

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**CHIPPEWA FALLS FEDERATION OF TEACHERS,
LOCAL 1907, WFT, AFT, AFL-CIO**
and
CHIPPEWA FALLS SCHOOL DISTRICT

Case 118
No. 55428
MA-10014

Appearances:

Schneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Timothy E. Hawks**, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the Union.

Mr. Robert Butler and **Mr. Larry Holtz**, Staff Counsel, Wisconsin Association of School Boards, 122 West Washington Avenue, Suite 400, Madison, Wisconsin 53703, appearing on behalf of the District.

ARBITRATION AWARD

The Chippewa Falls Federation of Teachers, Local 1907, WFT, AFT, AFL-CIO, hereafter referred to as the Union, and Chippewa Falls School District, hereafter referred to as the Employer or District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. The undersigned was so designated and hearing was held in Chippewa Falls, Wisconsin, on August 25, 1998. The hearing was not transcribed and the record was closed on November 9, 1998, upon receipt of post-hearing written argument.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties were unable to stipulate to a statement of the issue. The Union frames the issue as follows:

Did the Chippewa Falls Area Unified School District violate the collective bargaining agreement between it and the Chippewa Falls Federation of Teachers, Local 1907, WFT, AFT, AFL-CIO, when it implemented a plan to move teachers from the Middle School to the High School?

If so, what is the appropriate remedy?

The District frames the issue as follows:

Did the District violate Article V, Section H of the master agreement between Chippewa Falls Unified School District and Chippewa Falls Federation of Teachers?

If so, what is the appropriate remedy?

The Arbitrator adopts the following statement of the issue:

Did the Chippewa Falls Area Unified School District violate the collective bargaining agreement between it and the Chippewa Falls Federation of Teachers, Local 1907, WFT, AFT, AFL-CIO, in the manner in which it moved teachers from the Middle School to the High School?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE V

Working Conditions

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Section B. Staff Reduction

When the Board, in its sole discretion, determines to decrease the number of bargaining unit teachers, in whole or part, it may lay off (fully or partially) the necessary number of teachers according to the following procedures:

1. The Board shall determine the assignment area in which the layoff shall occur.

2. The Board shall make its determination regarding the position(s) to be partially or wholly discontinued, as well as an initial determination as to the bargaining unit teacher(s) to be partially or wholly laid off applying in the latter determination the following order of selection:

a. Normal attrition resulting from those teachers who the Board may be aware intend to retire or resign as of the time of the proposed discontinuation.

b. Volunteers for such layoff of whom the Board Union may be aware. No teacher shall be allowed to volunteer for layoff unless the only effects on the implementation of 2e are: (1) The volunteer will be laid off, (2) the teacher who would have (sic) laid off will not be laid off and (3) the teacher who would have moved into the originally designed laid off teacher's position is certified to fill the position of the volunteer. The position of the volunteer will not be posted. (4) Volunteers for layoff will have full recall rights as set forth in Section C below, subject to the following qualifications: A teacher on voluntary layoff may refuse an offer of employment by the School District in his/her discretion and such refusal shall not prejudice his/her later recall rights; provided, however, that said teacher's recall rights will still expire as provided in paragraph 1 of Section C hereof. (5) Job seniority shall accrue to the volunteer for layoff during the first year of his/her voluntary layoffs. (6) Job seniority shall not accrue to the teacher who would have been laid off during the first year that he/she occupies the position vacated by the volunteer.

In addition to foregoing, the Board will agree via side letter not to challenge the application of a teacher on voluntary layoff for unemployment compensation benefits on the grounds that his/her layoff was voluntary and that there is a job available for him/her.

c. After a minimum of two semesters, a volunteer for layoff may notify the Superintendent of his/her intention to return. Upon return, a volunteer for layoff shall be placed in his/her original position or a position equivalent to the one previously held.

d. Teachers without regular certification in the subject field and/or grade level.

e. If all teachers are certified, teachers without regular certification: (1) The term regular certification refers to the regular license issued by the Wisconsin Department of Public Instruction, and professional and/or temporary certification shall not be considered regular certification. It shall be the sole responsibility of the individual teachers to keep their certification current. Such certification shall be on file in the office of the Superintendent of Schools, 1130 Miles Street, Chippewa Falls, WI 54729. For the purpose of this Article, including recall rights, certification of individual teacher(s) shall be determined each year as of February 1 and October 1.

f. The following procedure will determine how teachers will be affected whenever attrition and volunteers cannot accomplish the elimination.

Step I. The Board and the Federation will determine the teacher with the least district seniority in the building in the subject field area being reduced. Involuntary transfers shall be made to maintain the principle of seniority that to the extent possible, the least senior employee shall be laid off providing the remaining employees are certified to perform the remaining work. The affected teacher shall be involuntarily transferred to the position of the least senior teacher in that certification area in the district with a comparable position (full time/full time: part time/part time).

Step II. The displaced (less senior) teacher from step I shall be involuntarily transferred to the position of the least senior teacher in their certification area(s) within the district.

Step III. Step II shall be applied to all subsequently affected teachers.

Step IV. If an affected teacher does not qualify for movement within or between buildings or classifications, according to the preceding steps, that teacher shall be laid off in whole or in part, as is necessary to carry out the Board's decision.

Whenever application of this procedure results in the layoff of a teacher, the affected positions will not be posted. Positions vacated by attrition and volunteers, however, will be posted.

3. The Board shall notify the Union and the teacher(s) to be partially or wholly laid off, in writing, by June 1st of the preceding school year.

