

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**MARINETTE EDUCATION ASSOCIATION**

and

**SCHOOL DISTRICT OF MARINETTE**

Case 60

No. 64402

MA-12889

(9-3-04 grievance of JN -- work assignment upon reinstatement)

---

**Appearances:**

**Stephen Pieroni**, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, PO Box 8003, Madison, Wisconsin; and **James Blank**, Executive Director, Northeast United Educators, 1136 North Military Avenue, Green Bay, Wisconsin, appearing on behalf of the Association.

**James Morrison**, Attorney, Law Offices of James A. Morrison, 2042 Maple Avenue, P.O. Box 406, Marinette, Wisconsin, appearing on behalf of the District.

**ARBITRATION AWARD**

At the joint request of the parties, the Wisconsin Employment Relations Commission (WERC) designated the undersigned Marshall L. Gratz as arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' July 1, 2001--June 30, 2003 Collaborative Professional Agreement (Agreement).

The undersigned Arbitrator heard the dispute on June 10, 2005, at District office in Marinette, Wisconsin. Following distribution of the hearing transcript, The parties summed up their positions in writing. Briefing was completed on November 1, 2005, marking the close of the hearing.

**ISSUES**

At the hearing, the parties agreed to authorize the undersigned Arbitrator to decide the following issues:

1. Did the District violate the Agreement when it assigned the Grievant to a full-time study hall supervisor position in August of 2004?

2. If so, what shall the remedy be? (The parties stipulated that the Association is not requesting a retroactive remedy. [Tr.II, 4])

### PORTIONS OF THE AGREEMENT

#### ARTICLE III Board Functions (Management Rights)

A. The Board of Education, on its own behalf, hereby retains and reserves onto itself, without limitation, all powers, rights authority, duties and responsibilities conferred upon and vested in it by applicable law, rules and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:

1. To the executive management and administrative control of the school system and its properties and facilities, and the activities of its employees;

2. To employ and reemploy all personnel and subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or the[ir] dismissal or demotion, their promotion and their work assignment;

3. To establish and supervise the program of instruction and to make the necessary assignments for all programs of an extra-curricular nature that, in the opinion of the Board, benefit students;

4. To determine means and methods of instruction, selection of textbooks and other teaching materials, the use of teaching aids, class schedules, hours of instruction, length of school year, and terms and conditions of employment;

5. The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes; Section 111.70, and then only to the extent such specific and express terms thereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States. The Board recognizes that items in this management rights article are subject to negotiation providing said items do not conflict with this agreement and the laws of the State of Wisconsin.

...

ARTICLE VI Transfers

A. Voluntary . . . .

B. Involuntary. No vacancy shall be filled by means of involuntary transfer or reassignment if there is a qualified volunteer in the system available to fill the said position.

1. Written notice of the involuntary transfer or reassignment shall be given to the teachers as soon as practicable and except in cases of emergency not later than May 4th.

2. At least five (5) school days prior to the finalizing of the teacher's involuntary transfer, a conference will be held with the teacher by his/her immediate supervisor, at which time a discussion of the intended transfer and the reasons in writing for the intended transfer will be provided by the supervisor.

. . .

ARTICLE VII Grievance Procedure

A. A grievance shall be defined as any problem involving a teacher's wages, hours or conditions of employment or the interpretation, meaning or applications of the provision of this agreement or Board policies dealing with wages, hours or conditions of employment. . . .

Whenever a grievance shall arise, the following procedure shall be followed:

. . .

5. The Association may within thirty (30) days of receipt of the board's decision submit the grievance to binding arbitration. The Wisconsin Employment Relations Commission shall appoint a commissioner or member of its staff to act as arbitrator.

. . .

ARTICLE VIII Teacher Evaluation, Fair Dismissal and Layoff

A. The Board and the Association recognize the importance and value of evaluating the process and success of both newly employed and experienced personnel. The Board and the Association agree that evaluation has as its purpose the improvement of the school program by assisting each teacher to improve his/her professional competencies. The Board shall evaluate teachers

to assess job performance. Formal monitoring or observation of work performance of a teacher will be conducted openly and with the full knowledge of the teacher. Informal evaluations, referring to all observations noted and recorded in the normal course of day to day supervision may still take place and may be entered into the personal file. If entered into the personal file the teacher shall be given a copy of such within five (5) working days of observation. Personal file herein mentioned will refer to the one personal file maintained in the central district office.

B. The following procedure will be used in the formal evaluation of teachers:

1. During the early part of the school year, the administration will supply all teachers with copies of the school district's evaluative instruments. Any proposed changes in the evaluative instrument shall be brought to the attention of the Association prior to adoption by the Board.

2. Teachers with less than three (3) years' experience in the district will be observed at least three (3) times each school year by their principal, supervisor or other professional certified administrator. Experienced teachers shall be observed as determined by the administrative team, but not less than one evaluation every three years.

3. Assistance shall be provided to teachers upon recognition of "professional difficulties". The assistance shall begin within five (5) working days following the "recognition" day. For the purpose of this article, professional difficulties shall apply to deficiencies observed in classroom management, instructional skills, pupil evaluative skills, and/or professional preparation, and to deficiencies on matter contained within the schools's [sic] evaluative instrument.

4. The teacher shall acknowledge that he/she has read all evaluations and other materials to be placed in his/her personal file by affixing his/her signature to the file copy. Such signature does not necessarily indicate agreement with contents of such material. The teacher may write a rebuttal statement to be included in the personal file.

5. If a teacher is dissatisfied with the evaluation, he/she may request an evaluation by another administrator mutually agreed upon by the teacher and the superintendent.

C. Teachers will have the right to review the contents of their personnel file and to receive a copy of any documents contained therein. A teacher will be entitled to have an Association representative present during such review. The

Board may protect the confidentiality of personal references, academic credentials and other similar documents received prior to the teacher's initial employment.

D. If a teacher indicates that any materials in the personal file are obsolete or inappropriate, the superintendent will review said documents and if he/she agrees, they will be destroyed. All obsolete materials such as personal references or documents relating to prior employment, will be removed from the file and destroyed. Any disagreement over the obsolescence or inappropriateness of documents shall be subject to the grievance procedure beginning at step 2. All documents that fall under state statute language relative to public documents are subject to the seven (7) year limitation. All other written materials shall be exempt from the seven (7) year limitation.

E. Any complaints regarding a teacher that are made to the administration by any parent, student or other person, shall be in writing and signed by the complainant and a copy given to the teacher as soon as possible. The teacher shall have the right to answer any signed complaints and the answer shall be reviewed by an appropriate member of the administration and attached to the file copy.

F. A teacher is a professional who should be judged by equally professionally trained personnel to determine competence as a staff member. Because contract non-renewal is a serious matter, an orderly procedure must be followed to assure due process to each individual. The following steps (1, 2, 3) are to be followed for nonprobationary teachers.

1. When the administration determines that a member under its supervision is not performing in an effective manner, it should refer said teacher to the supervisor or principal, as the case applies.

2. The administration should counsel said teacher, giving suggestions to help implement corrective action. If, after a reasonable time stipulated by the administration, there is no improvement, the case is referred to the superintendent.

3. After a review of the case, the superintendent makes a judgment. If convinced of the professional difficulties of the teacher, he/she must notify the teacher in writing by the last day of February of the non-renewal of contract, stating reasons for such action in writing. If requested in writing, the teacher shall receive a private conference within five (5) days of this notice.

4. No non-probationary teacher shall be non-renewed, disciplined or dismissed without just and reasonable cause. Each teacher entering this school system for the first two (2) years of service shall be considered a probationary teacher. The probationary teacher prior to dismissal, or non-renewal, shall be provided the right to supervisory counsel and suggestions with the appropriate time for correction on his/her part. No probationary teacher shall be disciplined, dismissed or non-renewed capriciously or arbitrarily.

5. A teacher who is notified that he/she is to be laid off will have the right to displace any less senior teacher system wide whose work he/she is certified to perform. Certified shall mean that the teacher has the necessary certificate or can provide evidence by June 30 that the necessary certificate can be acquired by the beginning of the ensuing school year. No teacher may be prevented from securing other employment during the period he/she is laid off under this subsection. Such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies. Such reinstatement shall not result in a loss of credit for previous years of experience. No new appointments may be made while there are laid off teachers available who are qualified to fill the vacancies. It will be the teacher's responsibility to notify the superintendent in writing by March 1st each year of his/her availability for reinstatement. Recall rights will be limited to three (3) years.

6. The School Board may lay off the necessary number of teachers within respective areas of certification only in inverse order of the appointment of such teachers. Notification of layoff shall be in writing by April 30.

...

### **BACKGROUND**

Among the District's responsibilities is the operation of a K-12 public school system serving the Marinette, Wisconsin area. At various material times, Nancy Hipskind has been the District's Superintendent, and James Morrison has been the District's attorney.

At all material times, the Association has been the exclusive collective bargaining representative of the District's teachers bargaining unit consisting of all certified personnel, excluding supervisory, managerial or confidential employees. At all material times, James Blank has been the Association's business representative, and Stephen Pieroni has been the Association's attorney.

The Grievant in this case, for whose name either Grievant or JN is substituted throughout this award, began employment with the District in September of 1991. From that time until the District issued her an order of termination on April 14, 2004, JN was employed

as a teacher of emotionally disturbed (ED) pupils at the elementary level. At all material times, JN has been certified (i.e., licensed by the Wisconsin Department of Public Instruction) to teach emotional behavioral disability pupils in grades pre-kindergarten through grade 9.

The District's Board of Education issued its April 14, 2004, notice of termination to JN following a hearing before the Board over several evenings, generating some 1100 transcript pages. A grievance asserting that the termination violated the Agreement was filed and processed through the Agreement grievance procedure. At the binding arbitration step of the procedure, the parties submitted to WERC staff arbitrator Peter Davis the following issues:

Whether the School District of Marinette had just cause for the termination of JN from her employment as a teacher in the Marinette School District and, if not, what the appropriate remedy would be?

Following a hearing and the submission of written arguments, Davis issued his award in the matter on August 23, 2004. The concluding paragraph of the award read as follows:

In summary, of the allegations upon which I have concluded the discharge can appropriately be based, I have found the record evidence substantiates the allegations of holding JC by the hair, provoking JC, and using obscenities. By the slimmest of margins, based in large part on JN's length of service and prior good record, I conclude that this serious misconduct does not establish just cause for JN's discharge. However, given the severity of the misconduct, JN's reinstatement is without back pay. Should JN engage in any such misconduct again, her immediate discharge will be contractually appropriate.

Following the parties' receipt of the award, the District notified JN that it was assigning her to work at the High School supervising five periods of study hall. JN reported as directed and -- except for several absences -- performed high school study hall duties on a full-time basis from the beginning of the 2004-05 school year through October 8, 2004, when she ceased working and began a medical leave. As of the June 10, 2005, date of the arbitration hearing in this matter, JN remained on medical leave and had not been medically released to return to work.

On September 3, 2004, the grievance giving rise to the instant arbitration was filed by JN and the Association asserting that "[JN's] involuntary assignment as a full-time study hall teacher at the High School . . . violated . . . [Agreement] Article VI B. Involuntary Transfers and Article VIII F. 4 - Discipline Without Just and Reasonable Cause. In regard to the latter . . . this assignment is a demotion and constitutes discipline for conduct that has been previously adjudicated." By way of remedy, the grievance requested "an assignment of JN to an ED classroom teaching position within her area of certification." The grievance also stated

that JN and the Association "will also be filing a prohibited practice complaint with the WERC, alleging a violation of 111.70(3)(a)5 Stats., (failure to accept the terms of an arbitration award)."

The District denied the September 3, 2004, grievance at all pre-arbitral steps, and the grievance was submitted to arbitration as noted above. The District's position in response to the September 3, 2004, grievance is outlined in a September 7, 2004, letter from Morrison to Pieroni. That letter reads in pertinent part, as follows:

. . .

Thank you for your letter of September 3, 2004. I will forward your grievance to Dave Johnson who will process it in a normal course as he would any other grievance.

By way of informal response, it is the position of the District that JN's assignment is neither a demotion nor discipline. The School District has a responsibility to assign teachers to positions for which they are qualified and in so doing must consider all relevant information to consider that qualification. While the arbitrator ignored all of the testimony of the hearings, the School District cannot because we have every reason to believe that that testimony is credible. Therefore in making an assignment, the District must believe that that information is true.

In addition and entirely separately and completely sufficiently, the arbitrator's finding that JN abused JC in the fashions that he found she did and that she was being returned to her job after two (2) years without pay and "by the slimmest of margins" demonstrates that the arbitrator recognized that her conduct with respect to at least that student was seriously wrong. The District cannot place JN in a position where she has the opportunity to abuse other students as the arbitrator found she abused JC.

JN is currently in her position because it is a position for which she is qualified and for which, considering all of the circumstances, poses the least risk to students. It is the position of the administration that JN was not involuntarily transferred but was assigned to a position for which she was qualified. It is the position of the District that she is not currently qualified by reason of her conduct for a position teaching elementary emotionally disturbed students. That is an area in which she has certification. My understanding is that she does not have broad certification but the District was able to accommodate her employment in a meaningful teaching position. There is, parenthetically, no guarantee that that will be the case in the future, and JN would be well-advised to broaden her certifications, as indeed are virtually all other teachers who are working in an industry where we are facing declining enrollment and staff cutbacks.

. . .



On January 14, 2005, JN and the Association filed with the WERC a prohibited practice complaint against the District, alleging, in pertinent part, as follows:

Upon receipt of Arbitrator Davis' Award, [the District], through its Superintendent, refused to return JN to her former position as a teacher of elementary emotionally disturbed pupils. Instead, respondent directed JN to supervise a study hall at the High School on a full-time basis. Said full-time study hall monitor position had not previously existed in the certified personnel bargaining unit. Said assignment was not sanctioned by Arbitrator Davis' Award and it had the effect of reducing JN's career prospects by preventing her from using her substantial skills and experience such that her skills are likely to atrophy and her career is likely to be stunted. Said assignment has the tendency to interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed by Section 111.70(2), Wis. Stats in violation of Section 111.70(3)(a)1, Sis. Stats. Further, said assignment discourages membership in the Marinette Education Association by discriminating against JN in terms or conditions of employment in violation of Section 111.70(3)(a)2, Wis. Stats. [The Association and JN later amended that statutory reference to 111.70(3)(a)3, Stats.] . . .

[The District's] conduct described . . . above, constitutes a refusal to accept the terms of Arbitrator Davis' Award in which he reinstated JN. The assignment of JN to be a full-time High School study hall monitor is inconsistent with Arbitrator Davis' order of reinstatement and violates Section 111.70(3)(a)5, Wis. Stats.

The relief requested in the complaint is entirely prospective, including, among other things, "that [the District] be ordered to reinstate JN as a teacher of emotionally disturbed pupils consistent with her licenses. . . ."

By joint request of the parties, the WERC designated the undersigned Marshall L. Gratz as both the examiner in that prohibited practice complaint case and as the arbitrator in the instant grievance dispute.

By letter dated January 25, 2005, to Davis in his capacity as WERC General Counsel, Morrison responded to the complaint, in pertinent part, as follows:

I have a copy of the Prohibited Practice Complaint which Steve Pieroni has forwarded to you with respect to the above matter. I believe you are quite familiar with this matter because you made the Decision which is at the writ of this Prohibited Practice Complaint. The School District obviously admits that you made a Decision but denies that it has failed to follow that Decision in any

respect. In fact the Decision that you made, by its terms, expressly excluded the vast majority of the evidence against JN because, as I understand it, you held that members of the administration had that information and did not act upon it in a timely fashion. Nevertheless, you found the conduct of JN to be so seriously problematic that you sustained her suspension for two years and warned in your Decision that any further misconduct on her part would be grounds for immediate dismissal. You did not order that JN be specifically returned to the teaching of emotionally disturbed students. You ordered that she be reinstated to a School District position.

The School District has, under the Collective Bargaining Agreement, the right to assign teachers to teaching positions. A study hall position is a teaching position. It is an appropriate assignment for JN given all of the circumstances in this case. Among other things, your Decision was issued several days into the school year so it would have been impossible to return JN to the same assignment even if the School District believed that was appropriate because there was already a teacher in that position. The School District does not believe that it is appropriate to return JN to a position where you have found she seriously abused students and where there is overwhelming evidence as reflected in the transcript that she serially abused students physically, psychologically and verbally. The School District's primary responsibility, of course, is to the safety and protection of students.

The School District acted in good faith in returning JN to a teaching position balancing its responsibilities under its contract with the teaching staff, which gave you the power to make the award which you did on the one hand, and its primary responsibility to the protection of students. Clearly the School District would have been justified in making such an assignment on far less evidence of misconduct or unsuitability on the part of JN so the District rejects entirely the Prohibited Practice Complaint which has been filed. The study hall position to which JN was assigned did not result in any reduction of pay or benefits. Mr. Pieroni complains that it had the effect of reducing her career prospects by preventing her from using her substantial skills and experience. It is the position of the School District that she demonstrated conclusively that she does not have the skills or experience which is appropriate to handling emotionally disturbed students. You did not find to the contrary. You found that the evidence sustained that she had abused students and you did not find that the other evidence was incredible. Rather, you found that you were simply not going to consider it because you believed that School District management had that information and did not act properly upon it. In effect, you applied something of an "exclusionary rule" to such evidence. Presumably that was an appropriate approach for you to take, however that does not make the evidence that was adduced at a six (6) day hearing non-existent. It does not make the conduct which occurred irrelevant to the considerations of JN's future prospects.

It is simply wrong to state that a School District cannot, in the exercise of its discretion under a Collective Bargaining Agreement, consider a teacher's prior conduct in determining an appropriate assignment. The School District can and indeed must consider relevant information to determine where a teacher is most appropriately placed to meet the needs of students. If JN desires to improve her prospects for education, she can obtain additional education or experience, but the School District of Marinette does not intend to return her to a position teaching emotionally disturbed elementary school students given the record of her past history with them. This is not a refusal to implement your award, nor is it a refusal to rehire JN. She has been hired to a real teaching position requiring real teaching skills for which she is paid a real teacher's salary. It is not her assignment of choice but her conduct has indicated that her assignment of choice is not in the best interest of the school children. That is regrettably the fact but nevertheless the fact. Obviously this is a matter that will now have to be considered by Mr. Gratz. Because Mr. Gratz is also hearing a grievance on this matter, Mr. Pieroni and I agree that Mr. Gratz should hear this matter as well. I appreciate your assistance in making this information available to him and making the appropriate assignment so that we can proceed the most expeditious way in this difficult matter. Thank you.

During the course of communications concerning hearing scheduling, at the suggestion of the undersigned Arbitrator, the parties agreed to seek clarification of the award by Arbitrator Davis. By e-mail dated February 4, 2005, Pieroni wrote Davis and the undersigned Arbitrator as follows:

This letter is to advise that the parties have elected to ask Mr. Davis to clarify his award with regard to the reinstatement issue. We ask that Mr. Gratz retain jurisdiction of the complaint and grievance until we have received clarification from Mr. Davis. At that point we will determine what issues, if any, need to be resolved by Mr. Gratz.

Mr. Morrison and I agree that Mr. Davis may refer to the Complaint and Mr. Morrison's response dated Jan. 25, 2005 for the context of the issue regarding reinstatement of the grievant.

Basically, the parties wish to know what Mr. Davis' Award intended regarding reinstatement of the grievant. If Mr. Davis wishes further information from the parties, please let us know.

By e-mail dated March 25, 2005, Davis wrote Pieroni, Morrison and Blank as follows:

SUBJECT: RE: Marinette School District

My award required reinstatement of JN to her former position. My award did not preclude the District from exercising any contractual right to involuntarily transfer JN to another position or any contractual right to monitor/supervise her classroom performance.

Peter Davis  
Arbitrator

By an exchange of letters to the undersigned Arbitrator (dated March 29, 2005, from Morrison and April 7, 2005, from Pieroni), the District, contrary to the Association and JN, asserted that the grievance and complaint were rendered moot by Arbitrator Davis' March 25, 2005 clarification, by the fact that JN had lost no pay or benefits, and by the fact that JN remained on a medical leave that began in October of 2004, such that she is unavailable to accept any assignment. By e-mail dated April 7, 2005, the undersigned Arbitrator denied the District's March 29, 2005, requests for dismissal.

Hearings on both the complaint and the grievance were conducted sequentially on June 10, 2005. After the complaint hearing was concluded, the parties agreed on the issues for determination in this matter and that the record and arguments in the complaint case would constitute the record and arguments in the grievance case, as well.

As of the June 10, 2005, hearing in the instant matter, JN remained on a medical leave from her employment with the District, and she had not been medically released to return to work.

Additional factual background is noted in the summaries of the parties' positions and in the discussion, below.

### **POSITIONS OF THE PARTIES**

In its post-hearing arguments, the Association asserts that the Davis award, as initially issued, and as clarified, required the District to offer JN reinstatement to her former position as a teacher of elementary emotionally disturbed pupils; that the record does not establish that it would have been impossible for the District to have complied with that requirement; that Agreement Art. VI.B. conditions the District's right to involuntarily transfer or reassign JN to a High School study hall position on, among other things, first seeking volunteers for the position, which the District did not do; that the High School study hall duties the District assigned to JN on a full-time basis do not require a certified teacher, are often assigned to

non-certified personnel, and have never before been assigned on a full-time basis to a teacher bargaining unit employee on a full-time basis. Assigning JN such an unprecedented, skill-atrophying and career stunting assignment constitutes a disciplinary demotion without just and reasonable cause violative of Agreement Art. VIII.F.4. The Association requests an order requiring the District to offer to reinstate JN as a teacher of emotionally disturbed pupils consistent with her certification when she is medically released to return to work.

In its post hearing-arguments, the District asserts that it has complied with the requirements of the Davis award as initially issued, and as clarified, in that it reinstated JN to her former position as a teacher, at her former salary and benefits levels; that it exercised its Agreement Art. III rights to assign by assigning her High School study hall duties that are routinely performed by both teacher bargaining unit personnel and others, and which do not require DPI certification so that they are not inconsistent with JN's limited licensure. The District asserts that its actions are not disciplinary in nature and not a demotion, since JN continues to receive salary and benefits at her former levels. The District further asserts that the evidence presented to Arbitrator Davis concerning JN's misconduct -- both that which was considered by Davis, and that which was not -- justifies the District's determinations that JN is not qualified to teach emotionally disturbed pupils and that it is not appropriate to expose emotionally disturbed pupils to the risk of further abuse by JN. The District requests that the grievance be denied in all respects.

### DISCUSSION

The undersigned Arbitrator has concluded that, read in the context of the parties' correspondence requesting award clarification, Arbitrator Davis' reference to "her former position" in his March 25, 2005, clarification meant JN's former position as teacher of emotionally disturbed pupils, not JN's former position as a teacher.

In their correspondence requesting that Arbitrator Davis clarify his award, the parties asked "what Mr. Davis' Award intended regarding reinstatement of the grievant," and they "agreed that Mr. Davis may refer to the Complaint and Mr. Morrison's response dated Jan. 25, 2005 for the context of the issue regarding reinstatement of the grievant."

In the Complaint, the Association and JN alleged that the District had improperly "refused to return JN to her former position as a teacher of elementary emotionally disturbed pupils [and] [i]nstead . . . directed JN to supervise a study hall at the High School on a full-time basis. . . ." (emphasis added). In its January 25, 2005 response, the District wrote to Davis, "[Y]ou did not order that JN be specifically returned to the teaching of emotionally disturbed students. You ordered that she be reinstated to a School District position."

Arbitrator Davis' award clarification read as follows: "My award required reinstatement of JN to her former position. My award did not preclude the District from exercising any contractual right to involuntarily transfer JN to another position or any contractual right to monitor/supervise her classroom performance." (emphasis added).

While Davis' clarification, like his initial award in the matter, did not use the phrase "teacher of emotionally disturbed students," the undersigned Arbitrator is nonetheless persuaded that Davis' clarification used "her former position" as shorthand for "her former position as a teacher of emotionally disturbed pupils." Had Davis intended, as the District argued in its January 25, 2005 response, "that she be reinstated to a School District position," he would have utilized more generic terminology than a reference to JN's "former position," and he would have had no reason to add the statement that "[m]y award did not preclude the District from exercising any contractual right to involuntarily transfer JN to another position."

The undersigned Arbitrator has therefore concluded that, read in the context of correspondence requesting award clarification, Arbitrator Davis' reference in his March 25, 2005, clarification to "her former position" meant JN's former position as a teacher of emotionally disturbed pupils, not JN's former position as a teacher. The undersigned Arbitrator therefore rejects the District's contention that it reinstated JN "to her former position" within the meaning of the Davis award, as clarified.

The District also contends that, in the circumstances of this case, it acted within its contractual rights because (1) the evidence presented at the Board and Davis arbitration hearings demonstrated that JN was not qualified to teach emotionally disturbed pupils because she "failed to use any identifiable methodology that would be appropriate for that group of children at that age group"; (2) the serious misconduct found by Arbitrator Davis demonstrated that JN could not safely be returned to a position teaching emotionally disturbed pupils; and (3) the issuance of the Davis award at the beginning of the school year, when all of the District's ED teacher positions were already assigned to other members of the bargaining unit, made it impossible to reinstate JN to one of those positions at that time.

While the undersigned Arbitrator is persuaded that the District's assignment of JN to the High School study hall position was a good faith response to the District's belief regarding JN's qualifications and fitness to safely teach emotionally disturbed pupils, the Agreement does not permit the District to countermand the requirements of the Davis award as the District has done in this case.

Notably, the deficiencies in JN's teaching methodology cited by the District at the June 10, 2005, hearing in this case were not the focus of the April 14, 2004, termination notice or therefore of the Board and Davis arbitration hearings, and were not subjected to the detailed procedures set forth in Art. VIII for identifying and remedying "professional difficulties." In those circumstances, it is inconsistent with the Agreement and the Davis award for the District to have reassigned JN from ED teacher to full-time high school as it did in this case, on the basis of alleged deficiencies in JN's teaching methodology.

Regarding student safety concerns, the District has available to it various means by which to observe and monitor JN's interactions with emotionally disturbed pupils for the purpose of protecting the safety of those pupils from abuse. The fact, that JN committed the

serious misconduct found by Arbitrator Davis despite previous District investigatory efforts and despite the presence of adult education assistants, does not persuasively establish that the District, in the context of Arbitrator Davis' stern warning about the consequences of any recurrence of JN's misconduct and with a now attentive and responsive administration, cannot assure the safety of emotionally disturbed pupils in a class taught by JN.

While the timing of the Davis award coupled with the non-existence of an ED teacher vacancy and the procedural conditions precedent to layoff and involuntary transfer in Agreement Arts. VIII.F.5-6 and VI.B. undoubtedly made it more complicated, time-consuming and perhaps expensive for the District to comply with the Davis award, the District took no steps toward eventually reinstating JN to an ED position. While the timing and circumstances at the beginning of the school year might well have justified a District decision not to reinstate the Grievant to an ED teaching position immediately, the District's actions were in no way temporary or destined to achieve compliance with the Davis award once the complications and delays that the timing of the award created were overcome. Furthermore, when an arbitrator reinstates a discharged employee it often creates an inconvenience for the employer and sometimes causes another employee to be displaced. Upholding the terms of the agreement ordinarily takes precedence over such other considerations. For those reasons, the undersigned Arbitrator rejects the District's contention that the timing of the award and the non-existence of an ED teacher vacancy gave the District the right to assign JN indefinitely to a full-time high school study hall position as it did.

The undersigned Arbitrator therefore concludes that, notwithstanding the District's good faith bases for preferring that JN not be reinstated to teach emotionally disturbed pupils, the District's general Art. III right to assign employees is superseded by the specific provision in Art. VII.A.5. making grievance awards "binding."

However, as noted, Arbitrator Davis' expressly stated that "[m]y award did not preclude the District from exercising any contractual right to involuntarily transfer JN to another position." That presents the question of whether the District's assignment of JN to a full-time High School study hall position was a valid exercise of the District's involuntary transfer rights.

Article VI.B. constitutes a limitation on the District's general Art. III.2. right to determine a teacher unit employees' work assignment. In its first sentence, it prohibits the filling of a vacancy "by means of involuntary transfer or reassignment if there is a qualified volunteer available to fill the said position." That requirement, unlike the notice requirement in VI.B.1, makes no express provision for any exceptions to its applicability. It is undisputed that the District did not seek volunteers for the High School study hall position to which it assigned JN in the fall of 2004. While the proximity of the initial issuance of the Davis award to the beginning of the 2004-05 school year would have complicated the process of seeking volunteers, those difficulties were not sufficient to entirely relieve the District of its contractual obligation to seek volunteers before permanently and involuntarily reassigning JN to the High School study hall position from the ED teacher position to which Arbitrator Davis had ordered JN reinstated.

For the foregoing reasons, the undersigned Arbitrator has concluded that by assigning JN to a full-time High School study hall position in the fall of 2004, rather than to her former position as a teacher of emotionally disturbed pupils, the District violated: the Davis award, as initially issued and as clarified; the portion of Art. VII A.5. providing that grievance arbitration awards are "binding"; and the involuntary transfer provisions of Art. VI.B.

By way of remedy for the Agreement violations noted above, the undersigned Arbitrator has ordered the Employer to conditionally reinstate JN to a full-time position as a teacher of emotionally disturbed pupils in some or all of the grades for which JN is certified, pre-kindergarten-9. However, in recognition of the fact that JN had not been medically cleared by her health care provider(s) to return to work as of the date of the complaint hearing in this matter, the undersigned Arbitrator has allowed the District to condition its offer of reinstatement on JN's being medically cleared by her health care provider(s) to return to work, and on her being so cleared before the point in time, if any, at which the Agreement would authorize the District to terminate JN's rights to return to work on account of the length of her absence on medical leave.

Because the ISSUES submitted are fully resolved based on the foregoing considerations, the undersigned Arbitrator does not find it necessary to address the Association's additional contention that the study hall assignment in this case also constituted disciplinary action violative of Art. VIII.F.4.

### **DECISION AND AWARD**

For the foregoing reasons, and based on the record as a whole, it is the decision and award of the undersigned Arbitrator on the ISSUES noted above that

1. The District did violate the Agreement, and specifically Art. VI B. regarding involuntary transfers and Art. VII A.5. providing that grievance arbitration awards are "binding," when it assigned the Grievant to a full-time study hall supervisor position in August of 2004.
2. The remedy for the Agreement violations noted above shall be as follows. The District, its officers and agents, shall immediately conditionally offer to reinstate JN to full-time employment as a teacher of emotionally disturbed pupils in some or all grades pre-kindergarten through nine (PK-9), when and if she is medically cleared to return to work by her health care provider(s) before her rights to continued District employment are terminated in a manner consistent with the Agreement on account of the length of her absence on medical leave.

Dated at Shorewood, Wisconsin this 28<sup>th</sup> day of December, 2005.

Marshall L. Gratz /s/  
\_\_\_\_\_  
Marshall L. Gratz, Arbitrator



