BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEW LISBON SCHOOL DISTRICT

and

NEW LISBON EDUCATION ASSOCIATION

Case 39
No. 66385
MA-13501

(Gibson Grievance)

Appearances:

Scott R. Mikesh, Attorney, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, Wisconsin, 53703, on behalf of the New Lisbon School District.

Gerald Roethel, Executive Director, Coulee Region United Educators, 2020 Caroline Street, La Crosse, Wisconsin, 54603, on behalf of the New Lisbon Education Association.

ARBITRATION AWARD

The District and the Association are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. On October 9, 2006 the Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission on behalf of Rhea Gibson, herein Gibson or the Grievant, alleging a grievance for "failure to transfer a teacher to an opening". From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held in the matter on March 27, 2007 in New Lisbon, Wisconsin. No transcript was prepared. The parties filed written briefs and arguments thereafter and the record was closed on May 15, 2007.

ISSUES

The parties did not stipulate to a statement of the issues. The Association states the issues as:

> Did the School District of New Lisbon violate Article VIII – Assignments and Transfers when it failed to transfer Rhea Gibson to the open seventh and eighth grade social studies position? If so, what shall the remedy be?

The District states the issues as:

Did the School District of New Lisbon violate Article VIII – Assignments and Transfers when it transferred Joshua Board to the open seventh and eighth grade social studies position? If so, what is the appropriate remedy?

The parties' statements of the issues are essentially the same. The District's statements are selected to determine if the District's actions were a violation of the labor agreement.

RELEVANT CONTRACT PROVISIONS

ARTICLE II
BOARD FUNCTIONS

A. It is recognized that the Board has and will continue to retain the rights and responsibilities to operate and manage the school system and its programs, facilities, properties and activities of its employees.

B. Without limiting the generality of the foregoing (Paragraph A), it is expressly recognized that the Board's operational and managerial responsibility includes:

1. The right to determine the location of the schools and other facilities of the school system, including the right to establish new facilities and to relocate or close old facilities.

2. The determination of the financial policies of the District, including the general accounting procedures, inventory of supplies and equipment procedures and public relations.

3. The determination of the management, supervisory and administrative organization of each school or facility in the system and the selection of employees for promotion to supervisory, management or administrative positions.

4. The maintenance of discipline and control and use of the school system property and facilities.

5. The determination of safety, health, and property protection measures where legal responsibility of the Board or other governmental unit is involved.

6. The right to enforce the reasonable rules and regulations now in effect and to establish new rules and regulations from time to time not in conflict with this Agreement.

7. The direction and arrangement of all working forces in the system, including the right to hire.

8. The right to relieve employees from duty on recommendation from the administrative staff for poor or unacceptable work or for other legitimate reasons.

9. The creation, combination, modification, or elimination of any teaching position deemed advisable to the Board.

10. The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards and judgment of employee performance.

11. The determination of the layout and the equipment to be used and the right to plan, direct, and control school activities. The determination of the processes, techniques, methods and means of teaching and the subjects to be taught.

Nothing in this Agreement shall limit in any way the District's contracting or subcontracting of work or shall require the District to continue in existence any of its present programs in its present form and/or location on any other basis.

C. The foregoing enumerations of the functions of the Board shall not be considered to exclude other functions of the Board not specifically set forth; the Board retaining all functions and rights to act not specifically nullified by this Agreement.

. . .

ARTICLE VIII
ASSIGNMENTS AND TRANSFERS

. . .

B. When making transfers, the Board, where practical, shall take the training, experience, specific achievements, service to the District, wishes and convenience of the teacher into consideration. However, it is understood that the instructional requirements and best interests of the school system and the pupils are of primary importance. The Superintendent and/or his/her designee will meet with a bargaining unit member to discuss the reasons why the bargaining unit member was not selected.

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ARTICLE IX
STAFF REDUCTION

Section I

If a teaching position or program is to be eliminated or reduced for reasons other than the performance or conduct of the teacher, the Administration will follow the provisions set forth in this Article.

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Section III

In implementing a staff reduction, the following steps will be utilized:

Step 1. Attrition of teachers will be taken into consideration before a layoff occurs.

Step 2. Temporary or part-time teachers will be laid off before full-time teachers where administratively feasible.

Step 3. The following point system for the purposes of determining teacher order of layoff or staff reduction will be used. When a position is to be eliminated or reduced, the teacher with the least number of points in the program or department affected shall be laid off or reduced. However, if the teacher to be laid off or reduced is certifiable in another area or subject and has more points than someone in that area or department, then that teacher would be transferred to that area and the teacher with the least points in the affected area or department would be designated for layoff with the same potential for transfer as above.

Point System Criteria and Allocation

a. Length of continuous teaching service n the District: forty (40) points for each year and twenty (20) points for each half year. Part-time teachers' experience points will be figured upon the teacher's percentage of employment.

b. Academic training: BS or BA = 100 points; BA+20 = 150 points; BA+30 = 175 points; BA+40 = 200 points; MS or MA = 225 points; MS+15 = 250 points; MS+30 = 275 points.

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ARTICLE XIX
GRIEVANCE PROCEDURE

Definition – For the purpose of this Agreement, a grievance is defined as a difference of opinion regarding the interpretation or application of this Agreement.

Grievance Processing Procedure: Grievances shall be processed in accordance with the following procedure.

Step 1. Within seven (7) calendar days after the occurrence of the incident on which the complaint is based or first becomes known to the grievant, an earnest effort shall be first made to settle the matter informally between the employee and his/her immediate supervisor.

Step 2. If not settled in Step 1, the immediate supervisor shall give his/her written answer within seven (7) calendar days of the time the grievance was presented to him/her in writing. The written grievance shall include the facts upon which the grievance is based, the issues involved, the articles alleged to be violated and the relief sought. The grievance shall be signed and dated by the grievant.

Step 3. If not settled in Step 2, the grievance may within seven (7) calendar days be appealed, in writing, to the Superintendent. The Superintendent shall give a written answer no later than fourteen (14) calendar days after receipt of the appeal.

Step 4. If not settled in Step 3, the grievance may within fourteen (14) calendar days be appealed, in writing to the Board of Education. The Board shall give a written answer within thirty (30) days after receipt of the appeal. The grievant or his representative may present evidence and argument to the Board at the grievance hearing.

Step 5. If not settled in Step 4, Binding Arbitration. In order to process a grievance to binding arbitration, the following must be complied with:

Written notice of such a request for arbitration shall be given to the Board within fourteen (14) calendar days of the receipt of the Board's last answer.

The matter must have been processed through the grievance procedure within the prescribed time limits, or the arbitrator shall have no power or authority with regard to that particular grievance.

> Grievances involving the same act or same issue may be consolidated into one (1) proceeding, providing the grievances have been processed through the grievance procedure by the time arbitration is requested.
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> Within fourteen (14) school days after such written notice of submission to arbitration, the Board and the Professional Rights and Responsibilities committee will jointly file a written request with the Wisconsin Employment Relations Commission (WERC) to provide a panel of five (5) potential arbitrators from the WERC's staff. The panel of potential arbitrators shall be reduced to one (1) by the process of alternate striking of names by both parties until one (1) arbitrator remains. This person shall act as the sole arbitrator in resolving the grievance. The grievant will strike first. If the WERC will not provide a panel of five (5) potential arbitrators from its staff, the WERC will be requested to appoint an arbitrator to determine the matter. No grievance may be submitted to arbitration without the consent of the Association. The arbitrator shall meet with the representatives of both parties, hear evidence, and give a decision which will be final and binding on both parties within thirty (30) days of the close of the hearing.
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> In the event that there is a charge for the services of an arbitrator, including per diem expenses, if any, and/or actual and necessary travel and subsistence expenses, or for a transcript of the proceedings, the parties shall share the expenses equally.

BACKGROUND AND FACTS

The New Lisbon School District had a one year opening for the 2006-2007 school year to teach 7th and 8th grade social studies due to a leave of absence. At the time of the hearing herein it was not determined if the position would remain open after the current school year. If the position remains open the District expects to post for it internally. This is a subject specific position with five class sessions and a study hall/skills type session each day. Much of the curriculum has to do with American history. On July 12, 2005 the District posted the position to internal staff. Two District teachers applied for the one year position.[1] They were Rhea Gibson and Joshua Board.

[1] A third teacher withdrew from the process before interviewing.

Grievant and Board were interviewed for the position by Linda Hanson, who is the Junior High School and High School Principal. She had approximately 29 years of teaching and administrative experience in the New Lisbon and Deerfield School Districts. Hanson regularly performs hiring or transfer interviews and makes hiring and transfer recommendations for the District, using a team for interviews if outside candidates are involved. Among other things, she discussed certifications, experience, the curriculum and what each would like to do with the position, pointing out it was a one year position. She had concluded that both had sufficient certification to fill the position. In the past the District has transferred teachers between grades and curriculums with those teachers having varied experiences in those areas, as well as considered new hires under similarly varied circumstances.

Grievant was a 3rd grade teacher and in her 23rd year of teaching in the District. This included 12 years in Title 1 reading with a year of that instructing 7th grade students, and 11 years teaching 3rd grade. She held a 1-8 regular education license, a 316 reading teacher license for preK-12 and a 1st through 8th grade psychology license. She has taught summer classes including elementary reading and high school JTPA school-to-work or at risk student classes teaching basic skills. She holds a Masters in elementary education and has 30 + additional credits beyond that. She has had course work, both undergraduate and graduate, in the area of social studies which may bring her close to having a minor in social studies or obtaining a social studies certification from DPI. She has received ECRI training for reading and classroom management, Love and Logic for resolving discipline problems and responsibility for choices made and their consequences, and TRIBE training for students working in cooperative groups. She has had other Title 1 workshops and training sessions in District and region-wide in-service training. She has traveled throughout many parts of the United States and has been overseas and has visited many historical and cultural points of interest. She has consistent exemplary ratings for Title 1 reading teaching. She has a Department of Public Instruction commendation for gains made in state and national averages. She has been on curriculum writing committees for the District and been on other various committees. She has been involved in community service projects with the District. She offered these and other experiences as to her qualifications, including transcripts, during her interview for the position and its curriculum, including study skills and reading content.

Joshua Board had taught fourth grade in the District for one year. Prior to that, he had been a substitute teacher for a semester at Richland Center School District teaching 9th grade social studies. He holds a teaching license certified for grades 1 through 8 and has a math minor. He had also interviewed with Hanson for a position he had as a Junior High basketball coach.

After the interviews, Hanson contacted a current and former principal and a former superintendent who were professionally familiar with the candidates, in Board's case primarily from prior hiring interviews. They indicated a preference for Board, and noted Grievant having done very well with younger children.

Hanson chose to recommend Board be selected for the position. She felt both candidates were certified for the position. She considered the training of each and felt that Board's specific substitute teaching experience in the semester of social science was the tie breaker.[2] Her consideration of experience was in the subject area they actually had taught. Subject experience was more important to her than grade level experience. In making her decision she did not go further to consider specific achievements, service to the District, or wishes and convenience of the teacher. She did not consider prior evaluations as part of the process. She felt, as did the principles she had consulted, that Board was a best fit for the position. She described best fit in this context as a feeling that she gets with the experiences that she has had in talking with teachers and hiring teachers when she just seems to know. It is nothing other than just simply what her gut is telling her. Hanson did consider the instructional requirements and best interests of the school system and the pupils, and that was of primary importance to her. Board was offered the position and accepted it. Gibson was informed of the decision by letter dated July 21, 2006 from Hanson, which stated:

> Dear Mrs. Gibson,
>
> Please accept my thanks for taking the time to come to interview for the Jr. High social studies position. We appreciate the interest that you expressed in our program.
>
> The position has been filled by a teacher that we feel best fits the needs of our program.
>
> Have a wonderful summer.
>
> Sincerely,
>
> . . .

Neither the Superintendent nor his designee met with Grievant to discuss the reasons why she was not selected. They did meet in September, 2006, to discuss the grievance process when that process was about to go before the Board on September 11th.

After receiving the letter, on or about July 26th Grievant unsuccessfully tried to call the Administrator and then went to the School District to speak with Hanson about not being selected for the position. Hanson was not at the building at that time, and Grievant was leaving the area that afternoon. Grievant wrote a letter to Hanson which the District received on July 27, 2006. The letter referenced the above letter from Hanson, indicated Grievant was the person most qualified for the position, reiterated Grievant's qualifications, and asked that the letter be accepted as step 1 in the grievance procedure in the parties' agreement. Grievant's letter did not mention a specific Article or clause in the collective bargaining agreement which she felt was violated.

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[2] Hanson testified to the effect that she had been previously instructed by her superiors to use that approach.

Hanson wrote back to Grievant by letter dated August 2, 2006, stating:

. . .

I have received your grievance letter dated July 26, 2006. I believe that I understand the basis of your letter. According to Article XIX, Grievance Procedure, Step 2, of the Negotiated Agreement of the NLEA, "the immediate supervisor shall give his/her written answer within seven (7) calendar days of the time the grievance was presented to him/her in writing." Since I received your grievance in writing, I am assuming that we are on Step 2 of the grievance procedure.

Step 2 also states that: "The written grievance shall include the facts upon which the grievance is based, the issues involved, the articles alleged to be violated and the relief sought." While I can assume that your grievance is based on Article VIII, Assignments and Transfer, Par. A & B, I do not know that for sure.

Consequently your grievance is denied.

. . .

Also on August 2, 2006, Grievant wrote to District Administrator Ed Dombrowski in response to Hanson's letter. Grievant's letter assumed they were then at Step 3 in the grievance process. In reference to previous correspondence on the matter, Grievant confirmed that her grievance was based on Article VIII, Assignments and Transfers, Par. A & B. Grievant stated she had been told by Hanson when interviewing that seniority did not count and that she disagreed with that statement since no other candidate had social studies certification. She reviewed the status of her potential social studies endorsement to her license and referenced a prior grievance of another teacher regarding seniority. She stated she should be awarded the Jr. High social studies position because she was the most qualified person who applied.

By letter of August 16, 2006, Dobrowski responded to Grievant's letter as follows:

RE: Step 3 Grievance

Dear Mrs. Gibson,

I have received your appeal of step 2 in the grievance process found in the New Lisbon Negotiated Professional Agreement. (Page 16).

The review of information included documentation found within the Grievance Processing Procedure inclusive of Step 1, Step 2 and Step 3.

The determination of the allocation and assignment of work is difficult when highly competent employees compete for a position. However, when a determination is made, it is made with the most current information available as it was presented at the time the decision was made.

> The Board of Education recognizes the right to hire and arrangement of the work force as an important part to operate and manage the school system. Therefore, as a result of the review of information, the appeal is denied.
>
> Step 4 of the Grievance Processing Procedure states: "If not settled in Step 3, the grievance may within seven (7) calendar days be appealed, in writing to the Board of Education. The Board shall give a written answer within 30 days after receipt of the appeal. The grievant or his representative may present evidence and argument to the Board at the grievance hearing.
>
> If you have any questions, please feel free to contact me.
>
> Sincerely,

Grievant then appealed to the Board by letter of August 21, 2006, continuing her contention that she was the most qualified candidate who applied for the position. After meeting with the Board on the appeal, the Board denied the appeal and wrote to Grievant on September 22, 2006. The Board's letter briefly outlined the facts of filling the vacancy, and reviewed the grievance history and response. The Board's denial was based on three reasons. 1. The grievance did not comply with the procedural requirements of Article XIX, Step 2. 2. The contract does not restrict the Board's ability to determine the qualifications for a position or ability to hire the most qualified applicant for a position. 3. The Board made its hiring decision based upon the best interests of the School District and the information available at the time of hire. The Board's letter referenced Articles II, VIII and XIX of the labor agreement and portions of the text therein.

This grievance arbitration followed. Further facts appear as mentioned in the discussion.

POSITIONS OF THE PARTIES

Association

In summary, the Association argues that the grievance has been properly processed. The District was fully aware of what contract provision was being objected to, even though the Level 2 grievance does not reference a contract provision. The District was not disadvantaged. The Association contends arbitral authority supports its position.

The Association argues that the District failed to follow the language in Article VIII B in evaluating the two candidates for the position. Principal Hanson simply utilized two, and not all of the components of the Article. And, in doing so, she used a definition of experience which is too narrow, especially in view of other transfers made in the District. Had Hanson considered all the required components then Grievant would have been chosen for the transfer. In terms of training, experience, service to the district, specific achievements, and the wishes and convenience of the teacher, Grievant far exceeds Board on these criteria.

The Association also argues that the District's prior conduct regarding transfers does not support the District's decision in the instant grievance. There is an entire list of teachers who now teach in junior high who left elementary positions, none of whom had previously taught the specific curriculum which they now teach. The Association cites arbitral authority in support of selecting the more senior of qualified applicants. The Association argues that Hanson's response to Association questions does not follow her purported theory on how the language works. Hanson believes it was critical to the transfer process that the prospective transferee must have taught in the subject area, and Board taught social studies, as did other transferees in other cases. Grievant taught social studies as part of the third grade curriculum, so Board had no advantage over her. In certain hypothetical situations, Board, under Hanson's logic, loses the relative comparison. The Association believes the District is unsuccessfully trying to find some justification why Board was selected.

The Association further argues that for the District to have a best fit requirement provides no insight and devalues the transfer language. There is no greater weight factor to apply here. And, Grievants's capacity to incorporate reading into the social studies curriculum should not be used to her disadvantage. To re-employ Board in the future would be based on an improper advantage, and totally ignore a collective bargaining agreement provision. The District's arguments would grant it unlimited discretional ability to place Board in the position. The provision concerning the best interests of the school district does not allow it to ignore all other components of the paragraph as to training, experience, achievements and District service. The Association believes Grievant is the best candidate and should be awarded the position if it remains open for next year.

District

In summary, the District argues that the Association has the burden to prove the District behaved in an arbitrary, capricious or discriminatory manner when it determined Board was the best fit candidate for the position. The District argues that the grievance is procedurally deficient because Grievant failed in Step 1 to make an earnest effort to settle the matter informally. The Grievant also failed to specifically refer to the Article alleged to be involved at the Step 2 level.

The District argues that it was within its contractual discretion to determine Board was the best fit for the position. The labor agreement gives the District the express right to hire and to allocate and assign work, to determine policies affecting the selection of employees and to retain all functions and rights to act not specifically nullified by the agreement, among other things. The Board's argument emphasizes, under Article VIII B, that it is understood that the instructional requirements and best interests of the school system and the pupils are of primary importance. Grievant has a combination of unrelated District service, unrelated teaching experience and unrelated achievements which do not trump the Board's requirement to make decisions in the best interest of the school system and pupils. It is clear the District made the proper decision.

Citing arbitral precedent, the District argues that language protecting the best interest of the school system allows it to engage in a much broader balancing and weighing the decision's impact of a full range of legitimate interests. In deciding to hire Board, Hanson examined his actual experience teaching social studies. He was the only applicant with experience similar to the position. No provision in the agreement leads to the conclusion that Grievant's unrelated teaching experience trumps Board's semester of social studies teaching in the Richland Center School District. Board's experience, not Grievant's, fulfills the agreement's mandate to place primary importance in instructional requirements and best interests of the school system and students.