4. A layoff shall not create a "vacancy" under this Agreement, and no posting of any teacher to be laid off is required.

Section C. Recall Rights

1. When a bargaining unit teaching position, for one semester or more, becomes available, the most senior teacher on layoff status with recall rights and regular certification for the open position shall be recalled. Recall rights extend for a period of three (3) years from the first day of work missed due to the layoff.
2. The Board shall mail notices of recall by certified mail to the teacher's last known address. It shall be the teacher's responsibility to keep the Board informed as to his or her current address.
3. If the Board does not, within twenty-one calendar days from the date the recall notice was delivered to the last known address of the employee as verified by certified mail, receive written confirmation of the teacher's acceptance of recall, the teacher loses all rights to be recalled.
4. All benefits these teachers have accumulated shall be retained. (No vacancies may be filled with new employees while there are laid off teachers available who are qualified to fill the vacancies).
5. Teachers laid off may reject reduced employment with the school district without prejudicing recall rights to a full-time position. Reduced employment shall include less than full-time employment and work of less than one full semester. The teacher may secure other employment during the period he/she is laid off.
6. When a bargaining unit teaching position of more than nine weeks but less than one semester becomes available, the most senior teacher on layoff status with recall rights and regular certification for the open position shall be offered the position.

Section D. Voluntary and Involuntary Transfers

1. Voluntary Transfer
 - a. A list of all known vacancies shall be posted in each school and in the Board office as they become known to the administration. A list of any existing vacancies shall be posted in the Chippewa Herald Telegram on each Sunday throughout the summer months, and application for such vacancies must be received in the Board office by noon of the following Thursday. Vacancies of less than one (1) semester need not be posted.
 - b. Requests for transfers shall be submitted in writing to the Superintendent within five (5) business days after the posting of the vacancy.
 - c. Such requests shall be granted on the basis of:
 1. Training, certification, and experience of the teacher in relationship to the requested position.

2. All factors being equal, district seniority in the school system.
3. Priority of request in the case of tied district seniority shall be determined by the Superintendent.
 - d. Notice of all positions shall clearly set forth the qualifications for the position or positions.
 - e. Where requests for transfer have been approved, notification shall be given to all applicants for said positions within five (5) calendar days. New teachers will not be hired to fill a position until teachers already in the system have had an opportunity to apply.
 - f. Applicants not employed in the system shall not be hired until teachers in the system have had an opportunity to apply for the position according to the procedure outlined above.

Notice of transfer shall be given to the teacher no later than the end of the school term, except if the vacancy should occur after that date.

- g. If a teacher in the system does not receive the position, that teacher, upon request, shall be notified in writing of the reasons for not receiving that position.

2. Involuntary Transfer

a. Involuntary transfers made because of decreased student enrollment or other causes shall be based only on seniority and subject matter certification. Whenever an involuntary transfer between classifications (i.e., as stated in Section B., paragraph 1) is to occur, the certified teacher with the least district seniority who is assigned to the affected classification shall be the first transferred. Whenever an involuntary transfer is to occur within the classification, the certified teacher with the least district seniority who is assigned to the affected building, shall be the first transferred.

b. It is understood that an involuntary transfer between classifications may necessitate a second involuntary transfer within the classification.

c. Teachers transferred involuntarily shall have the right to return to their original buildings in the reverse order in which they transferred as such positions become available.

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Section H. Teacher Assignments and Duties

1. In assigning teaching duties, first consideration will be given to the primary professional competence of the teacher and to teaching experience in other fields. No teacher shall be subject to assignments other than those specified in the teacher's area of certification except made by mutual agreement between administration, teacher, and the president of the Federation or designee.
2. Any extra-curricular or extra hours of duty shall be offered to qualified employees on a voluntary basis. Any employees choosing not to accept such assignments shall not be penalized or discriminated against in any way. Teachers under contract for an extra-curricular position shall retain that position for the duration of the individual contract or until a suitable replacement is found.
3. All presently employed teachers shall be given their prospective schedules for the following year on or about May 1, but not later than May 15. The CFFT shall be notified of any changes to the schedules after that date.
4. Whenever a teacher substitutes for another teacher during his/her preparation time, the substituting teacher will be paid at a rate of \$10.00 per class period at the secondary level and at a rate of \$10.00 per hour at the elementary level.

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APPENDIX D

Management Rights

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

1. To the executive management and administrative control of the school system and its properties and facilities.
2. To hire all employees and, subject to the provisions of law, to determine their qualification and the conditions for their continued employment.

The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific express terms of this agreement and Wisconsin Statutes: 111.70, and then only to the extent such

specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin and the Constitution and laws of the United States.

BACKGROUND

The Chippewa Falls School District has one High School, one Middle School and six Elementary Schools. At the start of the 1996-97 school year, the District's Middle School contained 6th, 7th, 8th and 9th grades. Prior to March of 1997, the District announced its intent to relocate the 9th grade class from the Middle School to the High School.

On March 10, 1997, the Union's grievance committee met with District Superintendent Larry Annett to discuss the administration's plans for staffing at the High School following the relocation of the 9th grade. Thereafter, the committee and Union Executive Board wrote to Dr. Annett and stated, in relevant part, as follows:

The CFFT Grievance Committee met with Dr. Annett on March 10 to discuss the movement of teachers from the Middle School to the High School when the ninth grade students move to the High School. It is the Federation's position that this movement should occur exactly the same way it occurred when the 6th and 9th grades were moved to the Middle School when it opened in 1977. At that time, High School teachers were first given the opportunity to volunteer for the transfer to the 9th grade. These voluntary transfers were based on certification and seniority. Those positions that were not filled with volunteers, were filled with involuntary transfers of the least senior certified teachers. The 6th grade positions were filled from the elementary schools by exactly the same procedure. This procedure clearly followed the Master Agreement as outlined in Article V, Section D, Voluntary and Involuntary Transfers.

. . .

Responding on March 31, 1997, Annett wrote, inter alia:

The secondary administrators and I have put considerable thought into the procedure to be used in reassigning teachers from the Middle School to the High School in 1998. Our first concern is to insure that we create a pool of properly certified (9-12) teachers we feel would do the best job at the High School. In the spirit of cooperation and keeping staff morale high, we will be proposing a plan which allows teachers to voluntarily transfer into these positions.

As we discussed in March, the voluntary movement will likely fill the majority of these positions. In cases where there are too many volunteers for a single position, or if there are not enough volunteers, the administration will judge the qualifications and academic preparation of available staff. If, in our judgment, all training and experience factors are equal, seniority would play a part.

It is important to remember that these positions are reassignments and are not new master positions or vacancies. As such, they do not fall under Article V, Section D of the Master Agreement.

. . .

On April 4, 1997, the CFFT Grievance Committee responded and stated, in relevant part, as follows:

. . . the Federation considers these positions to be transfers that are covered under Article V, Section D of the Master Agreement. To repeat ourselves, the Federation believes that:

1. Voluntary transfers should be granted these positions at the High School based on certification and seniority as stated in Article V, Section D, paragraph 1.c.
2. If more teachers are needed, the least senior, certified teachers should be involuntarily transferred as stated in Article V, Section D, paragraph 2.a.

The Federation is very firm in its commitment to this contract language and its past practice when the Middle School added grades six and nine. . . .

On April 10, 1997, Annett responded, in relevant part, as follows:

. . . We can, however, generate a list of volunteers in preparation for this move. We plan on doing this early in the Fall.

Hopefully, volunteers will take care of the lion's share of 9th grade staff moving to the High School. For those that are not covered by volunteers, the administration wishes to reserve the right to reassign staff who are moving with their students to a new location.

. . .

Thereafter, the Union grieved the District's "intent to not follow the Master Agreement Article V, Section D, Voluntary and Involuntary Transfers." In a letter dated May 14, 1997, the CFFT Grievance Committee advised Superintendent Annett of the following:

. . .the Federation considers these positions to be transfers that are covered under Article V, Section D of the Master Agreement. The Federation believes that:

1. Teachers transferred involuntarily from the High School to the Middle School have recall rights to return to the High School as stated in Article V, Section D, paragraph 2.c.
2. Voluntary transfers to the High School should be granted to teachers based on D.P.I. certification to teach 9th grade courses and seniority as stated in Article V, Section D, paragraph 1.c.
3. If more teachers are needed, the least senior, certified teachers should be involuntarily transferred as stated in Article V, Section D, paragraph 2.a.

. . .

The grievance was appealed to arbitration and Arbitrator Lionel L. Crowley conducted a hearing on December 18, 1997. After the Union presented its witnesses, the parties agreed that this particular grievance was premature and that the record in this proceeding would be preserved as depositions for a hearing, if necessary, on a mature grievance.

On January 14, 1998, the District presented the process it intended to use to "reassign" staff to the High School. At that time, the District identified the following guidelines:

1. We will be responsive to the desires of staff – we will assess the level of interest of each staff member that is certified to teach grades 9-12.
2. We will limit these reassignments to Middle School staff. Simply because there are teachers elsewhere in the system/ that are certified the High School positions does not mean that we are putting them into the pool for possible reassignment.
3. The background, training and experience will be important factors in considering the new assignments.
4. To insure flexibility of staffing we will need those reassigned to the High School to have certification through grade 12.
5. We will reassign in a manner than insures no lay-offs.
- 6. Most importantly, we will reassign staff based on what is most likely to build the strengths of both programs.**

As you can tell, several factors will be used to determine which staff will be assigned to the High School, among which will be the willingness of the teacher to be reassigned. Curt, Jim Sauter and I will be meeting with each of you individually later this month to gauge your willingness to be reassigned. Let me reiterate that although it is important, your desire to relocate is only one of several factors we will be considering in reassigning staff. The guiding principle in the entire process is maximizing our instructional programs' strengths at both buildings.

. . .

- Vacant positions that occur at the Middle School will not automatically be assigned to the High School. It may be that the best person to fill a vacancy is already on staff, and the vacant position should stay at the Middle School.
- The High School is not the final arbiter of which staff will be moving to the High School. We will attempt to evenly balance the needs of both schools.
- Staff who are at the Middle School as a result of involuntary transfer will have the right under the involuntary transfer language to return to the High School.

On February 12, 1998, the Union advised Superintendent Annett that the Union did not agree with the District's process, but would judge the correctness of the selection of faculty by the outcome of the process. The Union stated that the Union maintained the position that the most senior certified volunteers would be transferred; that the least senior certified would be involuntarily transferred and that the Union would grieve any violations of the Master Agreement.

On March 27, 1998, Dr. Annett and the principals of the High School and Middle School wrote to Middle School teachers and provided them with a list of the teachers to be "reassigned to the High School." On April 16, 1998, the Union's grievance committee "refiled" its grievance and stated, in relevant part, as follows:

According to the Master Agreement, Article V, Section D, para 2a, "Involuntary transfers made because of decreased enrollment or other causes shall be based only on seniority and subject mater certification.... Whenever an involuntary transfer is to occur within the classification, the certified teacher with the least district seniority who is assigned to the affected building, shall be the first transferred." At no time does the Master Agreement recognize the term "reassignment", a term that Dr. Annett has used constantly in reference to

those teachers moving to the high school. This term was again used in the official letter of March 26, 1998, informing the staff of the “reassigned” teachers.

According to the Master Agreement, Article V, Section D, para 1, voluntary transfers shall be granted on the basis of training, certification, and experience of the teacher and all factors being equal, district seniority is (sic) the school system.

1. The Federation is grieving the term “reassignment”, as we believe these positions to be transfers.

2. The Federation agrees that Rick Lucas(science) and Jeanne Morissette (special ed) were involuntarily transferred to the middle school and are recognizing their recall rights to return to the high school.

3. The Federation agrees that the following people should be moved to the high school, but grieves the fact that they were “reassigned”. We believe that these people should be involuntarily transferred, because they did not volunteer and are the least senior certified in their departments. The Federation also expects these people to receive letters verifying that these moves are involuntary transfers and that they will have recall rights as stated in Article V, Section D, para. 2c:

Bob Brunner (phy-ed)
Lori Hendricks (phy-ed)
Irene Salazar (foreign language)
Jennifer Koehn (music)
Neil Jarosz (tech-ed)
Lisa Warren (FACE)

4. The Federation is grieving the involuntary transfer of Donna Linhart (.4 foreign language) and believes that Jodi Fahrman should be involuntarily transferred because she is the least senior teacher in foreign language. It is our understanding that is a .4 French position, and that both teachers are certified to teach French. If Mrs. Linhart is to teach French, it should be in addition to her Spanish classes at the middle school, and Mrs. Fahrman should be split between the two buildings. Therefore, the Federation expects that Mrs. Linhart will not be involuntarily transferred. We also consider this to be an involuntary transfer for Mrs. Fahrman, and expect that she will receive a letter verifying this with recall rights.

5. In regards to the volunteers, the Federation agrees that the following people should be transferred to the high school because they volunteered and are the most senior certified amongst the volunteers:

Sharon Smith (English)
Kara Gingras (.6 social studies)
Bob Rooney (WECEP)
Tom Pomietto (social studies)
Jay Sweney (math)
Jeff Keding (.4 math)
Candy Jenke (science)
Peter Peterson (.2 business)
Ron Buckles (.4 music)

6. The Federation is grieving the voluntary transfer of Karen Eisenbarth (English). Lois Mertes volunteered to be transferred to the high school and she has more seniority than Karen. Lois Mertes should be voluntarily transferred to the high school and Karen Eisenbarth should remain at the middle school.

7. The Federation is also grieving the fact that Steve Armstrong volunteered to be transferred to the high school and is the most senior certified volunteer in math. Therefore, Steve Armstrong should be voluntarily transferred to the high school.

8. The Federation is grieving the transfer of Rick Moen (math). He should not be transferred because he did not volunteer, and there are enough certified teachers who did volunteer to fill the math positions.

9. Tim Crawford (science) and Steve Reinhart (math) have both withdrawn their intentions to be voluntarily transferred to the high school. These withdrawals have allowed the Federation to accept the voluntary transfers of Candy Jenke in science and Jay Sweney in math.

10. All teachers in this grievance shall be made whole by adhering to the provisions in Article V, Section D of the Master Agreement.

On April 22, 1998, the District's Board of Education stated that "Because the Board continues to believe that the transfer of employees from the middle school to the high school was a reassignment rather than a voluntary or involuntary transfer, the Board of Education has rejected your grievance" Thereafter, the grievance was submitted to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The grievance, together with the testimony of Gary Hjelm, identifies the adversely affected staff and remedy as follows:

. . .

3. The Federation agrees that the following people should be moved to the high school, but grieves the fact that they were “reassigned.” We believe that these people should be involuntarily transferred, because they did not volunteer and are the least senior certified in their departments. The Federation also expects these people to receive letters verifying that these moves are involuntary transfers and that they will have recall rights as stated in Article V, Section D, para. 2c.

Bob Brunner (phy-ed.)
Lori Hendricks (phy-ed.)
Irene Salazar (foreign language)
Jennifer Koehn (music)
Neil Jarosz (tech-ed.)
Lisa Waren (FACE)

. . .

5. The Federation is grieving the voluntary transfer of Karen Eisenbarth (English). Lois Mertes volunteered to be transferred to the high school and she has more seniority than Karen. Lois Mertes should be voluntarily transferred to the high school and Karen Eisenbarth should remain at the middle school.

. . .

7. The Federation is also grieving the fact that Steve Armstrong volunteered to be transferred to the high school and is the most senior certified volunteer in math. Therefore, Steve Armstrong should be voluntarily transferred to the high school.

8. The Federation is grieving the transfer of Rick Moen (math). He should not be transferred, because he did not volunteer, and there are enough certified teachers who did volunteer to fill the math positions.

The term “transfer” applies to any personnel action that moves an employe from one position to another position. The longstanding, continuous practice of the District has been to define “position” in terms of its location in a building, among other criteria. Since this personnel action moved employes from one building to another, the employes changed their positions and, thus, were transferred.

The collective bargaining agreement provides for the application of seniority in the event of transfer. First, volunteers are to be offered the opportunity to transfer in order of the most senior qualified volunteer. In the event that there are an inadequate number of volunteers, the least senior qualified teacher may be involuntarily transferred.

In dispute are several discrete cases where the most senior teacher who volunteered to transfer was not allowed to do so, or where the teacher ordered to transfer was not the least senior teacher qualified for the position. A teacher who is involuntarily transferred has a collective bargaining right to return to his/her former position.

The collective bargaining agreement contains no discrete definition of the word “position.” If the word “position” is defined in the broadest possible generic term, *i.e.*, the “job of the teacher,” then the administration could, at its will, “assign” any employe to teach any subject at any grade level at any school. In the event of a layoff, the Board could reduce the total number of positions in the District; lay-off the least senior teacher; and reassign the staff to teach what and where it wanted. There would be no need for involuntary transfers of any sort.

