

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLINTONVILLE SCHOOL DISTRICT

and

CLINTONVILLE PUBLIC SCHOOLS – EDUCATIONAL SUPPORT PERSONNEL

Case 53
No. 68733
MA-14331

Appearances:

Robert W. Burns, Attorney at Law, Davis & Kuelthau, S.C., 318 South Washington Street, Green Bay, Wisconsin 54301, appearing on behalf of Clintonville School District.

David A. Campshure, UniServ Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303, appearing on behalf of Clintonville Public Schools – Educational Support Personnel.

ARBITRATION AWARD

The Clintonville School District (“District”) and the Clintonville Public Schools – Educational Support Personnel (“Association”) are parties to a collective bargaining agreement (“Agreement”) that provides for final and binding arbitration of disputes arising thereunder. On March 13, 2009, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a dispute related to a trial period clause in the Agreement. At the parties’ request, the Commission provided a panel of five WERC-employed arbitrators, and the parties thereafter selected the undersigned to serve as arbitrator in this matter. A hearing was held on October 14, 2009, in Clintonville, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A stenographic transcript of the proceeding was made. Each party submitted initial and reply post-hearing briefs, the last of which was received on December 22, 2009, whereupon the record was closed.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

ISSUE

The parties agreed to allow the undersigned to frame the statement of the issue to be heard. The District proposes the following statement of the issue:

Did the District violate Article XIII of the collective bargaining agreement between the parties when it denied the requests of McAuly and Thebo for a change of assignment in the fall of 2008?

The Association proposes the following statement of the issue:

Did the District violate Article XIII of the parties' agreement when it denied the requests of Patti McAuly and Krista Thebo to return to their former positions during the forty-workday trial period. If so, what is the appropriate remedy?

The undersigned adopts the following statement of the issue:

Did the District violate Article XIII of the Agreement when it denied the requests by Grievants Patti McAuly and Krista Thebo to be returned to their former positions? If so, what is the appropriate remedy?

REVELANT PROVISIONS

The Agreement contains the following provisions that are relevant to this matter:

ARTICLE II

MANAGEMENT RIGHTS

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

• • •

- C. To hire, promote, transfer, schedule and assign employees in positions within the school system;

• • •

ARTICLE XIII

VOLUNTARY JOB TERMINATIONS, JOB POSTINGS, TRANSFERS AND
TRIAL PERIODS

- A. Employees who plan to leave employment with the District shall, whenever possible, provide their supervisor with advance notice of such intention at least twenty-one (21) calendar days before the expected date of termination.
- B. The Association President shall be notified by mail and e-mail of all vacancies and/or open positions for each job in the school district, including a brief description of and qualifications for the position.
- C. All bargaining unit members shall be notified by a posting in each school building office in a visibly accessible area, for five (5) days and following this posting the position may be advertised in the local paper and Shopper's Guide.
- D. Vacant or new positions will be filled first from the list of qualified bargaining unit member applicants. Promotions or transfers will be determined on the basis of ability to perform the job, experience and the employee's performance appraisals contained within their personnel record. If the applicants for a job have essentially the same ability, experience and performance appraisals, the applicant with the greater seniority in the bargaining unit will fill the position.

In the event that a part-time position's hours are increased, but still remains a part-time position, that position shall first be offered to the employee holding that position. If the employee does not desire the position, it will be considered a new position and shall be subject to the posting procedure indicated above. In the event a part-time position's hours are increased in any classification to full-time, it will be considered a new position and shall be subject to the posting procedure indicated above, unless the employee working in the part-time positions total working hours in more than one (1) classification equals full-time. In that case, the employee holding the position being increased to full-time in one (1) classification shall be offered the full-time position. If the employee does not desire the position, it will be considered a new position and shall be subject to the posting procedure indicated above.

Definitions:

Upward Transfer – When a bargaining unit member voluntarily or involuntarily moves to a job classification with an increase in wage, i.e., Clerical III to Clerical II, or Custodian I to Maintenance Mechanic.

Lateral Transfer – When a bargaining unit member voluntarily or involuntarily moves to a new work assignment but retains the same job classification and the same wage.

Downward Transfer – When a bargaining unit member voluntarily or involuntarily moves to a job classification with a decrease in wage, i.e., Clerical II to Clerical III, or Paraprofessional I to Paraprofessional II.

E. Transfers shall be handled as follows:

1. Trial Period: An employee, who is transferred upward, downward or laterally to another position, shall serve a trial period of forty (40) workdays. An employee who does not satisfactorily complete the trial period at the end of forty (40) workdays or who, within the trial period, voluntarily requests to return to his/her former position shall be returned to his/her former position and his/her former pay rate. In the event the Superintendent determines an employee is not qualified to fill a position before the end of the forty (40) workdays, the Superintendent reserves the right to return this employee to his/her former position and his/her former rate of pay.
2. Employees who receive an upward transfer will be temporarily positioned one column back. If this would result in a reduction in pay, they will keep their current pay. The employee will be placed in the proper column after their trial period has been served.

Employees who receive a lateral transfer shall retain their same rate of pay.

Employees who receive a downward transfer shall be red-circled at the higher rate of pay until completion of their trial period. After completing the trial period they will retain the same years of service level as in the higher classification.

- F. No employee shall be unilaterally transferred between a building within the City of Clintonville and Bear Creek unless there is an elimination of a position.
- G. Summer Employment: School year employees shall be given the opportunity to apply for summer school employment within their current job classification (The definition of temporary employee in Article VII does not apply to this summer employment). These paraprofessional positions shall be filled first by the most qualified senior bargaining unit members applying for the position, except as provided herein. Paraprofessionals with experience working with specific pupils with special needs may be offered summer work with those pupils without regard to seniority. During this temporary summer employment, bargaining unit members shall be eligible to use unused emergency leave, personal leave and sick leave due them under the Master Agreement. Grievances concerning qualifications for summer school employment may only be appealed through Level 4, the Board level of the Grievance Procedure.

BACKGROUND

Each of the Grievants in this case is employed as a paraprofessional by the District. A District paraprofessional typically provides assistance either to a specific District student or, more generally, to a classroom. The District employs approximately thirty-five paraprofessionals.

Each of the Grievants has worked for the District for several years and has held several different paraprofessional assignments during the course of her employment. At the very end of the 2007-2008 school year, each of the Grievants was notified of her assignment for the 2008-2009 school year. Grievant Patti McAuly had been working with three students at a District middle school in the 2007-2008 school year; she was assigned to work at the elementary school with student "NM" for the 2008-2009 school year. Grievant Krista Thebo had been working in the 2007-2008 school year with student "J" at the elementary school; she was assigned to work with elementary student "G" for the 2008-2009 school year.

Within forty working days of starting in these new assignments in the 2008-2009 school year, both Grievants made a request to the District to be allowed to return to the positions they held in the 2007-2008 school year. Each of these requests cited the forty-workday trial period language in Article XIII(E)(1) of the Agreement. The District denied these requests, taking the position that the Grievants were not eligible to invoke the trial period provision because they had not "transferred" to the positions they sought to vacate, but rather were "assigned" to

those positions.¹ The Association grieved these denials, and that grievance led to the present proceeding.²

It is undisputed on the record in this matter that a District paraprofessional comes to occupy a paraprofessional assignment in the District in one of two ways. First, at the end of each school year, the District gives every paraprofessional an assignment for the following school year. Sometimes these assignments result in a paraprofessional being associated with the same classroom or student as the previous year; other times not. Even if there is no major change to a paraprofessional's assignment – that is, the paraprofessional is associated with the same classroom or student as in the previous year – the District still gives that paraprofessional notification as to what his or her assignment will be for the following year. At the end of the 2007-2008 school year, assignments for the subsequent year were handed out to each of the District's paraprofessionals on a slip of paper.³ In prior years, the District had given the paraprofessional staff verbal or e-mail notices as to what the assignments would be for the following school year. These assignments are made by the District based on a number of factors that may or may not take into account the paraprofessionals' individual preferences. Further, the jobs to which the District's paraprofessionals are assigned at the end of each school year to commence at the beginning of the next year are not posted before they are assigned. Nor does the Association receive any notice indicating that those jobs are vacant or available to be filled.

The second way to receive a paraprofessional assignment is through a posting. When a new paraprofessional position is created in the District or when an existing paraprofessional position is vacated, that position is posted. Pursuant to Article XIII of the Agreement, the Association president also receives notice of such openings or vacancies. These posted assignments can be filled voluntarily or involuntarily. The positions to which the Grievants were assigned for the 2008-2009 school year and which they subsequently requested to leave were never the subject of a posting or any notification to the Association president. The Grievants received notice of their assignments on the slips of paper that were handed out to all paraprofessionals at the end of the 2007-2008 school year.

The Agreement that applies to this dispute is dated July 1, 2006, through June 30, 2008. Article XIII of the Agreement has undergone a series of revisions in the past. In the 1996-1998 collective bargaining agreement between the parties, Sections D and E appeared as follows:

¹ The District sent correspondence to Grievant McAuly setting forth this rationale for its denial of her request. While the District did not respond to Grievant Thebo's request with correspondence setting out its rationale, it has been clear that it takes the same position with respect to Thebo's request that it took with respect to McAuly's.

² The grievance filed by the Association also included bargaining unit member Cathy Wied. The Association did not, however, pursue the grievance insofar as it related to Grievant Wied in the present proceeding.

³ The exception to this was four paraprofessionals who, for reasons not reflected on the record, apparently were not given assignments for the 2008-2009 school year.

- D. Vacant or new positions will be filled first from the list of qualified bargaining unit member applicants. Promotions or transfers will be determined on the basis of ability to perform the job, experience and the employee's performance appraisals contained within their personnel record. If the applicants for a job have essentially the same ability, experience and performance appraisals, the applicant with greater seniority in the bargaining unit will fill the positions.

Definitions:

Promotion - When a bargaining unit member moves to a job classification with an increase in wage, i.e., Clerical III to Clerical II, or Custodian I to Maintenance Mechanic.

Transfer - When a bargaining unit member voluntarily or involuntarily moves to a new work assignment but retains the same job classification and the same wage.

- E. An employee, upon being promoted to transferred to another position, shall serve a probationary period of thirty (30) days. An employee who does not satisfactorily complete the probationary period at the end of thirty (30) days shall be returned to his/her former position and his/her former pay rate. In the event the Superintendent determines an employee is not qualified to fill a position before the end of the thirty (30) days, the Superintendent reserves the right to return this employee to his/her former position and his/her former rate of pay.

In the 1998-2000 collective bargaining agreement, the following language was added to Section D:

In the event that a part-time position's hours are increased, but still remains a part-time position, that position shall first be offered to the employee holding that position. If the employee does not desire the position, it will be considered a new position and shall be subject to the posting procedure indicated above. In the event a part-time position's hours are increased in any classification to full-time, it will be considered a new position and shall be subject to the posting procedure indicated above, unless the employee working the part-time positions total working hours in more than one (1) classification equals full-time. In that case, the employee holding the position being increased to full-time in one (1) classification shall be offered the full-time position. If the employee does not desire the position, it will be considered a new position and shall be subject to the posting procedure indicated above.

Section E was also revised in the 1998-2000 collective bargaining agreement to delete the following strikethrough language and add the following underlined language:

An employee, upon being promoted or transferred to another position, shall serve a probationary period of ~~thirty (30)~~ forty (40) work days. An employee who does not satisfactorily complete the probationary period at the end of ~~thirty (30)~~ forty (40) work days or who, within the probationary period, voluntarily requests to return to his/her former position shall be returned to his/her former position and his/her former pay rate. In the event the Superintendent determines an employee is not qualified to fill a position before the end of the ~~thirty (30)~~ forty (40) work days, the Superintendent reserves the right to return this employee to his/her former position and his/her former rate of pay.

In the 2006-2008 Agreement, the title of Section XIII was changed from “voluntary job terminations and job postings” to “voluntary job terminations, job postings, transfers and trial periods”. Also, Sections D and E were revised with the following deletions and additions:

D. Definitions:

~~Promotion~~ Upward Transfer – When a bargaining unit member voluntarily or involuntarily moves to a job classification with an increase in wage, i.e., Clerical III to Clerical II, or Custodian I to Maintenance Mechanic.

Lateral Transfer – When a bargaining unit member voluntarily or involuntarily moves to a new work assignment but retains the same job classification and the same wage.

Downward Transfer – When a bargaining unit member voluntarily or involuntarily moves to a job classification with a decrease in wage, i.e., Clerical II to Clerical III, or Paraprofessional I to Paraprofessional II.

E. Transfers shall be handled as follows:

1. Trial Period: An employee, ~~upon being promoted or who is transferred upward, downward or laterally~~ to another position, shall serve a ~~probationary~~ trial period of forty (40) workdays. An employee who does not satisfactorily complete the ~~probationary~~ trial period at the end of forty (40) workdays or who, within the ~~probationary~~ trial period, voluntarily requests to return to his/her former position shall be returned to his/her former position and his/her former pay rate. In the event the Superintendent determines an employee is not qualified to fill a position before the end of the forty (40) workdays, the Superintendent reserves the right to return this employee to his/her former position and his/her former rate of pay.

2. Employees who receive an upward transfer will be temporarily positioned one column back. If this would result in a reduction in pay, they will keep their current pay. The employee will be placed in the proper column after their trial period has been served.

Employees who receive a lateral transfer shall retain their same rate of pay.

Employees who receive a downward transfer shall be red-circled at the higher rate of pay until completion of their trial period. After completing the trial period they will retain the same years of service level as in the higher classification.

DISCUSSION

The basic question in this case is whether the Grievants should have been allowed to take advantage of the trial period language at Article XIII(E) of the Agreement to return from the paraprofessional assignments they were placed in by the District for the 2008-2009 school year to the paraprofessional assignments they had in the 2007-2008 school year. The District's position in this case is that the trial period option set forth at Article XIII(E)(1) expressly applies only to a position into which a paraprofessional has "transferred". It contends that the assignments that are distributed among the paraprofessionals by the District at the end of each school year, which assignments are to commence at the beginning of the subsequent school year, are not transfers. The District argues that its interpretation is supported by language scattered throughout Article XIII, which defines a transfer as movement into "new or vacant" position. According to the District, a new or vacant position can only come to exist once beginning-of-the-year assignments have been made, such that a position can be then vacated or created anew. Once a District paraprofessional has begun in an assignment at the beginning of a new school year, then any move that paraprofessional would voluntarily or involuntarily make to a new or vacant position would constitute a transfer, and that individual would be entitled to take advantage of the trial period provision.

The Association asserts that the District's theory creates an artificial distinction between work assignments that commence at the start of the year and work assignments that commence after a school year has begun. The Association contends that the Agreement is devoid of any language that indicates that the rights of employees are different depending on when they began working in a paraprofessional assignment. It points out that Article XIII(D) defines a transfer as an instance where a bargaining unit member "voluntarily or involuntarily moves to a new work assignment".⁴ The Association asserts that, based on this broad definition, any change in

⁴ Of the three transfer concepts defined at Article XIII(D) of the Agreement, those being "upward" transfer, "lateral" transfer, and "downward" transfer, the Association's argument focuses specifically on the definition of lateral transfer. Because neither of the Grievants was moved to a lower or higher classification, their changes in

assignment, regardless of when it occurs or who initiates it, makes the affected paraprofessional eligible for the trial period benefit. Here, it is undisputed that the Grievants were involuntarily moved to the work assignments that commenced at the beginning of the 2008-2009 school year. Each of these changes, according to the Association, constituted a transfer. Because the trial period language at Article XIII(E)(1) provides that any paraprofessional requesting as much “shall” be returned to his or her former position, the District did not have the discretion to deny the Grievants’ requests.

It is true, as the Association points out, that there is no provision in the Agreement that expressly recognizes a difference between the “assignments” made at the end of one school year by the District to commence at the beginning of the subsequent school year and the “transfers” that otherwise occur. The District’s superintendent acknowledged as much in the course of the hearing in this matter. Nevertheless, it is reasonable to infer from the Agreement that such a distinction exists.

On a general level, it must be acknowledged that the management rights clause at Article II of the parties’ Agreement reserves to the District the right to “hire, promote, *transfer*, schedule and *assign*” employees (emphasis added). The fact that transferring employees and assigning employees are identified in this provision as two separate undertakings suggests some substantive difference between these terms. Certainly the District’s general right to transfer employees can be said to be modified by Article XIII, the title of which indicates that it generally pertains to transfers. The District’s right to assign employees, however, does not appear to be similarly modified by any other provision in the Agreement.

A close reading of Article XIII also persuades me that the assignments the District hands-out at the end of each school year to commence at the beginning of the following school year do not constitute transfers. Paragraph D of Article XIII starts with the following two sentences:

Vacant or new positions will be filled first from the list of qualified bargaining unit member applicants. Promotions or transfers will be determined on the basis of ability to perform the job, experience and the employee’s performance appraisals contained within their personnel record.

The manner in which the beginning of the first sentence of paragraph D refers to “vacant or new positions” and the beginning of the second sentence refers to “promotions or transfers”, suggests that these terms are understood to refer to the same concept. In other words, it is the vacant and new positions into which transfers (and promotions) occur. Similarly, paragraph XIII(B) establishes that the Association president is to be notified “of all vacancies and/or open positions for each job in the school district”. Insofar as this reference in paragraph B to “vacancies” and “open” positions is made, as with paragraph D, under the umbrella of an Article that pertains generally to “transfers”, it reinforces the notion that it is these types of positions in particular into which transfers occur.

assignment would be most appropriately associated with the lateral transfer concept.

This analysis begs the question as to why the assignments made by the District at the end of each school year to be commenced at the beginning of the subsequent school year are not considered transfers into vacant, new, or open positions. Indeed, the terms “vacant”, “new”, and “open” are not defined in Article XIII or anywhere else in the Agreement such that it is obvious that the parties intended to exclude assignments from those concepts. I am persuaded, nevertheless, that those beginning-of-the-year assignments should not be classified as transfers. A “transfer”, by its plain meaning, implies movement from one thing into another. The Union does not dispute that every paraprofessional receives notice of his or her assignment at the end of each school year for the beginning of the next. The District has persuasively argued that its paraprofessionals can only transfer out of one job into another once they are in their positions, and they are only in their positions once these annual assignments have been made.

To support its position in this case, the Association relies foremost on the definitions section set forth at Article XIII(D). There, a “lateral transfer” is defined rather broadly as a situation where an Association member “voluntarily or involuntarily moves to a new work assignment”. The Association argues that the fact that this definition includes the term “assignment” should be read to indicate that the parties intended to subject beginning-of-the-year assignments to the trial period provision. I disagree. First, there is nothing in the Agreement or on the record in this case that indicates that the use of the term “assignment” in Article XIII(D) is intended to constitute a reference to the beginning-of-the-year changes made by the District. Further, to the extent that an employee “transfers” in the narrow sense discussed above into a new or vacant position, he or she transfers into an “assignment”, making the use of this terminology appropriate even in the limited confines of the transfer provision. Finally, the lateral transfer definition must be read in the larger context of the Agreement in which it functions. Based on the several factors already discussed, the concept of a transfer is inextricably linked with vacant and new positions, and not with assignments that are commenced at the beginning of every school year. This reading narrows the seemingly broad definition of a lateral transfer at Article XIII(D).

The substance of paragraphs B, C, and D of Article XIII supports this conclusion. Paragraph B provides that the Association president is to be notified of all vacant and open positions, and paragraph C provides that such positions are to be posted within the District. The record in this case establishes that positions that are assigned at the end of one school year to commence at the beginning of the next are neither communicated to the Association president, nor are they posted. There were no communications or postings made with regard to the work assignments for the 2008-2009 school year, including those given to the Grievants. Further, paragraph D of Article XIII indicates that ties between applicants for transfers are to be filled on a seniority basis. The District indicated that it considers many factors when making beginning-of-the-year assignments, but neither party suggested that the process is constrained by the seniority requirements set forth paragraph D. Importantly, there is no evidence on the record indicating that the Association ever has grieved the District’s failure to follow any of these procedures with regard to beginning-of-the-year assignments. In other words,

those job assignment changes apparently have not been treated in practice by the parties as though they are the type of positions that are covered by Article XIII.

The Association argues that the notification and posting requirements set forth at paragraphs B and C of Article XIII should be read only to apply to voluntarily filled vacant and new positions. It suggests that, in contrast, the rest of the language in Article XIII, starting with the definitions section of paragraph D and working down to include the trial period provision at paragraph E, should be read to apply to voluntarily *and* involuntarily filled positions, including the beginning-of-the-year assignments handed-out by the District. This argument is not persuasive. There is nothing on the face of Article XIII that indicates that it should be interpreted and applied in this bifurcated manner. The provisions of Article XIII appear to apply, generally, to voluntarily and involuntarily filled vacant and new positions. The uncontroverted testimony at hearing by the District's superintendent corroborates this reading, establishing that positions that are the subject of postings and notices can be filled on an involuntary basis, as well as a voluntary basis. This evidence runs directly contrary to the Association's claim that the top half of Article XIII applies only to voluntarily filled positions.

Beyond that, a certain omission in the Agreement leads to the conclusion that Article XIII does not cover the beginning-of-the-year assignments by the District. Specifically, there is a complete lack of direction in the Agreement indicating what type of assignment change would be sufficient to constitute a transfer such that it would trigger applicability of the trial period provision. The Association asserts that it's simple: if a paraprofessional assigned to a student gets assigned to a different student, that would be a transfer; and if a paraprofessional assigned to a classroom gets assigned to a different classroom, that would be a transfer. The answer to that question did not appear to be so established or uniformly understood, however, in the minds of the witnesses who testified on behalf of the Association at hearing. When asked about any such system under cross-examination, each witness seemed to be formulating her response as it was being provided, and each one came up with her own, slightly unique idea as to what type of beginning-of-the-year change would be sufficient to constitute a transfer. The system only became "simple" as the Association described it in its post-hearing brief. Further, it is apparent that the two changes identified by the Association as triggering the trial period provision are only the most basic types of changes that occur with respect to paraprofessional assignments. Other less obvious changes can occur that might or might not trigger the trial period provision. Even a paraprofessional who is assigned to the same student from year-to-year will experience changes in her assignment in that she will move with that student from classroom to classroom and even to a different building; and even a paraprofessional who is assigned to the same classroom from year-to-year can undergo changes in her assignment such as different students in the classroom and possibly even a different teacher. The fact that the parties failed to establish in Article XIII or anywhere else in the Agreement which changes would be sufficient to trigger the trial period provision suggests that it was not intended that beginning-of-the-year assignments would be subject to that benefit.

The Association further argues that a conclusion such as the one I have drawn is inappropriate because it nullifies other language of Article XIII. Specifically, the definition of a transfer includes not only “voluntary” changes in assignments, but also “involuntary” changes, and the Association asserts that excluding the beginning-of-the-year assignments made by the District from the definition of a transfer will strip the “involuntary” reference of meaning. This assertion, however, is undermined by the record in this case. As discussed above, it has been established that positions that are the subject of postings can be filled on an involuntary basis. Thus, it is not accurate to suggest that beginning-of-the-year assignments are the only involuntary changes that occur, and the involuntary terminology has meaning even without the inclusion those assignments in Article XIII.

Further, I do not agree with the Association’s assertion that an interpretation in the District’s favor causes the employee right at issue here to turn on an arbitrary factor. The Association asserts that the District’s argument is that assignments that start at the beginning of the school year are not subject to the trial period provision and assignments that start any other time are. It asserts that the timing of when an assignment begins should not dictate whether an employee has access to the trial period benefit. While it is clear that the District’s position in this case has a chronological component in that it carves beginning-of-the-year assignments out of the transfers that are eligible for the trial period benefit, that distinction does not appear to be arbitrary. The District has persuasively shown that there is a substantive basis in the Agreement for concluding that assignments made at the beginning of the year should not be considered transfers covered by Article XIII.

The Association further argues that a decision in the District’s favor will give the District the unregulated right to move employees into new assignments and thereby erode the employees’ posting rights. It argues that broad application of the trial period provision is important because there are many factors that could cause a paraprofessional to not feel comfortable in a position. My conclusion here recognizes that, while the District’s beginning-of-the-year assignments do not trigger the trial period benefit, the vacant and new positions that are filled through transfer do trigger the option to use that benefit. Thus, employee posting rights have not been eroded in that the trial period benefit will continue to apply in the limited circumstances identified in Article XIII. The understandable fact that Association members would feel more comfortable with a less restricted provision does not change my interpretation of the language of the Agreement.

Finally, it is necessary to address the other extrinsic evidence on the record. Each party in this case has argued that its position is supported by what it characterizes as the clear and unambiguous language of the Agreement. Given the extent to which a decision in this case has required parsing of undefined terminology and inconsistent provisions, however, I do not regard the language as clear and unambiguous. Having said that, however, I also have not found certain extrinsic evidence presented by the parties to be particularly helpful.

First, I have not been influenced by the District's argument that there is an established past practice of not invoking the trial period option with regard to beginning-of-the-school-year assignments made by the District. The record reveals three instances in which the trial period provision in Article XIII has been invoked. One such instance apparently related to a position that had been posted, and therefore is distinguishable from the present situation. Two other instances occurred simultaneously on an occasion when two bargaining unit employees were involuntarily assigned to another position, were denied the opportunity to use the trial period language to return to their former positions, and chose not to grieve the denial. These are very few instances. The fact that the Association has not until now fully or successfully pursued its alleged right to invoke the trial period provision with regard to a non-posted, beginning-of-the-year assignment does not constitute an unequivocal, clearly enunciated, and readily ascertainable practice of not doing so.

Further, I am not persuaded that the bargaining history evidence on the record supports the Association in this case. The District superintendent testified that the interpretation of the trial period language for which the Association advocates in this proceeding was not discussed between the parties at the bargaining table. Cindy Frazier, a District bookkeeper and member of the Association, testified otherwise. She recounted the situation in 2005 when two Association members were thwarted in their effort to use the trial period provision to return from an assigned position to a former position. Frazier asserted that the changes to Article XIII that were made in the 2006-2008 Agreement were intended to address this occurrence. This assertion, however, is not persuasive. In the same sense that I have concluded that a reading of Article XIII does not support the Association's position in this case, it is also not at all apparent that the changes that were made to Article XIII in the 2006-2008 Agreement were oriented, as Frazier claims, toward correcting the problem encountered by the two bargaining unit members.

The Association also argues that the 2006-2008 Agreement was changed to uniformly define all types of transfers as including involuntary moves, as well as voluntary ones. I already have concluded that the inclusion of the involuntary transfer is consistent with the outcome of this case. Thus, I am not persuaded that this bargaining history evidence supports the Association's arguments to the contrary.

Further, the Association argues that the change in the 2006-2008 Agreement from the word "probationary" to "trial" has significance. Specifically, it asserts that the use of the word "trial" made it so that both the District and employees have the option to decide whether a job is suitable and underscores the right employees have to return to former positions. While I do not disagree with the Association's interpretation of the change in terminology, I read that change within the limited confines of Article XIII, which is limited to transfers. It is not a change that persuades me that Article XIII should be read to have broader applicability.

Finally, the Association argues that two significant changes were made to the language of Article XIII(E) in the parties 1998-2000 collective bargaining agreement. First, what was still known then as the “probationary” period was lengthened. Also, language was inserted giving employees the right to return to a former position. The Association makes the argument that it is reasonable to construe that those changes were not made independent of one another, but were a trade-off. This argument fails for two reasons. First, without some evidence, there is no basis for concluding that these changes represented a trade-off. Second, even if they did, the Association did not explain and I am not able to determine how such an exchange supports the Association’s position in this case.

AWARD

The grievance is DENIED.

Dated at Madison, Wisconsin, this 8th day of July, 2010.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator