

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration of a Dispute Between

MENOMINEE INDIAN SCHOOL DISTRICT

and

MENOMINEE NON-TEACHERS ASSOCIATION

Case 59
No. 68489
MA-14248

(Job Posting Grievance)

Appearances:

Geoffrey A. Lacey, Attorney, Davis & Kuelthau, S.C., 318 South Washington Street, Suite 300, Green Bay, WI 54301, appeared on behalf of the Menominee Indian School District.

David A. Campshure, UniServ Director, United Northeast Educators, 1136 N. Military Ave., Green Bay, WI 54303-4414, appeared on behalf of the Menominee Non-Teachers Association and Grievant Amy Turney.

ARBITRATION AWARD

The Menominee Indian School District, herein the District, and the Menominee Non-Teachers Association, herein the Association, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a Request to Initiate Grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Association concerning job posting for its member, Amy Turney, herein Turney or Grievant. From a panel the parties selected Commissioner Paul Gordon to serve as arbitrator. Hearing was held in the matter on April 1, 2009 at Keshena, Wisconsin. A transcript of the proceedings was prepared. The parties filed written briefs and reply briefs and the record was closed on June 29, 2009.

ISSUES

The parties stipulated that the issues to be determined are

Did the District violate the parties' agreement when it did not award the head cook position posted on May 6, 2008 to Amy Turney?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II

Management Rights

The Board possesses the sole right to operate the school system and all management rights repose to it. These rights include, but are not limited to the following:

- A. To relieve employees from their duties because of lack of work or any other legitimate reasons;
- B. To maintain efficiency of school system operations;
- C. To take whatever action is necessary to comply with State or Federal law;
- D. To introduce new or improved methods or facilities;
- E. To determine the kinds and amount of services to be performed as pertains to school systems operations; and the number and kind of classifications to perform such services;
- F. To determine the methods, means and personnel by which school systems operations are to be conducted;
- G. To establish work rules and schedules of work;
- H. To hire, promote, transfer, schedule and assign employees in positions within the school system;
- I. To change existing methods or facilities;
- J. To contract out for goods or services.

ARTILCLE III

Grievance Procedure

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E. Arbitration

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Decision of Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. Any modification and addition to or deletion from expressed terms of the Agreement by the Arbitrator shall be considered a per se violation.

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ARTICLE IV
Vacancies/Transfers

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E. Voluntary Transfer: The administration shall consider requests for transfers to vacancies within the school district. Priority shall be given to in-district requests in the filling of vacancies on a seniority basis if the requesting employee is qualified. Denial shall only be made for good cause. In the case the senior applicant(s) is/are denied requested transfer(s), the superintendent shall notify the senior applicant(s) in writing for the reason(s) for any denied transfer.

1. An employee accepting a voluntary transfer within their job classification or out of their job classification shall maintain their seniority and step on the salary schedule within their current or new job classification.
2. An employee who seeks and is granted a voluntary transfer shall not be eligible for another voluntary transfer for two (2) years from the effective date of the original transfer unless waived by both parties.

* * *

BACKGROUND AND FACTS

Grievant's employment with the District started as a parent involvement coordinator in 2004, a position in the bargaining unit. In September 2007 she voluntarily transferred to a position of Administrative Assistant in the High School. In May of 2008 she sought a voluntary transfer to either the Head Cook position at Keshena Primary School (serving over

200 people daily) or to the Cook position at the High School (serving about 200 people daily), both of which had vacancies posted and advertised to the general public. The Head Cook position pays about \$2.10 per hour more than the Cook position and has some additional responsibilities.

Grievant's prior experience in the food service industry included ten years as a catering and sales coordinator at the Menominee Casino Bingo and Hotel, where she planned menus, kept records, inventoried and ordered food and equipment, scheduled and oversaw a 200 person capacity banquet room and outside catering. She staffed and oversaw the back line cooks, wait staff, and bartenders. She also prepared food, served food, delivered, set-up and take-down catering events. She received training in various aspects of food service during this employment. For at least 10 years she has worked with her family doing personal catering services such as Powwows, weddings, and funerals. This involved preparing food for 400 to 500 people. She also worked in a family operated restaurant for a year. Her mother had been a Head Cook in the School District for the past 20 years and was employed as one of the Head Cooks in the District at the time.