Context informs us that the word “position” is intended to be something narrower than the broad definition assumed above. The contract language implies that every teacher has a unique position and that, in this specific case, the voluntary transfer language requiring a posting of vacant positions is exempted. This argument is supported by the language of Section B, Staff Reduction, 2. b.; Section B, 2. c.; and Section B, 2. f., Step I and Step II. As well as by the testimony of Mary Blake, Building Steward for 19 years, which demonstrates a longstanding practice in which each posting identified the building location of the position and the position was identified as a discrete vacancy with an assigned a vacancy number.

There are several collective bargaining agreement references to building location in context of the definition of “position.” The most revealing is in the “Involuntary Transfer” subsection, *i.e.*, Article V, Section D, 2., and Article V, Section B, 2. By review of context and by necessary implication, it is evident that the term “position” is defined in part by the identity of the building in which it is located.

For the purpose of the involuntary transfer and voluntary transfer provisions, the longstanding and continuous practice of the District has been to define “positions” by the

building in which they are located, among other criteria. The testimony of Mr. James Ramsdell, District Superintendent from 1977 to 1990, and Union President Gary Hjelm confirms this practice.

The Laure Shilts situation is in every critical way identical to that of this grievance. It involved a situation where the Board reduced the number of positions at one school and increased them at another. In that situation, Superintendent Annett did not believe he could simply reassign staff to positions in different buildings, but rather, applied the involuntary transfer language.

Superintendent Annett involuntarily transferred Nicki Schur. In that case, the number of positions at her school had been decreased. She is transferred not into a new position, but rather a vacant position. Notably, she has the right to return to her former position and the vacancy is also posted. Evidence of the operation of the involuntary transfer provision demonstrates that, in 1997, Superintendent Annett did not believe that he had the right to “reassign” staff to positions in different buildings.

Letters of May 29, 1996, and April 14, 1998, offer compelling evidence that, in fact, the District did recognize that the new jobs at the High School were “new positions” discrete from those at the Middle School. When the District decided to move the 9th grade from the Middle School to the High School, Morissette invoked her “Article V, Section D, 2. c. . . . right to her original position and returned to the full-time LD position at the High School. Her right to do so existed only if her original High School LD position became vacant, a fact that Superintendent Annett testified did not happen.

In summary, for at least 20 years the District has defined the word “position” by reference to the building in which it was located. Whenever a new position was added in a building, regardless of its affect on the total number of positions in the District, the position was posted as a vacancy and the voluntary transfer language controlled the selection of who got the position. Whenever the District reduced the number of teaching positions in a building, the teacher adversely affected by the reduction was moved according to seniority and certification and the involuntary transfer language controlled.

Twice in the last 25 years larger shifts occurred. The first, in 1977, involved the reverse situation presented in this case; the District moved the 9th grade from the High School to the Middle School. It applied identical voluntary transfer and materially identical involuntary transfer language to determine who was to be transferred. In 1996, the District closed two schools and opened a new one. The Superintendent wrote to the Union’s Executive Committee and reported that “contractually, this is an involuntary transfer.” Superintendent Annett did not believe he could simply reassign staff to positions in different buildings, but rather, was required to apply the involuntary transfer language.

On March 23, 1995, the District proposed to modify the involuntary transfer language as follows:

Item No. 2: Article V – Working Conditions – Section D. Voluntary and Involuntary Transfers – 2. Involuntary Transfer (page 16).

Add the following language:

d. In building involuntary transfer is at the discretion of the principal. The principal. (sic) such transfers must be made prior to the teacher being notified of his/her assignment for the upcoming year.

The Union opposed this proposal and the District withdrew it. The District is attempting to gain through arbitration that which it failed to gain through collective bargaining.

The past practice relied upon by the Union reflects the parties' understanding of ambiguous contract language. The parties may not unilaterally renounce such a practice. Whatever else the District may have disavowed in 1995, it did not affect the parties' understanding of the contract terms. Moreover, the District continued the identical practice of identifying positions in terms of their building location from 1995 to the date of the hearing.

The District claims that when it decides to "reassign" staff there is never a vacancy; therefore, neither the voluntary nor involuntary transfer language comes into play. If this were true, then when the enrollment bubble passes through, the building principal would simply "reassign" the Elementary School staff to cover the change in staffing needs at will. As Superintendent Ramsdell testified, the increase in staff at a single grade caused by the bubble produced a vacancy that must be posted. The subsequent decrease in staff caused by the passing of the bubble produces involuntary transfer.

Principal Sauter's testimony that High School teachers are reassigned class sections within their departments is not relevant. Not only are these intra-school shifts, but also as the Union's witnesses testified, the provisions of Article VI, Section H, exist precisely because of this practice and to affirm it.

Principal Asleson's testimony that he had "reassigned staff" was impeached upon confrontation with the job postings of the positions to which he claimed to have reassigned staff. Superintendent Annett's testimony was limited to several EEN positions, often with multiple school assignments, and several exceptions which tend to prove the rule shown by the Union's evidence.

For the first time, the District argues that, with respect to two pairs of employees, the Union did not show that the most senior volunteers did not otherwise compare well based upon the additional criteria found in Article V, Section D. The Arbitrator should hold the District to the position that it has taken throughout the grievance procedure, not one that it raised for the first time at hearing. The District's only response to the Union's grievance throughout this case has been that Section D did not apply whatsoever. Alternatively, the evidence shows that the distinctions relied upon by the District do not relate to the requested position. The requested position is specifically a 9th grade position. Certification to teach at grades 10 through 12 is not related to the requested position. A minor academic preparation in speech and drama is not related to the requested 9th grade English position. All relevant factors being equal, seniority is the contractual tiebreaker and should be applied.

The Management rights relied upon by the District are circumscribed by the provisions of the contract relied upon by the Union. The grievance should be sustained and relief granted as requested by the Union.

District

The District's actions are supported by clear and unambiguous contract language. Past practice may not abrogate clear and unambiguous contract language.

The relevant clear and unambiguous contract language is contained in Section D, Voluntary and Involuntary Transfers, and Section H, Teacher Assignments and Duties. Superintendent Annett testified to the meaning of Section H and D.

In that testimony, the Superintendent defined "primarily professional competence" to mean academic background and "teaching experience in other fields" to mean the kind of experience the teacher has that relates to the assignment. The Superintendent further stated that the second sentence of that paragraph means that no teachers shall be assigned to teach something for which they are not certified without the agreement of the teacher, the administration and the Union. The testimony of the High School principal corroborated the testimony of the Superintendent and established that, with respect to Article V, Section H, an assignment would involve the curricular area and that that the District assigns teacher duties and schedules on a yearly basis.

Article V, Section D, addresses vacancies, the procedure for posting the vacancy, requests for transfer and how transfer requests will be granted. There were no vacancies created by the addition to the High School; the subsequent transfer of 9th grade students to the High School; or the corresponding transfer of staff with the 9th grade students. Nor were there any reductions in staff or layoffs. Rather, there was an en masse reassignment of teachers to the High School, which is located four blocks from the Middle School.

Approximately three new positions were created from increased enrollment and from the addition of the 9th grade to the High School. The District clearly has the authority under Section H, Teacher Assignment and Duties, to reassign personnel to the High School. The management rights clause also gives the District the authority to perform reassignments of this nature. The language of Article V, Section D, does not specifically and expressly modify these management rights.

In determining who would be reassigned to the High School, the Superintendent gave consideration to the following criteria: (1) academic preparation; (2) experience of the teacher; (3) certification of the teacher; (4) individual's preference to move; and (5) balance of the strengths of the two departments (levels of expertise, experience and proven track records who do well in these areas). The Superintendent acted in a manner that is consistent with the management rights clause.

In March of 1995, the Board sent a letter to the Union disavowing any past practice relating to transfers. Following this disavowal, the District adhered to the contract that states that seniority is only applied when training, certification and experience are equal.

As arbitrators have recognized, the past failure of an employer to enforce the clear provisions of the agreement does not bar insistence on subsequent compliance with clear and unambiguous contractual requirements. Since the inception of the current contract language, the District has reassigned staff in the District without using Section D, Voluntary and Involuntary Transfers, and without posting the position according to Article V, Section D.

Mr. Ramsdell was Superintendent when the District transferred staff into a new Middle School in 1997, but the entire decision making process had been completed prior to his arrival. Conduct which occurred over twenty years ago, by a Superintendent who failed to take advantage of Section H, Teacher Assignments and Duties, can hardly constitute a binding past practice.

As Union President Hjelm acknowledged at hearing, the majority of his testimony involved situations in which teachers were involuntarily transferred from one school to another because of reduced enrollment or one school was closed. In the present case, there has been no reduction of hours or positions.

The Union's reliance on the involuntary transfer of Shilts is misguided. The Union has ignored the fact that the District eliminated all teaching positions at the ninth grade in the middle school and moved the ninth grade to the High School.

Superintendent Annett's testimony concerning the reassignments at Parkview Elementary in 1995, enrollment bubbles and the movement of EEN teachers demonstrates that

the District has frequently changed the assignments of teachers without using the voluntary/involuntary language. In those cases no vacancies were created so management clearly had the right to assign employees to available work.

Principal Sauter confirmed that the District has frequently changed employees' assignments at the High School under the authority provided in Article V, Section H. These changes in assignments within departments have been done on a consistent basis, have not been posted as vacancies and have not been challenged by the Union.

When a vacancy has occurred, the District has voluntarily transferred staff based on training, certification and experience and then seniority, if all factors are equal. Involuntary transfers between classifications are done by certification, with the least senior employee assigned to the affected classification being the first transferred. Involuntary transfers performed within classifications are done by certification with the least senior employee assigned to the affected building.

Reassignment cannot be required solely on the voluntary/involuntary language because the contract language so clearly and explicitly states that the District has the right to give first consideration to the primary professional competence of the teacher and to teaching experience in other fields. Moreover, there is no unequivocal, consistent, and mutually agreed upon practice that would indicate such a requirement.

The Union claims that, in each of two groups of employees, the least senior employee was assigned to the High School when a more senior teacher had volunteered. The first group consists of Mr. Armstrong and Mr. Wilcox and the second group consists of Ms. Eisenbarth and Ms. Mertes. Assuming arguendo, that Article V, Section D, is controlling, this provision favors seniority only if all factors are equal.

All factors are not equal. Mr. Armstrong is only certified to teach up to 9th grade math, while Mr. Wilcox's certification is K-12 math. Ms. Eisenbarth has all the certifications of Ms. Mertes, as well as a minor in speech and drama.

The testimony of Principal Sauter demonstrates the importance of having teachers in the High School who are able to teach grades other than just 9th grade in order to have the ability to develop an effective master scheduling in the building and to make adjustments when enrollment changes occur. Currently there are no teachers in the High School who are only certified for 9th grade, and the Principal could not imagine hiring a teacher who did not have a High School certification. Allowing Armstrong and Mertes to move to the High School would inhibit the District's ability to develop an effective master schedule, would cause problems in integrating curriculum and would severely limit its flexibility to make future adjustments.

The District is required to select a more senior bargaining unit member only where the training, certification and experience are equal. The Union must demonstrate by a preponderance of the evidence that the District acted in an arbitrary, capricious or discriminatory manner in not selecting Armstrong and Wilcox for the positions at the High School. The Union's evidence fails to meet this burden.

In summary, the District's conduct is supported by explicit and unequivocal contract language. The Union's claim of a longstanding, continuous practice in which the position has been defined in terms of its location in the building is without merit. As administrators testified, the reassignments were made for educational policy, curriculum and staff balancing reasons.

The District did not overstep its authority in reassigning the teachers to the High School. The management rights clause specifically gives the District the right to the executive management and administrative control of the school district, its properties and its facilities. Article V, Section B. relied upon by the Union states that "the board shall determine the assignment area in which the layoff shall occur."

Assignment area is broader in scope than a building. Assignment area is District-wide. The District retains, through the Management Rights clause, the right to determine qualifications for positions. The District made its reassignments based upon the employee's certification, qualifications, and program needs.

The Union has not demonstrated that the District has acted in an arbitrary, capricious or discriminatory manner in reassigning teachers to the High School. The grievance should be denied.

DISCUSSION

The District relocated the ninth grade from the Middle School to the High School. The Union does not dispute the District's right to make such a move. Rather, the Union argues that the District violated the collective bargaining agreement in the manner in which it determined which Middle School teachers would be moved to the High School as a result of the relocation of the ninth grade.

Article V, Section H, 1, states as follows:

In assigning teaching duties, first consideration will be given to the primary professional competence of the teacher and to teaching experience in other fields. No teacher shall be subject to assignments other than those specified in the teacher's area of certification except made by mutual agreement between administration, teacher, and the president of the Federation or designee.

Relying upon this language, as well as the contractual Management Rights clause, the District implemented a procedure for selecting the teachers to be moved to the High School. Under this procedure, the District selected teachers on the basis of academic preparation; experience of the teacher; certification of the teacher; individual's preference to move; and balance of the strengths of the two departments (levels of expertise, experience and proven track records who do well in these areas).

Kermit Culbertson was the Union's Chief Spokesperson at the time that the language of Article V, Section H, 1, was agreed to by the parties. According to Culbertson, the parties intended this provision to allow the District some flexibility in assigning courses and class sections to high school and middle school teachers.

James Ramsdell, the District Superintendent from 1977 to 1990, states that, during his tenure with the District, the "assignment" rights in Article V, Section H, 1, involved class changes within a particular Department and that usually the Department "would work it out." (Ex. 15, p.103) Ramsdell's testimony concerning the parties' application of Article V, Section H, 1, was corroborated by the testimony of Union President Gary Hjelm, who has been employed by the District for over twenty years.

Current High School Principal James Sauter stated that he frequently changed teacher assignments. Sauter's testimony, however, does not demonstrate that any change in an "assignment" has involved moving a teacher from one building to another building. Rather, his testimony suggests that the change in "assignments" is due to changes in course offerings and involves changing the class assignments and/or schedules of teachers.

Current School Superintendent Larry Annett clearly believes that the language of Article V, Section H, 1, provides him with the right to move teachers from the Middle School to the High School. The evidence demonstrates, however, that, with the possible exception of EEN teachers, who are not at issue in the present case, Article V, Section D, has determined teacher movement from one building to another building.

Under the well-established posting procedures of the District, a teaching position is identified as having the classification "Teacher." A teaching position is also identified on the basis of location, *i.e.*, a specific school building such as Chippewa Falls Middle School, and the program area, which may be a general program area such as "Reading/Language Communication," or a specific grade such as "Grade 7 Team." Thus, when a teacher bids for a vacancy, the teacher is also bidding for a specific building location. The principle that a teacher has a seniority right to continue to work in the building into which the teacher has posted is affirmed by the language of Article V, Section D, 2(c), which states as follows:

c. Teachers transferred involuntarily shall have the right to return to their original buildings in the reverse order in which they transferred as such positions become available.

The evidence of the parties' prior conduct establishes that the language of Article V, Section D, 1, Voluntary Transfer, is followed when a teacher with an existing position posts into a vacant position. The evidence of the parties' prior conduct establishes that the language of Article V, Section D, 2, Involuntary Transfer, is followed when there has been a reduction in the number of sections of a grade level at one school and an increase in the number of sections of a grade level at another school.

In the latter situation, the least senior certified teacher is involuntarily transferred from the building that has suffered a reduction to the building that has experienced an increase, unless such a transfer would cause a lay-off. (In the present case, there is no issue of lay-off) The position into which the teacher is involuntarily transferred is posted and filled as a vacancy. Teachers who are involuntarily transferred have the return rights set forth in Article V, Section D, 2(c).

On two prior occasions, there has been an en masse movement of teachers from one building to another. The first of these movements occurred in 1977, when the District moved the 6th grade from the elementary schools and the 9th grade from the high school to the middle school. The teaching staff and the administrative staff who were present at the time of this move and who testified at hearing agree that the resulting teacher movement involved both voluntary and involuntary transfers.

The testimony of these witnesses further demonstrates that the District first asked for volunteers; that the District received two volunteers; and that these two volunteers were accepted because they had made a request to volunteer and had the appropriate certification. Approximately nineteen teachers were involuntarily transferred.

The second en masse movement occurred in the middle of the nineties, when the District discontinued elementary classes at two buildings, i.e., Korger-Chestnut and First Ward, and opened a new elementary school at Parkview. It is not evident that the District sought any volunteers. As set forth in Superintendent Annett's letter of October 25, 1993, the entire staffs of Korger-Chestnut and First Ward were involuntarily transferred to Parkview.

The evidence of the parties' prior conduct concerning en masse movements indicates that the parties are in agreement that teachers who are subjected to an en masse movement are "transferred." In each instance, however, the parties followed a different procedure when transferring en masse.

Under the plain language of Article V, Section D, 1, a “voluntary” transfer occurs when a teacher with an existing position in the District posts into a vacant position. A posted position sets forth the qualifications for the position. Requests to be voluntarily transferred into the posted position are granted on the basis of:

1. Training, certification, and experience of the teacher in relationship to the requested position.
2. All factors being equal, district seniority in the school system.
3. Priority of request in the case of tied district seniority shall be determined by the Superintendent.

Contrary to the argument of the Union, there is no contractual basis for exempting the posting requirement of the “voluntary transfer” provision.

In the present case, the disputed positions were not posted as vacancies and the Union has not requested that the positions be posted as vacancies. Absent a posted vacancy, Article V, Section D, 1, is not applicable.

Under the plain language of Article V, Section D, 2, an “involuntary” transfer occurs because of “decreased student enrollment or other causes”. In the present case, the District moved the entire ninth grade from the Middle School to the High School. As a result of this movement, ninth grade positions were lost at the Middle School and gained at the High School.

The undersigned is persuaded that the movement of teachers from the Middle School to the High School was triggered by a decreased student enrollment at the Middle School. Thus, the “involuntary” transfer language of Article V, Section D, 2, is applicable.

The Union maintains that the District is bound by the voluntary/involuntary procedure used to effectuate the 1977 transfer. Assuming arguendo, that one event rises to the level of a binding past practice, the District’s letter of March 23, 1995 is sufficient to repudiate a past practice that is inconsistent with the contract language and that is not reaffirmed following the repudiation.

The voluntary/involuntary procedure used by the parties in 1977 is inconsistent with the current contract language. The record fails to demonstrate that the procedure used in 1977 was reaffirmed following the March 23, 1995 repudiation of past practices. Given these facts, the voluntary/involuntary procedure used by the parties in 1977 does not give rise to a binding past practice. Nor does it demonstrate any mutual intent with respect to the meaning and application of Article V, Section D, of the current collective bargaining agreement.

The District's March 23, 1995 repudiation of past practices associated with the contractual voluntary/involuntary transfer procedure and the language of Article V, Section H, 1, is not sufficient to repudiate a past practice that is not inconsistent with the contract language and that has been reaffirmed by subsequent conduct of the parties. Such a past practice may be relied upon as evidence of the parties' mutual intent with respect to the interpretation and application of a provision.

In summary, the District relies upon the language of Article V, Section H, 1, to argue that it may "reassign" teachers from one building to another. A building location is not generally considered to be a "teaching duty." Not only is the District's construction of Article V, Section H, 1, not supported by the plain language of the provision, but also, it is inconsistent with the evidence of bargaining history and prior conduct.

For the reasons discussed above, the undersigned is persuaded that the movement of teachers from the Middle School to the High School is governed by the language of Article V, Section D, 2, and not by Article V, Section H, 1. Under the terms of the parties' collective bargaining agreement, the specific express terms of Article V, Section D, 2, take precedence over the Management Rights clause.

Neither the plain language of Article V, Section D, nor the evidence of the parties' prior conduct, demonstrates that the District has a contractual obligation to transfer the most senior certified Middle School teacher who volunteered to be transferred. Rather, Article V, Section D, 2, requires the District to involuntarily transfer the least senior certified teacher. Under the mutually accepted practice of the parties, the teacher who is involuntarily transferred is entitled to receive a letter that verifies that he/she has been involuntarily transferred and that notifies the teacher that he/she is entitled to Article V, Section D, 2(c) return rights. Additionally, the position into which each teacher is involuntarily transferred must be posted and filled as a vacancy.

While contesting the method of the District's decision-making, the Union does not contest each result of that decision-making. The remedy set forth below is limited to the results that have been contested by the Union.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Chippewa Falls Area Unified School District violated the collective bargaining agreement between it and the Chippewa Falls Federation of Teachers, Local 1907, WFT, AFT, AFL-CIO, in the manner in which it moved teachers from the Middle School to the High School because the teacher selection procedure implemented by the District does not comply with the requirements of Article V, Section D, 2, of the collective bargaining agreement.

2. Bob Brunner; Lori Hendricks; Irene Salazar; Jennifer Koehn; Neil Jarosz; and Lisa Warren have been involuntarily transferred to the High School. The District is to provide a letter to each of these teachers that verifies that he/she has been involuntarily transferred and that notifies the teacher that he/she is entitled to Article V, Section D, 2(c) return rights. Unless the Union and the District mutually agree otherwise, the position into which each teacher was involuntarily transferred must be posted and filled as a vacancy.

3. The District does not have a contractual obligation to transfer the most senior certified teacher who volunteered to be transferred. Thus, the District did not violate the parties' collective bargaining agreement when it denied the transfer requests of Steve Armstrong and Lois Mertes.

4. Inasmuch as Karen Eisenbarth is the least senior certified teacher, the District has a contractual right to involuntarily transfer Eisenbarth to the High School. The District is to provide Eisenbarth with a letter that verifies that she has been involuntarily transferred and that notifies her that she is entitled to Article V, Section D, 2(c), return rights. Unless the Union and the District agree otherwise, the position into which Eisenbarth was involuntarily transferred must be posted and filled as a vacancy.

5. Inasmuch as Rick Moen is the least senior certified teacher, the District has a contractual right to involuntarily transfer Moen to the High School. The District is to provide Moen with a letter that verifies that he has been involuntarily transferred and that notifies him that he is entitled to Article V, Section D, 2(c), return rights. Unless the Union and the District agree otherwise, the position into which Moen was involuntarily transferred must be posted and filled as a vacancy. 1/

1/ Following the involuntary transfer, Moen exercised a contractual right to transfer back to the Middle School. This Award addresses only those rights that are triggered by Moen's involuntary transfer from the Middle School to the High School.

Dated at Madison, Wisconsin, this 31st day of March, 1999.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator