

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEW BERLIN SCHOOL DISTRICT

and

**WISCONSIN EDUCATION ASSOCIATION COUNCIL,
LAKEWOOD UNISERV AND NEW BERLIN EDUCATION ASSOCIATION**

Case 25
No. 61977
MA-12122

(Roberta Voss Grievance)

Appearances:

Michael Aldana, Quarles & Brady, LLP, Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, appeared on behalf of the New Berlin School District.

Steven Cupery, UniServ Director, Lakewood UniServ Council, 13850 West Burleigh Road, Brookfield, Wisconsin 53005, appeared on behalf of the New Berlin Education Association.

ARBITRATION AWARD

On January 3, 2003, the New Berlin School District and the New Berlin Education Association, Lakewood UniServ, Wisconsin Education Association Council filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, as Arbitrator to hear and decide a dispute pending between the parties. A hearing was conducted on September 29, October 2, and October 14, 2003 in New Berlin, Wisconsin. A transcript of the proceedings was taken, and distributed by October 30, 2003. Post-hearing briefs and reply briefs were filed and exchanged by March 25, 2004.

This Award involves the recall rights of Roberta Voss.

BACKGROUND AND FACTS

Roberta Voss is the grievant in this dispute. The parties entered into the following factual stipulation relative to Ms. Voss:

Fact Stipulation – Roberta Voss

- 1. Ms. Voss began her employment with the New Berlin School District on August 22, 1974. She held the position of full-time teacher in family and consumer education (home economics) and health until the time of her layoff on June 4, 1999.**
- 2. At the time of her layoff Ms. Voss was at the highest pay rate in the salary schedule and if she is entitled to recall, she would be placed at the highest step in the salary schedule.**
- 3. During the 1999-2000 school year, Ms. Voss worked as a substitute from September 9th (1999) to the end of the school year. She signed two long term substitute contracts that school year, one on October 7th, 1999 and a second on January 14, 2000.**
- 4. Roberta Voss has a life license in Family and Consumer Education for grades 7-12. On December 26, 2001, Roberta Voss was issued a 5 year teaching license to teach grades 6-12 in Broad Field Social Studies, History grades 6-12 and Health Pre K-12. She brought in her Initial Professional Education Certificate on January 2nd, 2002 and gave it to Diane Melville in Human Resources.**
- 5. Ms. Voss brought in her five year license described above on January 4, 2002 and presented it to Diane Melville. This license was effective July 1, 2001.**

Under the terms of the parties' collective bargaining agreement, the relevant portions of which are set forth below, Ms. Voss was subject to a three-year recall period.

On, or about, January 5, 2002, Ann Krumrich, a Middle School Math teacher indicated her intent to retire. A dispute arose regarding her eligibility for certain retirement related benefits. That dispute was subsequently resolved and ultimately the terms of the resolution were ratified by the School Board on April 22, 2002.

The New Berlin Middle School was experiencing a decline in student enrollment during this period. In anticipation of Ms. Krumrich's retirement, the Administration advised Middle School Principal Terry Weingrod that she would not be allowed to fill the position occupied by Krumrich. Weingrod developed a strategy to cover certain course offerings, including Math, with her current staff. It was her goal to keep the Middle School staff intact. There were two staff members, Tammian Moore and Nicole Ehlert, who were certified but not teaching Math. Weingrod approached the more senior Ehlert first. The parties entered into the following factual stipulation relative to Ms. Ehlert:

Fact Stipulations – Nicole Ehlert

- 1. Ms. Nicole Ehlert began her employment with the district in a regular teaching position on August 20, 1999. At the time she taught two sections of math at New Berlin West High School and three sections of Science at New Berlin West Middle School for the 1999-2000 school year. At some point just prior to or during the 1999-2000 school year Ms. Nicole Ehlert presented the District with her five year teaching license from the Department of Public Instruction. The License was issued 7/1/99.**
- 2. During her second year of employment (2000-2001 school year) Ms. Ehlert taught science. She split her teaching time between the New Berlin West High School and Middle School. During her third year (2001-2002) she taught four sections of science and one section in Writing at the New Berlin West Middle School.**
- 3. Sometime in February of 2002, Ms. Nicole Ehlert was approached by West Middle School Principal Terry Weingrod asked whether she would be interested in filling the math position that might be vacated as a result of Ann Krumrich's possible retirement. This action was initiated by Principal Weingrod. Ms. Nicole Ehlert indicated that she would prefer to stay in science. Each time Ms. Ehlert was approached on subsequent occasions by Mr. Weingrod about taking the math position she responded that she would prefer to stay in science.**
- 4. On or about June 10, 2002, Ms. Nicole Ehlert received a letter from the District dated June 9, 2002 stating that she would be transferred to a social studies position at New Berlin West Middle School for the 2002-2003 school year. She remains in this position today.**

5. **Ms. Nicole Ehlert did not see a posting for the math position filled by Tammy Moore nor did she see a posting for Tammy Moore's social studies position. She also did not submit a written application for the social studies position. Ms. Ehlert's transfer to the social studies position was involuntary.**
6. **Sometime during the week of June 10, 2002, Ms. Nicole Ehlert met with New Berlin West Middle School Principal Terry Weingrod at Ms. Weingrod's request and was verbally told of the transfer to the New Berlin West Middle School social studies position.**

Tammian Moore became aware of the anticipated opening in Math, and approached Principal Weingrod. The parties entered into the following factual stipulation relative to Ms. Moore:

Fact Stipulations – Tammian Moore

1. **Ms. Moore began her regular employment with the district as a Long Term Substitute on January 17, 2000. At the time she taught math at New Berlin West Middle School.**
2. **She signed a contract for a regular full-time teaching position on July 2, 2000 and taught social studies at New Berlin West Middle School for the 2000-2001 and 2001-2002 school years.**
3. **Sometime in February of 2002, Ms. Tammy Moore approached New Berlin West Middle School Principal Terry Weingrod and expressed her interest in filling the math position that might be vacated as a result of Ann Krumrich's possible retirement. This action was initiated by Ms. Tammy Moore. Prior to this, Ms. Moore had heard that another employee, Ms. Nicole Ehlert had been approached by Ms. Weingrod about taking the position.**
4. **On or about June 10, 2002, Ms. Moore received a letter from the District dated June 9, 2002 stating that her request to be transferred to a math position at New Berlin West Middle School for the 2002-2003 school year would be honored. She remains in this position today.**
5. **Ms. Tammian Moore never saw a posting for the math position she filled in 2002. She also did not submit any written application for the math position.**

6. **Sometime during the week of June 10, 2002, Ms. Moore met with New Berlin West Middle School Principal Terry Weingrod and was verbally told of the transfer to the New Berlin West Middle School Math position.**
7. **Tammian Moore's maiden name was Stollberg. Her name changed to Moore upon her marriage on October 14, 2002. At some point during the Spring of 2000, Ms. Tammian Moore presented the District with her five year teaching license from the Department of Public Instruction. The License was issued 7/1/99.**

The position vacated by Ms. Krumrich was never posted. The position vacated by Ms. Moore was never posted. The number of Math positions did not change between 2001-02 and 2002-03. The number of Social Studies positions did not change between 2001-02 and 2002-03. The number of core subject Full Time Equivalent positions went from 17.4 in 2001-02 to 16.4 in 2002-03.

The Association filed a grievance on June 14, 2002 protesting the fact that the District did not recall Ms. Voss. The grievance was denied and ultimately appealed to arbitration.

The operative language in this dispute has been a part of the collective bargaining agreement for years. The parties have experienced layoffs in the past and have some related history.

In May, 1994, the following "agreement" was created. The District's version of the document, dated May 12, 1994, is set forth below:

NEW BERLIN PUBLIC SCHOOLS
New Berlin, Wisconsin

**Summary of Agreement on Interpretation of
NBEA/BOE Master Contract as it
Relates to Teacher Transfer in Special Cases**

May 12, 1994

- I. **TRANSFER WITHIN THE SCHOOL (Intra School Teacher Transfer)**
 - A. The assignment of teachers within the building is the responsibility of the building administrator subject to appropriate review.

- B. Teachers grades EC-6 may be reassigned to any position on the teaching staff for which they have certification.
- C. Certified staff members may be reassigned to other positions (i.e., EEN, reading resource, guidance, librarian, etc. provided the transfer, or exchange is mutually agreed to by both of the transferring professionals and the building administrators certify that superior staffing arrangements will result.
- D. Reassignment to an open position within a building (i.e., one created by increased staffing or the resignation or voluntary transfer of a certified professional) will require the posting of the position in the usual fashion both within and outside the district with the final candidate being selected by the building administrator following the district search process. Teacher positions will be filled first with qualified individuals from the EC-6 in-building teacher transfer pool and then individuals will be selected from the EC-6 teacher pool.

II. TRANSFER BETWEEN SCHOOLS (Inter School Transfers)

- A. When excessive staffing in a building creates the necessity of transferring staff members from a school, procedures from article V, section b3 will be followed.
 - a. Qualified volunteers shall be considered first.
 - b. In making involuntary reassignments, least senior teachers within the grade level or department will be transferred first.
 - c. Grade level or department assignments will be determined by the schedule currently in place, summer transfer decisions will be based on the prior year schedule.
- B. Intra school placement in other positions such as guidance or library will be subject to the district search process.

III. TRANSFER TIMELINE

- A. In all instances transfer notification will be made in a timely fashion but in such a manner that highly accurate projects based on timely data will be used to form the recommendation.

- B. Any teacher wishing another assignment or transfer to another school shall make his/her wishes known by February 15.
- C. The district shall post all known vacant positions by April 18.
- D. Teachers considered excess staff shall have first choice of positions based on an order determined by seniority, provided they met all certification requirements.
 - a. Review of recall
 - b. Disability return decision
- E. Teachers requesting assignment to these vacant positions must submit their intent to accept the position within seven calendar days.
- F. Teacher layoff notices will be issued on or before May 1.
- G. District will attempt to have district wide schedules completed by May 15.
- H. It is understood that teacher schedules will be firmly in place by August 15. **HOWEVER**, teacher assignments and reassignments are subject to district needs throughout the year.

The Association's version of the "agreement" differs in a number of respects. The Association document is dated May 2, 1994. Paragraph I.A. has a period after the word "administrator", and has the words "subject to appropriate review" lined out. A "?" appears next to the deletion. Par. I.B. has the words "grades EC-6" lined out. There is a handwritten note "EC-12" written in the left hand column and the word "building" appears in parentheses following the sentence.

It is the District's view that the references to EC-6 limits whatever reach the document has to the Elementary School level. The District further points to paragraph I.A. as confirming its right to assign. The Association points to paragraph I.D. as a definition of an "open position" requiring posting. The Association points to Par. III.C. and offered testimony that positions were historically posted regardless of the date they came open.

Doug Straus, the former Human Relations Director, sent the Association the following memo on June 1, 1995:

NEW BERLIN PUBLIC SCHOOLS
New Berlin, Wisconsin

June 1, 1995

To: Jack Stacy
Joe Hanser

Fr: Doug Straus

Su: Language Change

Below in sample (1) is the language we agreed to with reference to the order in which involuntary transferred/laid off teachers make selections.

Sample (2) has the same intent but seems to be clearer in its intent (at least to Glenn Schilling and me).

Your reaction?

- (1) The selection by teachers involuntarily transferred or laid off from open positions shall not preclude the recall or cause the layoff of another member of the bargaining unit as long as certified teachers remain available to fill the required positions.
- (2) The selection from the list of open positions by teachers involuntarily transferred or laid-off shall not preclude the recall or cause the layoff of another member of the bargaining unit, as long as a position within their certification is open.

The Association contends that the document amounts to an agreement between the parties which prevents the District from involuntarily transferring Ehlert to the social studies position where the transfer blocked the recall of Voss.

In 1999, the District reassigned Rose Zarski, a bargaining unit employee, within the building, in order to prevent the layoff of another employee. Zarski grieved, and the

Association supported her grievance, contending that the employer lacked the authority to involuntarily reassign an employee to prevent layoff. In the current dispute, the size of the building workforce was reduced by 1 FTE. To recall Voss from layoff would have resulted in the involuntary transfer of an employee out of the building.

Many of the events referred to above occurred in the context of actual/threatened layoff. No layoffs occurred in 2002.

ISSUE

The parties could not stipulate to the issue to be decided.

The Association believes the issue to be:

Did the Employer violate the Collective Bargaining Agreement and any supplemental agreements, and if so what should the remedy be?

The District believes the issue to be:

Did the Employer violate the Master Agreement when it did not recall Bobbie Voss from layoff, and if so what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE V

...

CONDITIONS OF EMPLOYMENT

- B. Teacher Assignment, Reassignment, Layoff and Recall
 - 1. The Board retains the right to make grade, subject and activity assignments. The Board also retains the right to make reassignments and transfers between schools as necessary in the best interest of the district subject to the terms and conditions of this agreement. Notification of transfer and reassignment shall be made in writing.
 - 2. Any teacher wishing another assignment or transfer to another school shall make his/her wishes known by February 15 in order to be given consideration for the following school year. Transfers will take into

consideration employees' professional training, experience, specific achievements, and service in the district. Applications must be renewed annually to remain valid. Vacancies for the following school year that become known after February 15 shall be posted in areas adjacent to the teachers' mailboxes in all buildings.

In order to implement the above, the Association will foster among its membership notification of intention not to renew individual contracts at the earliest possible date. The Board will post by February 1 all vacancies known prior to January 15. All applications for transfers to these vacancies as received by February 15 will be given consideration prior to selecting new employees.

...

3. When a reassignment of a teacher or teachers is necessary, qualified volunteers shall be considered first. In making involuntary reassignments consideration shall be given to years of service in the New Berlin system with those teachers most recently appointed to the district being reassigned first, except where departmental, necessary extra-curricular, kindergarten, primary, intermediate, or upper grade level needs prevail. In all cases, the welfare of the district shall be given prime consideration.

In the matter of involuntary transfers, a teacher's seniority within the system is considered at grade or departmental level within a building. As the transfers occur, the displaced teachers maintain their district seniority within the grade or departmental level they transfer to.

A teacher who has been subject to layoff shall receive the first offer of any long-term substitute teaching assignment for which he or she is certified. Such offers shall be extended in reverse order of layoff.

...

9. In making involuntary assignments and transfers, the convenience and wishes of the individual teacher will be considered. If a disagreement arises concerning assignments or transfers, within three (3) days mutually satisfactory arrangements will be pursued to the extent they do not conflict with the instructional requirements and best interests of the school system and its pupils.

10. If the Board decides to reduce or eliminate a teaching position(s), the Board shall have the sole right to determine the position(s) to be reduced or eliminated. A reduction in the number of hours in a particular position shall constitute a partial layoff. Elimination of a position shall constitute a full layoff. In all events, notices of full or partial layoff for the ensuing school year shall result in teachers receiving preliminary notice of layoff on or before May 15 and final notice of layoff on or before June 1. In a layoff situation consideration shall first be given to years of service in the New Berlin system with those teachers most recently appointed to the District being laid off first, providing, however, that the remaining staff is certified, and have the educational background and teaching experience to fill the necessary positions in the District.

...

11. In the event of a recall, teachers on layoff will be recalled in the reverse order of layoff provided they are qualified for the position. The layoff shall not result in a loss of credit for previous years' service.
12. No new or long-term substitute positions will be filled by other than a certified, qualified member of the bargaining unit who has the requisite background and experience and who is on layoff.
13. Teachers who have been laid off will have recall rights for a period of three (3) years from the date of layoff and shall accept or reject the recall within a period of ten days after the Board mails a certified letter.

...

Section 1. Grievance Procedure

Step H. Subject to the procedural and substantive requirements set forth in this paragraph, a grievance which is not resolved in the previous steps of the grievance procedure may be appealed to arbitration.

Arbitration will be permitted only where the following requirements are met:

...

- (c) The issue must involve the interpretation or application of a specific provision of the agreement. General statements as to the intent or spirit of the agreement shall not give rise to claims for arbitration.

...

The arbitrator shall not have power to add to, subtract from, alter or amend the agreement. Nor shall the arbitrator have any authority to reverse or interfere with any exercise of discretion by the Board permitted by this agreement. Even if the arbitrator shall determine there has been a violation of this agreement, the arbitrator shall have no power or authority to order the payment of any back pay or other financial award or remedy of any nature whatsoever except such pay as is properly due for services actually performed. In any case where the foregoing limitation upon the authority of the arbitrator would preclude an adequate remedy for the alleged grievance, the grievant may elect to pursue appropriate proceedings before an administrative agency or a court.

POSITIONS OF THE PARTIES

The Association contends that should the Employer prevail in this proceeding, it would result in the denial of most, if not all recall rights. The Association contends that what is clear from the facts is that when Krumrich left her math position there was an opening that should have been posted. A voluntary transfer of Moore filled the math opening. Ms. Moore's transfer created a second opening in a Social Studies position, which was filled by the involuntary transfer of Ms. Ehlert. This transfer both blocked the recall of Ms. Voss and violated the rights of Ms. Ehlert to remain in Science.

The Association asserts that when Krumrich retired a vacancy was created. The Association denies that the FTE level is relevant to the existence of a vacancy in either Math or Social Sciences. Once Moore moved to Krumrich's position, she created an opening in Social Studies. There was no reduction in the number of Social Studies positions. The District did not seek volunteers by recalling Voss. Rather, it involuntarily transferred Ehlert into the Social Studies position. The Association claims there was no evidence that the Employer considered seniority in doing the involuntary transfer. Had it done so, a less senior teacher, Lockwood, would have been transferred to an open High School Science position.

The Association cites the May 2, 1994 memo for guidance as to when an opening occurs. Under the terms of that document an open position is "...created by increased staffing or the resignation or voluntary transfer of a certified professional..." The language of that document does not state that there is only an opening if it cannot be filled by reassignment of others. The Association goes on to contend that the May 2, 1994 document and the June 1, 1995 memo support the Association's contention that reassignment cannot be done to fill an opening and thereby negate the obligation to post nor block the recall of a laid off employee.

The Association contends that the Employer delayed the timing of the transfers of Moore and Ehlert in such a way as to deny the recall rights of Voss. In essence, the Association contends that the Employer timed these decisions to fall just beyond the three year recall period of Voss.

The Employer contends that no new employees were hired for a position for which Ms. Voss was qualified during the period of her recall. The Employer points to the recall provisions of the Agreement, and notes that recall must be to a position. The Employer argues that there was no vacancy or opening requiring hiring into a position to which Ms. Voss was qualified.

The Employer denies that Krumrich's retirement created an opening. Krumrich's position was in Math. Voss was not certified in Math. No new staff member was added in the Middle School. Existing staff members assignments were changed, no grievances were filed, to cover for her retirement. Total FTE in core curriculum dropped from 17.4 to 16.4.

The District contends that the Association's claims regarding reassignment or transfer have no contractual basis. Management witnesses testified that the collateral documents do not refer to a circumstance where an employee is already on layoff. The Employer notes that Section I, Step H., par (c) requires that to be arbitrable, the issue must involve the interpretation or application of a specific provision of the agreement. General statements as to the intent or spirit of the agreement shall not give rise to claims for arbitration.

The District points out that the Association's claim that the District should have involuntarily reassigned employees to accommodate a recall of Ms. Voss flatly contradicts the position of the Association in the Zarske grievance.

The contract language on reassignments and transfers is clear, reserving those rights to the Board. The decisions were motivated by declining enrollment, a retirement, and a desire to keep the Middle School faculty intact.

DISCUSSION

The retirement of Ann Krumrich triggered the events leading to this Award. When she retired, her math position was vacated. The employer made a decision to eliminate a position through attrition. The employer made a second decision to continue to carry the same math curriculum/course offerings as before, notwithstanding the overall reduction in the workforce. There is no dispute that these decisions are matters reserved to the employer.

Once these decisions were made, the math position vacated by Krumrich was open/available to be filled. The position was not posted. Ms. Voss was not certified to teach math. The employer approached Ehlert, the most senior employee in the building certified to teach math, and asked her to volunteer to teach math. She declined. The Association regards Krumrich's position as a vacancy within the meaning of Article V, but does not challenge the selection of Moore, notwithstanding the District's failure to post the opening. The District contends that there was never a vacancy in existence since the number of positions equaled the number of faculty at the Middle School.

Ms. Moore volunteered to teach math, and was given the assignment, without protest from the Association. Once Moore was reassigned, her Social Studies position became vacant. The District made a determination to maintain the level of Social Studies offerings despite the reduced level of staffing. It is at this point that the Association claims that a vacancy, which must be posted, arises. The Association further claims that Voss had recall rights to the vacancy, and that Ehlert was inappropriately involuntarily assigned to the Social Studies position. According to the Association, Lockwood, a junior employee, should have been involuntarily transferred out of the building to an open position to accommodate the recall of Voss.

There is little support within the provisions of the collective bargaining agreement for the Association claims. Article V.B. 1. gives the Board the right to make subject assignments, reassignments, and transfers between schools. Ehlert was assigned a new subject matter, in which she was certified, to teach. That assignment appears to fall within the managerial prerogative of the District. Moore approached Weingrod about the math job sometime in February. Article V.B. 2. permits teachers who seek a new assignment to make that fact known, and to receive consideration. There is no objection to the process that led to Moore securing the math slot.

Article V.B.2. requires that certain vacancies be posted. The parties dispute whether or not a vacancy ever existed. If such a vacancy was created, Article V.B.2. requires that it be posted. The consequence of a pre-January 15 vacancy posting is that transfer applicants be given consideration prior to selecting new employees. As to vacancies that become known after February 15, there is no contractually explicit obligation. Notably, there is no reference in Article V.B.2. to the rights of employees on layoff.

Article V.B.3. does expressly address job rights of employees on layoff. The paragraph commits the District to offer long-term substitute work to employees on layoff. This provision is not directly relevant to this dispute. Similarly, Article V.B.11 specifically addresses the rights of teachers on recall. Paragraph 11 calls for recall in the inverse order of layoff, provided the employee is qualified. Neither this provision nor any other in the contract specifies the sequence in which assignment, transfer and recall proceed.

The Association asserts that the side agreements and practice of the parties reconcile the sequence of events. I do not regard the May 12 (May 2) 1994 Summary agreement to be particularly useful. The parties have competing versions of the document. One significant difference is that the reference to EC-6, which is disputed, may well narrow the scope of Paragraph 1 to elementary level teachers. The May, 1994 document defines an open position in the context of reassignment. The document is itself titled "Teacher Transfer". The only reference to recall is in paragraph III.D. Review of recall is listed, without specification under a paragraph which addresses teachers considered excess staff. This entire document appears to focus on the assignment of teachers under circumstances where there exists the possibility of layoff. The specifics of recall are, at most, an afterthought.

The collective bargaining agreement uses the term "vacancy". It is possible that vacancy and opening are synonyms. It is equally possible that they are not. It is possible that the parties would regard an opening for purposes of transfer/assignment as different than a vacancy which must be formally posted, and which may have recall consequences. The May, 1994 document(s) were belatedly discovered, only weeks before the hearing. No one was able to persuasively explain the relationship of the document to the collective bargaining agreement. I do not believe it contributes anything of significance to the record.

My view of the June 1, 1995 memo from Straus is similar. The memo appears to address a circumstance of dislocation caused, at least in part, by a pending layoff. Read literally, both paragraphs address "selection. . .of open positions. . .by teachers involuntarily transferred or laid off. . ." The paragraphs address the circumstance where a teacher selects a position. The only person who arguably selected an open position here was Moore. Ehlert did not select the position that is in the center of this dispute. She was involuntarily assigned to that position. It appears to me that this memo was intended to address the circumstance where teachers currently on the payroll, but potentially subject to layoff/reassignment search for alternative positions. These paragraphs seem to limit access to open positions under circumstances where the selection of a certain opening would block a recall or prompt a layoff. That is not what happened here.

Nothing in the collective bargaining agreement requires the employer to recall Voss to the open Social Studies position. The District was within its contractual right to maintain the staff at the middle school and reassign teaching assignments to accomplish that goal.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 15th day of September, 2004.

William C. Houlihan /s/

William C. Houlihan, Arbitrator