There were eight applicants for just the Cook position and seven applicants for both the Cook and Head Cook positions, for a total of 15 applicants. A few of these were not interviewed. Besides Grievant, one of the other applicants for both positions was Jeffrey Cox, who was from outside of the bargaining unit. He had been substituting as a cook in the District High School. The record is not very clear as to how long, but it was between four and six months. He also did some substitute custodial work there. He has about three months experience while in the Marines in field set up and meal serving.

In May of 2008 Grievant realized that she had had a voluntary transfer within two years when she went to the Administrative Assistant position. Therefore, under Article IV E.2 of the collective bargaining agreement she sought a waiver of the two year eligibility requirement in that subsection in order to pursue transfer to either the Head Cook or Cook position. She discussed this, separately, with District Administrator Wendall Waukau, the Principal at the primary school and the outgoing and incoming principals at the high school. Waukau told Grievant that the transfer limit would be waived and she could transfer if the Principals agreed. Waukau testified at the hearing in this matter that he told Grievant he would handle the waiver the same way for teacher requests in that if she were the most qualified candidate he would sign off on the transfer request. He also testified that he is not aware of any other circumstances since he has been the District Administrator in which a waiver of the two-year restriction of voluntary transfer was sought. Grievant and Waukau both testified at the hearing in this matter that in these discussions there was no discussion of who her qualifications would be compared to or that she would be compared against either internal applicants or applicants from outside the Association. The Principals were agreeable to waiving the two year limit. Grievant understood that the Principals and Waukau were all willing to waive the two year limit if she were selected for either position, and she then posted for both positions.

Grievant was interviewed for both positions by the High School Principal, Chuck Raasch, and the District Business Manager/Food Service Director, Robert Ferguson. Ferguson manages the food service budget. During the interview she explained her food service experience to them. Grievant met all the requirements and qualifications in the position descriptions for both open positions, and after the interviews she was considered by the interviewers to be qualified for both positions. The job description for the Head Cook position does not require prior school district food service experience.

Raasch and Ferguson also interviewed Jeffrey Cox. They found him to be qualified for both positions. Ferguson then recommended to Waukau that Cox be hired as the Head Cook because he had had experience as a cook in a school system, a USDA program with specific food handling and serving requirements, which Ferguson thought was important and that Cox was familiar with. It is not essential, in Ferguson's view, to have prior school district food service experience to be successful as a Head Cook in the District. However, Ferguson had once hired a head cook from outside the school system and that did not work out. These matters figured into his recommendation. Raasch felt that Cox and Grievant had equal qualifications but that Cox's school district experience was the tipping point. Waukau realized that this recommendation was based in part upon Cox having only worked five or six months as a cook in the District and for Waukau it was not a concern. He accepted the recommendation and Cox was offered the Head Cook position. Waukau also considered Grievant qualified for both positions, but because Cox was being offered the Head Cook position, Grievant was offered the Cook position and Waukau approved waiving the two year limit and approved that transfer, which she accepted on or about June 2, 2009. She was told that she was not offered the Head Cook position because she was not the most qualified applicant for that position.

As to the District following USDA requirements, Ferguson has a great deal of responsibility in seeing that those requirements are met. These requirements are all contained in information and manuals that is available to the Cooks and Head Cooks. It is Ferguson's responsibility to see that those are complied with. There are DIP records and requirements which must also be followed. He communicates regularly with the Head Cooks and gives and receives information to and from them and the Cooks to stay in compliance with the guidelines and requirements.

On June 5, 2009 the Association filed a grievance on behalf of Grievant over the selection of the Head Cook position. The Grievance stated the issue as:

Amy Turney applied for the Head Cook position at KPS. She was notified on June 2nd that she did not receive the position. She was also told the position was offered to a non-bargaining unit member, because that person was "more qualified." Amy is qualified for the position based on having owned a restaurant and prior catering experience.

The Grievance contended that the sections(s) of the collective bargaining agreement violated was:

The District violated Article IV – Vacancies/Transfers, Section E when it did not award the Head Cook position at KPS to Amy, as she was the senior qualified in-district applicant.

The Superintendent and KPS Principal had indicated to Amy that two year limitation on voluntary transfers could be waived.

The District denied the grievance which eventually led to this arbitration. During the grievance process the grievance was presented to the District Board of Education. The Board heard from the Association at that level. After that meeting the Board itself sought and reviewed the applications of Grievant and Cox. Also after that meeting Ferguson submitted a letter to the Board defending his decision and explaining his rationale, which was consistent with that set out above. The Association was not copied in that letter and it did not receive it until after the Board decision. That letter, however, also contained some matters critical of Grievant as to some irregularities in a school activity bank account she and others worked with and her attendance, among other things. It stated in part:

Amy's poor record keeping with the high school activity account which ultimately experienced a loss of over \$8,000 was of concern to me. As a head cook she would be in charge of completing paperwork and working with a budget of over \$85,000.

and:

Hiring Amy Turney as head cook, given her attendance, her lack of school food service experience, and her poor recordkeeping of the student activity account, in my opinion, was not in the best interest of our students or MISD.

The Association did not have a chance to question Ferguson about his letter or its subject matter in front of the Board or submit countervailing information before the Board denied the grievance. At the hearing in this arbitration it became apparent to the undersigned that there was absolutely nothing to show that Grievant had any poor record keeping concerning the activity account or any other accounts. Not only was there no evidence of any such short coming, but the evidence did show that several people in the District were involved in how the account was managed, the matter had been investigated by outside authorities and no responsibility for the discrepancy was shown to be Grievant's. Also, the evidence at the hearing was clear that her use of contractually bargained for leave days or sick days was well within the contracted amount she was entitled to use, that she has never been disciplined for anything in the District, and that she is a very competent and dutiful employee who is undeserving of the insinuations in the letter. No one from the Board of Education was called to testify at the hearing in this matter.

Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

Association

In summary, the Association argues that internal applicants are given priority for transfer requests. Grievant was the senior qualified in-district applicant for the head cook position. The District violated Article IV Section E of the CBA when it denied her that position and hired an external applicant. Looking at each sentence in Section E, the District did consider her request to transfer. The word “most” does not appear in the second sentence to modify “qualified” as to giving priority to in-district transfer requests. The District had an obligation to prioritize Grievant for the head cook position because it says “shall”. Cox was not an internal applicant and his application for head cook should only have been considered if there were no qualified in-district applicants. The District admits Grievant was qualified. The language is clear and unambiguous. As the senior qualified internal applicant the District was required to transfer her to the head cook position. The District has failed to sustain its burden to show that denial of awarding the position to Grievant was for good cause. The only justification the District provided for denying the position to Grievant was a claim she was not the most qualified applicant. But determining that Mr. Cox was more qualified is irrelevant. Therefore, the District lacked good cause to deny her the position. And the District did not provide any written reason to Grievant for denying the transfer request as is required in Article IV. She was merely informed she was not the most qualified. The only written reasons given by the District were generated during the grievance process, which are inappropriate and prejudicial and do not constitute notice to Grievant of the reasons for her denial.

The Association argues that the District’s actions in denying Grievant’s request to transfer to the Head Cook position were arbitrary and capricious. After the Association and the District presented their positions on the grievance to the Board of Education the Board tabled the matter, wanting to look at the respective applications. Mr. Ferguson then sent an unsolicited memo to the Board concerning the hiring decision, which the Association learned about the same day the Board reconvened for action. The Association received a copy of the memo the day after the Board made its decision denying the grievance. It was highly inappropriate and prejudicial for the District to communicate arguments to the Board without the Association having the opportunity to rebut or even hear those arguments. Additionally, the arguments of the Board were contrived and baseless. Cox’s experience was listed as in the cafeteria, not the kitchen. Grievant’s experience was dismissed as being for adults. Giving more weight to Cox’s six months food service experience over Grievant’s ten years catering and restaurant experience flies in the face of reason. Ferguson also attacked Grievant’s record keeping skills and accused her of being responsible for the loss of funds from the high school activity account. However, Grievant simply input entries given to her by others and was not placed on an improvement plan or disciplined for poor record keeping. Grievant, whose mother is a head cook in the District, also disputes Ferguson’s claim that the head cook is responsible for working with an \$85,000 budget because the budget and menus are controlled

by Ferguson and the District bookkeeper and the head cooks do not control the budget – Ferguson does. And Ferguson played down in his memorandum Grievant’s catering and restaurant experience largely on the basis of one head cook he deemed unsuccessful. Ferguson’s claim that Grievant had an attendance problem was pure fabrication. She has never been spoken to or disciplined for attendance and has no excessive use of sick leave, no tardiness issues and no abuse of contractual leave provisions. The District, through Ferguson’s memo, acted in an arbitrary and capricious manner, citing dictionary definitions of arbitrary. Thus, the District lacked good cause to deny her request to transfer to the head cook position.

The Association also argues that the transfer waiver is not the issue at hand. The District’s argument that it did not have to grant the waiver fails due to the fact that the District did grant her the waiver when it offered her the cook position. The Grievant disputes the District claim that she was told up front there would be a waiver if she were the “most” qualified applicant. It was her understanding that if she was selected the candidate for either position that either principal - one would allow her to leave and one would allow her to enter their building or offer the waiver. This position is supported by Mr. Waukau, who testified that his talk with Grievant on the subject did not include internal or external applicants being considered together, and that it was common to post internally and externally at the same time. Under Article IV, Section E, priority clearly has to be given to internal applicants. The District acted arbitrarily when it effectively denied a waiver for the head cook position but then granted a waiver for the cook position. It used the waiver to circumvent the first paragraph of Article IV, Section E and hire an external applicant who, by any objective standard, lacked the skills and experience possessed by Grievant.

In reply to the District’s arguments, the Association contends that the District’s decision to waive the voluntary transfer restriction for Grievant for one position, but not another was subjective. It cannot do that. The District used the waiver to circumvent the language in Article IV, Section E which requires priority be given to in-district requests. There is no dispute Grievant is qualified for the head cook position. The contract language is clear and unambiguous. There is no provision that allows the District to bypass a qualified internal candidate in favor of an external applicant, even if the external applicant is more qualified. Further, the District’s qualification decision was not objective. And in Waukau’s talks with Grievant there was no discussion of internal and external applicants being considered as one pool. It was Grievant’s understanding she would receive priority as an internal candidate and granted a waiver if selected for either position. The District acknowledges Grievant’s reasons for requesting a transfer were valid. Under Article IV, Section E priority has to be given to internal applicants and Grievant, as the senior internal applicant should have been awarded the head cook position. The District sidestepped the contractual provision.

The Association further argues that it is appropriate for the Arbitrator to review the District’s hiring decision. An employer’s rights to determine qualifications cannot be exercised in an unreasonable manner, citing arbitral authorities. The District acted unreasonably here. And it did not have good cause under the contract language to deny the transfer to the head cook position. This is clearly within the jurisdiction of the arbitrator.

The Association argues that the evidence of record does not support the District's selection of Mr. Cox over Grievant for the Head Cook position. The record does not support a finding that Cox was the most qualified. Grievant's qualifications were far superior to those of Cox. There is no rational basis to weigh Cox's six months as a substitute cook and three months serving food in the Marine Corps over Grievant's more than ten years of food service in catering and restaurants. Ferguson embellished Cox's experience by testifying to his three years food service in the Marine Corps. He then admitted that Cox's application was actually three months, not three years. And the record is devoid of facts to support the District assertion the Cox had been performing the duties of the head cook position for several months already, was familiar with manuals and serving size requirements, and that he came to the job with no bad habits. He was a substitute cook, not a substitute head cook. Paid hourly, his experience would be just over three months working for the District, compared to Grievant's ten years in catering and restaurants. Rational people would not conclude that Cox was more qualified than Grievant. Also arbitrary was the generalization made by Ferguson that people with catering and restaurant experience do not make good school district head cooks. That sweeping statement is based on the poor performance of one former head cook. Such oversimplification is par for the course in this case, where the District determined that six months as a substitute cook prevailed over ten years of food service experience.

The Association requests that the District be ordered to offer Grievant the Head Cook position and make her whole for any lost wages and benefits.

District

In summary, the District argues that it had the authority to grant or deny a waiver of the two year restriction on voluntary transfers without limitation. The contract language is clear and unambiguous. If a transfer request has been granted, that employee is not entitled to another such transfer for two years. A transfer within two years is entirely within the discretion of the District to prevent by virtue of the required mutual agreement of the parties. There are no caveats, provisions or limitations on that discretion within the contract. And there is no assertion that the District's action was made on any discriminatory, anti-union or other improper motive. Grievant was aware of the two year requirement and she sought permission to transfer. The content of the conversation between Grievant and Waukau is not subject to any meaningful dispute. Grievant acknowledges that she was led to understand that if she were the selected candidate – considering both internal and external candidates – then she would be allowed to transfer. Waukau advised her that if the two building principals accepted it and Grievant was the most qualified for the position she would be allowed to transfer. The terms under which the District was willing to agree to a waiver were clearly stated and understood. Grievant would have to be selected as the most qualified candidate for either position in order to obtain a waiver. She was granted a waiver for the cook position. She was not offered and not granted a waiver for the head cook position. She was never told she was unqualified for the position. Both positions place no minimum qualifications on them. The contract language is clear. The District offered to exercise its right to approve of the transfer, despite the two year restriction, if she were the most qualified. She was selected for

the cook position and not for the head cook position. She was granted a waiver for the cook position and not the head cook position. The case is that simple. There is nothing in the contract language that grants Grievant any right to the position beyond that in Article IV, Section E, sub.2. Grievant says she believes she should have been offered the head cook position because she felt she met the qualifications of the job description. This is the crux of the Association's position. But the dispute is whether this fact gave rise to an obligation to offer her the head cook position. No reasonable interpretation of the contract language places that obligation on the District.

The District argues that the Association's attempt to insert the arbitrator's judgment regarding a hiring decision where there is no contract language restricting the District's management right to make that decision should be rejected. This matter is a question then of whether the District was within its rights under the contract to determine that Grievant was not the most qualified candidate for the head cook position. The management rights clause grants the District the right to hire, promote, transfer, schedule and assign employees in positions within the school system. The authority is restricted in Article IV only if an employee has not obtained such a transfer within the preceding two years. Nothing in the contract prevents the District from reverting back to its retained management rights to make a hiring decision based on comparing candidates as a prerequisite to granting a waiver. That is what occurred here. The District must make an objective comparison of candidates and not act in an arbitrary, capricious discriminatory or retaliatory manner, citing arbitral and statutory authorities. The Association does not have the authority under the contract to engage an arbitrator to review the District decision making absent those types of motives, which are not here. The decision is not arbitrary or capricious if reasonable minds could arrive at the same conclusion given the facts, citing arbitral authority. There is nothing in the record to suggest any improper motive of the District. The District's hiring decision cannot be assailed simply because the Association disagrees with the objective and non-arbitrary analysis made by the District. Expanding the role of the Association in the hiring process represents a significant expansion of the contract language and an unwarranted infusion on management rights.

The District also argues that ample evidence supports the District's selection of Cox over Grievant for the head cook position. Cox was more qualified for the head cook position. Ferguson's primary basis for his selection of Cox over the Grievant for head cook was school food service experience. Raasch reached the same conclusion. That was the reason communicated to Waukau at the conclusion of the interviews. The District had a prior bad experience with a head cook hire with a background very similar to Grievant's. Food service is subject to recipe and portion control, particularly at the elementary school where the head cook position was located. Nutritional components and record keeping requirements govern school district food service. They are unique to food service in a school. The expectations can be learned and the job postings list preferences rather than requirements. However prior experience with new hires with prior food service experience and preconceived ideas was problematic. Ferguson was familiar with each candidate, and in the end, Cox was the only person with school food service experience, which set him apart from the rest, including Grievant. There is no doubt that Grievant had experience in food service and had a good, clean work history in her district employment. There is no doubt she was qualified to the position. Given the lack of required qualifications, anyone is qualified. The District simply

made a decision between two candidates based on the fact that one candidate had experience – albeit limited – that was directly related to the position. According to Grievant’s testimony, there is little distinction between the cook and head cook positions. In that sense Cox had been performing the duties of the head cook for several months, was familiar with the manuals, familiar with serving size requirements, and had no bad habits from other cooking experiences. The District has never asserted that Grievant was unqualified or would have been unsuccessful in the position. However, the District picked a person that the Food Service Manager had been observing in virtually the identical position for several months, versus Grievant with a good employment history and strong work ethic, but no school food service and prior experience of the variety that previously caused problems for District hires. There is no way to establish that hiring the only person with experience in the position offered, regardless of the duration of that experience, is unreasonable.

In reply to the Association’s arguments the District contends that despite the Association’s attempt to ignore the sole contractual provision relevant to this matter, the fact remains that the contract clearly and unambiguously grants the District authority to grant or deny any transfer request within two years of a prior voluntary transfer. The Association’s arguments focus on parsing the language in the first paragraph of Article IV, Section E. But the contractual provision in sub-paragraph 2 of Article IV, Section E eliminates the deferential mandate of the grant of a voluntary transfer request exclusively focused on by the Association. It is undisputed that Grievant sought a transfer within two years of her prior voluntary transfer and therefore needed to obtain a waiver in order to transfer into a vacancy. The Association employs tortured reasoning. It folds Article IV, Section E on top of itself rendering the bargained-for exception to employee transfer right meaningless. The contract grants complete discretion to the District to determine whether it will or will not agree to grant a waiver with respect to a request for voluntary transfer into a vacancy when submitted by an Association member who has already been granted such a transfer within the preceding two-year period. And there is no evidence of any illegal motive, and the District had every right to place conditions on its willingness to agree to grant a waiver. Grievant sought permission to transfer despite the contractual limitation placed on her right to transfer. Grievant was aware of the restriction. Waukau conveyed to Grievant that he would grant the waiver if Grievant were the most qualified for the position, which makes logical sense. There is no distinction between being the most qualified candidate and being the selected candidate. Grievant was not the selected candidate anyway. Grievant certainly understood that she was seeking two separate positions that were handled separately and for which she needed separate transfer authorization. Grievant submitted two separate transfer requests for two separate positions. She was granted one and denied the other, which is within the discretion of the District under the contract language.

The District also contends that the Association’s argument that the hiring decision was arbitrary is not supported by the record. Ferguson and Raasch both independently arrived at the same conclusion for the head cook position. Grievant and Cox were the best candidates, but they liked Cox for the position because he had been working in the kitchen largely performing the duties of the head cook position. Grievant was qualified and a good fit, but better for the cook position. There were no minimum qualifications. Waukau was advised of

the decision and the deciding factor of Cox's school food service experience, which made him more desirable to the position. It defies logic to assert that the three individuals separately acted arbitrarily and all reach the same conclusion. There is no evidence of any improper motive. The Association bears the burden of establishing a violation of the contract. In this case the contract grants discretion to either grant or reject a waiver request, and the Association has not established illegal motive or arbitrariness. The waiver referred to is an explicit exception to the internal candidate preference afforded members in the first paragraph of the contract section. Of course the District used its waiver right to circumvent an otherwise granted bargaining unit member preference – that is the whole point of the exception. The Association argument would effectively eliminate sub-paragraph 2 from the contract. All provisions of the contract must be given effect, and the contract must be read as a whole. As to the Ferguson memorandum to the Board, ultimately all the administrators were consistent in their preference for school service experience. Past experiences with other hires are a valid consideration. There was nothing obviously unreasonable about this decision. The memorandum to the Board does not factor in any fashion into the decision to be made. Whether it was appropriate for the purpose of that step in the grievance process is a purely academic question because ultimately Grievant had recourse to binding arbitration before a neutral arbitrator to review the actions of the District. There was no deprivation of any right or process.

The District requests that the grievance be denied.

DISCUSSION

The issues in this case center on whether Grievant, a member of the bargaining unit, should have been offered the Head Cook position pursuant to the terms of Article IV of the collective bargaining agreement. There were two vacancies, one for a Head Cook position and one for a Cook position. These positions were initially sought by 15 applicants. Grievant was offered the Cook position and the Head Cook position was offered to Jeffrey Cox, who had been a substitute Cook in the District but was not in the bargaining unit.

Grievant had voluntarily transferred into the position of Administrative Assistant at the High School within two years of her request to voluntarily transfer to either the Head Cook or Cook position. Article IV, Section E states in pertinent part:

E. Voluntary Transfer: The administration shall consider requests for transfers to vacancies within the school district. Priority shall be given to in-district requests in the filling of vacancies on a seniority basis if the requesting employee is qualified. Denial shall only be made for good cause. In the case the senior applicant(s) is/are denied requested transfer(s), the superintendent shall notify the senior applicant(s) in writing for the reason(s) for any denied transfer.

1. An employee accepting a voluntary transfer within their job classification or out of their job classification shall maintain their seniority and step on the salary schedule within their current or new job classification.
2. An employee who seeks and is granted a voluntary transfer shall not be eligible for another voluntary transfer for two (2) years from the effective date of the original transfer unless waived by both parties.

Grievant had discussed seeking a waiver of the two year limit for voluntary transfers with Superintendent Waukau and the affected Principals. There is some dispute as to the exact nature of the conversation between Grievant and Waukau. Regardless of that, the Association contends that Article IV, Section E requires that Grievant be offered the Head Cook position because she was not only qualified but was the most qualified for the position and because as an in-district employee her request must be given priority over the non-bargaining unit applicant. The Association disputes whether the most qualified condition was actually a requirement set by Waukau. The Association contends there was no good cause to deny that position to her, and that the reason for the denial was not put in writing to her. The Association also objects to the District Food Service Director having submitted an unsolicited memorandum to the Board of Education during the grievance process that brought up several new matters critical of the Grievant without the Association having a chance to address or rebut those matters before the Board denied the grievance.

The District contends that Sub-paragraph 2 prevents Grievant from having an absolute right to the Head Cook position, that that sub-paragraph allows the District to put the “most qualified” condition on granting a waiver within two years, that the hiring decision is for the District to make as a management right which was not arbitrary or capricious but was made with appropriate considerations and, that the memorandum to the Board is not a reason to set aside the hiring decision.

The Association’s analysis of the first paragraph of Article IV, Section E is supported by the record. The language is clear and unambiguous. Grievant, as an in-district transfer, would be contractually entitled to priority over the outside candidate, given that there is no question about her being otherwise qualified to do the work. This would be true even if she were not the “most” qualified, compared to an outside candidate. However, the Article must be read as a whole, and that includes sub-paragraph 2. In interpreting the agreement, that sub-paragraph cannot be read out of existence. That sub-paragraph puts a two-year limit on an employee’s ability to seek a voluntary transfer, such as in this case. Sub-paragraph 2 is a condition on the employee’s right and priority in the first paragraph of Article IV, and requires the Parties to agree to a waiver of the two-year limit for a voluntary transfer. It is in sub-paragraph 2 that the District makes its case.

There is nothing in the collective bargaining agreement that requires the District to agree to the waiver. The District retains discretion as to whether to agree to a waiver and can put conditions on its agreement. Nothing in the collective bargaining agreement prohibits the

District from making a condition that compares qualifications of non-bargaining unit applicants with in-district applicants. As the District argues, that is what it did here. The Association argues that by the District allowing Grievant to seek the positions and by allowing the waiver for a transfer, Grievant was entitled to the priority in the first paragraph. But that ignores the condition upon which the waiver was premised and which sub-paragraph 2 allows. The fact that the District granted the waiver for the Cook position does not mean, as contended by the Association, that it must therefore grant the waiver for the Head Cook position. Grievant did not meet the condition for the Head Cook position, although she did for the Cook position. Applying the condition to both positions, she was the most qualified for one, but not the other. The Parties appear to agree that the District uses sub-paragraph 2 to circumvent the other provisions of Article IV, Section E. But this really is not circumvention. Sub-paragraph 2 limits the employee rights in the first paragraph, and grants discretion to the District that it would not otherwise have in the first paragraph for voluntary transfers within two years. The existence of the two-year limitation makes a difference.

There is some disagreement as to what that condition was, if any. The record persuades the undersigned that there was a condition placed on the District's agreement to waive the two year limit, and that condition was that it would be waived if Grievant were the most qualified candidate for either position. Grievant knew she needed to seek the waiver and spoke with the building Principals about it, and discussed the matter with Waukau. Waukau maintains that he told her he would waive the two-year limit if she were the most qualified candidate, and referenced how the process is followed for teachers (even though it appears that that process had not yet been followed for teachers while Waukau had been Superintendent). There is no evidence that the discussion was limited to only internal candidates. While there was no specific discussion of outside or in-district employees being considered, Grievant understood that she would have the waiver if she were selected for one of the positions. Her understanding does not eliminate or make impossible the existence of the "most qualified" condition. This clearly implies that she realized there would be a selection process and other applicants would be involved. She thus knew she would be compared to other candidates. The condition is also consistent with the need to seek a waiver in the first place, rather than having an entitlement to the priority. There is no evidence of any discussion of seniority or the priority as are contained in the first paragraph of Article IV. The evidence is persuasive that "most qualified" was the condition that Waukau made and communicated to Grievant when she sought the waiver.

The selection process then applied the condition. While the Association argues that Grievant was more qualified than Cox, the selection and hiring process is a management right as pointed out by the District. The employer normally does have the right to determine and assess the qualifications for a position it is filling. Ferguson and Raasch both felt that, while both Grievant and Cox were qualified for the positions, Cox's limited experience in school food service was a qualification that Grievant did not have and that gave Cox an advantage for the Head Cook position. That is a factor related to the job. The District can and does point to this difference in qualifications, and puts weight on it. It has a factual basis to determine that Cox was more qualified for the Head Cook position. This is not arbitrary or capricious. There is no evidence or argument that any illegal or improper factors or considerations entered

into the selection process. There may have been a different decision made. Reasonable minds might find Grievant to have been the more qualified between the two, and the District may or may not have made a better decision. But, it is the responsibility and prerogative of the District to make that decision and it did so within the bounds of its discretion. It is not improper per se for it to discount some experiences of candidates. The collective bargaining agreement does not otherwise limit the discretion in determining qualifications. Contrary to the cases cited by the Association, here the District did not make its determination in an impermissibly unreasonable manner. The prior school food service experience of Cox was the determining factor for both Ferguson and Raasch making him, in their opinions, the most qualified candidate. That is what was communicated to Waukau as the reason for recommending Cox for the Head Cook position. The selection of Cox for the Head Cook position rather than Grievant was made in conformance to the condition placed on the waiver of the two-year limit.

The Association argues that the denial of the Head Cook position to Grievant was not for good cause. But, as pointed out above, the condition on the waiver was valid, and there was a justifiable distinction and determination of qualifications between the two candidates. The difference in qualifications was the cause for Grievant being denied the Head Cook position. That difference in qualifications is good cause for the denial.

The Association argues that the District did not notify Grievant in writing of the reason that she was not selected for the Head Cook position. Article IV, Section E requires that a senior applicant be notified in writing of the reasons for any transfer denial. Here, Grievant was not provided a written reason for the denial until the grievance process was invoked. However, it is clear from the grievance itself that Grievant was informed within days at most of the non-selection for the Head Cook position and that she was told the position was offered to a non-bargaining unit member because that person was more qualified. The Association has not demonstrated any disadvantage in Grievant being informed verbally rather than in writing. The District has maintained its qualification argument consistently. This is a very technical matter which has not substantively affected or altered the rights of the Grievant or the Association. The collective bargaining agreement does not set a time limit within which the written notice needs to be given. There is no evidence that any request was made to put the reasoning in writing sooner. The undersigned is not persuaded that the delay by the District in providing a written notice in lieu of the verbal one is a sufficient violation so as to affect the result in this case.

A more troubling matter is the unsolicited memorandum from Ferguson to the Board of Education that included new matters critical of Grievant that were presented without the Association having an opportunity to challenge or rebut those allegations. Those were the school activity account records and attendance. Those matters were not part of the reasoning in the selection process made by Ferguson, Raasch and Waukau. All three testified to the nature of the considerations and these two matters were not included. Besides contending that the matters in the memorandum are contrived and baseless, the Association argues that sending the memorandum was inappropriate and prejudicial. It argues that the action was arbitrary and capricious. The evidence at the hearing in this matter is convincing that those matters are

indeed contrived and baseless. Grievant was not responsible for the activity account record errors. The Food Service Director, Ferguson, has as much if not more to do with the \$85,000 food service budget than anyone else, and Grievant did not have an attendance problem. The Association is rightly concerned that such mischief with the grievance process was based on prejudice, bias, or convenience rather than on reason or fact. However, the Association has not demonstrated actual prejudice, bias or convenience. The selection decision and recommendation to Waukau was based on the respective, relevant qualifications of the applicants. That part the District got right. The memorandum to the Board was a cheap shot. While it is not clear that the matters in the memorandum actually affected the Board's decision as to the grievance, certainly there is a taint there. However, it is the merits of the selection decision that are reviewable in this arbitration process, as the District observes. Whether the Board put any weight on the record keeping and attendance matters or not when reviewing the grievance filed over the selection, the initial selection decision is still reviewable here with an opportunity to cure any contractual violation in the actual selection. That selection and the Board's consideration of the grievance are two different matters. Any procedural irregularity did not affect the selection made before the grievance was filed. Whether the District complied with or violated Article IV, Section E is what needs to be determined here. The Association was informed on the day the Board was to meet that Ferguson had submitted a correspondence to the Board about the hiring decision. The Association did not ask for a rehearing or reconsideration by the Board after it received a copy of the memo, albeit after the Board denied the grievance. The undersigned is not persuaded that this memorandum irregularity is of sufficient impact as to set aside the entire selection process which is otherwise reviewable here. Such a scenario for sustaining a grievance may present itself in a different setting with a more demonstrable impact so as to be a contractual violation of the grievance process. The District is not free to game the grievance process. But that is not the case before me.

The District did not violate the Parties' collective bargaining agreement when it did not award the Head Cook position posted on May 6, 2008 to Grievant. Accordingly, based upon the evidence and arguments in this case I make the following

AWARD

1. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 28th day of September, 2009.

Paul Gordon /s/

Paul Gordon, Arbitrator