

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TOMAHAWK SCHOOL DISTRICT

and

TOMAHAWK EDUCATION ASSOCIATION

Case 47
No. 56681
MA-10376

Appearances:

O'Brien, Anderson, Burgy, Garbowicz and Brown, L.L.P., by **Attorney Steven C. Garbowicz**, 221 First Street, Box 639, Eagle River, Wisconsin 54521, appearing on behalf of the Tomahawk School District.

Mr. Gene Degner, Executive Director, Northern Tier Uniserv Central, 1901 W. River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501, appearing on behalf of the Association.

ARBITRATION AWARD

Tomahawk School District, hereinafter referred to as the Employer or the District, and the Tomahawk Education Association, hereinafter referred to as the Association, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances arising thereunder. The Association made a request, with the School District concurring, that the Wisconsin Employment Relations Commission designate a Commissioner or member of its staff to hear and decide a grievance filed by the Association. The undersigned was so designated. The hearing was transcribed, the parties filed post-hearing briefs and reply briefs, and the record was closed on January 11, 1999.

ISSUE

The parties do not agree as to the statement of the issue.

The District suggests that there are two issues to be resolved in this case:

Issue # 1: Did the District violate Article 2C by transferring Ms. Mielke to the high school to fill the requirements of students entering the 9th grade in the Tomahawk School District?

Issue # 2: Did the District violate Article 16F & G by filling the middle school position with interns?

The Association words the issue differently: (d)id the district violate the rights of the grievant under the collective bargaining agreement by not giving the grievant the middle school position that was filled by two interns? If so, what is the appropriate remedy?

I define the issue as whether the District violated the rights of the grievant under the collective bargaining agreement when it transferred Sue Mielke from her position in the middle school as a special education teacher to a special education teaching position in the high school? If so, what is the appropriate remedy?

CONTRACTUAL PROVISIONS

The parties cite the following contractual provisions.

Article 2 – Management Rights Clause

A. The following Management Rights Clause is understood to be the function of the Board. This clause is intended to fill the present void in the master agreement, but in no way to replace or nullify any of the expressed provisions of the master agreement presently in effect.

...

C. Without limiting the generality of the foregoing (paragraph 1), it is expressly recognized that the Board's operational and managerial responsibilities includes (sic):

...

The direction and arrangement of all the working forces in the system, including the right to hire, suspend, discharge or discipline, or transfer employees.

...

The creation, combination, modification or elimination of any teaching position deemed advisable by the Board.

The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards and judgment of employee performance.

...

Article 4 – Savings Clause

If any article or part of this Agreement is held to be invalid by operation of law or by any court of law, or if compliance with or enforcement of any part should be restrained by such tribunal, the remainder of the Agreement shall not be affected thereby, and the parties shall enter into negotiations for the purpose of arriving at a mutually satisfactory replacement for such article or part thirty (30) days after official notification of a change in law.

...

Article 16 – Layoff/Vacancies

A. Layoff Procedure: The School Board may from time to time have to reduce the teaching staff because of declining enrollments, budgetary limitations, or changes in educational programs. When the Board faces such a situation, the District Administrator will recommend to the Board which teachers to layoff.

B. Standards for Layoff: The District Administrator will base his/her recommendations on the following standards:

1. Normal attrition

2. a) Length of Service – Except as listed below in 2b, the teacher with the least length of service in the Tomahawk school system shall be laid off first.

b) Consideration of Qualifications – The School Board shall be permitted to exempt teachers from the provisions of 2a (above) whenever:

(1) The teacher's area of licensed certification is required for the maintenance of an existing program.

(2) The teacher is the head coach of a conference sport and cannot be replaced by appointing a qualified member of the remaining staff. Whenever a head coach of a conference sport is laid off, the Board shall have the sole right to determine the replacement and the appointee must accept the position.

(1) Voluntary layoff – The District Administrator may consider for layoff any teacher who has submitted to the District Administrator a written and signed statement indicating the teacher's desire to volunteer for layoff status. Such statement must be submitted to the District Administrator on, or before, January 1 of the school year preceding the year of layoff.

Acceptance or rejection of volunteer for layoff is the prerogative of the Board.

Any teacher placed on voluntary layoff status shall retain all rights and privileges accorded under Sections C, D, & E of the Article.

No teacher placed on voluntary layoff shall acquire, nor be accorded, any special recall rights not granted to teachers of regular layoff status. Nor shall any teacher on voluntary layoff status be reinstated to regular teaching status by means other than those stated in this Article.

C. Notification: The Board will notify each teacher being considered for layoff of the elimination of his/her position and of his/her re-employment rights by April 1 of the calendar year in which the layoff will take place.

D . Recall Procedure: When a teaching position becomes available, the Board will recall last laid off teachers according to the same standards the Board followed when it reduced the work force.

The Board will mail a recall notice by certified mail to the teacher's last known address. The notice will advise the teacher of the time and place to report for duty. The following rules will apply to recall rights:

1. Each teacher is responsible for keeping the Board informed as to his/her current address.
2. A teacher who does not respond in writing to a recall notice within fourteen (14) calendar days of the date on which notice was mailed loses all rights to be recalled.
3. Re-employment rights of laid off teachers will terminate at the end of the second (2nd) school year following the year of layoff notification.
4. A teacher shall not lose his/her recall rights if they secure other employment during the recall period.

E. Benefits: Any teacher on layoff status may, during the recall period, elect to continue any, or all, benefits which are part of this contract by:

1. Notifying the District Administrator in writing of the desire to continue the benefit.
2. Paying the entire cost of said benefit.

The Board will make no payment for any benefit for teachers on layoff status.

The Board will prorate contributions for all benefits for any teacher who is recalled to a part-time status. The amount of contribution will directly correspond to the individual's fraction of full-time employment.

Any teacher who is reduced to, or recalled to, a part-time status shall accrue seniority at the normal full-time rate for the period worked on part-time status.

Any teacher who is recalled under this article shall retain all rights, benefits and seniority that may have accrued prior to the time of layoff.

No teacher will be laid off for any portion of a school year if said teacher is contracted on an individual basis to teach for that year.

C. If a vacancy/vacancies occurs and the District decides to fill the vacancy/vacancies, the District shall fill said vacancy/vacancies with a qualified bargaining-unit member if that member can be made available and applies for the position(s). State certification does not necessarily imply that the person is qualified. The District retains the sole right to determine if a person is qualified.

During the course of the school year vacancies will be posted in the Faculty Rooms.

During the summer months vacancies will be posted in the District Administrator's Office.

Bargaining-unit employees will have seven (7) days to apply. The district, in return, will notify said applicants of its decision within three (3) days of its determination.

G. All vacancies, permanent or new, except those created by leaves granted under the collective bargaining agreement for the duration of a semester or more, shall be filled by employees covered or to be covered by the collective bargaining agreement and afforded all rights therein.

All vacancies created by leaves under the collective bargaining agreement of a semester or more shall be filled by an employee covered by the collective bargaining agreement and afforded all rights therein, except the recall provision. Internal transfers shall maintain recall rights, but no new employees filling said temporary positions or temporary positions caused by transfers shall be granted any recall rights.

All vacancies, permanent or new and less than a semester, may be filled by long term substitutes who shall not be considered bargaining unit employees.

All employees filling vacancies created under the collective bargaining agreement of a semester or more and not receiving recall rights shall be given credit for such service in the Tomahawk School District, including experience on the salary schedule and credit toward the probationary period, should they ultimately be hired to fill a full time teaching position.

Long term substitutes shall be defined as those substitutes filling in for one position for a semester or more and shall be differentiated from a short term sub who might fill in for an extended period of time but less than one semester.

BACKGROUND

Susan E. Mielke has been employed as a special education teacher by the Tomahawk School District since 1987. For her first 7 years of employment she was assigned to the District's High School. In 1994, however, she applied for a posted special education 6th grade teaching vacancy in the District's Middle School, to which the District had attempted to append additional athletic coaching responsibilities.

Initially Ms. Mielke was unsuccessful in her effort. A District administrator advised her that although she was both certified and qualified for the position of a Middle School special education teacher she was not a coach for any of the athletic coaching positions posted with the teaching job and, therefore, would not be appointed. The successful applicant for the transfer was another District employee, Steve Laskowski, who has a certification of K-12 Learning Disabilities (LD) and was also qualified and willing to be a coach.

Ms. Mielke filed a grievance challenging the administrative decision that had turned down her transfer request, asserting that the District's unilateral addition of coaching responsibilities to a teaching position violated the "Standards Clause" (Article 6) of the parties' collective bargaining agreement. Following an arbitration hearing Ms. Mielke prevailed in her grievance, and the District was ordered to grant Ms. Mielke the position that she had sought in the Middle School. (Case 42, No. 51203, MA-8529, Greco, 3/95)

That arbitration award was issued on March 16, 1995. Ms. Mielke, however, was aware that special education students tend to be troubled by change, particularly mid-year change. For that reason, she opted to finish the school year at her original position at the High School (as expressly permitted by the arbitration award), thus enabling her students to finish the school year with no change in their teacher.

However, Ms. Mielke never was transferred into the 6th grade special education teaching position ordered by the arbitrator. Instead, Ms. Mielke was transferred to a 8th grade special education teaching assignment at the Middle School where she remained for 3 years. Mr. Laskowski has remained in the 6th grade-teaching slot (where he also coaches both cross-country and Odyssey of the Mind, an academic extra-curricular activity).

During the 1997-98 school year, members of the Tomahawk School District Middle School special education teaching staff were asked if anyone wished to transfer to the High School. No one volunteered to make the move. Mr. Freude, the Middle School Principal, then advised Ms. Mielke and Mike Houle, another Middle School special education teacher, that in the absence of any volunteer for transfer to the high school either Ms. Mielke or Mr. Houle would be involuntarily transferred to the high school. Mr. Houle also serves as head basketball coach at the High School. Mr. Houle reportedly reminded Mr. Freude of an earlier promise that Mr. Houle would not have the same students for two consecutive years.

During her conference with Mr. Freude, Ms. Mielke questioned whether her elementary LD (learning disability) teaching licensure was legally sufficient for her to teach 14 LD high school students. She learned that due to a rule change by the Department of Public Instruction, her elementary LD now permits her to be given high school LD assignments because she is also licensed to teach ED (emotionally disturbed students from grades 7-12.). However, it also appears that Ms. Mielke, Mr. Houle and Mr. Laskowski (and perhaps others, as well) all had sufficient teaching certifications for any one of them to have filled the high school special education teaching slot to which Ms. Mielke was ultimately assigned.

Ms. Mielke also asked why everyone who was certified was not also being considered for the involuntary transfer. Ms. Mielke reports being told, "Well, we have to consider lunch duty and extra curriculars." Ms. Mielke also brought up the subject of coaching duties, noting that "We (the District) have coaches all over." Ms. Mielke testified that the administrator's response was that "it's best if they stay in the (building) area that (in which) they teach."

In a subsequent conversation with Mr. Freude and Mr. Pedersen, the District Director of Special Education, Ms. Mielke was advised that she was being transferred back to the High School. According to Ms. Mielke, she was told she was being transferred because she knew the High School staff and the students.

Prior to his retirement on June 30, 1998, Curtis Powell had been the Tomahawk School Superintendent for nine years. As Superintendent, Mr. Powell had the authority to transfer teachers without Board of Education approval. He had exercised that authority when he transferred Ms. Mielke back to the High School.

According to Mr. Powell, the certifications of both Mr. Houle and Ms. Mielke had appeared to him to be even in a lot of areas. Mr. Powell did not indicate whether he had considered the qualifications of Mr. Laskowski. However, Mr. Powell claimed to be particularly impressed with Ms. Mielke's personality, her eight years of experience in the High School, and her familiarity with both High School staff as well as the students about to be promoted from the Middle School to the High School. Mr. Powell also noted that the students with whom Mr. Mielke had been working in the Middle School do not like change. Thus, if Ms. Mielke were transferred to the High School she would be able to move right along with her students.

