

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHWEST UNITED EDUCATORS

and

BARRON AREA SCHOOL DISTRICT

Case 60
No. 69144
MA-14499

(Tripp Reassignment Grievance)

Appearances:

Mr. Stephen Pieroni, Attorney, Wisconsin Education Association Council, 33 Nob Hill Drive, Madison, Wisconsin, appearing on behalf of Northwest United Educators.

Mr. Stephen L. Weld, Attorney, Weld, Riley, Prenz & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of Barron Area School District.

ARBITRATION AWARD

Northwest United Educators, hereinafter "NUE," and Barron Area School District, hereinafter "District," requested that the Wisconsin Employment Relations Commission provide a panel of staff arbitrators from which to select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected. The hearing was held before the undersigned on February 4, 2010, in Barron, Wisconsin. The hearing was transcribed. The parties submitted briefs, the last of which was received by June 7, 2010 whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The District frames the issues as:

Was the involuntary transfer of the Grievant to Ridgeland-Dallas Elementary School in the best interest of the school district? If so, what is the appropriate remedy?

NUE frames the issues as:

Did the District violate the collective bargaining agreement when it involuntarily transferred the Grievant from the sixth grade at Riverview Middle School to the fourth grade at Ridgeland-Dallas Elementary School? If so, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I accept NUE's framing of the issues.

RELEVANT CONTRACT PROVISIONS

...

ARTICLE I – RECOGNITION

...

- C. NUE recognizes the board's right to operate and manage the school system subject to the conditions of this Agreement, the Board retaining all functions not otherwise specifically modified or nullified by this Agreement.

...

ARTICLE III – ORGANIZATIONAL RIGHTS

...

- D. The parties agree that the individual teacher shall have full freedom of association, self-organization, and the designation of representatives of his/her own choosing, to negotiate the terms and conditions of his/her employment, and that he/she shall have the right to refrain from the same. The parties further agree that said teacher shall be permitted such choice free from interference, restraint, or coercion by either the Board or NUE, or their agents.

...

ARTICLE VIII – LAYOFF

- A. When the Board deems it necessary to decrease the number of teachers, it may lay off the necessary number of teachers on the basis of certification and seniority; provided, however, that when the difference in seniority is no greater than 3 years, the final determination shall be made on the basis of performance as evaluated by the teacher's immediate supervisor. The Board shall give preliminary notice of layoff by May 1 and final written notice to the teacher(s) by June 1.

- B. No teacher may be prevented from securing other employment during the period he/she is laid off under this Article. In the event of a vacancy within 2 school years, such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies. Such reinstatement shall not result in a loss of credit for previous years of service. No new or long-term substitute appointments may be made while there are laid off teachers available who are qualified to fill the vacancies.

...

ARTICLE XIII – VACANCIES, TRANSFERS AND REASSIGNMENTS

- A. Grade, subject and activity assignments shall be made by the Board, but in doing so the Board hereby agrees to consider in each case the teacher's certification, experience, length of service in the District, qualifications for the position and personal wishes and convenience; however, it is understood that the best interest of the school system and the pupils are of primary importance. In making assignments and transfers, the same criteria will be applied. Activity assignments, however, will be made by mutual consent with the individual.

When a transfer is made or denied, the individual will be notified in writing of the disposition of his/her request.

The District reserves the right to make involuntary extra-duty assignments for official timers and score keepers. Such involuntary assignments will be rotated among all staff receiving compensation for coaching sports. Such involuntary assignments will be rotated in a non-discriminatory fashion. Payment for such involuntary assignments will be made pursuant to Appendix C.

...

- C. Teachers who desire a change in grade and/or subject assignment or who desire to transfer another building may file a written statement of such desire with the Superintendent of Schools not later than May 1. Such statement shall include the grade and/or subject to which the teacher desires to be assigned and the school or schools to which he/she desires to be transferred, in order of preference.

In case of an involuntary transfer to another building, the transferee shall have recourse to the grievance procedure and it shall be the burden of the Board to establish that the transfer was in the best interest of the school district.

...

BACKGROUND AND FACTS

The District provides educational services to the public of the Barron area. There are five schools in the District; Barron High School, Riverview Middle School, and three elementary schools including Ridgeland-Dallas, Almena and Woodland. The high school, middle school and Woodland Elementary are located in the city of Barron. Almena is 12 miles west of Barron and Ridgeland-Dallas is 15 miles southeast of Barron. At all times relevant herein, Lance Northey was Riverview Middle School Principal and Monti Hallberg was the District Administrator.

The Grievant, Dan Tripp, is 24 year elementary and middle school teacher having begun his teaching career with the District in school year 1985-86 at Ridgeland-Dallas Elementary School teaching third grade. The following year he moved to second grade at Woodland Elementary School. The Grievant then taught fourth grade for 19 years; the first six at Almena and then 12 additional years at Woodland Elementary School. In 2006-2007, he moved to Riverview Middle School where he taught sixth grade for three years until his involuntary transfer to fourth grade at Ridgeland-Dallas Elementary School in 2009-2010.

In addition to teaching in the District, the Grievant has been a member of the Barron Teachers Association wherein he served on the bargaining team since 1997, became Association President in 2007 and took over as the Northwest United Educators UniServ President in 2009.

In July 2008, Riverview Middle School Principal John Gerven retired from the District. His late retirement placed the District in need of an administrator with a short time period to search and complete the hire. Mr. Lance Northey was hired to the position and his first day of work was August 25, 2009, the same day that the teaching staff returned from their summer break. Shortly after Northey's arrival, teachers began to question his competency and voiced concerns about his leadership ability. This occurred not only because two staff members were

unsuccessful candidates for the principalship, but also because of perceived communication and organizational shortcomings. The Grievant, having recognized the dysfunction, intervened and attempted to serve as a conduit for communication between Northey and the teaching staff. In this role, the Grievant voiced the staff's concerns to Northey and to District Administrator Monti Hallberg.

In 2008-2009, the District's financial situation deteriorated to the point where the District started exploring its options, including a referendum. In addition to searching for new funding sources, the District worked to reduce its costs. As a result of declining enrollment in grades five and seven (the 2009-2010 sixth grade and eighth grade classes), the District eliminated two middle school teaching positions. Consistent with the lay off provisions of the labor agreement, the District laid off Brooke Doporcyk who taught grade three at Woodland and Dennis Arneson who taught grade four at Ridgeland-Dallas, based on their certification and seniority. These two lay offs created vacancies at the elementary schools and the District still needed to reduce the middle school staff by two teachers.

The Grievant was verbally informed on May 22, 2009 that he would be transferred to Ridgeland-Dallas Elementary School to teach fourth grade. The Grievant met with Northey on May 27 and with Hallberg on June 18 pursuant to the grievance procedure to grieve his transfer. The Board of Education addressed the grievance and Hallberg responded to the Grievant on July 27, 2009, as follows:

Dear Dan,

This letter is to follow up to the Board of Education decision to deny the grievance filed by NUE on your behalf regarding the administrative decision to move you to Ridgeland-Dallas Elementary School 4th grade.

This decision represents the Boards (sic) agreement that the reasons for this transfer was (sic) in the best interest of the school and the students. As stated in Article III, A., "it is understood that the best interests of the school system and pupils are of primary importance." The reasons I presented to you for your transfer support the above contract language and include:

- A 6th grade teacher has to be moved due to a reduction in students and therefore a reduction in one FTE 6th grade position.
- Ridgeland-Dallas Elementary School has a 4th grade opening due to layoff of a least senior teacher.
- Ridgeland-Dallas Elementary is in need of one male teacher in the building as staffed in the previous 10 years.

- Mr. Tripp has 18 years of 4th grade experience which is valuable for the students and the school system. We value this experience and research supports this experience is the primary predictor of future success.
- Your direct transfer is the least disruptive and avoids significant additional training and avoids loss of valuable experience.

Regarding other options of staff transfers to Ridgeland-Dallas Elementary, all had negative consequences for students and the school system.

Sincerely,

/s/
Monti J. Hallberg
District Administrator

POSITIONS OF THE PARTIES

District

The District needed to make over \$900,000 in budget cuts to balance its 2009-2010 budget. It eliminated 6.5 positions including three teachers, one of whom was the fourth grade teacher at Ridgeland-Dallas Elementary School. The District complied with the Layoff provision of the labor agreement and based its' staff reductions on certification and seniority which results in employees being laid off without any correlation to the positions that have been eliminated. In this instance, the District needed to move one sixth grade and one eight grade teacher out of their positions and two teachers into the two teaching vacancies created by the two lay offs.

The District made its tentative staffing plan in June 2009. One eighth grade teacher voluntarily transferred to the vacant third grade position, leaving only one decision to be made; which sixth grade teacher would be involuntarily transferred to the fourth grade position at Ridgeland-Dallas Elementary School. Ultimately the District decided the Grievant would be transferred.

The District decided to the transfer the Grievant after taking into account a number of operational considerations. First, it wanted to keep the fifth grade transition team secure. The decision to relocate the fifth grade to the middle school was highly controversial and four transition teachers were selected. This transition team conducted a study of other programs, wrote curriculum and developed a plan for transition. The transition of fifth graders to the

middle school proved to be successful and the District did not want to change the composition of the team.

Second, the District wanted the fewest possible number of staffing moves. The Grievant was the logical choice for the fourth grade position. He was an experienced fourth grade teacher who was familiar with the Ridgeland community. This transfer did not involve multiple transfers as each of the scenarios offered by the Association would have required. Finally, moving the Grievant avoided disruption to school operations and staff.

Third, the District considered all four of the sixth grade teachers and concluded it was in the "best interest of the District" to transfer the Grievant. Of the four sixth grade teachers, Gene Rick was the most senior with 30 years experience teaching sixth grade, taught science, and was likely to retire after the 2009-2010 school year. Lori Trowbridge and Kelly Akins each had taught 10 years in sixth and seventh grade. The Grievant was the only one of the four that had experience in fourth grade. There was a reasonable basis for the District to conclude that the Grievant was the best candidate for transfer based on his qualifications, experience and the benefit associated with limiting movement to one teacher.

Fourth, the District needed a male teacher at Ridgeland-Dallas to serve as a role model and resource for the Ridgeland-Dallas male students. The Association has not offered any evidence to challenge the conclusion that placing a male teacher at an elementary school is in the best interest of the students.

The terms of the labor agreement require that involuntary transfers are made on the basis of "the best interest of the school district." This language recognizes that there will be instances where the District's staffing needs will override the personal preferences of the teachers. The District has offered four rational, educationally sound considerations for the transfer decision. Consistent with Arbitrator Hempe's conclusion in TOMAHAWK SCHOOL DISTRICT, Case 47, No. 56681, MA-10376 (4/99) since the District's reasons are "soundly based, rational, and reflective of the best interest of the special education students the District is required to serve," then it has satisfied its contractual obligation. The arbitrator need not address whether it was the wisest of all decisions, or eve a wise decision, instead she only need determine whether it was a reasonable exercise of discretion. See FAIRWAY FOODS, 44 LA 161, 168 (Solomon, 1/65) and WAUZEKA-STEUBEN SCHOOL DISTRICT, Case 26, No. 68964, MA-14428 (Bauman, 1/10).

The District did not violate Article III – Organizational Rights when it transferred the Grievant to Ridgeland-Dallas. There is no evidence of malice directed at the Grievant. Further, there is no evidence that the Grievant's activities were distinguishable from other bargaining unit members. The Grievant was one of several middle school teachers who voiced complaints about the middle school's new principal. Other staff initiated conversations with Hallberg in the hallways and voiced concerns with Northey. Two internal candidates, who had applied for and did not receive the principal position, voiced concerns with Northey's performance. The District has a good working relationship with the local Association. NUE

is merely speculating that emails, minutes and meeting attendance played a part the transfer decision-making, but there is simply no evidence that the District transferred the Grievant for any union activities.

Finally, Article XIII, section D is the only section in the labor agreement which specifically references “involuntary transfers.” The grievance cites a violation of section A, but at no place in section A is there any reference to transfers from one building to another. Section A applies to internal building assignments and transfers. Section A does not apply to transfers between buildings and NUE’s failure to rely on the language of section D is grounds for dismissal.

The District respectfully requests that the grievance be denied.

NUE

NUE argues that the Grievant was transferred in violation of either Article XIII - Vacancies, Transfers or Reassignments, section A or Article III - Organizational Rights, section D.

