BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

STOUGHTON EDUCATION ASSOCIATION

and

STOUGHTON AREA SCHOOL DISTRICT

Case 49
No. 56725
MA-10398

(Grievance of Robert Hanssen)

Appearances:

Ms. Mallory K. Keener, Executive Director, Capital Area UniServ-South, on behalf of the Stoughton Education Association.

Lathrop & Clark, Attorneys at Law, by **Mr. Michael J. Julka**, on behalf of the Stoughton Area School District.

ARBITRATION AWARD

The Stoughton Education Association, hereinafter the Association, and Stoughton Area School District, hereinafter the District, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the District in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on October 28, 1998, in Stoughton, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by February 8, 1999. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated that there are no procedural issues and to the following statement of the substantive issue:

> Did the Stoughton Area School District violate Section 205.0(4) of the 1995-96, 1996-97 Collective Bargaining Agreement with the Stoughton Education Association when it denied a transfer to Robert Hanssen for the physical education vacancy for the 1997-98 school year and if so, what is the remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1995-96, 1996-97 Agreement are cited:

Lay Off: **124.0**

When the Board determines that lay-off of teachers in a department or departments is necessary because of decreases in enrollment, budgetary or financial limitations, or educational program changes, the administration, in determining which teachers are to be laid off, will give consideration to the following criteria:

A. Appropriateness of training, experience, or certification with respect to the teaching assignments which must be filled.

B. Co-curricular assignments or activities held.

C. Length of service in the District: Length of service in the District shall be determined from the date that the employee actually began to work for the District. Such date shall be for the period of total service in the District.

. . .

Arbitration Procedure: **131.3**

. . .

E. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. Any modification and addition to or deletion from expressed terms of this Agreement by the arbitrator shall be considered a per se violation of Section 298.10 of the Wisconsin Statutes.

. . .

Management Rights: **200.0**

Nothing herein contained shall abridge the right of the Board of Education to establish such rules and regulations as may be necessary to maintain the Board-directed level of services providing, however, that such rules and regulations are not inconsistent or in conflict with the provisions of State statutes, this agreement, or any other agreements arrived at by the Board of Education and the S.E.A. The right to hire, suspend, discharge for just cause, promote or demote employees shall remain vested in the Board of Education. Such right and power vested in the Board of Education shall not be used for the purpose of discrimination against an employee solely because he or she is a member of an association or union. Nothing in this article shall be interpreted as limiting the negotiability of any of the items mentioned herein for future contracts.

. . .

Vacancy and Transfer: **205.0**

1. Notice of unit vacancies, including full-time, part-time, and extracurricular, will be posted on the official bulletin board in each school and sent to the Association president. Such notices shall contain the date of posting, a description of the position, name of the school, name of the person to whom application is to be returned, and the date by which the application is to be returned. Postings shall occur within ten (10) working days after the district determines that the vacant position shall be filled.

2. Teachers who desire a transfer to another building may file a written statement of such desire with the superintendent no later than the last day of the first semester. Such statement shall include the building to which the teacher desires to be assigned in order of preference.

3. All normal vacancies shall be filled by teachers from within the school district provided, (a) they make application within ten (10) days of the posting date of the vacancy notice, and (b) are qualified for said position. All emergency vacancies such as resignations that are accepted by the Board in the middle of the school year, or deaths, etc., shall be exempt.

4. The superintendent may deny requests for reassignment or transfer for just cause. Extra curricular and/or additive assignments shall be excluded from this provision. Part-time and temporary teachers have no rights under this provision.

5. A vacancy shall exist for posting only after regular assignments are made within a building.

BACKGROUND

The District maintains and operates a number of school buildings within its boundaries. The Association is the bargaining representative of the District's professional staff.

With regard to the history of the provision of the Agreement in issue, Vacancy and Transfer, Section 205.0, the first vacancy and transfer provision was included in the parties' 1978-1980 Agreement. That agreement was the result of an interest arbitration award in which the District prevailed and "vacancy and transfer" was in issue. The Association had initially proposed language that included using seniority as the determining factor if two or more certified employes requested transfer to the same vacancy, as well as wording that was identical to the present wording of the first sentence of Sec. 205.0, subsection 4, i.e., the just cause language in issue. The Association dropped both provisions in the course of the parties' exchange of proposals/final offers. Former Superintendent James Fricke, who was Superintendent in the District from 1971 to 1990 and present at the negotiations for the 1980-1982 Agreement that resulted in the current wording of Sec. 205.0, testified that it was the Board's counter to the Association's proposal that was finally agreed to by the parties for inclusion in the 1980-1982 Agreement. The language has remained unchanged since then. (Tr. 48).

Robert Hanssen, hereinafter the Grievant, has been employed by the District as a middle school physical education teacher since 1974. In addition, he has been the head football coach at the high school for 15 years, supervises the weight room at the high school one-third of the school year and teaches summer school.

On March 5, 1997, a vacancy was posted for a full-time high school physical education teacher position for the 1997-98 school year due to a retirement. Three employes applied for the vacancy, including the Grievant and Kim Monsen, a physical education teacher in the District since 1988, who then was teaching part of the time at the elementary level and part of the time (one hour each day) at the high school, and who is the head volleyball coach at the high school. The third individual who applied was a part-time teacher and therefore not eligible to apply for a transfer under Section 205.0.

The District established a selection committee for the purpose of selecting among the applicants to fill the high school physical education position. The committee initially consisted of Olin Harried, the High School Principal, Mark Felix, the Director of Vocational Programs and supervisor of the District's physical education program, Jo Sheehan, Chair of the Physical Education Department, and Gayle Dyreson, another physical education teacher at the high school.

The Grievant and Monsen were sent the following memorandum of April 3, 1997 from Harried:

MEMO TO: Kim Monsen
Bob Hanssen

FROM: Olin Harried

SUBJECT: **1.0 High School Physical Education Vacancy**

Thank you for your interest in our 1.0 physical education position; Ms. Dyreson, Ms. Sheehan, Mr. Felix and I met on April 3 to finalize the criteria we'll use in evaluating your candidacy for this position.

The selection criteria includes the following processes:

Step One An individual teacher perceiver interview with me; this norm-referenced interview will allow us to get to know you better as a teacher. Please contact Linda Olson to schedule a time to complete this first step in the selection process.

Step Two A team interview with Ms. Sheehan, Ms. Dyreson, Mr. Felix and myself; I'll schedule this interview after you've completed the perceiver interview.

Step Three In one to two pages, please describe what you consider to be an ideal or visionary 9-12 physical education curriculum. This position paper is due by the end of the team interview.

Please contact me if you have questions; we look forward to meeting with you.

Harried conducted the perceiver test with the two applicants on or about April 10, 1997. The Grievant and Monsen received scores of 10 and 11, respectively, on the perceiver test. Harried only shared the general results with the rest of the committee and the scoring matrices were destroyed. Harried considered the results on the perceiver test to be "a wash", with both scoring "satisfactorily".

Felix withdrew from the selection committee/interview team prior to the interviews due to a conflict and was replaced by Marge Hecker, who now teaches German, but who had formerly taught physical education at the high school. The interviews were conducted on May 15, 1997 by Harried, Dyreson, Sheehan and Hecker, lasting approximately one hour each. The applicants' vision statements were turned in at the end of their interviews. At the interviews, both of the applicants were asked the same questions, which had been developed by Harried and Sheehan.

All four of the interviewers felt Monsen did better than the Grievant in the interview process, giving more in-depth and elaboration in her answers. With 1 = excellent, 2 = satisfactory and 3 = unsatisfactory, the committee individually and privately scored each applicant's vision statement. The Grievant received a total score of 9 (2, 2, 2 and 3) and Monsen a total score of 5 (1, 1, 1 and 2) in their vision statements. The committee unanimously selected Monsen as the most qualified applicant, although the Grievant was considered qualified for the position as well, and would have been offered the position if Monsen had chosen not to accept it.

Monsen was offered, and accepted, the high school physical education position. The Grievant was notified by a telephone call from Harried that Monsen had been selected for the position. In that regard, there is some dispute about what the Grievant was told by Harried. The Grievant testified that Harried told him that the perceiver test and interview had been "a wash", that Monsen's vision statement was "a bit better" than his, and that the biggest reason she was selected was that she had high school experience and the Grievant did not. Harried testified that he told the Grievant the perceiver test had been "a wash", that he had a "fine interview", but that the interview team unanimously felt Monsen had a stronger interview and had done better in that regard, and that they felt the same way about the vision statement.

Harried's telephone call was followed up with a memorandum of May 20, 1997, to the Grievant stating that the Committee had determined Monsen was the "most qualified applicant" for the vacancy and that she had accepted the position.

A grievance was subsequently filed on the denial of the Grievant's application to transfer into the high school physical education position. The parties attempted to resolve their dispute, but were unsuccessful, and proceeded to arbitrate the matter before the undersigned.

POSITIONS OF THE PARTIES

The Association

The District failed to meet the just cause standard required by the contract when it denied the Grievant's request for transfer. The testimony of James Fricke, the former district administrator, who was in the office when the transfer language was bargained into the contract, established that seniority has always been an important criterion in transfer decisions. Therefore, regardless of the turnover in administrators since Fricke, the interests of continuity and stability require that any determination of just cause under the transfer language include a consideration of the length of service of the applicants, which was not done in this case. The testimony further indicates that while seniority has not been the "sole criterion", the parties have interpreted this language in the past to include consideration of seniority as an important factor, therefore, it is within the Arbitrator's authority to sustain the grievance without deviating from the language of the Agreement.

The District has the burden to establish that the successful candidate was "demonstrably superior" to the Grievant, as is required by the just cause standard, and failed to meet that burden. High School Principal Harried was responsible for the selection process and developed a three-step procedure involving a perceiver test, an interview by the selection panel, and preparation of a written vision statement by each candidate, to determine who was "most qualified". Harried testified he considered both candidates to be qualified. He gave no consideration to seniority because it was not mentioned in the contract. Both the perceiver and vision statement were "previously uncommon practices which were largely untested." The candidates performed nearly equally on the perceiver test and Monsen did somewhat better on the interview and vision statement. This failed to establish the "dramatic superiority" needed to override the Grievant's greater experience and years of service. The Grievant's considerable seniority and experience as the high school football coach were disregarded as part of the process and therefore there was no fair consideration of his record.

The position that seniority must be considered an important criterion is supported both by past practice and the bargaining history of the parties. Association research reveals that in the past, where more than one person has applied for a transfer, it has uniformly gone to the most senior applicant. This explains why no grievances over transfers were filed previously. This is also consistent with the testimony of Fricke that seniority was always given considerable weight in transfer decisions while he was administrator. Likewise, the inclusion of the just cause standard in transfer determinations requires a consideration of seniority, an obligation tempered by consideration of other factors, such as training, experience and certification, and implies an assurance and, if necessary, proof that in making the decision, the District did not act arbitrarily or capriciously, but acted fairly toward all candidates. Consideration of seniority in any comparison between employes upholds this principle because it is "observable, measurable, objective and accounted in a standardized manner", as well as nondiscriminatory and probative of competence.

Had the District, in fact, given seniority its proper weight in the selection process, the Grievant would have been selected. He is certified for the position, has worked in the high school as football coach and has 14 years more service in the district. The perceiver test was a wash between the candidates and the other teacher's slightly better performance on the vision statement and interview were inadequate to overcome the disparity in experience, had it been given its proper weight. The Association concludes that had the Grievant's seniority been considered as an important criterion in the selection process, it is clear that the District was required under the just cause standard to grant the Grievant the transfer to the high school physical education teacher vacancy. As a remedy, the Association requests that the Grievant be transferred to the position effective the beginning of the 1999-2000 school year.

District

The District describes the Association's position in this case as being both that seniority should be the determinative factor in transfer decisions and that it is simply a factor in such decisions, but asserts the evidence provided by the Association was exclusively in support of the former position. It is that position that the District directly addresses, although it asserts that neither position is supported by the Agreement, past practice or bargaining history.

As the Agreement explicitly states transfers shall be denied only on the basis of just cause, the Association's position necessarily presumes that seniority is the only basis for satisfying that standard. However, nowhere in Sec. 205.0 is seniority a required criterion for establishing just cause, and the record establishes there is no past practice which modifies this unambiguous language. In the rare instances where seniority was a determinative consideration in transfer situations, it was only because the candidates' other qualifications were found to be equal. Thus, even there, merely being "qualified" would not have been sufficient to prompt consideration of seniority as a determinative factor.

The assertion that "insufficient differences were established" in the candidates' qualifications to override the Grievant's greater seniority, entirely misconstrues the plain language and intent of Section 205.0. That provision was adopted as a means to ensure that the "most qualified" candidates were transferred, as clearly demonstrated by bargaining history. Since the Agreement does not require consideration of seniority to establish just cause, the District was not obligated to account for the difference in the candidates' seniority. Further, the selection criteria utilized did demonstrate a marked difference in their qualifications, such that the interview team unanimously favored Monsen over the Grievant in every respect.

The Association's assertion that the District has the burden of demonstrating that Monsen was "demonstrably superior" to the Grievant mischaracterizes the issue in this case. It is, rather, the Association's burden to prove that seniority is the basis for establishing just cause under the Agreement, and it has failed to meet that burden. That being the case, the District is not required to prove Monsen was substantially more qualified. It is sufficient that the District proved it determined which candidate was qualified in a non-arbitrary, non-capricious manner, and in this case it proved that it went to great lengths to do so. As the Agreement does not specify any particular criterion to be used in assessing qualifications under Section 205.0, as opposed to determining layoffs under Section 124, the District was not obligated to utilize any particular criterion, but only to ensure that the criteria used would be fair to both candidates and result in the non-arbitrary, non-capricious selection of the most qualified candidate.

Since the vacancy and transfer clause doesn't refer to seniority, it is the Association's burden to show that seniority must be considered, since it is asking the Arbitrator to expand the clear meaning of the contract language. The Arbitrator must analyze those assertions within the parameters of Sec. 131.3 of the Agreement and Sec. 788.10(1), Stats. If seniority is to be weighed in the determination of just cause, it must be because it is required by the plain language of the agreement, past practice of the parties modifying the agreement, or the bargaining history between the parties. Section 205.0 makes no mention of seniority, or any other criteria to be applied in determining just cause, leaving selection criteria to the District to determine. The Agreement does not define "just cause" and, as such, just cause is established if the denial is not "arbitrary or capricious". WEAVER V. WISCONSIN PERSONNEL BOARD, 71 Wis. 2D 46 (1976). It is a commonly accepted arbitral principle that management retains those rights it has not specifically bargained away. Further, the Agreement's management rights clause clearly vests authority in the District to establish the criteria for transfer decisions. The District did this and determined that the other candidate was more qualified using a three-part selection process. In fact, had the Grievant been selected merely on the basis of seniority, the District would likely have been open to a just cause complaint from the other candidate. The lack of reference to seniority in 205.0 is more significant given that seniority is specifically cited in the layoff provision, supporting the inference that the omission in the transfer section was intentional.

Likewise, there is no established past practice of considering seniority in transfer decisions. The Association offered no direct evidence that seniority was a determinative factor in past transfer decisions. It suggested this was the case by arguing that transfers in recent years were given to the most senior applicants, but this was directly refuted by evidence establishing that the successful applicants were also the most qualified. Further, if there was an unrefuted practice that seniority constituted just cause, there would have been no need to discuss the use of seniority to staff Fox Prairie School when it opened. The Association's unilateral impression that seniority was a factor in these decisions is insufficient to establish mutual knowledge and acceptance. Finally, the testimony of the last several administrators reveals there was no established and consistent practice of considering seniority in transfer decisions.

There is also no support for the Association's position in the bargaining history. Fricke's unrebutted testimony was that the language in the contract probably was initiated by an Association bargaining proposal. If so, the burden was on the Association to use clear language and any ambiguities should be resolved against it. In fact, the bargaining history supports the District. The Association offered transfer language incorporating seniority in its 1978 proposals, and when it was rejected by the District, it was ultimately withdrawn. The current just cause language was incorporated in the 1980 agreement and was proposed by the Association, but with no mention of seniority. Thus, the inference from the bargaining history is that seniority was specifically excluded as a consideration in transfer decisions.

The process applied by the District was fair and objective and justified the selection decision it made. Of the three criteria, the successful candidate prevailed in the interview and vision statement, and she was the unanimous choice of the selection committee. The perceiver test was a wash between the candidates, and not given any weight. The interview and vision statement were directly related to determining qualifications possessed by the candidates to successfully perform in the position. Even the Grievant acknowledged that the selection process was fair, and the Association failed to present any evidence to the contrary. The District's selection process was neither arbitrary nor capricious and resulted in the selection of the most qualified candidate. Under the circumstances, the District's process and decision comported with the contract and should be upheld. The Arbitrator would exceed his authority if he were to require the District to utilize seniority as a factor in making transfer decisions and to place the Grievant in the position.

Association Reply

The District mischaracterizes the Association's position. The Association maintains that seniority should be an important factor in transfer decisions, but not necessarily the determinative factor. This is a more reasonable position than that of the District, which argues that seniority is entitled to no weight whatsoever. The District maintains that it alone can

determine what constitutes just cause, without any reference to seniority, which is unreasonable and was not what the parties envisioned when the language was added to the contract. Even the District concedes that the most senior applicants have typically received transfers in the past and that they tend to be more qualified. Under the circumstances, any system that ignores seniority in the selection process is fatally flawed.

The testimony of Fricke shows that consideration of seniority was intended to be a component in the just cause determination. The District's argument that the lack of reference to seniority means that it was not intended to be considered has no merit. This would also exclude seniority as a factor in discharge and non-renewal decisions, which is clearly not the case. The Association's evidence shows that seniority has historically been a factor in transfer decisions. The District's example of the staffing plan used at Fox Prairie School, on the other hand, is anomolous and reflects a unique situation. Further, the testimony of District witnesses merely shows that in recent years, when there has been much turnover in top administration, seniority has not been a factor. During Fricke's tenure, however, which was when the language was added, seniority was consistently credited.

Finally, contrary to the District's representations, the process employed in making the transfer determination was not fair. It did not give any weight to the Grievant's years of service or his many high school activities, including coaching, teaching summer school and weight room supervision. Further, the District's claim that the Grievant was the principal's initial preference is not supported by the evidence and cannot be credited. Rather, the District employed a flawed process, which was administered by a committee with no experience in transfer selections. The criteria for selection were administered secretly and did not include seniority, which, in and of itself, makes the process inherently unfair. The District's contention that a process which is not arbitrary or capricious satisfies the just cause standard is inadequate. Just cause requires a higher standard and must include a consideration of seniority, which was not done in this case.

District Reply

The Association cites no authority for its contention that the just cause standard set forth in Sec. 205.0 imposes a burden on the District to establish that the selected candidate is "demonstrably superior" to the candidate whose transfer is denied. Such a showing is not required by the Agreement, nor is there support for it in either bargaining history or past practice. Despite the fact that Harried determined that his duty was to select the most qualified candidate, even this is not required by the contract language. The District's only obligation is to show that the selection process was not arbitrary or capricious, which it has met. Even assuming such a burden did apply, the District must still prevail since the successful applicant was the unanimous selection of the committee, reflecting its view that she was clearly the superior candidate.

As the contract is silent on how just cause is to be determined, it is the District's prerogative to make this determination under the Management Rights clause. There is guidance, however, in WEAVER, SUPRA. There, the court distinguished between just cause as applied in discharge cases and layoff cases. In the latter, the employer's duty is to show it has acted in accordance with administrative and statutory guidelines and " . . . the exercise of that authority has not been arbitrary or capricious." The court further held that "Arbitrary or capricious action on the part of the administrative agency occurs when it can be said that such action is unreasonable or does not have a rational basis. . .and [is] not the result of the 'winnowing and sifting' process." A transfer case such as this qualifies for the same standard and the process employed by the District clearly meets the standard.

The suggestion that Fricke's testimony established a past practice of relying on seniority is erroneous. While Fricke may have believed seniority to be important, this was merely an exercise of his prerogative and does not reflect a policy or understanding between the parties such that it should be deemed binding. Testimony offered by the Association's Grievance Committee Chair, Walker, is likewise not dispositive. While she stated that in the past transfers have always gone to the most senior employes, she did not offer evidence showing any cause and effect nexus between the two. The Arbitrator should not read a requirement into the Agreement which is not supported by the plain language, past practice or bargaining history, simply because the Association feels that seniority is a foundational principle in labor relations. Whether or not this is true, such language must be bargained for and is not just assumed to exist.

To the extent that bargaining history is pertinent, it supports the District. The just cause language was added to the Agreement without any reference to seniority and the Association now wants to read a seniority component into it by inference. There is no factual basis for this assertion.

The evidence refutes the assertion that the selection process was unfair because it failed to take into account the Grievant's seniority, years of service, and high school activities, such as summer school teacher, football coach and weight room supervisor. District exhibits show that teaching experience and high school experience were explored and included in the analysis. Being unhappy with the result of the process is insufficient to challenge its fairness or reliability. Absent clear language, it is the District's prerogative to determine the criteria for transfer selections. The Association has failed to establish any basis for requiring relative seniority between the candidates to be considered, nor has it shown that were seniority considered it would have resulted in a different outcome. The grievance should, therefore, be denied.

DISCUSSION

Initially, it is noted that there is some confusion as to what the Association's position is in this case. At hearing, the Association took the position in its opening statement that "the parties have a long-standing practice of granting a transfer to the more or most senior employe when internal candidates are deemed to be qualified for a vacancy." (Tr. 11). However, when District's counsel attempted to describe the Association's position as being that "there's a long-standing practice of seniority being the determining factor if two or more candidates for a position are qualified," the Association's representative objected to that characterization of its opening statement as inaccurate. (Tr. 58). In its brief, the Association asserts that its position is not that seniority is the sole criterion, but is an "important factor". (Association Brief, p. 7). In its reply brief, the Association states:

> From the outset, the District relies on the errroneous premise that the Union claims that seniority must be the entire basis or the sole basis or the determining factor to establish just cause for denial of the transfer of a teacher. This is not the Union's claim.
>
> The Union's claim is that seniority must be considered and not only considered but given weight befitting an important factor in making transfer decisions. The Union does not argue that length of service (seniority) should be the determinative factor in transfer decisions but that it should receive careful consideration. . .
>
> (Association Reply Brief, p. 1)

Some clarification of the Association's position is provided by its assertion that the District has the burden of establishing that the less senior candidate was "demonstrably superior" to the Grievant in order to establish that it had just cause to deny his transfer request in light of his seniority, and subsequently that,

> A fair consideration of the qualifications and experience of both candidates would demand that Monsen's qualifications be dramatically superior in almost every way for the employer to select an employee with nine years of service instead of one with twenty-three years of satisfactory service to the District.
>
> (Association Brief, pp. 9-11).

It appears then that the Association's position is that seniority is an important factor that must be considered in deciding between two or more qualified internal applicants for a non-emergency vacancy, and that, where as here, there is a significant difference in relative seniority, the weight

to be given seniority as a factor can only be overcome by a showing that the less senior candidate is "dramatically superior" with regard to all, or almost all, of the other criteria to be considered.

Conversely, the District's position may be summarized as being that given the lack of any reference to the criteria to be applied in Section 205.0, it is the District's right to determine the factors to be considered, and the weight they are to be given, in deciding between transfer requests of qualified internal candidates, and that the District is only required to utilize a fair process that results in a non-arbitrary, non-capricious decision.

An interpretation of the parties' Agreement must of necessity begin with a review of the applicable provision. Section 205.0, subsection 3, of the parties' Agreement provides that all normal vacancies shall be filled by teachers from within the District provided they make timely application and are qualified for the position. There is no dispute that both the Grievant and Monsen met those prerequisites. Subsection 4 of that provision provides that, "The Superintendent may deny requests for reassignment or transfer for just cause." It is the application of this language that is in dispute.

The just cause standard is not uncommon in labor agreements, albeit it is usually found in the context of discipline. In applying the standard, arbitrators have often assessed the propriety of an employer's conduct in terms of whether it was reasonable under the circumstances. While there is a temptation to attempt to define the just cause standard further, that is not a terribly useful effort and it is its application to the facts of the case that is important. See, John E. Dunsford, "Arbitral Discretion: The Tests of Just Cause", Proceedings of the Forty-Second Annual Meeting National Academy of Arbitrators, ed. Gladys W. Gruenberg, pp. 23-64, at 25.

Former Superintendent Fricke, the only individual to testify who was present when the current language of Section 205.0 was negotiated and who was responsible for implementing that language for ten years, shed some light on how the parties originally viewed the application of the just cause standard in that provision:

Q You said, I believe, that you would consider several different factors, is that correct?

A Yes.

Q All right. And I think you also said in response to questions from Mr. Julka that seniority would not be the only factor?

A Yes.

Q I believe that your testimony earlier indicated that it would be an important factor, is that correct?

A Yes.

Q So in determining whether just cause existed, would you examine all the factors and weigh them to determine whether just cause existed to deny a transfer?

A I don't think I can respond to that in a general sense because again, each employee, each individual situation may be different. I always looked at the process of transfer and the application of just cause as in Case A, we use five factors to make a decision, and we use those same five factors for all the applicants, and we had 10 applicants that if we then had a determining factor point one, point two, point three, whatever without going into specifics what they are, but we use factor one as the determining factor regardless of what factor one is.

The district has the burden, if needed, to justify that it is a just reason and that we are not and that we did not act arbitrarily and capriciously, but we acted fairly with the employee and all employees not just that employee.

(Tr. 64-66).

Fricke's explanation of an employer's obligations in this area is not dissimilar to that of Arbitrator Harry Dworkin in his often cited award in CELOTEX CORP., 53 LA 746:

> The contract contains no specific procedure governing the exercise of the company's responsibility to determine an employee's ability and qualifications. Nevertheless, it must be assumed that in delineating areas of responsibility, the contracting parties contemplated that a party charged with a duty or responsibility under the contract would exercise his authority in a sound, practical and rational manner, consistent with the purpose and object sought to be accomplished. It is inherent in the delegation of responsibility to management that it would fashion, adopt and utilize measures and procedures that meet the standards of fairness and reasonableness, and designed to determine ability and qualifications.
>
> (755)

As the Agreement is silent as to the procedure and criteria to be utilized, the District may develop the criteria to be utilized in selecting between qualified internal applicants for transfer to a vacancy, as long as they are reasonably related to the position's requirements and the applicant's ability to meet those requirements. Those criteria must then be applied in the same fashion to all of the applicants for that vacancy. It would not be reasonable, however, to disregard an applicant's length of service as one of the criteria to be considered. Dr. Fricke's testimony echoes this point:

> Q Jim, is it your testimony that seniority played some role in your decision making process in granting and denying transfers when you were the superintendent?
>
> A Yes.
>
> Q And what role did it play?
>
> A It was one of several factors or many factors that would apply.
>
> Q All right. What would have been the other factors?
>
> A Well, there is no complete list or no total list because in some situations there may be a unique issue that would deal with a given setting, a given transfer or vacancy.
>
> It could be certification. That would be an obvious one. It would be previous experience, it would be suitability for the position, the judgment that the person would work well at that grade level or not work well at that grade level. There is no typed list that I could at that point even have given you and said here are all the factors that conceivably might go into making that type of decision.
>
> Q You said there was no what kind of list?
>
> A Typed list.
>
> Q Typed list. Thank you. But seniority was one of these factors that you considered?
>
> A Yes.

Q Do you remember what kind of weight you would have given seniority?

A Seniority was always given careful consideration because it was a type of criteria that most teachers and the union in general would have placed a great deal of emphasis on, so it's not something that you would just ignore.

(Tr. 51-52)

Further, as the Association notes, an employe's length of service with the employer is normally a consideration in deciding the propriety of the level of discipline imposed under the just cause standard.

It is necessary to note at this point that to the extent any practice has been demonstrated, it is only that the parties intended that seniority be given consideration along with the other criteria the administration utilized in filling a particular vacancy. Except for two letters from Dr. Fricke in March of 1990 to unsuccessful applicants stating that, "The position was given to a qualified applicant with greater seniority", the rest of the evidence regarding a practice was anecdotal at best and inconclusive as to the basis for selection. The only direct testimony was from Fricke, who testified that seniority was the determining factor "only if everything else was equal", and that the District "never used seniority alone," (Tr. 59) and the superintendent at the time in question, Elgie Noble, who testified transfer decisions were made based only on qualifications. (Tr. 112).

Having concluded that the just cause standard required the District to use a process of selecting between qualified internal applicants for transfer to a vacancy that treated all of the applicants the same and which applied criteria for making that selection that were reasonably related to the functions of the job and the applicants' ability to perform those functions, including seniority, in an unbiased fashion, it is necessary to determine whether the District's conduct and decision failed to meet that standard.

Only two individuals who were directly involved in the selection process testified, the Grievant, as an applicant, and Harried, who headed the selection committee. In filling the high school physical education teacher vacancy, Harried established a three-part procedure described in a memo to the Grievant and Monsen as:

Step One An individual teacher perceiver interview with me; this norm-referenced interview will allow us to get to know you better as a teacher. Please contact Linda Olson to schedule a time to complete this first step in the selection process.

Step Two A team interview with Ms. Sheehan, Ms. Dyreson, Mr. Felix and myself; I'll schedule this interview after you've completed the perceiver interview.

Step Three In one to two pages, please describe what you consider to be an ideal or visionary 9-12 physical education curriculum. This position paper is due by the end of the team interview.

Of these three criteria, the teacher perceiver and the "vision statement" were new approaches in the District, the former a test developed by the Gallup Organization and the latter something Harried had designed himself. Harried testified that the perceiver test is designed to elicit responses from which one can evaluate an individual's unique abilities and talents. Due to contractual restrictions with Gallup, he could not, however, provide the questions that were asked, the applicants' responses or demonstrate how they were scored, beyond stating their responses were compared to pre-established "appropriate responses" that had been field-tested by Gallup for reliability. Harried testified he had received fifty hours of training and been certified by Gallup as competent to give the test, and identified several school districts that he was aware utilized the test. Beyond that, there is nothing else in the record that permits the Arbitrator to reach any conclusion as to the validity of the test or its relationship to the functions of the high school physical education teacher position. The Association's dissatisfaction with the use of a relatively new and unknown methodology that cannot be subjected to review is understandable. Certainly, without more in the record, the District would not be able to rely on such a test to support its decision. Nevertheless, Harried testified that the applicants' scores on the perceiver were "a wash" and therefore not considered by the committee in selecting between them.

With regard to the interview step, the Grievant and Monsen were asked the same set of questions by the selection committee and both interviews lasted approximately one hour. While Monsen chose to submit a resume at her interview, she was not asked to do so and the Grievant had not been told that he could not submit additional information. There is also no indication that Monsen's resume had any impact on the committee's decision. The questions asked at the interview were placed in the record and while not objective in the sense that there is only one correct answer to each question, the questions were related to the position and how the applicant would function in it. According to Harried, the interview team unanimously felt that Monsen did better in the interview and that her responses were more in depth and had more substance and elaboration.

The applicants' vision statements were individually and privately scored by each member of the interview team and Monsen was unanimously scored ahead of the Grievant, with Harried scoring the Grievant's vision statement unsatisfactory. A comparison of the applicants' statements does show that Monsen's statement was more detailed and specific vis-a-vis the

Grievant's less detailed, more general statement. Although not a significant factor in judging the statement, it is noted that the Grievant submitted a statement with his name misspelled, perhaps indicative of the level of care and thought he gave to this effort. While again a subjective criterion, the statements were related to performing in the position and available for review and comparison, and there was a rational basis for distinguishing between them.

As to the fairness of the procedure, the Grievant testified that he does not question the fairness of the process, but the people involved in it. Specifically, he objected to having the two high school physical education teachers on the selection committee/interview team, feeling they would be biased in favor of Monsen because she works with them at the high school. Harried testified that it has been the practice at the high school to include teachers in the department and department chairs as much as possible on the interview teams. The use of bargaining unit members who are already performing in the same position, or who have previously performed in the position, would seem to add to the fairness and objectivity of the process, rather than detract from it. The fact that the Grievant has taught one hour per day at the high school would not change that. The only indication in the record of any bias was the Grievant's testimony that he had heard a rumor that Sheehan had said she favored Monsen for the position even before the process began and that he called Harried about his concerns. While Harried testified he did not recall either the Grievant's phone call or talking to Sheehan about it, the Grievant testified that Harried told him he had talked to Sheehan about it and that she denied making such a statement, and that he (the Grievant) was satisfied with that response to his concerns. Thus, even according to the Grievant's own testimony there was no apparent bias. Certainly there is not sufficient evidence in the record to support a finding of bias on the part of members of the selection committee.

Harried testified that in addition to the interviews and vision statements, the committee also discussed other factors such as Monsen's having prior high school teaching experience and the Grievant not having such experience, Monsen being licensed in adaptive physical education as well as K-12 physical education and the Grievant only having the latter license, Monsen being certified in Lifeguarding and W.S.I. in addition to First Aid and CPR, while the Grievant only currently had the latter two (but would get the former two if he received the position), both had substantial head coaching experience at the high school level and both were satisfactory teachers as far as evaluations were concerned. Harried testified that while these matters were discussed, it was the interview and vision statements that were the basis for the Committee's decision that Monsen was the most qualified of the two applicants.

The Association asserts that even if the District was able to establish that Monsen was more qualified, that was not sufficient, rather, it must show that Monsen was "demonstrably" or "dramatically" superior to the Grievant to overcome the weight his greater seniority must be given. That assertion is not persuasive in light of Fricke's testimony and both the bargaining

history on this provision and the absence of any reference to seniority in it. It is not reasonably likely that the parties would agree on a vacancy and transfer provision that does not reference any criteria, let alone seniority, after having specifically rejected making seniority the deciding factor between two applicants with the requisite certification, and then intend that the provision be interpreted as a "relative ability" clause. Further, as the parties' contractual layoff procedure (Section 124) demonstrates, where they intended that seniority be considered an important factor in making a personnel decision, they expressly stated such in their Agreement.

In summary, the record establishes that the procedures the District utilized were reasonable in that they were fairly and uniformly applied to both applicants. Of the criteria utilized in its procedure, seniority should have been included as a factor and the perceiver test could be given no weight. The selection committee, consisting of three members of the bargaining unit and an administrator, unanimously chose Monsen as the superior candidate in both the interview and vision statement. Thus, even if the Grievant's seniority had been considered, Monsen still prevailed on two other factors and it would not be unreasonable for the District to select Monsen over the Grievant on that basis. Therefore, it is concluded that the District had just cause to deny the Grievant's request for transfer and did not violate Section 205.0, subsection 4, of the parties' Agreement when it did so.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 27th day of July, 1999.

David E. Shaw /s/

David E. Shaw, Arbitrator

DES/gjc
5908