BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE ASSOCIATION OF EDUCATORS

and

EAU CLAIRE AREA SCHOOL DISTRICT

Case 55
No. 57517
MA-10660

Appearances:

Mr. Michael J. Burke, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Eau Claire Association of Educators.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Brian K. Oppeneer** and **Attorney Stephen L. Weld,** 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Eau Claire Area School District.

ARBITRATION AWARD

Eau Claire Association of Educators and Eau Claire Board of Education are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Association, by request to initiate grievance arbitration received by the Commission on April 23, 1999, requested the Commission to appoint either a Commissioner or a member of its staff to serve as Arbitrator. The Commission appointed Paul A. Hahn as Arbitrator on April 30, 1999. Hearing in this matter was held on May 25, 1999 at the Board of Education offices in Eau Claire, Wisconsin. The hearing was not transcribed. The parties filed post-hearing briefs which were received by the Arbitrator on June 17, 1999 (Association) and June 18, 1999 (District). The record was closed on June 18, 1999.

ISSUE

The parties stipulated to the following issue:

Did the District violate Article V, Section I, Subsection 11 of the collective bargaining agreement, when it involuntarily transferred the Grievant to North High School? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I. RECOGNITION OF THE ASSOCIATION

Section A. The Board recognizes the Association as the exclusive bargaining representative of the eligible employees, consisting of all certified personnel under contract by the Board including classroom teachers, and other special teachers, but excluding the Superintendent of Schools, assistant superintendents, administrative assistants, and supervisory personnel.

. . .

Section B. Management Rights

1. The Board hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin and of the United States.

a. The Board shall have the right to the executive management and administrative control of the school system and its properties and facilities.

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

c. It is understood by the parties that every incidental duty and detail connected with each position or operation in any assignment or job description is not specifically set forth and that the assignment of new responsibilities shall be subject to the formation of reasonable work rules.

2. In the exercise of the powers, rights, authority, duties and responsibilities by the Board, the use of judgment and discretion in connection therewith shall not be exercised in an arbitrary or capricious manner nor in violation of the terms of this Agreement, Section 111.70 of the Wisconsin Statutes nor in violation of the laws of the Constitution of the State of Wisconsin and of the United States.

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ARTICLE IV. GRIEVANCE PROCEDURE

Section A. Definitions

1. A grievance is defined as a question(s) regarding the roper interpretation or application of a specific provision of this Agreement.

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Section C. Procedures for Adjustment of Grievances

Grievances shall be presented and adjusted in accordance with the procedures that follow. If both parties agree, any or all of Steps 1-4 can be waived.

. . .

Step 5. If the decision rendered is unacceptable, within ten (10) school days after receiving the decision of the Board of Education, the Association may appeal the decision of the Board directly to the Wisconsin Employment Relations Commission for arbitration.

a. The decision of the arbitrator shall be in writing and shall set forth his/her opinions and conclusion on the issues submitted to him/her at the hearing or in writing.

b. The decision of the arbitrator shall be binding upon both parties and shall be final except for a decision which would reduce or eliminate aids provided for school operation from State or Federal government or other sources, or change or abridge a mandatory school law and is limited to terms and conditions set forth in this Agreement.

c. Nothing in the foregoing shall be construed to empower the arbitrator to make any decision amending, changing, subtracting from, or adding to the provisions of this Agreement.

ARTICLE V. WORKING CONDITIONS

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Section I. Other Working Conditions

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11. Involuntary Transfer

Should an involuntary transfer be necessary due to reduction of staff within a school or department, the following procedures shall be followed:

a. Teachers within a building will be notified of the need to reduce the number of staff, and volunteers will be solicited.

b. In the event there are no volunteers, a teacher or teachers will be considered by the principal for involuntary transfer.

c. In considering teachers for involuntary transfer, the principal shall consider the following criteria in the order they are listed: (1) certification, (2) programmatic need, (3) district seniority, and (4) building seniority.

d. All proposed involuntary transfer will be reviewed by the Assistant Superintendent for Personnel before implementation.

e. Any teacher affected by the proposed involuntary transfer will be informed in writing by the principal of the rationale used to make the decision.

f. Decisions felt to be arbitrary by the affected party may be appealed through the grievance procedure.

g. Middle school teachers with grade 1-8 certification will not be involuntarily reassigned to a different grade level/subject area more than two (2) times in a four year period.

STATEMENT OF THE CASE

This grievance involves the Eau Claire Public School District (District) and the Eau Claire Association of Educators (Association) representing the employes set forth in Article I, Recognition. (Jt. 1) The Association alleges a contractual violation by the District for the involuntary transfer of the Grievant to North High School. This transfer was effected by a memorandum to the Grievant from Memorial High School Principal Tim Leibham dated November 6, 1998. (Jt. 4) The Association alleged a violation of Article V, Section I, Subsection 11, c., by notice of a written grievance dated November 20, 1998 to Principal Leibham. (Jt. 2) The grievance was denied by the District by memorandum to Association President Thomas Blount dated February 16, 1999 from Donald J. Lillrose, Assistant Superintendent. (Jt. 3)

The Grievant is a full-time teacher of cognitively disabled borderline (CDB) students at Eau Claire Memorial High School. The Grievant has been employed by the District as a Special Education teacher for the past 19 years. During the past several years the District has decentralized its program for cognitively disabled borderline students. Three years ago, for the first time, CDB students at the Middle School level were taught at their neighborhood school rather than at a centralized district location. For the 1999-2000 school year, the first CDB students who were being taught at their neighborhood Middle School will begin high school. Rather than being taught at a centralized high school location (Memorial High School), the students will attend their neighborhood high school. The District anticipated that between four to six CDB students would be enrolled as freshmen at Eau Claire North High School; the Memorial High School program would be reduced from 40 students to approximately 35.

During the 1998-1999 school year, the District's administration discussed the staffing of the North High School and Memorial High School CDB programs. The District concluded that one of Memorial's four CDB teachers would be transferred to North High School for the 1999-2000 school year. The Grievant was one of the four CDB teachers at Memorial, the others being Johnson, Zweifelhofer and Slupe. In the fall of 1998, Memorial High School Principal Leibham gave the four teachers, including Grievant, several opportunities to volunteer to transfer to North High School. Article V, Section I, Subsection 11 requires that in an involuntary transfer situation under Subsection 11, a., "Teachers within a building will be notified of the need to reduce the number of staff, and volunteers will be solicited." None of the four teachers volunteered.

On November 2, 1998 Leibham met with North High School Principal Downen, Memorial High School Assistant Principal Morley, Special Education Director Weisenberger and Assistant Special Education Director Teske to determine which teacher from Memorial would be involuntarily transferred. The five Administrators applied the criteria set forth in Article V, Section I, Subsection 11, c: (1) certification (2) programmatic need (3) district seniority and (4) building seniority. As all four teachers were properly certified, the Administrators first considered programmatic need. After analyzing the programmatic needs at both Memorial and North High Schools, the Administrators unanimously agreed that Grievant should be transferred to North High School to start the high school CDB program there. The Administrators did not consider (3) district seniority, nor did they consider (4) building seniority. The Grievant is the most senior of the four CDB teachers at Memorial High School.

At a meeting later on November 2, 1998, Leibham again requested volunteers, none of the four, including Grievant, volunteered. On November 5, 1998 Leibham informed the four teachers that Grievant had been selected to transfer and gave them his reasons orally. On November 6, 1998 Leibham, as required by Article V, Section I, Subsection 11, e., wrote Grievant a memorandum summarizing his rationale for Grievant's selection. (Jt. 4)

On November 20, 1998, the Grievant and Association filed a grievance alleging a violation of Article V, Section I, Subsection 11, subparagraph c. The Union alleged that Grievant, as the most senior of the four teachers at Memorial, should not have been selected for the involuntary transfer and that the District failed to take seniority into consideration. (Jt. 2) At the January 4, 1999 step three grievance meeting, the Grievant alleged a concern for her safety at North High School because of prior personal involvement with a janitor employed at North. The safety issue claimed by Grievant was investigated by the District, and Assistant Superintendent Donald J. Lillrose responded on February 16, 1999, assuring the Grievant that steps would be taken to assure her safety, but again denying the grievance. (Jt. 3) The grievance was appealed to the District School Board at a hearing on April 5, 1999. By letter of April 10, 1999, from the District's counsel, the grievance was again denied. (Jt. 5)

Having processed the grievance through the contractual grievance procedure and being unable to settle the grievance, the grievance was appealed to arbitration. No issue was raised as to the arbitrability of the grievance. Hearing in this matter was held by the Arbitrator on May 25, 1999 in the City of Eau Claire, Wisconsin at the District's offices.

POSITIONS OF THE PARTIES

Association

It is the position of the Association that the District violated the collective bargaining agreement when it involuntarily transferred the Grievant to North High School. The Association takes the position that in negotiating the 1993-1995 contract between the parties the Association attempted to include meaningful standards into the parties' labor agreement regarding involuntary transfers. (Assn. 2 & 3) The Association submits that contract negotiation evidence and the subsequent language confronting the Arbitrator in this matter require a consideration of all of the factors in Article V, Section I, Subsection 11, c. In this case, the Association argues, the District violated the contract by not considering all four factors and by specifically admitting on the record that it excluded consideration of the factors related to district and building seniority.

The Association takes the position that seniority should have been included in the District's consideration in this case specifically because the case made by the District for programmatic need is weak, citing examples where programmatic need is more justifiable, such as the need for male and female physical education teachers at the middle school level. The Association argues that the District did not make the case for programmatic need which would justify transferring a more senior teacher to North High School.

The Association avers that the Grievant and the remaining teachers at Memorial High School possess similar skills. All of the four CBD teachers have the skills necessary to start

the program at North High School for incoming CDB middle schoolers. The Association argues that the Grievant has performed many, if not all, of the functions cited for retaining the three least senior teachers at Memorial High School.

To further bolster its position, the Association argues that the District's admission that it would have been willing to accept any of the four teachers if they had volunteered, supports the Association's position that a subsequent claim of programmatic need overriding any consideration of seniority cannot be supported. Further, the Association states that while it might question whether the safety issue raised by the Grievant should have been included in the analysis of programmatic need, the safety issue should have caused the District to consider the seniority factors.

The Association, lastly, argues that if the District's action is upheld by the Arbitrator, then the involuntary transfer language will be rendered meaningless. The Association requests that the Arbitrator find the involuntary transfer decision as applied to Grievant to be arbitrary and requests that the Arbitrator require the District to return the Grievant to Memorial High School and transfer the least senior CDB Memorial teacher to North High School.

District Position

The District generally argues that management has the right to transfer employes and that absent a specific restriction that right cannot be abridged. The District argues that pursuant to Article V, Section I, Subsection 11, subparagraph c, the District considered the four CDB teachers at North for involuntary transfer pursuant to the required criteria, taking them in the order listed: (1) certification; (2) programmatic need; (3) district seniority; and (4) building seniority. All four teachers were certified and therefore the District moved to the next criteria, programmatic need. The District made its decision on programmatic need and therefore, the District argues, it did not need to consider district or building seniority. The District argues that its programmatic need decision was not arbitrary.

The District takes the position that Principal Leibham brought together the North Principal and representatives of the District's special education program into the decision-making process. That committee determined that the North CDB teacher needed to be a strong advocate for cognitively and physically limited students and that it was important for the North CDB teacher to have an understanding of the processes at the Department of Human Services, Department of Vocational Rehabilitation and community agencies. The District submits that Grievant was best able to work in a classroom with several students, learning at different paces, at least for the first "couple of years" at North High School.

The administrative group gathered by Principal Leibham also considered the programmatic needs at Memorial which would still have 36 CDB students. The CDB program

at Memorial had reached a situation where the other three teachers were actively involved in out-of-school and after school activities which were crucial to Memorial's program of integrating CDB students into the community by teaching the students work and social skills. To continue that program the Memorial teachers had to be willing to maintain and develop those after school activities. While the Grievant may have been involved in those after school activities in the past, the District points out that the Grievant testified that her personal life has changed where she consciously needs to limit her after school activities. The District submits that North's program for the first several years will not require out-of-school activities as the current program at Memorial. The District summarizes its programmatic need argument by concluding that the Grievant was best suited for North's programmatic needs and that the decision of special education personnel and administrators was unanimous.

The District then confronts the bargaining history testimony and argument of the Association and defines it as irrelevant stating that the language is clear on its face. The District points out that the Association, not the District, brought the issue of involuntary transfer to the table. (Assn. 1) The District notes that the Association sought seniority-based involuntary transfers. (Assn. 2) Based on the testimony of Association President Blount the District notes the Association did not achieve seniority-based involuntary transfer and that the language "programmatic needs" was added to the Association's proposal. The District submits that Association President Blount only "presumed" that the language in Article V, Section I, Subsection 11, subparagraph c required consideration of all four criteria.

The District addresses the Association's argument regarding volunteers by stating that under Article V, Section I, Subsection 11, paragraph b, the District is required to seek volunteers in an involuntary transfer situation. (Jt. 1) Since all four of the potential candidates for the North transfer were unwilling to transfer, the District as a result had the right to get the "best fit" for its programmatic needs, not transfer the least senior teacher.

The District takes the position that the decision by the District can only be overruled if it is found that under Article V, Section I, Subsection 11, paragraph f, the decision of the District is "arbitrary." (Jt. 1) The District discusses standards for arbitrariness, citing applicable case law. The District concludes its argument on arbitrariness by stating that although the Association may disagree with the decision of Principal Leibham and the administrative committee, it cannot accurately state that the decision was without a rational basis or the result of ". . . unconsidered, willful and irrational choice of conduct."

Finally the District argues that the safety issue raised by the Grievant and her Association is irrelevant and not before the Arbitrator as safety is not one of the criteria in the collective bargaining agreement that the District must consider. The District points out that it has taken steps to ensure Grievant's safety at North through its policy on non-discrimination/ sexual harassment/barrier-free facilities. (Assn. 4)

The District submits that the only issue before the Arbitrator is whether the District's application of Article V, Section I, Subsection 11, paragraph c was arbitrary. If the District did not arbitrarily apply the contractual provisions on involuntary transfer, the District argues that the transfer must be upheld. The District concludes by stating that there are program-related, rational reasons for the District's decision and therefore that decision should not be overturned. The District did not violate the labor agreement and the grievance should be denied.

DISCUSSION

The grievance in this matter presents a straightforward contract interpretation case involving the interpretation of Article V, Section I and Subsection 11, a through g. The key sections that I must consider for this decision are paragraphs c and f. Unfortunately, the parties do not agree on the interpretation of paragraph c and in particular, the role of seniority. 1/ The District argues that once it justified its position to transfer the Grievant under the programmatic need criteria it did not need to consider Grievant's seniority. The Association argues that seniority must be considered, or that all four factors under c must be considered in an involuntary transfer situation.

1/ 11. Involuntary Transfer

. . .

c. In considering teachers for involuntary transfer, the principal shall consider the following criteria in the order they are listed: (1) certification, (2) programmatic need, (3) district seniority, and (4) building seniority.

. . .

f. Decisions felt to be arbitrary by the affected party may be appealed through the grievance procedure.

It might be tempting for me to discuss at length contract ambiguity in this case. I believe, based on the positions of the parties and my own interpretation, that the contract language in paragraph 11.c. is susceptible to more than one meaning, but I decline to do so. I will render a decision in this case assuming that seniority should be considered without making a decision that this is the correct interpretation of paragraph 11.c. While the Association offered testimony and exhibits (Assn. 1, 2 & 3) regarding the bargaining history behind Subsection 11, this evidence was not conclusive as to the role of seniority. The District did not offer any evidence of bargaining history and neither party offered evidence of past

practice. 2/ Therefore, I believe it is best left to the parties to agree to the interpretation of paragraph 11.c.

2/ Arbitral authority is rooted in the parties' agreement. First and foremost, this agreement is the written contract executed by them. To the extent the contract is unclear, the most persuasive guides to the resolution of ambiguity are past practice and bargaining history. Each derives its persuasive force from the agreement manifested by the conduct of the parties whose intent is the source and the goal of the contract interpretation. GREEN BAY BOARD OF EDUCATION, CASE 185 NO. 53595 MA-9395 MCLAUGHLIN (1996).

The critical factor for me to address is whether the decision by the District to involuntarily transfer the Grievant was arbitrary. 3/ I do not decide whether I would have transferred the Grievant; I only decide was that decision, based on the record, arbitrary. To answer that question I do need to consider the facts surrounding the District's decision.

Memorial Principal Leibham presented creditable testimony as to the reasons why Grievant was transferred. Those reasons are amply summarized in Joint Exhibit 4. In addition, Leibham testified as to the need to maintain the cohesiveness of the after-school programs run by the three less senior teachers at Memorial which integrate these students into the community and the world of work. Grievant did not contradict Leibham's testimony that she has not, by her own choice, taken part in these programs for several years, even though she has in the past and is capable of doing so. Grievant was considered by the District to be the best qualified of the four CDB teachers at Memorial to start the program at North because of her overall understanding of how the CDB program works and to set up the program at North based on the Memorial model. At the start of the program at North High School, Grievant would not have to set up after school programs with the vocational technical school, the Department of Health and Family Services and other outside agencies with which she was not as familiar as the other three CDB teachers at Memorial.

3/ 11. <u>Involuntary Transfer</u>

. . .

f. Decisions felt to be arbitrary by the affected party may be appealed through the grievance procedure.

Based on the testimony and exhibits in the record, I find that the District did establish a programmatic need for the involuntary transfer of Grievant to North High School; the question now to be answered was that decision arbitrary assuming arguendo that seniority should be taken into consideration.

To find an action as being arbitrary is a justifiably high standard to meet. Essentially for the Association to prevail in this matter, I must find that the actions of the District were groundless, without reason, or as the Wisconsin Supreme Court has described it, action by the District that is ". . . either so unreasonable as to be without a rational basis . . ." 4/ While the Grievant may have been the senior employe, I do not on this record and facts find the District's decision to be arbitrary.

4/ Arbitrary has been defined by the Wisconsin Supreme Court as follows:

"Arbitrary action is the result of an unconditional, willful and irrational choice of conduct and not the result of the 'winnowing' and 'sifting' process." OLSON V. ROTHWELL 28 WIS.2D 233, 239 (1965).

"An arbitrary or capricious decision is one which is either so unreasonable as to be without a rational basis or the result of an unconsidered, willful and irrational choice of conduct." PLEASANT PRAIRIE V. JOHNSON, 34 WIS.2D 8, 12 (1967).

The OLSON case has continued to be cited and quoted for the appropriate definition of arbitrary. SCHOOL DISTRICT OF WAUKESHA V. SCHOOL DISTRICT BOUNDARY APPEAL BOARD 201 WIS.2D 109 (1996). WPPA V. PUBLIC SERVICE COMMISSION 205 WIS.2D 60 (1996).

A review of arbitration case law in general, including Arbitrator Engmann's decision [WEST ALLIS-WEST MILWAUKEE WERC CASE 64, NO. 42958, MA-5859 (1990)] cited by the District in its post hearing brief, generally finds the use of the words irrational, unreasonable and not based in fact to describe actions by an employer that are arbitrary.

In a labor context "arbitrator" has been defined as follows:

> ***". . . it is clear that unintentional acts or omissions by union officials may be arbitrary if they reflect reckless disregard for the rights of the individual employee. . . . They severely prejudice the injured employee. . . ."***

COLEMAN V. OUTBOARD MARINE CORPORATION, 92 WIS.2D 565, 580 (1979) citing ROBESKY V. QUANTIS EMPIRE AIRWAYS, LTD., 573 F.2D 1082, 1090 (9TH CIR. 1978).

> ***"In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a non-arbitrary manner, make decisions as to the merits of the grievance."***

VACA V. SIPES 386 U.S. 171, 64 LRRM 2369, 2378 (1967).

Labor arbitrators have found an employer's actions to be arbitrary when the employer acts on speculation without meaningful supporting evidence: And have not found an employer's action arbitrary where the employer acted in good faith for reasonable and justifiable reasons.

EAST OHIO GAS COMPANY, 91 LA 366, 374 DWORKIN (1988).
JAMES B. BEAM DISTILLING CO., 96 LA 844, 848 FLORMAN (1990).

The Association never questioned the District's right to transfer a teacher to North, a right which the District has under the contractual management rights clause. 5/ The District first asked for volunteers among the four CDB teachers at Memorial; none were forthcoming. The District then gathered appropriate administrative and special education staff to consider the needs of the CDB programs at Memorial and North and how best to staff them with certified and qualified teachers. The Association argues that the fact that the District would have accepted any volunteer from the CDB staff shows that they were all equally qualified. However, the contract requires that volunteers be sought. Once there were no volunteers, the District could start from the beginning, as it were, to select the most qualified staff to transfer.

The Association argues that the examples that Association President Blount testified to were "real" programmatic needs far greater than the programmatic needs in this case. But that is argument not fact, and I am bound to consider the programmatic needs of the CDB program not the needs of some other program. It should go without saying that in these types of cases there is some subjectivity to the decision making; there are no exact measurements possible. That is why the word "arbitrary" is used to set a standard in similar contractual situations.

5/ Joint Exhibit 1. Article I Recognition of the Association

. . .

Section B. Management Rights
1. . . .
b. The Board shall have the right to direct all teachers in the performance of necessary work functions. This power shall not be exercised in a manner which will defeat the specific provisions or basic purposes of this Agreement. The powers or authority which the Board has not officially abridged, delegated, or modified by this Agreement are retained by the Board.

I have carefully considered the testimony of the Grievant. I believe the record is clear that the main reason that Grievant did not want to transfer to North is as she testified "I think the biggest reason I do not want to transfer is the safety issue." The Association admits that it is on weak ground in adding a safety issue to the involuntary transfer criteria since no

such criteria or required consideration is found in the collective bargaining agreement. The

Association argues only that it should have been considered as part of the District's programmatic need decision making. I do not agree; no such requirement is found in the parties' agreement and specifically none is found in the section on involuntary transfers.

I have empathy with the Grievant's concerns about teaching at North where a former male friend works as a janitor who caused her personal grief after the relationship ended. However, I am bound by the terms of the parties' labor agreement, and I cannot require the District to consider adding safety concerns to the criteria to be considered to support an involuntary transfer decision. Even assuming the District were required to consider Grievant's personal safety, I believe the District has in good faith addressed Grievant's concerns. It is apparent that the District has investigated the situation with the former friend, who works at North, and has assured the Grievant and the Association that it will be concerned for Grievant's personal safety. (Jt. 3 and Er. 1 and 2) The District also has a policy against harassment which Grievant and her Association can use to assure her personal safety. (Assn. 4)

I again reiterate that I do not have to agree with the District's decision; I merely have to decide whether it was arbitrary. Taking into account the record and the briefs of the parties I find that the decision was not arbitrary and the District did not violate the collective bargaining agreement when it transferred the Grievant to North High School.

Based on the foregoing and the record as a whole, I enter the following

AWARD

The District did not violate Article V, Section I, Subsection 11 of the Collective Bargaining Agreement when it involuntarily transferred the Grievant to North High School. The grievance is denied.

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

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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