

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MIDDLETON EDUCATION ASSOCIATION

and

MIDDLETON-CROSS PLAINS AREA SCHOOL DISTRICT

Case 91
No. 71838
MA-15218

(Padrnos Transfer Denial)

Appearances:

Mr. William Haus, Haus, Roman and Banks, LLP, Attorneys at Law, 148 East Wilson Street, Madison, Wisconsin 53703 appeared on behalf of the Association.

Mr. Robert Butler, Attorney, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, Wisconsin 53703, appeared on behalf of the School District.

ARBITRATION AWARD

On November 14, 2012 the Wisconsin Employment Relations Commission received a request from the Middleton Education Association and the Middleton-Cross Plains Area School District seeking to have William C. Houlihan, a member of the Commission's staff, assigned to hear and decide a dispute between the parties. A hearing was conducted on November 20 and 29, 2012 in Middleton, Wisconsin. There was no formal record of the proceedings taken. Post-hearing briefs and reply briefs were filed and exchanged by April 1, 2013.

This dispute involves the denial of a request to transfer positions by Mark Padrnos.

BACKGROUND AND FACTS

Mark Padrnos, the grievant has been employed by the Middleton Area School District as a High School English teacher since he was hired in August of 2001.

On May 1, 2012 the District posted a vacant teaching position at the Glacier Creek Middle School. The position was titled "7th Grade Academic Literacy" and included the following qualifications:

1. A valid Wisconsin teaching certificate in the subject area of employment (Elementary, 1/8 with English Emphasis or Secondary English).
2. Minimum grade point average of 2.75 on a 4.0 grading system in degree course work
3. Ability to interact in a positive constructive manner with students, staff and public.
4. Teaching diverse student population (racially, culturally, socioeconomically varied).
5. Experience teaching middle school students.
6. Prefer Reading License 316 in addition but not required.

On May 28, 2012 the District posted another vacant teaching position at the Glacier Creek Middle School. The position was titled "8th Grade English Teacher (1.0 FTE, Regular Contract), and included the following qualifications:

1. Valid Wisconsin teaching certificate in the subject area of employment (Secondary English or Elementary with English Emphasis)
2. Minimum grade point average of 2.75 on a 4.0 grading system in degree course work.
3. Ability to interact in a positive constructive manner with students, staff and public.
4. Teaching diverse student population (racially, culturally, socioeconomically varied).
5. Experience working with middle school students.
6. Prefer classroom experience in or knowledge of Writer's Workshop and "Units of Instruction".

The District received a number of applications for the positions. Some applicants applied for both. On May 30, Mr. Padrnos applied for the 8th grade opening. His request was denied. On June 12, 2012 a grievance was filed which alleged a violation of Article 5, Section 5.9.5, and Appendix VI of the Master Contract.

The grievance was denied at the first step, on June 26, by Tabatha Gundrum, Director of Employee Services, who indicated:

This reply is related to the grievance that was received by MEA on Tuesday, June 12, 2012 at the District Administrative Center. This grievance is denied. As stated during the meeting with Mark Padrnos on June 7th, the transfer was denied and in keeping with Section 5.9.5.3, "Staff members who are denied a transfer will, upon request, be given the reasons therefore.", the reasons for the denied transfer were provided.

These reasons included the fact that Mr. Padrnos remains on an Improvement Plan and the District will not transfer him in the middle of that process. This rationale is supported by past practice which occurred a year ago with another similarly situated staff member.

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Padrnos appealed the denial on July 3, 2012.

Donald Johnson, Superintendent of Schools, denied the grievance on July 25 at his step of the procedure, by the following:

After a review of the language in article 5, section 5.9.5 and section 5.9.5.3 in the collective bargaining agreement, I find that the specific language in section 5.9.5.3 does reflect the district right to deny a transfer request. Further, granting this request is clearly not in the best interest of the students, parents, and colleagues in the district that would be impacted. The reality that Mr. Padrnos is currently on a "Plan for Improvement" related to his ability to deliver curriculum, plan instruction, and assess student performance appropriately and at an acceptable minimum standard is further evidence that supports a denial of this request.

The best interest of students and the district is to continue with the "Plan for Improvement" with the current supervision team, and not interrupt a process that has already been delayed and interrupted once. Allowing a teacher whose practice has been in serious question in his current assignment to transfer to another level, another school, and another course is not a prudent or reasonable action.

There is also precedent that the district has denied a previous transfer request of a staff member similarly situated.

The appeal of this denial forms the substance of this proceeding.

During the grievant's 2007-08 school year evaluation the District noted 4 areas of performance which it believed required attention. Those included the need to develop assessment rubrics, the need to develop healthier balance with student relationships, the need to

improve communication, record keeping and supervision, and the need to develop clear assessment guidelines for students at the start of a unit or lesson.

A number of events/incidents transpired over the course of the 2009-2010 and 2010-2011 school years that caused the District to conclude that Mr. Padrnos should be placed on a Plan of Improvement. A student requested that she be allowed to move out of Mr. Padrnos classroom because she felt uncomfortable with classroom conversations relative to her religion. A parent complained that Mr. Padrnos had contacted the family on a Sunday afternoon to discuss disciplinary strategy. Both the timing of the call and the topic were deemed offensive by the parent. A concern was raised by Administration about a remark made on a report card that could be regarded as racially insensitive and another that could be considered a violation of FERPA.

In January the grievant made a remark to students about how their clothing might be regarded as appropriate to a gay lifestyle. The remark was made in public and offended a co-worker. During this same time frame the district discovered that the grievant had not administered a semester exam for one of his courses, and a review of his grade book indicated that he had entered very few grades for the semester.

On February 8, 2011, the grievant was given a letter of reprimand noting these various concerns. He did not grieve that letter. The parties dispute the significance and applicability of these matters. I find them noteworthy because they form the basis of the District's concern over the performance of the grievant and that concern led to a Plan of Improvement.

A Professional Performance Improvement Plan was implemented on February 28, 2011. The plan was organized into 4 broad goals of improvement, each reflecting a District Domain Rubric.

The first goal (Domain 1; Planning and Preparation) required the grievant to demonstrate proficiency in knowledge of content and pedagogy. The goal listed a number of performance concerns, including outcomes that reflected a low expectation for students and a lack of vigor, unclear outcomes that do not permit viable methods of assessment, learning activities not suitable to diverse learners, unclear or chaotic lesson structure. Other concerns included: assessment structures incongruent with instructional outcomes, lack of formative assessment to provide students with frequent feedback, and lack of use of assessment results to design future instruction.

The first goal also identified certain direction and support. The grievant was directed to submit weekly unit and lesson plans, the content of which were identified. The plans were to identify learner outcomes and appropriate assessment methods. They were to be aligned with daily and unit outcomes and differentiated to engage all learners. He was directed to allocate appropriate blocks of time to learning activities, to provide students with rubrics for the summative assessment at the outset of the instructional unit, and to provide regular feedback to students based upon the formative assessments.

The second goal (Domain 2; Classroom Environment) required that the grievant create and maintain a classroom environment which supports student engagement and learning. A number of performance concerns were identified within this area. Evaluators observed that the teacher had negative, demeaning or sarcastic interactions with at least some of the students. It was noted that some unsupervised student groups were not engaged in learning. Concerns were expressed about the grievant's response to student misbehavior.

The second goal directed the grievant to use language which is culturally and age appropriate. He was directed to monitor group effectiveness and to use strategies that engage all learners. He was directed to develop a clear set of expectations and procedures for student behavior and teacher response.

The third goal (Domain 3; Instruction) directed the teacher to demonstrate a proficiency in instructional technique. The grievant was advised that his lesson purpose was unclear to students. The evaluators indicated that certain activities and assignments were inappropriate for students' age or background. The lesson structure was criticized. The evaluators indicated that students were not aware of the criteria and standards by which their work would be evaluated. The grievant's feedback to students was described as poor and untimely. The grievant was described as giving up on students who struggle.

The grievant was directed to communicate learner outcome to students at the beginning of each lesson, to learn and implement classroom discussions which engage all learners, to plan and manage his lessons. He was directed to share assessment criteria with students at the beginning of a unit, and to provide timely feedback to students on their writing. He was directed to identify and share the supports he has provided to struggling students.

The fourth performance goal (Domain 4; Professional Responsibilities) directed the grievant to perform professional responsibilities at a proficient level. The grievant was identified as having no system for maintaining information on student performance. The evaluators noted that his non-instructional records were in disarray. His feedback to students and families was deemed deficient. The evaluators described the grievant as avoiding participating in a culture of inquiry and resisting feedback on teaching from supervisors and colleagues.

The grievant was directed to maintain and produce a grade book with at least weekly feedback to students. He was directed to provide at least weekly updates to families on student progress. He was directed to seek out collaborative opportunities with other faculty and to implement changes suggested in classroom observations.

As noted, the formal Professional Performance Improvement Plan was implemented on February 28, 2011. Observations and meetings were held through the fall of 2011. On February 1, 2012, the final review of the Plan was held. The grievant was given a rating of Basic on the 1st and 3rd domains/performance goals. He was given a rating of Proficient at the

2nd and 4th domains/performance goals. The conclusion of the administrative team was a recommendation of non-renewal.

The language relative to the Professional Performance Improvement Plan (set forth below) was new to the 2011-2013 collective bargaining agreement. In response to the District's intent to recommend non-renewal, Counsel for the Association, by letter dated February 8, 2012, objected to the application of Article 13 of the contract to Mr. Padrnos. The Association argued that the provisions of the 2009-2011 contract should apply.

The District determined not to go forward with the non-renewal. Instead, by letter dated March 28, 2012, it terminated the Performance Improvement Plan effective Friday, March 28, 2012. Virtually simultaneously, the District issued a letter, dated March 28, 2012, placing the grievant on a new Professional Performance Improvement Plan, effective Monday, April 2, 2012. The initial meeting of the new Professional Support Plan occurred on April 10, 2012. The Awareness Phase began the next day.

The new plan had many of the same elements as did its predecessor. The grievant was at the very end of the Awareness Phase when he applied for a transfer. It was June 7, 2012 that the decision was made to move to the Improvement Phase of the second Plan, effective with the new school year.

ISSUE

The District believes the issue to be:

Did the District violate Article 5, Section 5.9.5 of the 2011-2013 collective bargaining agreement between the parties when it denied the grievant's request to transfer into the vacant 8th Grade English Teacher position at the Glacier Creek Middle School?

If so, what is the appropriate remedy?

The Association believes the issue to be:

Did the District violate the 2011-2013 Collective Bargaining Agreement of the parties when it denied the voluntary transfer request of the Grievant?

If so, what is the appropriate remedy?

As a practical matter, I view the two statements of the issue to be common. I regard Section 5.9.5 of the contract to control the outcome of this Award.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 2 – MANAGEMENT RIGHTS

- 2.1 The Board on its own behalf, hereby retains and reserves unto itself all powers, rights, authority, duties, and responsibilities conferred upon it and vested in it by applicable laws, rules, and regulations of the State of Wisconsin and the United States including, but not limited to:
- 2.1.1 The right to manage and control school properties and facilities;
 - 2.1.2 Select, direct, and/or reassign personnel;
 - . . .
 - 2.1.6 Evaluate staff and program;
 - 2.1.7 To discipline, discharge and/or non-renew employees for just cause except as otherwise provided by this agreement.
 - . . .
 - 2.1.9 Retain all functions and rights to act not specifically nullified by the Master Contract.
- 2.2 The exercise of these rights consistent with the terms of this agreement shall not be subject to grievance.

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ARTICLE 5 – CONDITIONS OF EMPLOYMENT

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5.9.5 Voluntary Transfers

When a vacant teaching position occurs, the position shall be posted and the bargaining unit employees shall have the opportunity to apply for a transfer to such vacant position.

- 5.9.5.1 A bargaining unit employee who wishes to transfer to a vacant teaching position shall file a written application therefore, and if the transfer is to a vacant position outside their (1) Grade Level

Classification/Department or (2) Grade Level Classification Subject Area, shall provide such additional information as required on the vacancy notice with the Office of Employee Services within ten (10) week days of the posting date of the involved vacancy notice.

5.9.5.2 Bargaining unit employees who wish to voluntarily transfer to a vacant position in the same (1) Grade Level Classification/Department or (2) Grade Level Classification Subject Area as defined on the Master Seniority List and who meet the minimum qualifications as established for the position shall not be required to compete with external candidates. In selecting between two (2) or more equally qualified bargaining unit members who have applied for a transfer to a vacant teaching position, the bargaining unit employee with the greatest district seniority shall be preferred.

Bargaining unit employees who wish to transfer to a vacant position outside their (1) Grade Level Classification/Department or (2) Grade Level Classification Subject Area as defined on the Master Seniority List and who meet the minimum qualifications as established for the position may be required to compete for such position with external candidates not currently employed by the District. All factors being equal, teachers on staff shall be given preference over external candidates and teachers with more district seniority shall be given preference over teachers with less district seniority for positions for which they have applied.

This right of transfer shall not apply to probationary teachers.

5.9.5.3 Staff members who are denied a transfer will, upon request, be given the reasons therefore.

5.9.5.4 Any teacher voluntarily transferred shall retain his/her individual seniority of District employment.

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ARTICLE 13 – NON-RENEWAL

13.1 Teachers employed in the District are subject to non-renewal on a statutory basis, as prescribed in Sec. 118.22, Wisc. Stats.

13.1.1 Probationary Employee: Non-renewals of teachers with three (3) consecutive years or less of employment in the District are not subject to just cause and are non-arbitral under the Grievance Procedure of the Master Contract.

13.1.2 Non-Probationary Employee: Commencing with the fourth (4th) consecutive year of employment in the District, non-renewal is deemed an arbitral issue under the Grievance Procedure of the Master Contract except as provided below.

13.1.2.1 Evaluation Process: After completing the probationary period, teachers will be subject to evaluation as per the terms of the collective bargaining agreement and applicable Board policies/administrative procedures. Where there are performance concerns warranting a Professional Support Plan (PSP), the following Awareness Phase and Improvement Phase may be implemented and may serve as the procedure for non-renewal;

After completing the probationary period, the parties agree to the following Professional Support Plan consisting of the Awareness Phase and the Improvement Phase as a procedure for nonrenewal.

Awareness Phase

The purpose of the Awareness Phase is to bring the subject teacher and individuals together to

identify and discuss areas of concern related to the District's Domain Rubrics taken from the District's evaluation framework or Professional Growth Plan. The District may make changes to its evaluation framework and/or the District's Domain Rubrics prior to the commencement of a school year. The District shall provide at least thirty (30) days notice of any changes and a copy of the changes to the MEA President.

1.) The administrative supervisor identifies, in writing, a Domain Rubric Component where current performance is deemed substantially not proficient by the supervisor. The administrative supervisor shall create a file for the teacher's Professional Support Plan (PSP) in which all documents related to the PSP shall be maintained. The District shall provide the teacher with copies of all documents placed in the PSP file and the teacher shall have the right to review/copy the documents and/or authorize review/copying of such file documents by a representative(s) of the teacher.

2.) The Awareness Phase will be discussed at an initial meeting. The Awareness Phase will last no longer than sixty (60) working days.

3.) At the conclusion of the Awareness Phase, the administrative supervisor and teacher will review the progress and the administrative supervisor will make one of the following decisions in writing:

- a.) Concerns resolved; no further action necessary; or
- b.) Progress noted, continuation of agreed procedures and extended timeline up to a

maximum of thirty (30)
working days; or

- c.) Concerns remain unresolved,
movement to Improvement
Phase.

. . .

Improvement Phase

The purpose of the Improvement Phase is to provide additional guidance and assistance for the resolution of concerns identified in the Awareness Phase of the Professional Support Plan for non-probationary teachers in order to encourage and promote success. The Improvement Phase shall consist of the following process:

- 1.) The Improvement Phase will be discussed at an initial meeting to be held within ten (10) working days of the completion of the Awareness Phase. The Improvement Phase will not last longer than ninety (90) working days.
- 2.) The Improvement Phase shall include the following elements which shall be provided to the teacher subject to the PSP at the initial meeting:
 - a.) A written statement identifying the concern relative to the District's Domain Rubrics;
 - b.) A written statement identifying the individuals involved in the plan, consisting of the following:
 - 1.) The teacher subject to the PSP;

2.) The principal supervising the teacher subject to the PSP;

3.) The peer coach;

i.) A qualified peer coach from the appropriate roster (including active and retired licensed teachers) selected by the principal of the teacher subject to the PSP. The peer coach's service shall be totally voluntary . . .

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iii.) The peer coach shall provide advice to the teacher in the improvement phase on how to improve teaching area /assignment skills and to successfully complete the remediation plan.

...

iv.) An additional evaluating administrator may be used as needed in any step of this process . . .

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- c.) A listing of activities/procedures to be initiated and utilized;
 - d.) A listing of resources to be allocated as necessary for the PSP implementation and completion including, but not limited to materials, staff development, implementation timelines and budgetary consideration;
 - e.) A timeline indicating implementation dates, final review dates, and meeting dates to review progress of the PSP.
 - . . .
 - f.) Additional observations will be conducted by the supervising administrator and no more than one other administrator. The peer coach shall be permitted to sit in on these observations to facilitate constructive assistance to the teacher who is the subject of the PSP. The supervising administrator shall evaluate the performance of the teacher subject to the PSP, in writing, and shall share such evaluation with the teacher promptly thereafter. The evaluation shall be placed in the teacher's PSP file.
- 3.) After the ninety (90) day work day Improvement Phase, the principal in consultation with the peer coach, shall state if sufficient improvement has taken place to justify a "proficient" or better rating.
- a.) If sufficient improvement has been made, the concern shall be deemed

resolved and the teacher is removed from the PSP.

- b.) If improvement has been made, but the concern is not resolved, the Improvement Phase may be extended for up to another ninety (90) workdays.
 - c.) If sufficient improvement has not been achieved, the teacher may be recommended for non-renewal.
- 4.) If non-renewal is recommended by the principal, the teacher may appeal to the Peer Review Panel. The Peer Review Panel shall consist of three (3) administrators of the teacher's choosing and two (2) teachers (volunteers, active or retired, selected by the administrator from a building different from that of the administrator).

. . .

- 5.) The Peer Review Panel shall review all documentation in the teacher's PSP file and any documents which the teacher elects to provide to the Panel. The Peer Review Panel shall also provide the teacher with an opportunity to be heard. The teacher may elect to be represented in making the presentation to the Peer Review Panel. The Peer Review Panel shall make one of the following findings:
- a.) The recommendation for non-renewal is upheld, and forwarded to the Board of Education;
 - b.) The Improvement Phase should be extended for up to ninety (90) additional days;

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13.2 Discipline and Discharge

13.2.1 Probationary Employee: Discipline or discharge of teachers with three (3) consecutive years or less of employment in the District are not subject to just cause and are non-arbitral under the Grievance Procedure of the Master Contract.

13.2.2 Non-Probationary Employee: Commencing with the fourth (4th) consecutive year in the District, discipline or discharge shall be based on just cause and is deemed an arbitral issue under the Grievance Procedure of the Master Contract except as provided for below:

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**MIDDLETON EDUCATION ASSOCIATION
MIDDLETON-CROSS PLAINS AREA SCHOOL DISTRICT
APPENDIX VI**

REASSIGNMENT AND TRANSFER

All vacancies must be posted in the manner stated below.

Grade Level Classification (Master Seniority List) refers to either: [Pre K-5] or [6-12]

<p style="text-align: center;">(1)</p> <p>Reassignment is within a building and within:</p> <p>a.) Grade Level Classification/Department OR</p> <p>b.) Grade Level Classification/Subject Area</p> <p>Will be posted within the building only</p>		<p>a.) Voluntary Teacher with most “District Seniority” given the position.</p> <p>b.) Involuntary Pre-K-5: Teacher with the least “Grade Level Classification” at particular grade is reassigned.</p> <p>Secondary: Teacher is transferred who has the least seniority in:</p> <p>1.) Grade Level Classification/Department OR</p> <p>2.) Grade Level Classification/Subject Area</p>
<p style="text-align: center;">(2)</p> <p>Transfer is</p> <p>a.) out of a building; OR</p> <p>b.) to a different Grade Level Classification/Department; OR</p> <p>b.) to a different Grade Level Classification/Subject Area</p> <p>Will be posted District Wide</p>		<p>a.) Voluntary Teacher with most “District Seniority” given the position</p> <p>b.) Involuntary Pre-K-5: Teacher with least “Building Seniority” is transferred</p> <p>Secondary: Teacher is transferred who has the least seniority in:</p> <p>1.) Grade Level Classification/Department OR</p> <p>2.) Grade Level Classification/Subject Area</p>

DISCUSSION

I believe this case turns on the question: Does the grievant meet the minimum qualifications that were established for the 8th Grade English teacher position that was posted? The grievant applied for the 8th grade position. The minimum qualifications reference is drawn from what I believe to be the controlling language of the collective bargaining agreement, Section 5.9.5.2.

Appendix VI addresses the same subject matter in a short hand, visual presentation of the text of the collective bargaining agreement. Appendix VI lacks much of the detail of the contract. There is no reference to qualifications. However, there is no evidence to suggest that the Appendix is intended to read the minimum qualification requirement out of the agreement. I

regard the Appendix as an outline or short-handed presentation of the terms of the agreement. I have accordingly focused this discussion on the text of the contract.

The minimum qualifications were set forth on the May 28, 2012 posting. There is no dispute that Mr. Padrnos has the appropriate teaching certificate (#1) and has achieved a 2.75 G.P.A. (#2).

There is a dispute as to whether the grievant had adequate middle school experience (#5). The listed requirement does not have a specific amount of experience identified. Mr. Padrnos has some experience. More to the point, this lack of experience was never listed as a reason for the denial of position, either by Gundrum, in her June 26 grievance response or by Johnson in his July 25 response. Under the terms of the collective bargaining agreement, Section 5.9.5.3 Padrnos was entitled to the reason his transfer request was denied. He requested that information and Gundrum's response purports to address the contractual requirement. Both Gundrum and Johnson point to the Plan of Improvement as the reason the request was denied. I believe Mr. Padrnos has a contractual right to rely upon the reasons he was given, in determining whether or not to file and process a grievance.

As a practical matter, the district was concerned about the grievant's performance. There is little in this record to suggest the district was meaningfully concerned that Mr. Padrnos had an inadequate middle school background. I do not believe the middle school experience qualification is relevant to this analysis.

Paragraph 6 of the posting expresses a preference for Writer's Workshop and Units of Instruction. As such these qualifications cannot be regarded as "minimum qualifications" within the meaning of Section 5.9.5.2. They are preferred, not required.

Mr. Padrnos was denied the transfer because he was on a Plan of Improvement. The qualifications under scrutiny in this proceeding are #3, the ability to interact in a positive constructive manner with students, staff and public, and #4, Teaching diverse student population.... Padrnos taught for 11 years in the district. The question is not whether he interacted with students, parents, etc. or whether he taught. He clearly did both. The real claim in this proceeding is that Padrnos was not performing his job in a minimally competent fashion.

The grievant was on a Professional Improvement Plan beginning in February 2011. Authority for that plan is currently found in Article 13 of the collective bargaining agreement. Article 13 is the non-renewal section of the contract. At the time of the initiation of the Performance Improvement Plan, Article 13 did not contain the detailed provisions outlining the Plan that is found in the contract language referenced below. However, the contract did authorize the District to evaluate teachers and left the vehicle for evaluation largely to the District. Whether the Performance Improvement Plan model would have supported non-renewal in 2012 is not before me. The Plan provided a basis for an extensive evaluation of the grievant.

It appears that parent and student complaints and incidents prompted the Plan. However, the elements of the plan reached far beyond the episodic incidents which led to the letter of discipline and the initiation of a plan. The Plan identified perceived deficiencies in the planning, preparation, and delivery of instruction. The grievant's interactions with students, classroom management, and effectiveness as an instructor were called into question. The Plan directed that he improve his evaluation of and feedback to students and families. The grievant was directed to identify and use more effective educational strategies. Taken together, these concerns address the full range of effective teaching.

The District evaluates bargaining unit personnel on a number of criteria. There are four performance categories: Unsatisfactory, Basic, Proficient, and Distinguished. Under the Improvement Phase of the Plan of Improvement, a teacher needs to achieve a Proficient or better rating to be deemed to have made sufficient improvement.

At the conclusion of the Plan, the grievant was evaluated as Basic in Domains 1 and 3. He was evaluated as Proficient in Domains 2 and 4. The shortcomings identified in the evaluation included the perceived inability to differentiate and engage all learners, and the grievant's instructional approach, as well as the propriety of assignments with respect to students age and background. The report, dated 2/1/12 recommends non-renewal. The District concluded that the grievant was not performing to the minimum standards in two general areas of teaching.

Plan 1 was terminated with the parties arguing over whether or not it could serve as a platform for non-renewal. Plan 2 was immediately initiated, and identified the same concerns that were the focus of Plan 1. The grievant applied for the transfer as the Awareness Phase of the second Plan of Improvement was concluding.

The grievant seeks a transfer under Sec. 5.9.5.2 of the contract. Under the terms of that provision he is entitled to a seniority based transfer if he meets the minimum qualifications established for the position. Criteria 3 and 4 have subjective components. He was denied the transfer because he was on a Plan of Improvement. Critical to this dispute is that his evaluations indicated that he was deficient in the ability to differentiate and engage all learners. He was cited as deficient in his instructional approach and the propriety of assignments to students age and background. The evaluations conclude that the grievant was not an effective teacher. They are critical of his ability to interact with students and they comment heavily on his teaching, including the ability to handle diversity.

Job Qualification #4 required the successful applicant to have experience "Teaching diverse student population. . ." I believe that implicit in this qualification is that the teaching be of a quality that satisfies minimum standards of performance. It cannot be that a teacher whose efforts to teach a diverse student body have failed is, by operation of the contract, deemed to possess the qualifications to teach a diverse student body. Such a reading is a perverse treatment of the word "qualifications".

The District has a right to evaluate teachers. That authority is expressed in Article 2, and is not in dispute in this proceeding. The District evaluated the grievant under the Plans of Improvement and concluded that his performance was deficient. Many of the shortcomings noted in the evaluation go to the essence of teaching. The District concluded that the grievant was not an effective teacher. The various shortcomings identified in the evaluation are as applicable to a Middle School teacher as they are to a High School teacher.

Section 5.9.5.2 contemplates consideration of evaluation results. If two equally qualified bargaining unit employees apply for a transfer, seniority governs. Some assessment of qualifications has to occur in order to compare the qualifications of the two internal candidates.

The evaluations were performed before the grievant applied to transfer. This is not a situation where the transfer application occurred and the district engaged in a post hoc evaluative process that disqualified the grievant. There were events which transpired that caused the District to undertake the evaluation process. That process concluded that the grievant was not performing to the standard expected of a teacher. The evaluations were not contrived. Job requirements 3 and 4 require some assessment as to ability and aptitude. Inherent in criteria 4 is the ability to teach at a minimally effective level. The District concluded that the grievant was not teaching at a minimally effective level. There is no basis in the record for me to second guess the evaluative conclusions.

I believe the District was within its rights to conclude that the grievant did not meet the minimum standards for the job that was posted.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 29th day of July, 2013.

William C. Houlihan /s/

William C. Houlihan, Arbitrator