The language of Article XIII, paragraph A is unique. The District agreed to consider, in each case of assignment, the teacher’s certification, experience, length of service in the District, qualifications, personal wishes and convenience. The District is obligated to provide objective, reliable and convincing evidence that it fairly considered all of the criteria when deciding that it was in the best interest of the school district to transfer the Grievant. Thus, the District must objectively show that the education of students would have been compromised if the District had transferred another qualified teacher to the fourth grade position at Ridgeland-Dallas in lieu of the Grievant. A balanced and fair evaluation of the criteria militated in favor of not transferring the Grievant.

The District offered four reasons in justification of its decision to transfer the Grievant. While NUE concedes the first two reasons - that a sixth grade teacher needed to be moved and that there was a fourth grade opening at Ridgeland-Dallas Elementary School due to layoff of a least senior teacher - were valid, there is insufficient objective and reliable evidence to support reasons three and four. The third reason offered by the District was the need for a male teacher at Ridgeland-Dallas Elementary, but this was nothing more than Hallberg’s subjective opinion. The custodian Ridgeland-Dallas is male and there is a male guidance counselor at the school two days per week. The District did not provide any educational research to justify Hallberg’s opinion. Moreover, Hallberg’s opinion does not rise to establishing a valid BFOQ which would allow for discriminating based on gender.

The District’s fourth reason, transferring the Grievant would be less disruptive and would avoid “additional training and avoids loss of valuable experience,” is not supported by the record. There were less senior qualified experienced teachers who would have been less inconvenienced had they been transferred to Riverdale-Dallas Elementary. The Grievant had

substantially more years of service and was significantly inconvenienced by the transfer since it resulted in an additional 30 miles daily commute.

NUE also poses the question, how much experience is “enough?” Hallberg agreed that there was not a significant difference between 12 years and 18 years experience. That would mean that there isn’t a significant difference between the Grievant’s 18 years of fourth grade experience and Cindy Madson’s 10 to 12 years experience. If not Madson, the Association asserts any of the following teachers could have been transferred to the fourth grade position and would have met the needs of the District and the pupils: Madson (date of hire 8/19/91), Duane Mettner (date of hire 6/16/97); Jonathon Lance (date of hire 5/19/08); or Lynn Gevens (date of hire 8/19/08). All of these teachers would have had a substantially shorter commute to Riverdale-Dallas Elementary School than did the Grievant.

The only testimony regarding disruption would be Hallberg’s unsubstantiated reference to the Grievant not being a “good fit” to join the fifth grade team. Hallberg testified that he heard that either the Grievant or the Grievant’s wife had conversations with members of the fifth grade team and told them that they or one of them – and not the Grievant – was going to be moving to Ridgeland-Dallas which caused some conflict. Hallberg also understood that the fifth grade team did not share the Grievant’s opinion of Northey. NUE maintains that whatever it was that Hallberg heard, they were unfounded rumors, and there is no evidence in the record which shows that the Grievant being assigned to the fifth grade at the middle school would have been detrimental to students or the District. Moreover, Hallberg’s claim that he wanted to keep the fifth grade team together was an after-the-fact justification that should be rejected as self-serving and unpersuasive. The Grievant should have been transferred to the fifth grade team based on his years of experience, his certification, his qualifications, and his personal wishes and convenience.

The District’s decision to transfer the Grievant violated the Grievant’s right to engage in protected concerted activity. The Grievant was a leader in the Association and NUE and was at the middle school. The Grievant attempted to assist the new principal, Lance Northey, in his relationship issues with the middle school staff. The Grievant solicited input from the frustrated middle school staff members and took it upon himself to act as a liaison between Northey and the staff. He brought the staff’s concerns to Northey and to Hallberg. As a result, he became the target of District hostility. The Grievant received sharply worded emails from Hallberg. NUE asks the Arbitrator to apply the “in part” test as set forth in *EMPLOYMENT RELATIONS DEPT. V. WERC* 122 Wis. 2nd 132 (1985). NUE maintains that the District’s reasons for transferring the Grievant were pretextual and there is evidence of anti union animus.

NUE asks for the grievance to be sustained and asks the Arbitrator to direct the District to assign the Grievant to a teaching position at the middle school. NUE further asks that the District compensate the Grievant for his commuting mileage to the Ridgeland-Dallas Elementary School at the IRS rate.

DISCUSSION

I start by pointing out that pursuant to Article XIII - Vacancies, Transfers and Reassignments, section D, the District bears the burden of showing that its decision to transfer the Grievant was “in the best interest of the school district.” Thus, the District must provide a reasonable and rationale basis for its decision to reassign the Grievant. That basis must be made in good faith and must be free of arbitrariness or capriciousness.

Moving to Section A, it provides the District with the specific right to make assignments and transfers, whether voluntary or involuntary, but when doing so it must, on a case by case basis, consider the “teacher’s certification, experience, length of service in the District, qualifications for the position and personal wishes and convenience.” While this language would appear to provide the Grievant some level of security, I cannot conclude that it actually does. The language asks the District to “consider” the criteria, but it does not provide a methodology under which that consideration must occur. Moreover it does not provide a hierarchy as to which criteria, if any, carry more weight than the other criteria.

The second clause of section A specifically states that the personal and professional characteristics and wishes of individual teachers are considerations but are secondary to “the best interest of the school system and the pupils” when involuntary transfer and reassignment decisions are made. The District therefore was obligated to consider the Grievant’s personal and professional criteria, but its main concern was to make its decision prioritizing the best interest of the District and students before the Grievant’s criteria.

Given the prioritization as contained in section A, I start with what the parties have labeled as the “primary” consideration – the best interest of the school system and the pupils - which the District was obligated to base its decision on when it selected the Grievant for transfer. The District maintains that its decision to involuntarily transfer the Grievant from the middle school to Ridgeland-Dallas Elementary School was in the best interest of the District. The District justified its decision with four reasons and provided these to the Grievant at the time it made the decision to move him to the fourth grade position at Ridgeland-Dallas. Those reasons were as follows: 1) a sixth grade teacher needed to be moved and there was a fourth grade opening at Ridgeland-Dallas Elementary School due to layoff of a least senior teacher; 2) the District wanted a male teacher at Ridgeland-Dallas Elementary School; 3) the District reassigned the Grievant to the vacant fourth grade position because he was experienced at the fourth grade level; and 4) transferring the Grievant was the least disruptive move and avoided additional training and loss of valuable experience.

At this juncture, I find it necessary to address NUE’s assertion that the District was obligated to provide evidence that there were no other staff members who could have been reassigned to the vacant fourth grade position. Contrary to the view of NUE, the language of Article XIII does not set forth this affirmative duty. Moreover, given the competing interests and listed factors, I am unclear what process could be utilized in order to differentiate between two, or possibly more, candidates. Assuming *arguendo* that District evaluated the fourth grade

vacancy and concluded there were two candidates that could be transferred and that either would fulfill the District's primary duty to make its decision "based on the best interest of the school system and the pupils," there is no methodology available in the labor agreement to differentiate and rank between the two candidates. For example, assuming all other criteria equal, if one candidate had more seniority, but less experience and the other candidate had less seniority and more experience, which of the two does the labor agreement state should be selected? And, if the other factors are not equal, the process becomes that much more confusing. As a result, while NUE has gone to great lengths to weigh the Grievant's credentials and personal preferences in comparison to other teaching staff members, I will refrain from completing such an evaluation, except to the extent that the District has differentiated the Grievant's experience from other teaching staff members.

A. *The District Sought to Staff Ridgeland-Dallas Elementary with a Male Teacher*

Hallberg testified that one of the reasons he considered and ultimately decided that the Grievant would be reassigned was his desire to retain a male teaching staff member at Ridgeland-Dallas Elementary School.

For at least 14 years, the District had staffed Ridgeland-Dallas with a male teacher; nine years with Dwayne Mettner (started at Ridgeland-Dallas in 1997-1998 school year) and then Dennis Arneson in 2008-2009. Arneson was one of the two teachers laid off effective the end of the 2008-2009 school year for budgetary reasons thus creating the fourth grade vacancy. Hallberg explained that having a male teacher in the building was beneficial because he felt it was important to have "a balance of female and male [teachers]," that he wanted a "male role model" in the school, and that a male teacher could talk to the boys about "male issues." He further indicated that in his view, "we've had a male there for many different reasons, talking about sexuality of adolescents and talking about issues that are maybe more male oriented that (sic) would be talking to a male." Tr. 132.

There is a rational basis to staff an elementary school building with at least one male teaching staff member. While it is possible that either the male custodian or part-time male guidance counselor could address problems that arise, I accept that having a full time male teacher available is advantageous and desirable. As to the NUE's claim that children of fourth grade age and younger haven't the need to discuss sexuality, this is somewhat naïve. It may be that they themselves are not sexually active, but that does not negate the topic from their daily lives nor does it eliminate the possible and likely existence that they will have questions which require answers.

B. *The District Desired to Capitalize on the Grievant's 18 years Experience at the Fourth Grade Level*

The District maintains that the Grievant was a logical choice for transfer because of his experience teaching fourth grade for 18 years in the District; for a time at each of the three

elementary schools, given his familiarity with the textbooks and curriculum and his understanding of the developmental needs of fourth grade children.

The record establishes that the Grievant taught a sample of the current fourth grade Everyday Math in 2005-2006 and was involved in selecting the textbook that is currently being used for fourth grade social studies. Moreover, the Grievant is familiar with the science and the reading/language arts used at that grade level due to his previous fourth grade knowledge. While I accept that the specific textbooks had changed since the Grievant taught that grade level, the Grievant had a comprehensive understanding of the curriculum at the fourth grade level. The Grievant had prepared and executed lesson plans for 18 years at that grade level. He knew the state standards and knew the dynamics of fourth grade children. The District's position is supported by the record.

NUE questioned "how much experience is enough" in the context of comparing the Grievant's 18 years against Cindy Madson's 10 to 12 years. I agree with NUE that there is little difference between the Grievant and Madson given their vast experience, but that does not negate the validity of the District's conclusion that transferring the Grievant was good for students.

C. Transferring the Grievant Would be the Least Disruptive and Avoided Significant Additional Training

Hallberg testified that involuntary transfers and the bumping process are "real problematic" to the District and to students and that he wanted to "minimize the bumping of staff members." Bumping in this context appears to mean the number of staff moved from one position to another, as determined by the District, in order to fill a vacancy and not employee driven bumping based on seniority as commonly understood in labor relations.

The District eliminated two teaching positions in preparation for the 2009-2010 school year; one at the sixth grade level and one at the eighth grade level based on student enrollment.¹ As a result of the eliminated positions, the District needed to reduce its teaching workforce by two. After laying off two teachers, the District had a fourth grade opening at Ridgeland-Dallas Elementary and a third grade opening at Woodland Elementary to fill. It further needed to reassign or transfer one sixth grade teacher and one eighth grade teacher. Seventh grade social studies teacher Jennifer Miller communicated to the District her desire to move to the third grade vacancy which the District approved, thus leaving only the sixth grade reduction to effectuate and the vacancy at fourth grade at Ridgeland-Dallas to fill.

¹ Jennifer Miller was a seventh grade social studies teacher. There is cross over between seventh and eighth grade teachers due to certifications. The record is unclear as what impact Miller's voluntary transfer had on the remaining seventh and eighth grade teachers.

Moving the Grievant resulted in one staff move – the Grievant from the middle school to the fourth grade position. Moving the Grievant to the fifth grade and supplanting a fifth grade teacher would have resulted in two moves – the Grievant to the fifth grade and a fifth grade teacher to the fourth grade. Two staff moves, rather than one, is not significantly more disruptive and I therefore do not find the District’s reason compelling. Moreover, Miller was moved to third grade and Hallberg testified that it was an eighth grade position being eliminated, not seventh. As a result, even if the seventh and eighth grade staff worked together and had an integrated schedule whereby some seventh grade teachers taught eighth grade classes, the fact of the matter is that some eighth grade teachers had their schedules changed enough to cover for Miller’s departure. Thus, there was if not a complete reassignment, at least a partial reassignment for an eighth grade teacher thereby resulting in two moves for that position.

NUE challenged the District exclusion of the fifth grade team asserting that the Grievant was qualified for any of those positions and had the District reassigning him to one of those positions, he would have been allowed to stay at the middle school. There were four staff members on the fifth grade team; Cindy Madson, Duane Mettner, Jonathan Lance, and Lynn Geverns. All of the fifth grade team members were less senior than the Grievant, had the same certification and lived in closer proximity to Ridgeland-Dallas than the Grievant.

Hallberg explained at hearing that he sought to maintain the fifth grade team, which was created in 2008-2009 when the District made the decision to move fifth grade students from outlying schools to middle school, due to the controversy that was created when the District proposed the move. Hallberg further explained that the team of four –each selected for specific reasons – had created a successful transition and program. They met throughout the summer of 2008, created a one week orientation program for the in-coming fifth graders and developed the curricula for the new fifth grade. Other than Hallberg’s testimony, there is nothing in this record that establishes this move (fifth grade to middle school) was a divisive topic and therefore I am hesitant to attach a high degree of emotion to the decision. At the same time, dismantling an individually selected team of teachers that developed and implemented a new fifth grade team-based curriculum is understandably not desirable. As such, the District’s proffered reason – that it wanted to maintain the fifth grade team - is reasonable and legitimate.

As to Hallberg’s testimony that the fifth grade team had voiced concerns as it related to the Grievant “joining” the team, this record does not support Hallberg’s conclusion. I accept that Hallberg had some recollection of an alleged verbal altercation between either the Grievant or the Grievant’s wife and some member(s) of the fifth grade team, but the fact that he did not indicate which of the four team members brought the altercation to his attention and his lack of certainty as to who (the Grievant or his wife) uttered the controversial comments makes it more believable that the event was brought to Hallberg’s attention via hearsay and/or rumor. Incomplete, inaccurate, and/or unsubstantiated allegations are not legitimate basis’ to make staffing decisions under the language of the parties’ labor agreement.

Next, the District asserts that transferring the Grievant avoided additional training since the Grievant was experienced in fourth grade and other staff would need to become knowledgeable on the fourth grade curriculum. As previously discussed, the Grievant had experience in the fourth grade, but as NUE points out, his experience was dated in comparison to Cindy Madson who taught fourth grade more recently than the Grievant. Madson had been a fourth grade teacher before the 2008-2009 school year when she became part of the fifth grade team at the middle school. The Grievant had a three year hiatus from fourth grade. I accept the District's argument as it relates to all staff, except Madson. The District's concern with additional training is not applicable to Madson, but when viewed in conjunction with the District's desire to maintain the fifth grade team, I cannot find that excluding her was arbitrary or capricious.

Ultimately, NUE is asking for me to upend the District's decision to reassign the Grievant because it not only disagrees with the reasons that the District utilized when it made the decision, but also because it concludes that there were better candidates for reassignment. This I cannot do because it is not the standard set by the collective bargaining agreement. The District provided reasonable and justifiable educational reasons for its decision. All reasons offered are supported in the record, except that claim that a single transfer – the Grievant – occurred, but that fact is only part of the District's avoidance of disruption argument which is supported and subsumed by its desire to avoid breaking up the fifth grade team.

Having found that the District made its decision to transfer the Grievant for reasons that promote the "best interest of the school system and the pupils", I move to whether the District considered the personal and professional criteria that it is contractually obligated to consider and failure to do so would result in a violation of Article XIII of the labor agreement. The criteria include the "teacher's certification, experience, length of service in the District, qualifications for the position and personal wishes and convenience." The record establishes that the District considered the Grievant's certification, experience, and qualifications as discussed above. The Grievant informed Hallberg of his wishes and convenience when they met in May 2009 and therefore the District was on notice of same. The only criteria which the District was required to consider, and was not specifically addressed in this record is the Grievant's seniority, but it is reasonable to conclude that the District considered the Grievant's seniority at the same time it considered the seniority of Gene Rick, the sixth grade teacher which the District passed over for transfer as a result of his 34 years seniority. The record supports a finding that the District considered the personal and professional characteristics of the Grievant, but that it ultimately concluded that the decision to transfer the Grievant was "in the best interest of the school system and the pupils."

D. The District Retaliated Against the Grievant in Violation of Article When he was Selected for Transfer

The Association argues that the Grievant was selected for reassignment due, in part, to his Association positions and protected concerted activities. Those activities included his intervention in the deteriorating relationship between Principal Northey and the staff at

Riverview Middle School, his email exchange which were viewed by Hallberg as disrespectful and his filing of grievances on behalf of the bargaining unit.

Article III of the labor agreement sets forth an agreement between the parties wherein they:

...agree the individual teacher shall have full freedom of association, self-organization, and the designation of representatives of his/her own choosing, to negotiate the terms and conditions of his/her employment, and that he/she shall have the right to refrain from the same. The parties further agree that said teacher shall be permitted such choice free from interference, restraint, or coercion by either the Board or NUE, or their agents.

NUE seeks application of the "in part" test and concludes that the Grievant was reassigned at least, in part, due to union animus. The "in part" test is applicable to alleged violations of violation of Sec. 111.70(3)(a)3, Stats. And was described by the Wisconsin Supreme Court in its decision in *EMPLOYMENT RELATIONS DEPT. v. WERC*, 122 Wis.2d 132, 142-143 (1985):

The employee must show that the employer was motivated, at least in part, by antiunion hostility. Therefore, proof that the employee was discharged for legitimate reasons is relevant in determining the employer's motive. The WERC in this case explains,

"As the key element of proof involves the motivation of [the employer] and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decision maker, [the employee] must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that [the employer] need not demonstrate 'just cause' for its action. However, to the extent that [the employer] can establish reasons for its action which do not relate to hostility toward an employe's protected concerted activity, it weakens the strength of the inferences which [the employee] asks the [WERC] to draw."

NUE claims the Grievant's efforts at the middle school prompted his transfer. The Grievant intervened in the relationship between the principal and the middle school staff. Both the Grievant and Hallberg testified to the strained relationship and deteriorating morale at that building and while they disagreed as to the severity and origination of the problems, there is no question that it was a disagreeable work environment. Nothing in this record supports the conclusion that the Grievant's efforts to resolve the communication and performance issues at the middle school were unwelcome by Hallberg or Northey. Rather, the Grievant effectively interceded and made some headway toward bettering the communication by serving as an intermediary.

Subsequent to the Grievant's intervention, a series of communication in letter and email were exchanged which NUE asserts serve as evidence of hostile to the Grievant. They include an exchange between the Grievant and Hallberg regarding the lunch room, an email refresher from Hallberg to the middle school staff regarding restorative justice, an email from Hallberg to the middle school staff regarding common planning time, and the sixth grade minutes from February 10 which Hallberg believed the Grievant wrote. All correspondence, including the lunch room situation, was directed to if not all staff, more than just the Grievant. There is no suggestion in the record that there is a causal relationship between the correspondence and his transfer.

NUE also points to disagreements between the District and the Association, specifically relating to teachers Sonja Diedrich, Rod Wieneri, and Heather Madison, and concludes that these situations are proof of the District's hostility to the Grievant and his bargaining unit activities. The evidence establishes that in all three situations, the local bargaining unit and the District worked together and resolved the issues. None of the incidents resulted in hearings or external adjudication. I cannot find animus in conflicts that occur in the course of an on-going relationship between two parties, especially when the parties resolve them internally.

Regardless of whether I apply the "in part" test or not, the evidence does not support a conclusion that there is a causal relationship between the Grievant's transfer and his protected concerted activities. The fact that the Grievant held Association and NUE leadership positions does not allow for the automatic conclusion that management actions in contradiction to the Grievant's desires will be deemed to be in retaliation for those activities. As explained above, the District's decision to reassign the Grievant was supported by legitimate business reasons. There is no hint of improper motives which can be attributed to the Grievant's duties as they related to his role in the Association or NUE or his completion of functions as a result of those roles.

In conclusion, the evidence establishes that the District's decision to transfer the Grievant was supported by legitimate educational reasons free of arbitrariness, capriciousness or improper motive. Moreover, there is no evidence to indicate that the Grievant's protected activities causally affected the District's transfer decision.

AWARD

1. No, the District did not violate the collective bargaining agreement when it involuntarily transferred the Grievant from the sixth grade at Riverview Middle School to the fourth grade at Ridgeland-Dallas Elementary School.

2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 21st day of September, 2010.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator