

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PHILLIPS EDUCATION ASSOCIATION

and

PHILLIPS SCHOOL DISTRICT

Case 108
No. 66643
MA-13587

Appearances:

Gene Degner, Executive Director, Northern Tier UniServ-Central, P.O. Box 1400, Rhinelander, Wisconsin 54501, for the labor organization.

Weld, Riley, Prens & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by **Andrea Voelker**, for the municipal employer.

ARBITRATION AWARD

The Phillips Education Association and the Phillips School District are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which district concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to the filling of a vacancy. The Commission designated Stuart D. Levitan as the impartial arbitrator. Hearing in the matter was held in Phillips, Wisconsin, on March 22, 2007, a stenographic transcript of which was made available to the parties by April 6. The parties submitted written arguments on June 4, and on July 15 waived their rights to file replies.

STATEMENT OF THE ISSUE

The Association frames the issue as:

Did the District violate the collective bargaining agreement between the Phillips Education Association and the district when it transferred Kathy Mencil to the 8th grade position without posting the position or attempting to recall the most senior certified staff person on layoff; and if so, what would be the appropriate remedy?

The District frames the issue as:

Is the grievance timely in accordance with Article VI of the parties' 2005-2007 collective bargaining agreement?

If so, did the District violate Article XII, Section E of the parties' collective bargaining agreement when it recalled a laid-off teacher to an open position for which she was qualified?

I frame the issues as:

Is the grievance timely?

If so, did the district violate the collective bargaining agreement by:

1. Filling the position of 7th/8th grade language arts without following the posting procedures of Article XVIII?
2. Involuntarily reassigning Kathy Mencil to that position?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE IV

MANAGEMENT RIGHTS

The Board of Education reserves onto itself all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by applicable law, to establish the framework of school policies including, but not without limitation because of enumeration, the right:

- (1) To the executive management and administrative control of the school system – its properties, facilities, and employees.

- (2) To employ and re-employ all personnel, and subject to the provisions of the law or State Department of Public Instruction regulations, determine their qualifications and conditions of employment or their dismissal or demotion, their promotion and their work assignments except as specifically modified by this Agreement.
- (3) To establish and supervise the program of instruction and to make the necessary assignments for all programs of an extracurricular nature that, in the opinion of the Board, benefit students.

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ARTICLE VI

GRIEVANCE PROCEDURE

The purpose of this procedure is to provide an orderly method of resolving grievances. A determined effort shall be made to settle any such differences at the lowest possible level in the grievance procedure. Meetings or discussions involving grievances or these procedures shall not interfere with teaching duties or classroom instruction.

DEFINITION: For the purpose of this Agreement, a grievance is defined as difference of opinion regarding the interpretation or application of a specific provision of this Agreement.

PROCEDURE REGARDING AREAS OF THIS AGREEMENT:

STEP 1 - Within 15 working days after the grievant knew, or could reasonably be expected to have known of the occurrence giving rise to the grievance, the grievant shall submit the grievance directly, in person, or, if desired, through the Association's designated representative, to the principal or the administrator with whom the grievance originated.

STEP 2 - If the problem is not satisfactorily resolved after the administrator's response, or if no decision has been rendered within 10 days after presentation of the grievance, the grievant shall reduce the grievance to writing, giving the reason the administrator's response was unsatisfactory and citing the issue involved, the section or provision of the contract allegedly violated, and the remedy requested. The grievant may forward copies to the chairperson of the Association's grievance

committee or directly to the superintendent within 5 working days after the administrator's decision or 15 working days after the grievance was presented, whichever is sooner. If the Association is selected to process the grievance, the Association's representative will refer it to the superintendent within 5 school days after receiving the written grievance.

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STEP 5 – Grievances not settled in Step 4 of the grievance procedure may be appealed to arbitration by the Association provided that:

- a. Written notice of a request for such arbitration is given to the Clerk of the Board within 10 working days of the Board's last answer in Step 4.
- b. The issue involves the interpretation or application of a specific provision of this Agreement.

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ARTICLE XII

LAYOFF CLAUSE

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- E. Recall: When a teaching position becomes available, the most senior teacher on layoff status with recall rights and full certification for the open position shall be recalled. Recall rights shall extend for a period of two years from the effective date of the layoff. Certification for purposes of recall shall be determined by the certification on file with the School District on or before date of the posting for the vacancy.

The Board shall mail notice of recall by certified mail to the teacher's last known address. It shall be the teacher's responsibility to keep the Board informed as to his/her current address.

If the Board does not, within 14 calendar days from the date the recall notice is delivered to the last known address of the employee as verified by certified mail, receive written confirmation of the teacher's acceptance of recall, the teacher loses all rights to be recalled. Teachers notified of recall shall be available for work no later than 15 days from

the acceptance of recall. Failing to report within 15 days will void the recall and all reemployment rights of the recalled teacher.

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ARTICLE XVIII

VACANCIES, TRANSFERS AND REASSIGNMENTS

A.

1. During the school year notices of vacancies will be posted on the bulletin board at each school building and sent to the President of the Association as soon as the administration is aware of the existence of such vacancies. During the months of June and July, the vacancies shall be posted for seven (7) days on the high school faculty bulletin board and sent to the President of the Association. During August, on the first teacher work day, vacancies shall be posted for three (3) work days on the high school faculty bulletin board and sent to the President of the Association. Vacancies, as defined in this article, shall also include all extra curricular vacancies as listed in Appendix C. (Extra curricular assignments filled by non-teacher employees shall not be vacant on a yearly basis but will only become vacant when the non-teaching employee resigns or is refused the position by the District.)
2. Teachers who desire a change for the succeeding year either in a grade and/or subject assignment, or who desire to transfer to another building, may file a written statement or such desire with the Superintendent no later than January 15. Such statement shall specify the assignment desired. Teachers may at any time indicate to the Superintendent a desire to change assignments.

B.

1. Teachers from within the school system will be given preference for vacant positions provided: (a) they make application within five (5) school days of the posting of the vacancy notice, and (b) are qualified for said position as determined by the Superintendent.

2. In the event two or more equally qualified teachers apply for the same position, the applicant with the most local tenure shall be assigned the position.
 3. The Superintendent, after consultation with the building administrators, may deny requests for reassignment or transfer if he/she feels justified by providing the explanation in writing setting forth the reason(s) for the decision to the affected teacher.
 4. For the purposes of this section, the Board of Education reserves unto itself the right to determine qualifications for the position. Guidelines for determination of qualifications shall be in writing.
- C. No reassignment or transfer shall be made without discussing it with the teacher.

BACKGROUND

In the spring of 2006, the Phillips School District was facing ongoing financial pressures due to declining enrollment, reduced state funding, and defeat by local voters of a referendum to exceed state-imposed revenue caps. In November, 2005, the Board had voted to close a district school (the Catawba school) and reduce staff across-the-board. Due to continuing uncertainty about staff levels and assignments, the District in March, 2006 issued individual teaching contracts which did not specify a particular assignment, but instead a general assignment. The contract also stated:

IT IS AGREED that Teacher assignment, re-assignment, and transfer within the District is the right of the School Board in the best interest of the educational program.

In April, 2004, the Association, District and teacher Amy Pippenger had resolved a pending grievance through an agreement which provided, among other terms, that Pippenger would be given preference over other candidates for any 9-12 math vacancy that arose over the next four years. That agreement was relied upon following the resignation of a high school math teacher in July, 2006, as Pippenger moved from her then-current position as a 7th/8th grade language arts teacher to the math vacancy, thus creating a vacancy in her middle school position. At that time, there were no teachers on lay-off with recall rights who were fully certified to teach 7th and 8th grades. The District's considerations for staffing for the 2006-2007 school year were further complicated by late resignations and the return of a 2nd grade teacher who had been on leave.

District Superintendent Jerry Trochinski then sought to fill the middle school vacancy through the recall and transfer to Pippenger's position of a laid-off K-3 teacher, Nicole "Nikki" Kalander, but the Wisconsin Department of Public Instruction would not issue an emergency teaching license for that assignment. Trochinski then sent the following letter on August 14, 2006:

To: All Tentatively Assigned K-5 Teachers
Re: Recall and Assignments

With recent staffing changes, we have been able to recall Nikki Kalander to a full-time teaching responsibility. Welcome Back!

Nikki's certification is K-3. She has checked on certification through 8th grade. However, the DPI will not issue an emergency extension to grade 8 of her license and it will take at least a year to complete course work for a licensure extension to grade 8. This situation leaves us with a need to place Nikki within the K-3 range. In order to assign Nikki a K-3 classroom, we will need to have a movement to *grade 8, the current unfilled responsibility. (emphasis added).*

We are seeking a volunteer(s) to move in order for a placement of Nikki to be made. The reason I used volunteer(s) is it may be that more than one person moves to allow for the K-3 assignment of Nikki. Just as an example – someone from K-3 moves to grade 5 and a grade 5 teacher moves to grade 8. Then Nikki could be placed in the K-3 range.

The 8th grade position will include one 7th grade class and an elective. The primary teaching area will be language arts.

Please consider being the volunteer(s) by letting me know by August 23, 2006. *Without a volunteer(s) option, we will need to make assignments to meet needs and contractual requirements (emphasis added).*

Thank you for your consideration.

In response to Trochinski's letter, 3rd grade teacher Margaret Retzlaff-Lasee agreed to move to a 4th grade position, freeing her former position for Kalander and leaving the District with one too many teachers at 4th grade and still one too few for the 7th/8th grade position. After the Board of Education formally recalled Kalander to a full-time teaching position on August 21, 2006, Trochinski and the relevant building principals discussed what steps to take. After a review of personnel files and brief discussions with several teachers, including Kathy Mencil, Trochinski on August 24 involuntarily reassigned fourth-grade teacher Kathy Mencil to the 7th/8th grade position. In her earlier discussion with Trochinski, Mencil had stressed how strenuously she opposed such a move, and how she believed it would be bad for herself and the overall educational mission of the District.

At no time during the process to fill Pippenger's vacancy did the District post a notice of that vacancy on school bulletin boards or provide notice of the vacancy to the Association president.

On September 14, 2006 – 15 working days after August 24, 18 working days after August 21 -- PEA Grievance Committee chair Ray Knihtila wrote District Superintendent Jerry Trochinski as follows:

This letter is intended to notify you of Step 1 of Article VI, GRIEVANCE PROCEDURE of the current Master Contract between the School District of Phillips and the Phillips Education Association. The Phillips Education Association has a grievance with the District for its failure to follow the contract in the following situation:

Article XII, Part E Recall: When a teaching position becomes available, the most senior teacher on layoff status with recall rights and full certification for the open position shall be recalled. Recall rights shall extend for a period of two years from the effective date of the layoff. Certification for purposes of recall shall be determined by the certification on file with the School District on or before the date of the posting for the vacancy.

The Association's position is that the Administration did not follow the Recall language by recalling a person that was not certified for the vacant 7th/8th Grade position. As there was no one on layoff that was certified for the position, this position should have been posted as a vacancy, and thus opened to all who are certified to apply for it.

On September 22, Trochinski replied to Knihtila as follows:

This correspondence is written in response to the September 14, 2006 grievance filed by the Phillips Education Association. Procedurally, this grievance is untimely and thus not comply with Article VI of the parties' collective bargaining agreement. Substantively, this grievance is without merit.

For all of these reasons, this grievance is denied.

On September 26, Knihtila responded to Trochinski in a letter which reiterated the text of his September 14 letter, adding a final paragraph as follows:

The Association's proposal to remedy this situation is to have a guarantee on the Administration's part to follow the language of Article XII, Part E Recall as stated above. This will alleviate the situation of teachers being transferred to a new position without adequate notice and/or preparation time for the new position.

In September, 2006, the Association and District entered into an agreement whereby Mencil and Retzlaff-Lasee would return to their prior assignments for the 2007-08 school year. These agreements, superseding contractual provisions for transfer and assignment, were non-precedent setting.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers that the movement by Amy Pippenger to a position teaching high school math created a vacant position in the 7th and 8th grade which the District was required to fill as such. The Union asserts the District should have first determined whether there were any teachers on layoff status with recall rights who were fully certified for that position. Then, the Association says, if there were no such candidates, the district should have posted the position internally to see if there were any volunteers. Only if and when that question were answered in the negative, the Association asserts, could the district have implemented an involuntary transfer or reassignment. The Union asserts the District acted properly when filling a vacancy the year prior, and should have acted in the same manner in this instance. That it did not shows that the superintendent is apparently not persuaded by contractual obligations when to post and when not to post vacant positions. Posting the vacant 7th/8th grade position would have given the District the opportunity of hiring or assigning someone who liked that level of students, rather than assigning someone who emphatically stated she hated such students. The Association also asserts the grievance was filed in a timely manner, within 15 days of the District notifying Mencil that she was being involuntarily transferred to the 7th/8th grade position. The Association concludes that the District should be ordered to cease and desist from not posting vacancies.

In support of its position that the grievance should be denied, the employer asserts and avers first that the grievance, filed September 14, is not timely because it was not filed within 15 days of Kalander's recall. The employer notes that, contrary to the Union's claim, the grievance did not challenge the reassignment of Mencil on August 24, but rather the recall of Kalander, which occurred no later than August 21. As to the merits, the District asserts that it properly reassigned teachers pursuant to its Article IV Management Rights, and that it first undertook the required discussions with the affected personnel, as mandated by Section C of Article XVIII. The District states it has a clear practice of reassigning teachers to meet its staffing and student needs, and that the Association has failed to offer any evidence that it has a role in determining what position is vacant or open. Moreover, the District maintains it acted in good faith when it reassigned teaching staff and recalled Kalander, actions consistent both with its duty to operate the schools in the best interest of the students and with the collective bargaining agreement. Further, the District states it did not have sufficient time to follow the procedure the Association calls for. Implicit in the Association's grievance is the position that it would rather have a bargaining unit member remain laid off than have teachers assigned to a different position for which they are certified.

DISCUSSION

Before evaluating the merits of this grievance, I must first consider the District's challenge to its timeliness. The collective bargaining agreement provides that the grievant "shall submit" the grievance "(w)ithin 15 working days after the grievant knew, or could reasonably be expected to have known of the occurrence giving rise to the grievance."

Although the agreement does not explicitly state what happens in the event the grievant misses that deadline, the common understanding is that untimely submission is a bar to further proceedings.

The Association filed the grievance on September 14, 2006, making August 24, 2006 -- 15 working days prior -- the earliest date for the event that created the grievance. Any event that Mencil or the association reasonably could have known about before August 24 cannot form the basis of a timely grievance.

There are two primary events in this analysis -- the recall of Kalander on August 21, and the involuntary reassignment of Mencil on August 24. Although the recall of Kalander to the 3rd grade position and the transfer of Mencil to the 7th/8th grade position previously held by Pippenger are intrinsically related, they are separate events. Kalander's recall is outside the 15-day window; Mencil's transfer is within. That is, if this grievance concerns Kalander's recall, it is untimely; if it concerns Mencil's transfer, it is timely.

In its initial filing on Sept. 14, the Association alleged the district violated the agreement by (a) recalling a person that was not certified for the vacant 7th/8th Grade position, and (b) not posting the position as a vacancy. Although the only contractual provision the Association explicitly cited was XII-E, the text of the grievance ("...the position should have been posted as a vacancy...") unmistakably also references Article XVIII.

At hearing, the Association stated the issue somewhat differently, but again referenced both articles XII and XVIII:

Did the district violate the collective bargaining agreement when it transferred Kathy Mencil to the 8th grade position without posting the position or attempting to recall the most senior certified staff person on layoff?

For its part, the District has maintained from its first response that the grievance was untimely.

Although the district is correct the association could, perhaps should, have filed its grievance in response to the Aug. 14 letter, it was not until Mencil's transfer that the association knew for sure that the district would not be complying with the posting provisions of Article XVIII. That is, it was the August 24 transfer of Mencil to the middle-school position that established the factual predicate for the grievance.

There is also the matter of economy and efficiency. The parties have fully litigated this matter on its merits, notwithstanding that Mencil has already been returned to her preferred grade school assignment. Given the continuing financial pressures the school district faces, and the likelihood of further such personnel moves, it is in the parties' mutual interest to have a clear understanding of what Articles XII and XVIII do and do not require.

Accordingly, I find the grievance timely and proceed to its consideration on the merits, where, as indicated by my statement of the issues, analysis is bifurcated. First, did the District violate the contract by filling the position of 7th/8th grade language arts without following the posting and review procedures of Article XVIII? And, did the District violate the contract by reassigning Kathy Mencel to that position?

There is no ambiguity about what the District is supposed to do when there is a vacancy for a bargaining unit position. First, under Article XII-E, the district is to recall the most senior teacher on layoff status who has recall rights and full certification for the open position. If there are no such teachers, Article XVIII then provides further clear instruction, starting with the posting. As the district clearly did not comply with those posting instructions – it doesn't even claim it did - the only question is whether the article applies.

The District contends that it does not, because the board alone determines what vacancies exist.

I agree that Article IV gives the board the right to determine what vacancies exist. Which is why it is so significant the district *itself* treated the middle-school position as the vacancy to be filled. That was precisely the purpose of Trochinski's letter of August 14 – to begin the process of filling the Pippenger vacancy.

The District cannot deny that this entire episode began with Pippenger vacating her position, and ended with Mencel being assigned in her place. It's a simple syllogism: Pippenger vacated her middle-school language arts position; the District reassigned Mencel to the middle-school language arts position. Mencel filled the Pippenger vacancy.

Trochinski explicitly acknowledged this very point at hearing, referring to “the vacancy in the 7th/8th area,” and “knowing we have the 7th/8th grade vacancy.” He even testified he drafted his August 14 letter “after we knew there would be a need to fulfill the 7th and 8th grade responsibilities.” As his August 14 letter stated, “we will need to have a movement to grade 8, *the current unfilled responsibility.*” (*emphasis added*).

Under the collective bargaining agreement, once Trochinski determined that there was a vacancy in the middle-school position which the District was going to fill, the provisions of Articles XII and XVIII should have been implemented. That meant, first recalling the most senior teacher on layoff status with recall rights and full certification for the position. If, as was here the case, there were no such teachers, Trochinski should have posted the notice of vacancy on each school bulletin board, with a copy of the notice to the president of the Association.

Instead, he drafted and sent a letter only to tentatively assigned K-5 teachers. In so doing, he violated the collective bargaining agreement.

I agree with the District that Trochinski was not operating out of bad faith. In fact, he was thinking creatively, trying to find the quickest way to bring a teacher on layoff back to full employment. As is discussed below, the collective bargaining agreement would not have prevented him from ultimately so doing; however, he had to first go through the proper procedure.

The Association has three values at stake in this grievance. First, although there were no teachers on layoff status with recall rights and full certification for the open position in *this* instance, the definition of “open position” or “vacancy” could very well affect such teachers in the future.

Next, there was testimony that there was at least one qualified teacher within the school system – Jenny Kleinhans –who would have been interested in the 7th/8th grade position, but who was not asked because Trochinski’s August 14 letter seeking volunteers went only to K-5 teachers. Although Kleinhans did not file a grievance in this matter, she was affected by the district’s interpretation of “open position” or “vacancy,” such that a similarly situated teacher in the future could indeed be a grievant.

In this regard, the Association also notes that its interpretation of the contract would likely have been good for students, since a teacher who chose 7th/8th grade students would invariably give them a better education than a teacher who loathed them.

Finally, the Association seeks to protect Mencil from an unwanted transfer. Here, although the personal impact is most pronounced, the contractual protections are least effective for this purpose.

The collective bargaining agreement explicitly assigns to the Phillips Board of Education “the right ... to employ and re-employ all personnel, and ... determine ... their work assignments,” except as otherwise provided for by law, administrative rule or the collective bargaining agreement.

Indeed, the Association effectively concedes that, ultimately, the District has the management right to make such an assignment; as it states in its brief, if there are no fully certified teachers on layoff with recall rights, and there are no satisfactory responses to an internal posting, the District can then begin “implementing involuntary transfers or reassignments.”

Indeed, the agreement explicitly reserves for the Board of Education the right to determine teacher “work assignments except as specifically modified by this Agreement.” Further, the provision in Article XVIII that “No reassignment or transfer shall be made without discussing it with the teacher,” clearly establishes that reassignments and transfers *can* be made.

At the time the District involuntarily transferred Mencil, it was treating the middle-school position as the vacancy to be filled. That means the district should have followed the recall process established by Article XII-E and the posting process provided pursuant to Article XVIII. It did not do the latter, and thus violated the collective bargaining agreement. The terms of the agreement and the steps in the instant chronology are so clear that what the parties may or may not have done in prior years is not dispositive.

The District contends that the Article XVIII posting process “was not even possible in this case,” due to the tight time-line for action prior to the start of the school year. The District knew it would need a 7th/8th grade teacher by August 14; it transferred Mencil on August 24, with the first day of school not until September 1 (following staff development days on August 30 and 31). The District had enough time to comply with the provisions of Article XVIII.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

1. That the District violated Art. XVIII A. and B. by not posting the vacancy for a 7th/8th grade language arts teacher.
2. That the District did not violate the collective bargaining agreement when it reassigned Kathy Mencil as the 7th/8th grade language teacher.
3. If and when future vacancies arise, the district shall comply with the recall provisions of Article XII-E and the posting provisions of Article XVIII.

Dated at Madison, Wisconsin, this 14th day of September, 2007.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator