BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ANTIGO EDUCATION ASSOCIATION

and

UNIFIED SCHOOL DISTRICT OF ANTIGO

Case 55
No. 59403
MA-11281

(Salary Schedule Placement Grievance)

Appearances:

Mr. James Conlon, **Esq**., UniServ Director, Central Wisconsin UniServ Council, Unit #5, appearing on behalf of the Association.

Mr. Ronald Rutlin, Attorney, Ruder, Ware & Michler, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Association and the District, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on April 24, 2001 in Antigo, Wisconsin. On July 3, 2001, the parties filed briefs, whereupon the record was closed. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

> Whether the District violated the collective bargaining agreement when it hired the Technical Education teacher for the 2000-2001 school year at Step 4.5 of the salary schedule?

The following comments are noted concerning the stipulated issue. First, the parties essentially asked the arbitrator for a declaratory judgment interpreting the agreement. Second, no monetary remedy is requested by the Association in this case. Third, the parties stipulated that McFarlane's placement on the salary schedule will not be affected in the event the Association prevails in this matter.

PERTINENT CONTRACT PROVISIONS

The parties' 1999-2001 collective bargaining agreement contained the following pertinent provisions:

I. BOARD'S RIGHTS.

> The Board's right to operate and manage the school system is recognized, including the determination and direction of the teaching force and the right to plan, direct, and control school activities; to schedule classes and assign work loads and subjects to be taught; to maintain the effectiveness of the school system; to determine teacher complements; to create, revise, and eliminate positions; to establish and require observance of reasonable rules and regulations; to select and terminate teachers; and to discipline, discharge, and non-renew teachers for a just cause.
>
> The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth; the Board retaining all functions not otherwise specifically nullified by this agreement.
>
> . . .
>
> General Conditions of Agreement
>
> . . .
>
> 15. Placement on Salary Plan.
>
> Up to full experience in schools outside the Antigo District may be used to determine placement on this contract.

The parties' 1997-99 collective bargaining agreement contained the following pertinent provisions:

General Conditions of Agreement

15. Placement on Salary Plan.

Up to full experience in schools outside the Antigo District may be used to determine placement on this contract.

. . .

26. Contract

D. . . .For the 1997-98 school year, the Board may place teachers with 0 years experience on either Step 1 or Step 2. For the 1998-99 school year, the Board may place teachers with 0 years experience on either Step 1, 2 or 3 at their discretion.

BACKGROUND

A. Introduction

The District operates a public school system in Antigo, Wisconsin. The Association is the exclusive collective bargaining representative for the District's certified teaching personnel.

The Association and the District have been parties to a series of collective bargaining agreements which govern the wages, hours and working conditions of the District's teachers. The agreements pertinent to this case are the 1999-2001 agreement and the 1997-1999 agreement.

B. Bargaining History

For about the last 20 years, the parties have had a provision in their collective bargaining agreement which deals with the topic of where newly-hired teachers who have previous teaching experience are placed on the salary schedule. That language is contained in Section 15 and provides thus:

15. Placement on Salary Plan.
Up to full experience in schools outside the Antigo District may be used to determine placement on this contract.

This contract provision modified the District's previous practice of not considering the teacher's full teaching experience when determining placement on the salary schedule. Association negotiator Jeff Hasheck testified that the parties adopted this provision to allow the District to consider a teacher's full teaching experience outside the Antigo district when determining placement on the salary schedule. Hasheck further testified that it was not the Association's intent in adopting this provision to allow the District to hire teachers with no previous teaching experience above Step 1 of the salary schedule.

During negotiations for the 1997-99 collective bargaining agreement, the parties agreed to new contract language which addressed the salary schedule placement of new teachers with **no** previous teaching experience. That language was inserted into the third paragraph of Section 26, subsection D. It provided thus:

> For the 1997-98 school year, the Board may place new teachers with 0 years of experience on either Step 1 or Step 2. For the 1998-99 school year, the Board may place new teachers with 0 years experience on either Step 1, 2, or 3, at their discretion.

This language allowed the District to place new teachers with **no** previous teaching experience at Step 1 or 2 of the salary schedule in the first year of the contract, and at Step 1, 2 or 3 in the second year of the contract.

During negotiations for the 1999-2001 agreement, the Association proposed to delete the above-referenced language from the third paragraph of Section 26, subsection D. The District agreed, and the language was deleted without any discussion. The parties did not discuss the impact of deleting this language. The aforementioned language evaporated when the 1997-99 agreement expired.

During the term of the 1997-99 collective bargaining agreement, the District hired a new teacher and placed that teacher, Craig Cigielski, at Step 5 of the salary schedule. When Cigielski was hired, he possessed no previous teaching experience. The Association filed a grievance in May, 1998, regarding the salary placement of that teacher. The grievance alleged that the District violated Section 26, subsection D, of the collective bargaining agreement when it placed Cigielski at Step 5 even though he had zero years of teaching experience. The District and the Association ultimately resolved the grievance with the following written settlement agreement:

> Agreement:
>
> - The action of the District in the presenting case does not constitute a precedent setting event.

- The District does not intend to place new teachers at a placement on the pay schedule at a level other than specifically identified in section 26, subsection D of the 1997 Master Agreement.

- The District and the AEA agree to collaborate for the good of all those affected when and if a situation were to arise that would give credence to the necessity of making an exception to the above statements.

FACTS

The only Technical Education teacher at the District's middle school resigned at the end of the 1999-2000 school year. That teacher taught such classes as woodworking and metal shop. Initially, the School Board decided not to fill the vacant Technical Education position due to budget limitations. In response, middle school faculty and members of the community asked the Board to reconsider their decision and not eliminate the Technical Education programs. The Board ultimately reversed their decision and decided to fill the vacant Technical Education position.

In June of 2000, the District's Human Resources Department posted the Technical Education position for internal applicants and advertised the vacancy in the local newspaper. Approximately ten individuals applied for the position. The District subsequently determined that two of the applicants were not qualified, and four of the applicants later withdrew from consideration. This left the District with about four applicants from which to choose.

In mid-July, 2000, the District offered the Technical Education position to Carl Schenzel, a recent graduate of the University of Wisconsin-Stout. Schenzel verbally accepted the District's offer. The District subsequently mailed an individual teaching contract to him to sign that included a starting salary at Step 4.5 of the salary schedule. However, Schenzel declined employment with the District because he was offered a higher salary by another school district, which he accepted.

In early August, the District offered the Technical Education position to Brian Ostreich, another recent graduate of the University of Wisconsin-Stout. Like Schenzel, Ostreich verbally accepted the District's offer, which also included a starting salary at Step 4.5 of the salary schedule. However, Ostreich also declined employment with the District because he was offered a higher salary by another school district, which he accepted.

In mid-August, the District offered the Technical Education position to Dale Larson, a teacher with a school district in another state who had 16 years of teaching experience. Like Schenzel and Ostreich, Larson verbally accepted the District's offer, which included a starting salary at Step 7.5 of the salary schedule. The reason Larson was offered a salary at Step 7.5

of the salary schedule was because of his previous teaching experience. However, Larson ultimately declined employment with the District for reasons not identified in the record.

In late August, the District offered the Technical Education position to William McFarlane. McFarlane had twelve years of business experience but no previous teaching experience. McFarlane verbally accepted the District's offer, which included a starting salary at Step 4.5 of the salary schedule. He signed an individual teaching contract with the District on August 25, 2000. The 2000-01 school year began three days later.

After McFarlane was hired, the Association filed the instant grievance which alleged that the District violated the collective bargaining agreement when it hired McFarlane at Step 4.5 of the salary schedule. The grievance was processed through the various steps of the grievance procedure and was ultimately appealed to arbitration.

The parties stipulated at the hearing that prior to McFarlane being hired, the District did not meet with the Association or collaborate with it concerning where McFarlane would be placed on the salary schedule.

POSITIONS OF THE PARTIES

Association

The Association contends that the District violated the collective bargaining agreement when it placed McFarlane at Step 4.5 of the salary schedule. According to the Association, the District should not have placed him there because he had no prior teaching experience. It makes the following arguments to support this contention.

First, the Association relies on the language contained in Section 15 of the collective bargaining agreement. As the Association sees it, that provision restricts where a newly-hired teacher with no experience can be placed on the salary schedule. In the Association's view, that provision specifies, in clear and unambiguous language, that new teachers can only be placed on the salary schedule based on their years of teaching experience. The Association believes this language precludes the District from placing newly-hired teachers with no previous teaching experience above the minimum (i.e. Step 1 on the salary schedule). The Association asks the arbitrator to give the language that interpretation and "not legislate new language." It argues that the District's proposed interpretation of the contract language (i.e. that it allows the District to place newly-hired teachers with no experience above the minimum) is not supported by the language itself.

Second, the Association argues in the alternative that if the arbitrator finds that the aforementioned language is not clear and unambiguous, and therefore needs clarification, then he can look to the parties' bargaining history for guidance in deciding this case. As the Association sees it, the parties' bargaining history supports its position here. To support this premise, it first relies on Association negotiator Jeff Hasheck's testimony. The Association notes that he testified that it was not the Association's intent in negotiating Section 15 two decades ago to give the District the right to place new teachers with no experience above Step 1 of the salary schedule. The Association maintains that Hasheck's testimony was unrebutted by any Employer witnesses, so the arbitrator should accept the Association's proffered interpretation of the language. Second, the Association calls attention to the fact that the 1997-99 collective bargaining agreement allowed the District to place new hires with no teaching experience above the minimum start rate, and that contract language evaporated at the end of that contract's term. The Association avers that if the District wanted the right to hire above the minimum, it had to negotiate such language with the Association, and that did not occur.

Third, the Association argues in the alternative that if the arbitrator finds that the contract language is ambiguous, and he looks to the parties' past practice for guidance, the Association maintains that there is no binding past practice which relates to the bargaining unit. To support that premise, the Association concedes that the District did indeed place a newly-hired teacher with no experience above the minimum in 1998. However, it notes that that placement was grieved and ultimately settled on a non-precedent setting basis. The Association argues that this one occurrence (wherein the District hired someone without experience above the minimum) did not establish a binding past practice concerning the meaning of the contract language.

Aside from the arguments just noted about the contract language and how it should be interpreted, the Association also contends that it was the District's own actions herein that caused the instant problem (i.e. hiring a new teacher with no experience above the minimum). To support this premise, the Association notes that the District originally decided not to fill the Technical Education position, and then later reversed their decision. The Association opines that "this indecision on the part of the District created a shorter timetable in order to fill the position." It further opines that the District had the option of placing candidate Dale Larson at the top of the salary schedule, but it chose not to do so (instead only offering to place him on Step 7.5). The Association speculates that if the District had offered him full credit for his teaching experience, this "could have possibly alleviated the problem."

Finally, the Association comments on the effect that placing a newly-hired teacher with no experience above the minimum has on other teachers. According to the Association, what happens is that it leads to animosity among the staff.

In sum, the Association asks that the grievance be sustained. The Association emphasizes that all it seeks from the arbitrator is a ruling that newly-hired teachers with no experience cannot be placed above Step 1 of the salary schedule.

District

The District contends that its hiring of McFarlane at Step 4.5 of the salary schedule did not violate the collective bargaining agreement. According to the District, it had the right to place him there. This contention is based on the premise that the collective bargaining agreement does not require the District to hire new teachers with no previous teaching experience at Step 1 of the salary schedule. It argues that the Association's claims to the contrary (i.e. that Section 15 of the agreement, and the deletion of the third paragraph of Section 26, subsection D limit the District's authority) are without merit. It elaborates on these points with the following arguments.

First, the District maintains that it possesses the inherent managerial right to hire teachers and place them on the salary schedule, subject only to the specific limitations contained in the agreement. Building on that premise, the District then avers that this agreement contains no specific limitation on its inherent management right to hire a new teacher with no previous teaching experience at a salary above Step 1 of the salary schedule. It argues that given the agreement's total silence on this issue, it has the inherent managerial right to hire teachers above Step 1 of the salary schedule.

Second, the District asserts that the record evidence illustrates the difficulty it had in filling the vacant Technical Education position. According to the District, the difficulty was primarily caused by the fact that other school districts were offering a higher salary for similar positions. The District asserts that the reason it offered McFarlane a salary at Step 4.5 of the salary schedule, and not Step 1, was to maintain the Technical Education program at the middle school. It believes that the record evidence establishes that it properly exercised its inherent managerial rights when it hired McFarlane at Step 4.5 of the salary schedule.

Third, the District contends that the Association's claim that Section 15 of the agreement prevents the District from hiring teachers with no previous teaching experience at a higher level than Step 1 of the salary schedule is without merit. This contention is based on the premise that Section 15 does not require the District to place a new teacher with no previous teaching experience at Step 1 of the salary schedule. It emphasizes that Section 15 only provides that the District **may** use full experience in schools at other districts when determining placement on the salary schedule. As the District sees it, Section 15 does not address the issue of placement on the salary schedule of teachers with no previous teaching experience. The District asserts that while there are teacher collective bargaining agreements that restrict a school district's authority with respect to teacher placement on a salary schedule, this particular contract is not one of them.

Fourth, the District argues that the Association's claim that the deletion of the third paragraph of Section 26, subsection D from the last agreement prevents the District from hiring teachers with no previous teaching experience at a higher level than Step 1 of the salary schedule is also without merit. For background purposes, the District notes that that language restricted the District's discretion on salary schedule placement of teachers with no previous teaching experience. The District argues that the deletion of that language resulted in the elimination of any limitation on the District's discretion on salary schedule placement for teachers with no previous teaching experience. The District asserts that the Association's contention to the contrary (i.e. that the deletion of that language restricts the District's discretion on salary schedule placement of teachers with no previous teaching experience) is just plain wrong. To support its contention, the District notes that the Association's argument assumes that the District must have specific language in the agreement giving it discretion on salary schedule placement of teachers with no previous teaching experience. The District avers this assumption is misplaced. The District maintains that when the parties deleted the third paragraph of Section 26, subsection D, they deleted the only specific language in the agreement addressing salary schedule placement of new teachers with no previous teaching experience. According to the District, once this lone limitation was deleted, the District reclaimed its inherent managerial right to place new teachers with no previous teaching experience at any salary above Step 1 of the salary schedule.

Finally, anticipating that the Association will argue that the District violated the terms of the June 5, 1998 settlement agreement when it hired McFarlane, the District contends that that agreement is no longer applicable. As the District sees it, the deletion of the third paragraph of Section 26, subsection D also voided the June 5, 1998 settlement agreement. This contention is based on the premise that the second bullet-point of that agreement specifically indicated that the District would not place a teacher on the salary schedule at a level "other than specifically identified in section 26, subsection D of the 1997 Master Agreement." The District avers that since the parties agreed, following the implementation of the settlement agreement, to delete the third paragraph of Section 26, subsection D in the 1999-2001 agreement, it logically follows that the second bullet-point of the settlement agreement that refers to Section 26, subsection D is no longer applicable because Section 26, subsection D no longer addresses the placement of new teachers with zero (0) years of experience on the salary schedule. The District maintains that since it is no longer necessary for the District to make "an exception to the above statements" because the second bullet-point no longer exist, there is no language for which the District must make an exception. Building on the foregoing, the District contends that it is no longer required to collaborate with the Association prior to placing a new teacher with no previous teaching experience on the salary schedule, even if the District places a new teacher at a level higher than Step 1. Consequently, the District believes it was not obligated to consult with the Association before it hired McFarlane at Step 4.5 of the salary schedule.

In sum, the District submits that no contract violation occurred when it placed McFarlane at Step 4.5 of the salary schedule. It therefore requests that the grievance be denied.

DISCUSSION

At issue here is whether the District can place a new teacher with no previous teaching experience at a salary above Step 1 of the salary schedule. The District asserts that it can, while the Association disputes that assertion. Based on the rationale which follows, I answer that question in the affirmative, meaning that the District can indeed place a new teacher with no previous teaching experience at a salary above Step 1 of the salary schedule.

Since the basic subject matter of this case involves a hiring decision made by the District, the logical starting point for purposes of discussion is to ask rhetorically whether there is a contract provision which deals with hiring. There is; it is the Management Rights clause. That clause provides, in pertinent part, that the Board has the right "to select. . .teachers." This language gives the Board, and thus the District, the management right to hire teachers. This right to hire or not hire is subject only to the specific limitations found in the collective bargaining agreement.

The next question is whether there are any contractual restrictions or limitations on the District's management right to place new teachers with no previous teaching experience at a salary above Step 1 of the salary schedule. The Association contends that there are, citing Section 15 of the collective bargaining agreement, and the deletion of the third paragraph of Section 26, subsection D. Each of these contentions is addressed below.

Attention is focused first on the Association's contention that Section 15 of the agreement prevents the District from placing new teachers with no previous teaching experience at a level higher than Step 1 of the salary schedule. That interpretation is not supported by the contract language. The following shows why. Section 15, which is entitled "Placement on Salary Plan", reads as follows:

> Up to full experience in schools outside the Antigo District may be used to determine placement on this contract.

This provision allows the District to consider a teacher's teaching experience outside the Antigo District when determining placement on the salary schedule. Specifically, it provides that the District **may** use full experience in other districts when determining placement on the salary schedule. Contrary to the Association's assertion, this provision does not require the District to place a teacher with no previous teaching experience at Step 1 of the salary schedule. Additionally, it does not preclude the District from hiring above the minimum. By

that, I mean that Section 15 does not prevent the District from placing a new teacher with no previous teaching experience at a level higher than Step 1 of the salary schedule. This provision only addresses the salary schedule placement of teachers who have previous teaching experience. It does not address the salary schedule placement of teachers with no previous teaching experience.

This interpretation is supported by the parties' bargaining history. Bargaining history is a form of evidence arbitrators commonly use to help them interpret contract language and ascertain the parties' intent regarding same. The uncontroverted testimony of Association negotiator Jeff Hasheck established that when the parties adopted Section 15, they mutually intended it to deal with the topic of where newly-hired teachers who had previous teaching experience are placed on the salary schedule. Specifically, they mutually intended Section 15 to allow the District to consider a teacher's full teaching experience outside the Antigo district when determining placement on the salary schedule. This contract provision modified the District's previous practice of not considering a teacher's full teaching experience when determining placement on the salary schedule.

Having just focused on what the parties mutually intended Section 15 to mean, the focus now turns to whether that provision had another meaning that was different from the one just noted. According to Hasheck, when Section 15 was agreed on, the Association did not intend that it would be used to allow the District to hire new teachers with no previous teaching experience above Step 1 of the salary schedule. I conclude that even if that was the Association's intent, that does not change the provision's meaning. My rationale is this: when arbitrators use bargaining history to help them ascertain the parties' intent, what they rely on is a manifested intent (i.e. what the parties communicate to each other about their understandings of a proposal); not undisclosed intent. In this case, it is not clear that the Association's intent in that regard was disclosed to the District. Insofar as the record shows, the Association never told the District in negotiations that they wanted Section 15 to also mean that the District could not hire new teachers with no previous teaching experience above Step 1 of the salary schedule. Since they did not, the District could not have agreed to the Association's unstated and undisclosed meaning. It can therefore be said with absolute certainty that both sides did not mutually agree that Section 15 precluded the District from hiring new teachers with no previous teaching experience above Step 1 of the salary schedule.

While Section 15 does not address the salary schedule placement of new teachers with no previous teaching experience, the parties' previous collective bargaining agreement contained language which did. That language was found in the third paragraph of Section 26, subsection D, and provided thus:

> For the 1997-98 school year, the Board may place new teachers with 0 years of experience on either Step 1 or Step 2. For the 1998-99 school year, the Board may place new teachers with 0 years experience on either Step 1, 2, or 3, at their discretion.

This provision limited the Board's managerial right to place where new teachers with no previous teaching experience could be placed on the salary schedule. Specifically, it provided that new teachers with no previous teaching experience could only be placed at Step 1 or 2 of the salary schedule in the first year of the contract, and at Step 1, 2 or 3 in the second year of the contract. During negotiations on the current agreement, the Association proposed to delete this provision and the District agreed. This was done without any discussion as to its impact.

As the Association sees it, the deletion of that language (i.e. the third paragraph of Section 26, subsection D) restricts the District's discretion on salary schedule placement of teachers with no previous teaching experience. I find otherwise. The problem with the Association's argument is that it assumes that the District must have specific language in the agreement giving it discretion on salary schedule placement of teachers with no previous teaching experience. This assumption is misplaced because it incorrectly presumes that the Employer has to be granted specific authority to take a particular action. Simply put, that is not the case. The converse is true. The Management Rights clause can certainly be read to give the District the right to place new teachers with no previous teaching experience at any salary above Step 1 of the salary schedule. That being so, it was up to the Association to get language which limits that authority. The Association did just that when the third paragraph of Section 26, subsection D was added to the agreement. As previously noted, that provision limited the District's authority because it provided that new teachers with no previous teaching experience could only be placed at certain steps (namely Step 1 or 2 in the first year of the contract and Step 1, 2 or 3 in the second year of the contract). The existence of that language shows that the parties know how to draft contract language which limits where the District can place new teachers with no previous teaching experience on the salary schedule. Once this specific limitation was deleted from the agreement, the District reclaimed the managerial right to place new teachers with no previous teaching experience at any salary above Step 1 of the salary schedule. Accordingly, the deletion of the third paragraph of Section 26, subsection D removed the only contractual limitation on the District's discretion on salary schedule placement for teachers with no previous teaching experience.

Having so found, it is noted that some teacher collective bargaining agreements do completely restrict the school district's authority with respect to new teacher placement on the salary schedule. This particular agreement does not do that. While this particular agreement does address the salary schedule placement of teachers with previous teaching experience, it does not address the salary schedule placement of teachers with no previous teaching experience. That being the case, the District is not contractually precluded from placing new teachers with no previous teaching experience at a salary above Step 1 of the salary schedule.

Next, the focus turns to the Association's contention that the District violated the terms of the June 5, 1998 settlement agreement when it hired McFarlane at Step 4.5. That particular settlement agreement was reached after the District hired a new teacher (Cigielski) who had no previous teaching experience, and placed him at Step 5 of the salary schedule. The Association grieved this action, alleging that the District's conduct violated the third paragraph of Section 26, subsection D. The parties resolved the grievance with a written settlement agreement. In the second bullet-point of that agreement, the District agreed that it would not place a teacher on the salary schedule at a level "other than specifically identified in Section 26, subsection D of the 1997 Master Agreement." The third bullet-point of that agreement specified that if the District needed to make "an exception to the above statements" (which I interpret to mean placing a teacher at a level not identified in Section 26, subsection D), it would "collaborate" with the Association before taking such action.

After this settlement agreement was reached, the parties did something which affected the settlement agreement. What they did was this: they deleted the third paragraph of Section 26, subsection D, in the 1999-2001 agreement. As a practical matter, this action made the second bullet-point of the settlement agreement no longer applicable. The reason is this: as noted above, the second bullet-point referred to Section 26, subsection D. At the time, that contract language addressed the placement of new teachers with zero (0) years of experience on the salary schedule. Since that language was subsequently deleted from the collective bargaining agreement, this means that Section 26, subsection D no longer addresses, as it once did, the placement of new teachers with zero (0) years of experience on the salary schedule. Inasmuch as the contract language referenced in the second bullet-point no longer exists, it is no longer necessary for the District to, in the words of the third bullet-point, make "an exception to the above statements." Thus, there is no contract language anymore for which the District must make an exception.

In sum then, it is held that this particular contract does not restrict the District's authority with respect to the placement of new teachers with no previous teaching experience on the salary schedule. It used to, but it does not anymore. That being so, the District can place new teachers with no previous teaching experience at a salary above Step 1 of the salary schedule.

Any matter which has not been addressed in this decision has been deemed to lack sufficient merit to warrant individual attention.

In light of the above, it is my

AWARD

That the District did not violate the collective bargaining agreement when it hired the Technical Education teacher for the 2000-2001 school year at Step 4.5 of the salary schedule. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 21st day of September, 2001.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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