The District argues that Hanson gave full consideration to both Board and Grievant, including travels and education, among other things. Neither candidate was stopped from presenting their reasons why the District should award the position to them. Hanson considered Board's subject specific experience to be a critical factor in deciding he was the best fit for the position. Hanson was aware of both candidates' seniority, achievements and wishes. Her decision did not violate the well considered process required under Article VIII B.

The District contends that Grievant is best suited to teach 3rd grade, particularly because of her reading specialist certification. Hanson's conclusions are supported by discussions with past administrators. Association arguments as to the meaning of experience are fatally flawed. Experience and years of service could amount to unintended double counting.

The District argues that the Association failed to show in any way that Hanson would have considered choosing Grievant over Board if she had balanced all of the five factors in a manner that suited the Association. Hanson stands by her decision and the Association failed to show she would have chosen Grievant over Board under a different reading of the contract language.

The District also argues that the Association's flawed interpretation of Article VIII B improperly strips the District of its contractually guaranteed discretion in making transfers. Article VIII does not require the Board to value training, experience, achievements, District service and wishes to the exclusion of their legitimate interests. The contract language does not require an analysis such as that contained in the agreements staff reduction language. To place such weight on seniority in a transfer matter would have required language drafted toward that result. The parties did not use that level of specificity in the assignments and transfers language, but gave the District discretion to choose the applicant it believed best fit the instructional requirements and best interests of the school system and pupils.

The District argues the Association failed to meet its burden of proof to show that the District's decision to transfer Board was incorrect. Objective factors lead to the determination that Board would be a better fit for the position. Reasonable people may disagree with the decision, but the decision does not violate Article VIII B, citing arbitral authority. Similarly, the District contends the Association failed to meet its burden of proof to show that the District's decision was arbitrary or capricious, citing legal and arbitral authority. The decision

was the result of a conscious consideration of all relevant factors. The District's selection was simply an exercise of the discretion it has to select the candidate who best fit the position. Hanson was fully aware of Grievant's training, experience, achievements, district service and wishes. And she spoke with past administrators. Hanson additionally followed her own instincts and experience. The Association failed to offer any evidence that Grievant would have been the better choice. The District offered substantial evidence that Board was better suited for the position and Grievant best suited to teach 3rd grade.

The District also argues that the Association's remedy is beyond the scope of the arbitrator's authority. Arbitrators cannot add to, subtract from, or modify terms of agreements. This was a one year decision. The Association's request is for next year, and is beyond the scope of the arbitrator's authority. If the position remains open the agreement requires it be posted for all bargaining unit members to have the opportunity to apply. There are no provisions in the agreement allowing this to be ignored. The requested remedy also ignores the contractual mandate that the primary consideration be the instructional requirements and best interest of the school system and the pupils. The remedy would blacklist Board.

The District further argues that the Association is incorrect to assert there are five hiring criteria the District must consider. Article VIII includes language where practical and the instructional requirements and best interests of the school system and the pupils are of primary importance. The Association fails to mention the best interest requirements. The language allows the District great flexibility and discretion. The Association's desire to have rigid criteria for evaluating employee transfers is contrary to the discretion that is inherent in the contract. The Association's arguments fit the staff reduction language, not transfers. This is an attempt to gain in arbitration what the Association could not get in bargaining. The Association's arguments regarding the transfer of other teachers must be disregarded. Those matters give no indication of what factors were considered in making a transfer, and Hanson was not questioned about much of that.

The District contends that the Association's argument that there is no greatest weight factor is incorrect. The instructional requirements and best interests of the school system and the pupils are of primary importance and this is a greatest weight factor the District must, and Hanson did, consider. The District argues the Association has ignored or misinterpreted the major portions of Hanson's testimony. She was not an employee when some of the cited transfers took place. Some transfers had only one internal candidate. Some Association statements are fabrications. The District contends that the grievance decision cited by the Association supports the District's decision to hire Board. The agreement does not have a sufficient ability clause, which might favor seniority. And, Hanson's response to the Association's hypothetical was appropriate and the Association fails to recognize Hanson's full testimony. The hypothetical would also require interviews and discussions with supervisors. The District requests the grievance be denied.

DISCUSSION

The case presents issues of procedure, merits and remedy.

Procedure

The District argues that the grievance is procedurally deficient and should be denied. It argues that Grievant did not make an earnest effort to settle the matter as required by Step 1 in the Article XIX Grievance Procedure, and that Grievant did not include the articles alleged to be violated in the written grievance at Step 2.

The relevant parts of Article XIX state:

> Grievance Processing Procedure: Grievances shall be processed in accordance with the following procedure.
>
> Step 1. Within seven (7) calendar days after the occurrence of eth incident on which the complaint is based or first becomes known to the grievant, an earnest effort shall be first made to settle the matter informally between the employee and his/her immediate supervisor.
>
> Step 2. If not settled in Step 1, the immediate supervisor shall give his/her written answer within seven (7) calendar days of the time the grievance was presented to him/her in writing. The written grievance shall include the facts upon which the grievance is based, the issues involved, the articles alleged to be violated and the relief sought. The grievance shall be signed and dated by the grievant.
>
> Step 3. If not settled in Step 2, the grievance may within seven (7) calendar days be appealed, in writing, to the Superintendent. The Superintendent shall give a written answer no later than fourteen (14) calendar days after receipt of the appeal.
>
> Step 4. If not settled in Step 3, the grievance may within fourteen (14) calendar days be appealed, in writing to the Board of Education. The Board shall give a written answer within thirty (30) days after receipt of the appeal. The grievant or his representative may present evidence and argument to the Board at the grievance hearing.

The grievance process began awkwardly for both parties. Both parties had time limits to consider in how they went through the grievance procedure. Step 1 requires an earnest effort shall be first made to settle the matter informally between the employee and his/her immediate supervisor. By use of the word between, both the employee and immediate supervisor are required to make an earnest effort. Grievant did make an earnest effort at step 1. Upon receipt

of the July 21st letter she promptly called the Administration office. She then discovered she needed to contact her supervisor, Hanson, and called the Administration office a second time. Grievant then went to the District office to speak to Hanson. Hanson was gone then. Grievant was about to leave the area for a few days. In Hanson's absence Grievant provided a letter detailing her position on why she should be selected and in that letter requested that it be accepted as Step 1 in the grievance process. These are all good faith attempts by Grievant to invoke Step 1 to informally settle the matter. The District did not make an effort to settle the matter at that step. The District did not attempt to meet with or discuss the matter with Grievant, but rather sent her the letter of August 2nd which immediately referred to Step 2 of the procedure and assumed the matter was at step 2 because of Grievant' having put her Step 1 request in writing. Hanson's letter did not discuss the merits of the selection or the circumstances surrounding it. It did not respond to the points raised by Grievant's letter. Hanson's letter assumed the matter was then at step 2 and merely restated some of the procedural requirements to respond to a step 2 grievance, and point out that she assumed the grievance is based on Article VIII, Assignments and Transfers, Par. A & B, but that she did not know that for sure. After knowing Grievant was requesting step 1 of the process, the District, through Hanson or anyone else, did not attempt to convene a meeting between Grievant and her supervisor, to call Grievant to discuss the matter, or to respond to her in writing as to the facts and circumstances of the transfer selection in an attempt to settle the matter. This was not an earnest attempt to settle the matter informally on behalf of the District. This did put the matter, from the District's perspective, into step 2 even though Grievant's letter specifically stated it was a step 1 request. Step 1 does not prohibit the use of a letter to invoke the process or as part of the process. Similarly, step 1 does not require that any article alleged to be violated be first identified as part of the step 1 process. Grievant did not fail to make an earnest effort to settle the matter informally in violation of the Step 1 provision in the Article. The grievance is not procedurally deficient at step 1.

From the above it is also clear that the District went immediately to step 2 of the process before contacting Grievant so as to give her an opportunity to state the Article she believed to be violated when presenting her grievance. In effect, the District supplied that information itself by Hanson's reference to Article VIII B in her August 2nd letter, and Hanson stated she believed she understood the basis of Grievant's letter. Grievant cannot be held to have failed to comply with the requirements of step 2 when the District did not give her that opportunity. It is very clear from that letter that the District assumed the process was at step 2 and was treating it as being at step 2, including time limits within which the District had to respond. This had the consequential effect of Grievant having to invoke step 3 by her letter of August 2nd to Dombrowski, which did contain an Article VIII violation reference. No one was mislead or confused as to the nature of the grievance. The undersigned is not persuaded that the grievance is procedurally defective at step 2. It is also noted that the Dombrowski letter of August 16th mentioned review of the information within step 2 and step 3, but then did not raise a procedural objection or deficiency (either step 1 earnest effort or step 2 Article identification) as a reason to deny Grievant's appeal. Rather, Dombrowski referred to the Board rights to hire and arrange the work force in operating and managing the school system

as the rationale for denying the grievance. While the Board of Education letter of September 22 referred to the step 1 earnest effort and step 2 article allegation, when this matter was heard at the arbitration hearing the District did not state any procedural deficiencies as an issue to be decided in the case or make any arguments on those issues. The District's brief does not state any procedural issue to be decided, yet the argument portion of its brief raises the above two procedural issues. The District has apparently abandoned these procedural abjections at various stages of the process, only to revive them later. Regardless of the District's failure to raise these procedural issues at various parts of the grievance and arbitration procedure, as stated above, the grievance is not procedurally defective for failure to state the Article alleged to be violated at step 2 of the proceedings.

Merits

The merits of the case concern the transfer of one of two teachers from teaching an elementary class to teaching 7th and 8th grade social studies. Both management rights provisions and assignments and transfers provisions under the labor agreement apply. Under Article II Board Functions, the Board does have broad authority to manage and supervise the school system, to direct and arrange all working forces in the system, including the right to hire, to determine the size of the working force, allocation and assignment of work and determination of policies affecting selection of employees, and judging employee performance, among other things. At first reading this would appear to maintain in the Board broad and unrestricted authority to make the transfer decision in this case. But, as pointed out in subpart C of Article III, the Board's rights and its discretion are not unlimited. The Board retains all functions and rights to act not specifically nullified by the agreement. That is where Article VIII comes into play. Under Article VIII the Board and the Association agreed to certain things when making transfers. Article VIII states in pertinent part:

> B. When making transfers, the Board, where practical, shall take the training, experience, specific achievements, service to the District, wishes and convenience of the teacher into consideration. However, it is understood that the instructional requirements and best interests of the school system and the pupils are of primary importance. The Superintendent and/or his/her designee will meet with a bargaining unit member to discuss the reasons why the bargaining unit member was not selected.

It is Article VIII B which forms the basis of the Union's argument, contending the District only considered training and experience in making the transfer decision, and more specifically, in failing to consider Grievant's specific achievements, service to the District, and her wishes and convenience. The District argues that Principal Hanson was aware of all of those things, but had the right to make a decision about which of the two teachers would be a best fit for the position in view of the primary importance of the instructional requirements and best interests of the school system and the pupils.

Article VIII B is very clear that, where practical, the Board shall take into consideration all five of the criteria listed in subpart B. The provision uses the word "shall". This is mandatory, if "practical". Here, the record is clear that it was practical for Hanson to consider all five of the categories or factors as applied to Grievant. Besides the training and experience which Hanson had referred to and admittedly considered, Grievant also had a documented record, accumulated over 23 years, of educational achievements such as her DPI accommodations, supervisory evaluations, exemplary ratings for Title 1 reading, a record of various education related activities performed in service to the District which included ECRI training, Love and Logic and TRIBE training, teaching summer school and JTPA classes, numerous workshops and in-service trainings, service on curriculum and other committees. Grievant also had presented to Hanson a detailed list of historically significant places she had visited and explained how she wished to use her travel experiences and related items as part of how she would teach the class. Information on all five factors was presented by Grievant to Hanson. There appears no reason why they could not be both quantified and qualified in comparing all five criteria between the two candidates. It was practical for Hanson to have considered all five categories. It being practical, the Article requires that the District shall consider all five.

Hanson testified, credibly, that she considered both candidates to be certified for the position. She further considered their training and subject area teaching experience. She stopped her consideration after that, experience teaching social studies being the tie breaker. The District argues that she did consider all the matters Grievant presented to her because Hanson was aware of them. However, Hanson's testimony was very clear. She testified that in making her decision she did not consider Grievant's specific achievements, her service to the District, or her whishes and convenience. Hanson had information available to her as to Grievant on the three additionally required categories. She credibly testified that she did not consider them in making her decision. She stopped at the tie breaker. In doing so she did not consider all five categories as required by the agreement and simply did not comply with the agreement when it was practical for her to do so. The District had an obligation to consider all five factors and Grievant has a right to have all five factors considered. That did not happen. Grievant was denied the opportunity to have those other factors again "tie" with Board, and then possibly have that tie broken in her favor. Grievant was denied the opportunity to have her relevant considerations applied to the standard of the requirements and best interests of the school system and the pupils. This is whether or not a narrow or broad definition of experience is applied. The record demonstrates that the attributes of Grievant as reflected in the other three categories or factors would, at a minimum, be relevant to instructional requirements and best interests of the school system and the pupils. This case is similar to DOUGLAS COUNTY, MA-9468 (Jones, January, 1997) where the failure to consider the specific contractually enumerated factors in determining qualifications was a violation of the labor agreement.

The Board makes a very strong argument that the agreement recognizes that the instructional requirements and best interest of the school system and the pupils are of primary importance, and this allows Hanson to make the best fit decision she made, especially considering Grievant was very good at teaching reading in the lower grades of a SAGE program school. The District is correct in that the matters of primary importance are the

standard by which the District is to make its decisions. However, that does not eliminate the preceding requirements as to how the District has obligated itself to meet that standard in making its decision. That is by the use of the five standards. The District has characterized its decision to choose Board as the best fit for the position. The term "best fit" does not appear in Article VII or in Article II. Viewing Board as the best fit appears to be the District's way of expressing requirements and best interests of the school system and pupils. Even so, this still requires that all five categories be considered in assessing that "best fit" with the instructional requirements and best interests of the school system and pupils.

The District has argued that the Association must show the District was arbitrary or capricious in order to prevail on its claim. But what the Association must show is that the District violated the agreement. It has done so by showing the District did not consider all the factors it was bound to in making the transfer selection. Inasmuch as the District failed to follow the contract by failing to consider all of the factors it was obligated to, it has acted in an arbitrary and capricious manner The District relies on WALWORTH COUNTY HANDICAPPED CHILDREN'S EDUCATION BOARD, MA-9212 (Neilson, March, 1996) in arguing the District's decision was not arbitrary. In that case the contract language at issue read in pertinent part:

> c. In the determination of requests for voluntary reassignments and/or transfers, the wishes of the individual teacher will be honored and that first consideration will be given to those already in the system who are qualified to the extent that they do not conflict with the requirements and best interests of the school system.

The Board in that case had considered everything that was required of it by the provision. This is a different provision than the one here. The one here did not have everything considered that was required. These are two material differences in the case which renders WALWORTH COUNTY unpersuasive on any matter of arbitrariness here. The failure to consider Grievant's total employment history, achievements and service to the District under this contract can be characterized as arbitrary. *Cf.* MARINETTE COUNTY, MA-9650 (Greco, August, 1997).[3]

The District argues that the decision to choose Board was the result of a conscious consideration of all relevant factors. As to Board that might be true. But as to Grievant it is not true, as explained above. Because all relevant, and required, factors were not considered for both candidates the District has not properly exercised its discretion. If considered alone, Board may have been a perfectly proper choice. But in a situation where there were two candidates and relevant factors were not considered for one of them, it cannot be determined that the choice of Board was proper, at least to the exclusion of Grievant.

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[3] The District is correct that the case of VILLAGE OF MENOMONIE FALLS, MA-13216 (Mawhinney, July, 2006), should not apply here because the clause in the contract there was a sufficient ability clause, which is quite different than the clause at issue in the instant case.

Both parties devoted considerable energy in their briefs addressing the status of previous transfers and assignments. However, neither party has established that these constitute a past practice which is binding on the parties. Moreover, there is nothing ambiguous about the word "shall" in Article VIII B which would require construction in view of past practice. The import of the parties arguments concerning other transfers is that they were of considerable variability and nothing therein would neither prohibit nor require the selection of either of the candidates here.

By not considering all the required categories for Grievant when it was practical to do so, the District violated Article VIII B when it transferred Board to the position.

Remedy

Having found a violation of the agreement, the matter of a remedy must be addressed. The Association argues that Grievant should be awarded the position if it remains open for the following year. The District argues that Board would be the choice in any event and that the Arbitrator has no authority to add to the labor agreement, in effect, by making the selection through a remedy. The District also argues that if the position needs to be filled again the labor agreement requires all teachers be given an opportunity to apply for it.

The remedy here is complicated by Hanson's testimony at the hearing to the effect that even now she would select Board over Grievant. What Hanson has done is to paint herself into a corner. The labor agreement was violated and this deprived Grievant of a fair opportunity at a position which even the District agrees she was qualified for. It is not practical to fashion an economic remedy here. Given Hanson's predisposition, a simple reconsideration of the transfer taking into account all required factors would emphasize form over substance and depreciate the binding nature of the labor agreement. An award directing that Grievant be transferred to the position, should it come open again and should she request it, is a practical remedy. This casts no aspersions on Board.

The District's concern for arbitral authority to fashion this remedy is answered simply by noting the District recognized, in its statement of the issues, that the arbitrator is to decide what the appropriate remedy is. The Association also framed the issues to include remedy. The District and the Association have thus granted the arbitrator authority to fashion a remedy in view of the violation. The District's argument voices a matter which is often specifically contained in the arbitration provisions in labor agreements (e.g., that the arbitrator may not add to, subtract from, or modify the language of the agreement). Interestingly, no such provision is contained in these parties' grievance and arbitration provisions in Article XIX. The District did not suggest, at any point in these proceedings, a different remedy or any remedy in the event one was required. It does not even suggest a reposting as an actual remedy, only that reposting would be required for the opening. But, as mentioned above, Hanson's predisposition would not make reposting a meaningful remedy. The District's

arguments would amount to allowing it to violate the labor agreement with no ramifications whatsoever. That would undermine the entire labor agreement and the collective bargaining process itself. The District's concern that it is bound to repost an open position raises a speculative issue. And, although neither party cited it, the labor agreement does have a savings clause, which is an implied understanding that there may be circumstances where a part of the agreement cannot be complied with for legal reasons beyond the control of the parties.

Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is sustained. As a remedy the District shall award to Grievant the 7th and 8th grade social studies position for the following year if it becomes or remains vacant and if Grievant requests it.

Dated at Madison, Wisconsin, this 18th day of June, 2007.

Paul Gordon /s/
Paul Gordon, Arbitrator

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