Mr. Powell conceded that if Ms. Mielke had been assigned to the 6th grade special education position (as the prior arbitration award had directed) instead of drawing the 8th grade special education opening, moving her to the high school would have been a complete change for her and the students.

Mr. Powell claimed his basis for initiating a transfer of a special education teacher to the High School was his belief that the High School would have a higher number of special education students the following year. Mr. Powell said that at the time Ms. Mielke was transferred, District officials anticipated a mixed class going into the High School because there were a large number of students going up through the system: “the fifth grade going into the sixth grade had some special needs; the kids in the Middle School had some special needs.” Mr. Powell used the analogy of a pig in a python to demonstrate his theory as to the shifting needs of a special education program.

Mr. Powell went on to say that it appeared to Mr. Freude, Mr. Stahmer (Special Education Director) and him that “. . . Ms. Mielke had a wealth of experience: she had been in the High School for quite some time; she was familiar with the High School staff; she had been familiar with the kids coming up through the system; she knew them and they knew her.” According to Mr. Powell, Ms. Mielke’s transfer back to the High School “best met our needs.”

Mr. Powell also testified that at the time of the transfer District officials believed that after one more year there would be no need for one of the special education teaching positions at the Middle School, and someone would have to be transferred to the High School. Although that view was consistent with his “pig in the python” theory, due to his retirement Mr. Powell does not know if that projection was realized. Based on that projection, however, Mr. Powell believed that it would be less disruptive for student-interns to fill what he believed would be only a temporary position at the Middle School. Moreover, unlike a bargaining unit member, an intern would not have to be “non-renewed” for the following year.

An intern is a student majoring in education who is hired by a school district to give the student practical experience, offer low-cost assistance to the school district in any area of need, and possibly provide the intern with a full-time job following the intern’s certification. An intern could be used, for instance, in situations where the District cannot find regular certified teachers to fill a position vacancy.

Mr. Powell claimed that Ms. Mielke’s transfer back to the High School was not based on any extra-curricular considerations. He asserted that if extra-curricular assignments had been taken into consideration, the District could have moved at least two other persons to the High School (including Mr. Houle) because they each had head high school coaching responsibilities. Ms. Mielke was transferred solely because the high school position required someone of her caliber, according to Mr. Powell.

Mr. Powell also contended that the District had attempted to obtain teaching interns for the High School position, but none were available for high school duty. The District was, however, able to locate interns for the Middle School.

Thus, to fill what Mr. Powell believed would be a temporary (one-year) position left vacant in the Middle School by Ms. Mielke's reassignment to the High School, the School District did hire two interns. As matters turned out, Ms. Mielke taught about the same number of High School students as she had taught the previous year in the Middle School.

POSITIONS OF THE PARTIES

Association

The Association views this as a case about the Tomahawk School District attempting to move a Middle School EEN teacher to the High School by devious methods. The Association believes that any rights claimed by the District flowing to it under the Management Rights clause of the collective bargaining agreement are secondary to the rights guaranteed the grievant under Article 16, Layoff/Vacancies.

The Association argues that in transferring Ms. Mielke to the High School, the District necessarily created a vacancy in the Middle School position from which Ms. Mielke was being transferred. Article 16 of the collective bargaining agreement provides that a vacancy must be filled by a bargaining unit member who applies for it and is qualified.

The Association does not agree that either the Management Rights clause or the "Pig in the Python" theory have any application in the instant matter.

The Association quotes the language found in Article 16, G of the collective bargaining and asserts it is clear and concise. It points out the vacancy in the Middle School caused by Ms. Mielke's transfer was not created by a leave for the duration of a semester or more. Furthermore, according to the Association, the language requires a vacancy be filled by a persons covered by the collective bargaining agreement, and an intern does not fit that description.

The Association next moves back to Article 16, F, and contends that language requires a vacancy to be filled by a qualified bargaining unit member if that member can be made available and applies for the position. According to the Association, the District did decide to fill the position (from which Ms. Mielke was transferred). Indeed, when the District decided to transfer Ms. Mielke it knew the position had to be filled, says the District.

The Association does not see how the contract language could be more clear or on point as to this issue. It cites arbitral and hornbook authority in support of the proposition that the clear meaning of language must be enforced, even if the results are harsh or contrary to the original expectations of the parties.

Reading Article 16, F and G in conjunction with each other, the Association thinks it is clear that they give the grievant the right to the Middle School position from which she was transferred.

The Association also accuses the District of attempting to undo a previous arbitration award. The Association points out that the position that the grievant was awarded in that proceeding is still occupied by the same person (Steve Laskowski) who held it in March 1995. The Association notes that Mr. Laskowski is fully qualified to fill the High School position.

Finally, the Association does not believe the District's rationale for the Mielke transfer is credible. It finds the District's action capricious and arbitrary. It contends that the "Pig in the Python" theory is invalid because there are as many EEN students in the Middle School in the 1998-99 school year as were there in the previous year; it suggests the "pig" appears to have become "piglets."

The Association also notes that the original discussion concerning the High School position focused on an LD position and that is what the position has become. But, says the Association, Ms. Mielke's licensure does not include 9th grade LD.

The Association further notes that the District also initially supported the Mielke transfer with the argument that it is best if coaching assignments are for the grade level being taught. Under this logic, says the Association, it would have made more sense to transfer Mr. Houle to the High School where he is the boy's varsity basketball coach.

The Association is not impressed by the District's reliance on its Management Rights clause of the collective bargaining agreement. That clause, says the Association, is still subject to the balance of the agreement. Moreover, the Association claims that the District's Director of Special Education could have assigned the interns to the 9th grade position instead of transferring Ms. Mielke to it.

In summary, the Association argues that if the grievant's previous position in the Middle School not been filled by interns there would be no vacancy and Article 16 would not be relevant. The contract is clear and concise, says the Association, and gives the Middle School position to a bargaining unit member or to a person about to become a member. In other words, the Association reiterates, a transfer that leaves a vacancy is different than a transfer that does not leave a vacancy.

District Position

The District believes the facts demonstrate that for the 1998-99 school year, District administrators anticipated a large number of EEN students moving from the Middle School to the high school level. Since there were insufficient staff at the High School to handle the large group and because it appeared the incoming EEN students had a variety of exceptional educational needs, the District attempted to locate a teacher who was certified in more than one special education area.

The District notes that no District teacher volunteered to make the transfer. The District further notes that the District was unable to find any intern candidates for the High School slot.

Thus, says the District, it was left with the alternative of transferring an existing staff person after assessing and comparing staff qualifications. Ms. Mielke was one of two candidates whom the District believed would be most suitable. Since she did not volunteer for the transfer, the District involuntarily transferred her to the high school position, claiming a right to act under the Management Rights clause (Article 2) of the collective bargaining agreement.

The District believes three provisions of Section C of that clause offer it the necessary authority to make the involuntary transfer: 1) the right to direct and arrange the work force, including the right to transfer; 2) the creation, combination, modification or elimination of any teaching position; and 3) the determination of the size of the work force and allocation and assignment of work to employees.

The District argues that the District considered Ms. Mielke the most qualified candidate for the transfer: 1) she possessed the necessary certifications; 2) she was familiar with the high school and its staff; 3) she was familiar with the students that would be in her class.

The District notes that when the decision for transfer of Ms. Mielke to the High School was made, it believed that Ms. Mielke would have a mixture of both ED and LD students. Later, the District was able to restrict her class to only LD students.

The District believes it was totally within its contractual rights in making the transfer. The District would be hard pressed to meet the needs of its students if it could not move its staff around to meet student needs. The purpose of a school district is to educate children, and staff exists to meet children's needs, the District asserts. Article 2 permits the District to meet these needs, otherwise the employees would have a veto right over any (involuntary) transfer the District might attempt, according to the District.

The District believes that former School District Superintendent Powell's "Pig in the Python" theory was a rational basis for the transfer. There were more EEN students coming into the high school than were entering the Middle School, argues the District, therefore it had to move a teacher to the High School to accommodate the growing population. The District continues to believe that Ms. Mielke was the best-qualified teacher to be reassigned.

The District rejects the Association's argument that the act of transferring Ms. Mielke to the High School created a vacancy in the Middle School that Article 16 mandates be filled by Ms. Mielke. This, says the District, is a Catch-22 kind of argument under which no involuntary transfer could ever be made.

In the instant matter, the District asserts, once the transfer was made the vacancy could not be filled with a bargaining unit member necessitating the hiring of two interns. Interns have been frequently used in the past, says the District. Therefore, it concludes, a past practice has been established contrary to Article 16,G.

The District finds no contract language dealing with its use of interns, and suggests that under all of the circumstances (including the fact that the position vacated by Ms. Mielke was expected to exist for only one more year) the District made an appropriate decision.

The District also distinguished the prior grievance arbitration award involving Ms. Mielke as not relevant to the existing situation. The District denies that the transfer of Ms. Mielke was retributive in nature as a result of the District's loss of that arbitration award.

Association Reply

The Association acknowledges that the collective bargaining agreement has very little language as to transfers. But, says the Association, the language as to filling vacancies is strict and rigid.

The Association suggests an easy contractual construction is that if a transfer causes a vacancy, there was no reason for the transfer, except perhaps for disciplinary purposes (that are covered by other provisions). The position that needed filling was the one at the High School, urges the Association, not the one at the Middle School. The Association accuses the District of failing to do its job in attempting to fill the High School position in that the District failed both to post the job externally and, next, to assign interns to it instead of Ms. Mielke.

The Association points out that Mr. Houle and Mr. Laskowski were also certified to fill the high school position.

The Association disagrees that the District would have a serious problem if it lacked the unfettered right to transfer under Article 2. The Association argues that if the "Pig in the Python" theory were correct transfer would have been necessary only because there would have been one too many positions at the Middle School (and thus no vacancy). The Association denies there were less students in the Middle School EEN program, contrary to the District's assertion.

The Association describes the District's "Catch-22" argument as "oafish." First, says the Association, the District has no need to transfer a teacher if that transfer leaves a vacancy except for disciplinary reasons. But if the District has a vacancy that needs filling the District can post that vacancy and fill it under the normal procedures of the collective bargaining agreement, according to the Association.

The Association continues to believe that the District has attempted to circumvent the collective bargaining agreement by making the transfer of Ms. Mielke and then filling the slot she vacated with interns.

District's Reply

The District continues to rely on Article 2, C of the collective bargaining agreement as its authority to transfer Ms. Mielke. That language specifically grants the District the right to transfer employees.

The District does not believe that any of the contract language cited by the Association refutes or restricts the right of the District to transfer an employee.

The District cites horn book and arbitral law in support of the proposition that management has the right to effect transfers as a necessary element in the operation of its business.

The District finds no language cited by the Association that limits the District's right to transfer Ms. Mielke. The District believes it has demonstrated a clear need to transfer Ms. Mielke in this case. The District points out that it did the best planning of which it was capable. The District is not omnipotent. The District based its planning for the future on events of the past year.

The District again denied that it was attempting to get even for the earlier arbitration award won by Ms. Mielke.

The District continues to assert that it regards Ms. Mielke as an extraordinarily valuable employee who is well qualified and does an excellent job.

Contrary to the assertions of the Association, the District believes the testimony of former School Superintendent Powell was consistent. Moreover, the District believes Mr. Powell's testimony indicates that the Director of Special Education could not have assigned the interns to the 9th grade position to which Ms. Mielke was transferred.

The District reiterates that over the last 7 or 8 years the District had established what must now be regarded as a past practice of utilizing interns on a frequent basis and that the Association has never objected until the instant matter arose.

DISCUSSION

The record is very clear that Susan Mielke is an excellent special education teacher. The former Tomahawk School District Superintendent, Curtis Powell, is unstinting in his praise for Ms. Mielke's teaching ability, her personality, and her popularity with her fellow-teachers.

Not surprisingly, the record also reveals Ms. Mielke to be a loving, caring teacher. Her victory in an earlier arbitration case gave her the option of an immediate transfer to the Middle School 6th grade teaching position she had sought. But Ms. Mielke also knew that EEN students might feel threatened by a change in their lives as profound as a new teacher in the midst of a school year. So Ms. Mielke postponed her move to the Middle School until the start of the next school year.

Given Ms. Mielke's earlier difficulties with a reassignment she sought and ultimately won only through arbitration, her current frustration and suspicions as to her transfer back to

the High School are understandable. In this instance, however, it appears to me that the District is acting both in good faith and within its contractual parameters.

Article 2, C of the collective bargaining agreement is entitled "Management Rights Clause." In actuality a good deal longer than a clause, the Article expressly enumerates certain "operational and managerial responsibilities" of the Tomahawk School Board. These responsibilities include the right to transfer employees, the right to create, combine or eliminate any teaching position, the right to assign work to employees, and the right to determine policies affecting the selection of employees.

The Association contends that any transfer rights claimed by the District under the Management Rights Clause are secondary to the rights guaranteed the grievant under Article 16. Specifically, the Association insists that Ms. Mielke's transfer to the High School not only created a vacancy in her previous Middle School position, but that such vacancy must be filled pursuant to the provisions of Article 16, F and G. Under this reasoning, the Association concludes that Ms. Mielke is contractually entitled to the very position from which she was transferred.

But contrary to the labored interpretation of the Association, the right of the District to transfer employees does not evaporate when a transfer causes a vacancy in the position from which the employee is being transferred. I find no such contractual circumscription to the District's right to transfer employees. Indeed, as the District suggests, under the Association's proposed interpretation no involuntary transfer could ever be made by the District. Nothing in the record remotely suggests that the parties ever intended this result.

The Association additionally argues that the District is attempting to undo a previous arbitration award. I do not believe the record supports this view.

On the contrary, the record not only indicates that Ms. Mielke remained at the Middle School post won in her arbitration award for three years, but that District administrators responsible for her transfer back to the High School were influenced by a number of objective, legitimate factors: 1) an additional special education teacher was needed in the High School; 2) due to a declining Middle School EEN student base, a Middle School special education teaching position would have to be eliminated in one more year; 3) Ms. Mielke was familiar with the EEN students to whom she was to be assigned at the High School; 4) Ms. Mielke was familiar with operations and protocol at the High School and was well-liked by other High School staff members; 5) although Ms. Mielke might have remained as a special education teacher at the Middle School for one additional year, no student interns were available to fill the increased special education instruction need that had developed at the High School; 6) student interns were available to fill the special education teaching vacancy created by Ms. Mielke's transfer; 7) Ms. Mielke had the necessary teaching certifications for the transfer.

None of these considerations appears to have any contractual impediment. I find them soundly based, rational, and reflective of the best interests of the special education students the District is required to serve. Consideration of whether or not Mr. Powell's "Pig in a Python"

theory was ultimately validated by subsequent events misses the point in this instance. The District is not required to have a perfectly pellucid crystal ball. More impressive to me is that in taking its transfer action the District relied on the "Pig in the Python" theory in good faith.

A special education teacher of Ms. Mielke's experience and qualifications is an extremely valuable asset to any school district. Hopefully, her teaching assignment preferences can be accommodated at some future time. In the instant matter, however, for the reasons discussed above her transfer to the High School does not violate the collective bargaining agreement of the parties.

AWARD

The grievance is dismissed.

Dated at Madison, Wisconsin this 1st day of April, 1999.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator