment of wood Technics instructor in River Falls according to 11-5-96 Memo on (sic) Understanding on Scheduling and was refused." Brenda Finn, the Board's Vice President – Academic, responded to the grievance in a letter dated December 15, 1997, to Susan Johnston, the then incumbent Union President. That letter states:

...

It is the college's position that (the Grievant) did not have rights to the position since he was not hired into the instructional area into which he requested to move. In a letter of employment dated June 15, 1988, (the Grievant) was extended a contract as an "apprentice carpentry instructor." He was not hired into the position of wood technics instructor.

The wood technics and apprentice carpentry programs are separate and distinct. As instructional areas they function under separate budgets. In dealing with distinct populations, each has different entrance requirements and/or screening procedures for students. The advisory boards for wood technics and apprentice carpentry are also separate and distinct. Certification requirements for the two programs are not interchangeable.

...

Johnston responded in a letter to Finn dated January 16, 1998, which states:

...

The school's treatment of apprenticeship instructors and programs is inconsistent. In Machine Tool, the apprenticeship program and the credit program are considered one entity and instructors can choose load from either area.

The requirements for apprenticeship instructors in carpentry are more stringent than those for faculty in Wood Technics so qualification isn't an issue. Furthermore, even if these are considered two different areas of instruction, (the Grievant) should have been able to obtain the River Falls assignment based on the transfer language. Article V, Section B, Number 6 states that "such requests shall be granted on the basis of seniority, all other factors being equal." Since (the Grievant) was the only instructor to request that work, he should have been given that assignment. . . .

This exchange sets the themes developed at the arbitration hearing.

The Wood Technics Position in River Falls

In April of 1997, the Board successfully passed a referendum, which included a new campus in River Falls. The area is expanding, and the Board determined that local demand for its Wood Technics program warranted a full-time position. The position had the added benefit that it could be offered as a site-based course during the construction of the new Board campus. Lab work could be accommodated through the sharing of local high school lab facilities. The Board's course catalog codes Wood Technics as 31-410-2, and summarizes its content thus:

Program Description

The Wood Technics program is designed for those who wish to pursue a career in building construction or related fields. This hands-on program primarily emphasizes residential construction. Specific areas of instruction include:

- Safety
- Materials and fasteners
- Floor & wall framing
- Roof framing
- Roofing
- Windows and doors
- Stair construction
- Insulation & moisture control
- Exterior finish
- Interior finish
- Site development

As a class project, students build a complete 1600-2000 square foot energy efficient home on a residential building lot. Every aspect of residential carpentry is covered during work on this home. . . .

Prior to the opening of the River Falls campus, the Board had successfully offered Wood Technics at its Eau Claire campus. The instructor of that course at all times relevant here was Joe Cook. At all times relevant here, the Grievant served the Board as a Carpentry Apprentice Instructor. The Board did not offer a carpentry apprenticeship program at River Falls because it did not perceive the contractor demand necessary to support such an offering.

After determining to offer Wood Technics at River Falls, the Board started the budgeting process. As a part of that process, the Board prepared a "Notice of Position Opening," which stated:

. . .

POSITION DESCRIPTION:

1. Provide instruction in the Wood Technics (residential building construction) program. Instruction includes construction and machine safety; all aspects of residential construction; estimating, drafting, and blueprint reading; and construction planning.
2. Assist with curriculum development, revisions, and implementation as required; assist with the development of future home plans.
3. Assist with and coordinate the general contractor requirements on a residential construction site.
4. Maintain equipment in the lab.
5. Participate in team meetings and on advisory committees. Activities include budget development, the scheduling of classes, management of the lab, and involvement in College-wide decisions.

Qualifications;

1. Bachelor's degree or equivalent with education or training in the residential construction area.
2. Minimum of two years' recent nonteaching occupational experience in the residential construction area.
3. Meet certification requirements of the Wisconsin Technical College System Board (Nos. 1 and 2 above).
4. Postsecondary teaching experience preferred.
5. Recent experience in job expediting/coordinating of residential construction preferred.
6. Experience in architectural drafting and residential estimating preferred.

...

The posting noted the position was to start August 4, 1997. The Grievant learned of the position and asked Bob Birchler, the Board's Dean of Instruction, if he could be placed in the position. Birchler advised the Grievant to file a job application. In late May of 1997, the Grievant filed an application for the position.

The Board's Selection of a Wood Technics Instructor for River Falls

As the Board worked through the budget process, Birchler informed Jim Brown, the Board's Vice-President of Operations, that the Grievant had asked to transfer into the position. Brown then discussed the issue with William Ihlenfeldt, the Board's President. Brown and Ihlenfeldt determined that the Grievant did not have automatic transfer rights to the position. Brown stated their reasoning on this point thus:

(W)e determined that Wood Technics and the Carpentry Apprenticeship were two distinct programs. They were separate and distinct because they were hired in as separate positions. . . . They were hired into separate hiring committees; and historically . . . we have had separate supervisors.

There was one brief period in time during reorganization when both of those programs were under the same supervisor, but that only transpired for a period of less than three years. Historically over time, there have always been two separate supervisors for apprenticeship and programs at the college. There have always been separate advisory committees.

The entrance requirements and the screening of students are separate. One student applies directly to the college. The other has to go through the joint apprenticeship committee and be screened. There are separate student requirements, separate lab and classroom components. . . .

Separate instructor certification to the extent that one had a requirement of apprenticeship . . . and one not. And then from the college's standpoint, there are different program requirements, expectations of the person holding the position in that program such as budgets, the recruitment of the students, the placement assistance provided to students, the management of the lab environments, promotion of the program, working with high schools. (Transcript, Tr. at 70-72).

After concluding the positions were part of distinguishable programs, the Board initiated a hiring process, which did not grant any transfer rights to the Grievant. Rather, he became one of a number of interested applicants.

Helen Blumer is the Board's Human Resources Manager. She became the facilitator for a hiring committee assembled to fill the River Falls Wood Technics position. Roughly fifteen people applied for the position. The members of the committee were Birchler; Cook; Barbara Ries, a math instructor; Bruce Rosenau, who serves as a non-Board employe member of the advisory committee for Wood Technics; and Janice Braune, an instructor from another discipline. Blumer assembled the committee for its first meeting, which covered Board hiring guidelines and relevant law. Also at this meeting, the committee set, by consensus, the criteria to be used to assess each candidate's qualifications. At this meeting, the committee reviewed the job posting, but took no action to review any of the applicants.

After determining the assessment criteria, the committee members individually reviewed the application materials submitted by each applicant. Each individual member then determined which of the applicants should be interviewed. The committee then reconvened to determine whether summing the individual committee member's conclusions on which applicants should be interviewed yielded a consensus. A consensus did not result until after some discussion. The committee's consensus determination was that five of the applicants would be interviewed. The Grievant was not one of the five. Geri Gamroth, a Human Resources Specialist, issued a letter dated June 19, 1997 to the Grievant to advise him of the committee's determination. That letter states:

Thank you for submitting an application for the "Wood Technics Instructor" position at Chippewa Valley Technical College.

The Screening and Selection Committee has completed its deliberations and at this time regrets to inform you that you are no longer being considered for the position.

Your interest in securing employment at Chippewa Valley Technical College is appreciated.

In a memo to Brown dated August 5, 1998, Blumer summarized the deliberations of the committee thus:

. . . (O)nly one committee member ranked (the Grievant) as one of their top five candidates, and based on consensus, his name was removed from the list of individuals to be interviewed. Prior to removing (his) name from the list, the committee extensively discussed whether they should provide (him) with a courtesy interview. The consensus of the group was that since he had ranked the lowest of the seven possible interviewees, that it would be inappropriate to grant him an interview. . . .

Blumer stated that her instructions to the committee “were to consider all of the applicants equally for their qualifications.” (Tr. at 100).

The Grievant

The Grievant was hired as a Carpentry Apprenticeship Instructor in 1988. He is a journeyman carpenter, and received a B.S. degree from UW Stout in 1979. His major was Vocational Education, and he served as a student teacher in the Board’s Wood Technics course in Eau Claire. While employed by the Board, he has worked summers in residential and in commercial construction. He is certified in Instructional Area 410 by the System Board of the Wisconsin Technical and Adult Education System. Instructional Area Code 410 is Carpentry and is broad enough to certify him to teach either Wood Technics or Carpentry Apprenticeship.

Apprentices in the Carpentry Apprenticeship program must fulfill four hundred hours of course work over a four year period. The Carpentry Apprenticeship program covers all the subject areas listed in the course catalog summary of the Wood Technics course and covers additional areas such as concrete construction, fire resistant construction, and metal studs. Apprentices are expected to get more theory and more in-depth instruction from the Carpentry Apprenticeship program than are students in Wood Technics. The two programs share at least one textbook. Lab work in Wood Technics focuses on fixed tools such as table saws, planers and jointers. Lab work in the Carpentry Apprenticeship program is intended to function as a hands-on complement to the ongoing lecture process. Apprentices may bring their own tools, and Board supplied tools are kept in a locker for the Apprenticeship program. The Grievant has used the Wood Technics lab facility in Eau Claire for his program, but does not routinely do so. Wood Technics puts its students onto a job site for the construction of a residence. Carpentry apprentices are expected to get on the job experience on job sites of their sponsoring contractors. The Grievant’s position requires him to travel, including to campus facilities in Wisconsin Rapids and Superior. He had hoped to transfer to the River Falls position to permit him more time at home with family.

Evidence on Bargaining History and Past Practice

The parties negotiated their first labor agreement in 1968. That agreement included a promotion procedure, but no transfer procedure. In 1969, the parties added a transfer procedure. What appears in the current labor agreement as Article V, Section C, 4, has not been materially changed from the parties’ initial creation of the procedure. What appears as the first clause of Article V, Section B, 6 of the current labor agreement has not been changed from the parties’ initial creation of the procedure.

Effective January 1, 1994, the parties agreed to a document entitled “Guidelines for Instructors to Achieve Bargaining Unit Status.” Item 1, k of that document states:

For layoff purposes, seniority for bargaining unit employees will include the instructional area (credit and noncredit), provided the incumbent is certified and meets any specific requirements of the position.

Non-credit offerings are continuing education courses, not tied to apprenticeship or associate degree programs.

Bargaining unit members can teach in more than one Board program within their Instructional Area. At one point, for example, a teacher with an Instructional Area 101 Accounting certification taught both the Board's Associate Degree Accounting program and the Account Clerk program. The Board, however, terminated the Account Clerk program. Beyond this, the Board offers three programs within the Secretarial Science Instructional Area.

The Board has also utilized instructors to teach both diploma and apprenticeship programs. Steve Gregerson has an Instructional Area 420 Machine Shop certification. For the 1997-98 school year he taught both in the Machine Tool Apprenticeship Program and in the Machine Tool Diploma Program. His certification to continue to do so, however, is in some doubt. For the 1997-98 school year Lynn Hazen and Sonja Lovely shared instructional duties, in the Barber/Cosmetology Apprenticeship Program. Both Hazen and Lovely also teach Board diploma programs in Instructional Area 502 Barber/Cosmetology. None of these teachers was hired to be an apprenticeship instructor. In each case, however, their assumption of apprenticeship programs was only part of their full-time load. Ihlenfeldt testified that the Board was willing to do this with part-time apprenticeship programs to determine how well the full-time teachers handled the apprenticeship programs. If and when the Board determined a diploma or apprenticeship program warranted a full-time position, he stated that the Board would post the position to all interested applicants to use its hiring process to screen for the most qualified. The different expectations and commitment to a full-time position warranted, in his view, such a posting. This precluded, in his view, offering the full-time Wood Technics position to the Grievant, who had been hired to be a full-time apprenticeship instructor.

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

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidence, the Union contends that the labor agreement contains "three provisions that address the issue of instructor movement to a different location or position: the Transfer Procedure, the Promotion Procedure and the Memo of Understanding Regarding Scheduling Issues." The three provisions are distinguishable, and address different circumstances. Because the grievance questions instructor movement within an Instructional Area, the transfer

provision applies.

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Noting that the Grievant is certified in Instructional Area 410, and that this includes the Carpentry Apprenticeship Program and Wood Technics, the Union concludes that the Grievant's request to teach Wood Technics clearly constitutes a transfer request. Beyond this, the Union contends that an examination of his personal experience and educational background establishes that he met all of the posted qualifications, required and preferred, for the Wood Technics position.

An examination of relevant bargaining history establishes that the parties created two distinguishable procedures to govern promotions and transfers. More specifically, the parties first included a promotion procedure in their 1968 labor agreement, while the transfer procedure was not established until 1969. That the language of the two procedures is not identical establishes that "(t)he difference between these two provisions must be taken into consideration." That the transfer procedure does not expressly mention the interview of outside applicants must, then, be considered significant. The Association adds that this conclusion is underscored by the stipulated issue and by what evidence there is of past practice.

The Board's responses to the grievance establish, according to the Association, that it "is attempting to restrict and narrow the definition of an instructional area." Its initial response indicated it viewed Wood Technics and Carpentry Apprenticeship as separate Instructional Areas. At the hearing, its position seemed to be that the two positions are one Instructional Area, but different programs within that area. The Union contends that the parties' practice is to define an Instructional Area as an area of certification rather than individual programs within an area of certification. The Board catalog and two negotiated settlement agreements underscore this conclusion. Beyond this, the Union argues that the Board has consistently permitted "other bargaining unit faculty to teach in more than one program within their Instructional Area, including teaching in the apprenticeship programs." That Wood Technics and Carpentry Apprenticeship are full-time positions affords no basis to distinguish the Grievant's circumstances from that of other teachers. Nor will the contract support the Board's attempt to distinguish between differing programs within a single Instructional Area. The provisions of Appendix F; Article V, Section B; Article V, Section C; and the "Guidelines to Achieve Bargaining Unit Status" each undercut the Board's position.

Even if the Board's view of the contract is accepted, it is apparent it "gave absolutely no contractual consideration to the grievant . . . for the River Falls Wood Technics position." The Board's failure to interview the Grievant has no contractual basis, and manifests that it "had no intention of abiding by the parties' agreement in this instance."

The Union concludes by requesting that "the arbitrator sustain the instant grievance, and grant (the Grievant's) transfer to the Wood Technics position on the River Falls Campus."

The Board's Initial Brief

After a review of the evidence, the Board contends that the issue posed by the grievance is “the continuing ‘most senior qualified’ vs. ‘most qualified senior’ issue over which employers and unions have been arguing since the passage of the Wagner Act some 60-odd years ago.” The Board contends that under this agreement, Subsection 6 of Article V, Section B is the “small, jeweled bearing on which the issue presented to the Arbitrator in this case turns.” More specifically, the reference to “all other factors being equal” presumes that the Board determine qualifications to determine when a position must be posted.

Acknowledging that it has filled positions in major layoffs and in Instructional Areas, such as Secretarial Science, “where certification requirements and job qualifications are similar,” the Board asserts that here, all other factors were not equal. More specifically, “two very distinct and separate programs are involved.” The River Falls Wood Technics program was a new, full-time offering from its creation. Testimony establishes that Wood Technics and Carpentry Apprenticeship are distinguishable programs, and that the Board has a practice of posting new, full-time positions. Beyond this, Board practice “over the years has been that transfers without a general posting are only appropriate within the same ‘program.’”

The Board contends that its “assignment of apprenticeship courses in Machine Tools and Barber/Cosmetology to instructors in the diploma program of each is distinguishable from the present situation.” In each case, assignment of “part time apprenticeship courses to presently employed full time diploma instructors is merely a reflection of the fact that there is a ready-made, convenient pool available for part time hours which is distinguishable from what the Employer would draw upon to fill a full-time vacancy.” The parties’ agreement makes the commitment to a full-time instructor more serious than that to a part-time instructor. It follows from this that the need to weigh qualifications regarding a full-time position is more pressing than that for part-time positions. Thus, the evidence regarding the Machine Tool and Barber/Cosmetology instructors is of no benefit in resolving this grievance.

Nor is the parties’ November 5, 1996 Memo of Understanding particularly helpful. This, and related Union attempts to define an Instructional Area as an Area of Certification, cannot obscure that being qualified for a position means more than being certified for it; that qualifications can vary from area to area; or that “in some areas of certification, different requirements exist from program to program with the same Wisconsin VTAE Board Certification number.”

The Board concludes that the Union is seeking to obtain in arbitration “the right to apply the ‘most senior qualified’ principle to all transfer requests.” The difficulty with this request is that the Union has yet to acquire this right in negotiations. Because “there can be no doubt that

(the Grievant) was treated fairly” under the Board’s hiring process, there is no support for the Union’s position. The Board concludes by requesting “that the grievance be dismissed.”

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The Union’s Reply Brief

The Union “strongly disputes” the Board’s assertion that the reference “all other factors being equal” has the meaning the Board grants it. A more reasoned view of the reference is “to allow the Employer to grant a transfer to a less senior employee over a more senior employee in cases where the less senior employee has superior qualifications, skills, abilities or experience.” To accept the Board’s view expands “the pool of applicants” beyond “internal employees” and this effectively guts the Transfer procedure.

The Union acknowledges that the Board has a practice of posting new, full-time positions, but disputes the Board’s view of the significance of Union acceptance of those postings. Those postings did not pose an interested unit applicant attempting to move to a position within their Instructional Area. Thus, the absence of challenge to such postings indicates no more than the Union’s agreement that they fall under the Promotion procedure, not the Transfer procedure.

The Union then disputes the Board’s attempt to assert that the Union’s view of the contract permits an unqualified applicant to move into a position in spite of their lack of qualification. The Union contends that its view of the contract acknowledges that “(w)here a program has specific standards or requirements imposed by an outside credentialing body, the employee must meet those additional requirements.” In this case, however, the Grievant exceeds the qualifications required of a Wood Technics teacher. Beyond this, the Association challenges the Board’s view of work assignments in the Machine Tool and Barber/Cosmetology Programs. In each case, “the apprenticeship hours are one portion of each full-time instructor’s regular full-time work load.” The assertion that the assignment of apprenticeship hours in each Program involves “just part-time hours” for which “a lower standard is somehow warranted” is “incorrect and misleading.” Just as apprenticeship and vocational instruction is combined in those programs, it should be in this case.

It is not necessary to conclude that the Union bargained a “most senior qualified” transfer provision to sustain the grievance. Rather, the Union seeks no more than to secure the benefit of the language it has bargained in Article V. Since the Grievant was the sole unit applicant and since he meets the qualifications for the Wood Technics position, he must be granted the transfer unless further prerequisites are implied. Such an implication, however, denies the Union the benefit of a negotiated Transfer procedure. The grievance must, the Union concludes, be sustained.

The Board’s Reply Brief

The Board chose not to file a reply brief.

DISCUSSION

The stipulated issue broadly questions the existence of a contract violation. The breadth of the issue is significant, since the most striking aspect of the grievance is the need to give it a contractual focus.

More specifically, the difficulty in establishing the contractual focus is the absence of contractual support for the Board's action. This is not to say the Board does not pose a considerable interpretive issue regarding Article V, Section B, 6. Rather, it underscores that even if the Board's interpretation of that section is accepted, it can only account for the Board's denial of the Grievant's transfer request. It fails to establish where in the labor agreement the Board bases its selection process. Article II, although not cited, could apply if the Board's action reflects a "retained" right. By its terms, however, Article II can apply only if Article V does not.

By its terms, Article V governs the filling of the River Falls Wood Technics position. Both Section B and Section C require posting of vacant positions. Even assuming Section B, which governs transfers, does not apply here, there is no persuasive basis to conclude that Section C is also inapplicable. It is headed "Promotion Procedure" and the Grievant's move to River Falls is arguably not a promotion. Subsection 1, however, gives Section C expansive coverage, by extending it to "promotions *and other vacancies*" (emphasis supplied). Even if the River Falls opening was not a promotion, there is no persuasive evidence or argument that it constitutes something other than a vacancy. In sum, Article V governs the grievance, thus making the "retained" rights of Article II irrelevant.

The applicability of Article V, however, dooms finding a contractual basis for the Board's actions. Section C, 4 mandates not just a review of a unit applicant's qualifications, but an interview. Blumer testified that the committee considered extending the Grievant a "courtesy" interview. This underscores the committee's commitment to its consensual procedures, but also underscores that the committee paid no regard to the provisions of Article V. Section C, 4 may extend a courtesy, but that courtesy is mandated: "All applicants within the bargaining unit shall be interviewed." Nor is Section C, 4 a matter of courtesy only: "All other factors being equal, first preference shall be given to presently employed personnel." All other factors may or may not have been equal, but the evidence does not afford any basis to conclude the committee ever weighed the Grievant's unit status as a factor worth consideration. This is not reconcilable to the terms of Article V, Section C.

This establishes, however, only the difficulty with establishing a contractual focus incorporating both parties' positions. That the contractual basis for the Board's acts is not

apparent does not establish a contractual violation. The issue remains what part, if any, of the agreement the Board's conduct violated. To address this issue requires an examination of the parties' dispute on the applicability of Article V, Section B.

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Although the stipulated issue implies "to post" is distinguishable from "to transfer", Sections B and C of Article V, both call for the posting of vacant positions. Section C, unlike Section B, expressly refers to the consideration of "applicants outside the system." The Board, contrary to the Union, asserts that Subsection B, 6, permits the consideration of outside applicants if "all other factors" are not equal. As preface to an examination of this point, it must be noted that the reference "all other factors being equal" appears in Subection B, 6, and in Subections C, 3 and 4. To read that phrase in Article V, Section B, 6, to call in the consideration of outside applicants would appear to read the express reference to "the administration shall be free to interview applicants outside the system" in Article V, Section C, 4, out of existence. It is not apparent why the bargaining parties would make the reference express in Article V, Section C, but not do so when bargaining, for the successor agreement, the transfer procedure of Article V, Section B. Beyond this, it must also be noted that Board compliance with Article V, Section B, 7 is less than apparent. The June 19, 1997, letter would appear to be a form issued to all rejected applicants since its final paragraph does not acknowledge that the Grievant is a Board employe. In any event, the letter falls short of constituting a notification "of the reasons" the Grievant did not receive the position.

These prefatory points form a troublesome background to the evaluation of the Board's position. Ignoring them, the strength of the Board's position is that Instructional Area and certification are not synonymous, which necessitates a review of qualifications to assure that general certification can be meaningfully brought into an individual position. This contention highlights that where the Board offers separate programs, even in the same general Instructional Area, the link between general certification and specific qualification is arguably best assessed by established Board hiring processes. The commitment underlying the filling of a full-time position underscores the importance of this process. The Board contends that Article V, Section B, 6, as highlighted by its consistent practice, brings its hiring process into play in this grievance since Wood Technics and Carpentry Apprenticeship are separate programs.

Both parties' arguments assume that if the two programs are not separate, the Grievant could exercise transfer rights. The Union's view of the relationship between a Board program and a System Board designated Instructional Area is different than the Board's. This poses a potentially complex and vexing issue. This general issue, however, need not be addressed to resolve the grievance, since both parties' view of the general issue assumes that the absence of significant difference between programs within an Instructional Area can support a transfer. The narrowest, and thus the most appropriate means to address their arguments is to determine if, as the Board asserts, the Wood Technics and Carpentry Apprenticeship programs can be considered sufficiently distinct to defeat the Grievant's rights under Article V, Section B. He was the sole unit applicant, and his qualifications to perform the work are not in dispute except as compared to

outside qualified applicants. Thus, his entitlement to the position is given if the Wood Technics and Carpentry Apprenticeship programs cannot be sufficiently distinguished to establish that “all other factors (are not) equal” under Article V, Section B, 6 as applied to his transfer request.

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The means to make this determination can be gleaned from the testimony and the parties’ arguments. The determination must be made on a case-by-case basis, focusing on whether desired competencies constituting the learning objectives of the programs require distinguishable instructor qualifications. To exemplify this, the parties agree that district programs within the Secretarial Science Instructional Area can be taught by instructors possessing certification in Instructional Area 106 Secretarial Science. Ihlenfeldt, in his testimony, contrasted this to Board programs in Diagnostic Medical Sonography and Radiography. Each program falls within Instructional Area 526, but:

There is a different occupational experience that’s required for both of those. We would not hire a person with medical sonography background to do radiography work, and vice versa. (Tr. at 109).

Thus, the issue is whether the relationship between Wood Technics and Carpentry Apprenticeship is better analogized to the programs within Secretarial Science or to the programs within Diagnostic Medical Sonography and Radiography.

Because the Board’s asserted differences between the Wood Technics and Carpentry Apprenticeship programs do not withstand scrutiny, those programs cannot be considered sufficiently distinct to defeat the Grievant’s transfer rights. Brown’s testimony sets forth the Board’s rationale, and structures the following discussion.

That the Board uses separate hiring committees and separate supervisors for the programs is evidence of difference, but considerably less than dispositive proof. The Board determines the hiring process and supervision for its teachers. If these factors alone determined whether programs are separate, the Board could unilaterally read Article V, Section B out of existence. That both programs, for a few years, shared supervision further undercuts the significance of these criteria standing alone. Ultimately, each factor prefaces rather than establishes a conclusion. What is it about the two programs that warrants separate supervision and hiring? What, if any, bearing does this have on the qualifications demanded of instructors in each program?

That the programs utilize separate advisory boards can evidence difference between programs. Johnston testified, however, that Instructional Areas may or may not be split into separate advisory boards and budgets. This makes it difficult to conclude that these factors, standing alone, establish anything beyond administrative convenience. The Barber/Cosmetology Instructional Area was once under two budgets and has been merged into one. Instructors within the Instructional Area teach both diploma and apprenticeship programs. The Board did not assert that the budget or advisory committee structure bore on the merging of programs in this or in the

Machine Tool programs. Rather, it highlighted that the instructors were part-time, and could be “tested” on a part-time basis to obviate the need for a separate posting. Against this background, it is difficult to give dispositive weight to the presence of separate advisory boards for Wood Technics

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and Carpentry Apprenticeship. That carpentry apprenticeship programs are contractor-driven in a state regulated trade may dictate the need for a separate advisory board. This would not seem to make residential carpentry skills less necessary to an instructor of Wood Technics than to an instructor of Carpentry Apprenticeship.

That entrance requirements are separate for Wood Technics and for Carpentry Apprenticeship warrants consideration, since students in the former program are presumably less knowledgeable than those in the latter. However, it is undisputed that the Grievant teaches apprentices with varying degrees of experience, including some without experience. Further, it is undisputed that the Grievant must teach apprentices at varying levels of experience within the program. It cannot, then, be concluded that the Grievant’s position has removed him from dealing with inexperienced students or with a range of experience among students.

The distinction between the courses involving lab work has no apparent significance on distinguishing the programs. Apprentices use less fixed equipment, yet the end point of the Wood Technics program is to get the students to a job site to build a house. The parallel to apprenticeship is apparent. Beyond this, the Grievant does use the Wood Technics lab at times. It can be noted that the Apprenticeship course involves more theory in classroom instruction than the Wood Technics course. If, however, this states a significant difference between the programs, then the instruction of any upper level course within the same discipline could be separated from its lower level prerequisites. Presumably, laying out a multi-level stairway or a gabled roof requires more theory than laying out a horizontal railing or a single level floor. It would not follow from this that the Grievant is not qualified to teach those aspects of his course outline which focus on less complicated functions.

The differences cited by Brown must be contrasted with the evident similarities between the programs. As noted above, the Grievant’s Apprenticeship program covers every detail noted in the course summary to Wood Technics. The Grievant possesses each qualification sought in the posting for Wood Technics. The two programs share at least one text book. While Brown highlighted lab equipment not shared by the programs, it is evident that students in each program use a common set of tools. The tools of residential construction are the same for the novice or the professional. The course code for Wood Technics is the 410 Instructional Area in which the Grievant is certified. The Grievant’s student teaching experience placed him in Wood Technics.

Ultimately, the Board’s attempt to distinguish the programs focuses less on the content of the programs than on the Board’s perception that a separate hiring process is the best means to assure the highest quality applicant in each full-time program. However, the weight this carries as

a policy judgement must be given contractual meaning to be dispositive here. To distinguish Carpentry Apprenticeship from Wood Technics on this record effectively reads the transfer rights of Article V, Section B out of existence. The Board's arguments indicate that the unique qualifications required in an Apprenticeship Program might rule out a Wood Technics instructor's

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requested transfer. They cannot make apparent how the Grievant's ostensibly greater qualifications than required for Wood Technics can work against him. Doing so would read the term "equal" in "all other factors being equal" in Article V, Section B, 6, as "identical." Adopting this interpretation reads the transfer rights of Article V, Section B out of existence. In sum, the Wood Technics and the Carpentry Apprenticeship programs cannot be sufficiently distinguished to defeat the Grievant's rights under Article V, Section B.

Before closing, it is appropriate to tie this conclusion more tightly to the parties' arguments. Whether the Union reads Instructional Area too broadly must be left to the case-by-case review noted above. The relationship between Board offered programs and general System Board certification poses an inevitably factual issue. Viewed from this perspective, the fact that instructors in Machine Tool and Barber/Cosmetology can combine diploma and apprenticeship programs is less evidence of a binding practice than evidence of the need to address each program on its own merit.

The significance of the Board's desire to protect the hiring process for full-time employees must be acknowledged. However, that desire cannot defeat the terms of Article V. To deny transfer rights under Section B, program differences must exist which are traceable to considerations beyond the Board's desire to use the hiring committee consensus procedure to weigh the qualifications of all applicants equally. This does not mean that the consensus-based hiring is flawed or that the commitment to a full-time position should be minimized. However, the hiring process must take relevant provisions of Article V into account. The consensus of a hiring committee cannot substitute for compliance with the labor agreement.

The November 5, 1996 Memo on Scheduling Issues is relevant background to the grievance, but unhelpful in resolving it. It does mention "instructional area," but combines "seniority and qualification" as considerations for making positions available without specifying how to weigh them in any particular case. The Mentink settlement agreement, in my opinion, is irrelevant by its terms: "It is also agreed that this situation is not precedent setting."

As noted above, the stipulated issue can be read to imply that positions open to transfer should not be posted. Also as noted above, Section B and C each require a posting. The grievance focuses not on the posting of the vacancy, but on its posting to outside applicants on the assumption the Grievant could assert no superior right to it.

The parties have not raised any issues regarding remedy, and the Award entered below grants the Union's request. The Award states no time line for granting the transfer, in the hope

that the parties can best address how to effect the transfer with a minimum of disruption to the affected teachers and students.

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AWARD

The Employer did violate the collective bargaining agreement when it did not allow the Grievant to transfer into the Wood Technics opening in the Fall of 1997 but chose instead to post it.

As the remedy appropriate to the Board's violation of Article V, Section B, it shall permit the Grievant to transfer to the Wood Technics position on the River Falls campus as soon as is feasible.

Dated at Madison, Wisconsin, this 23rd day of March, 1999.

Richard B. McLaughlin, Arbitrator

RBM/gjc
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