

**IN RE ARBITRATION BETWEEN:**

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**ISD #276, MINNETONKA PUBLIC SCHOOLS**

**and**

**EDUCATION MINNESOTA**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS No. 10-PA-0935**

**JEFFREY W. JACOBS**

**ARBITRATOR**

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**August 17, 2010**

IN RE ARBITRATION BETWEEN:

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ISD #276, Minnetonka Public Schools,

and

Education Minnesota.

DECISION AND AWARD OF ARBITRATOR  
BMS # 10-PA-0935  
Joseph Ricke grievance

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**APPEARANCES:**

**FOR THE ASSOCIATION:**

Rebecca Hamblin, Staff Counsel Educ. MN  
Maryann Dorsey, Educ. MN Field Staff  
Joseph Ricke teacher/grievant  
Mary Benson, President MTA  
Peggy Glaccum, Member Rights Chair  
Luke Fernholz  
Dawn Sorenson, Tech Ed. teacher

**FOR THE DISTRICT:**

Greg Madsen, Kennedy and Graven  
Bill Jacobson, East Middle School Principal  
Pete Dymit, West Middle School Principal  
Tim Alexander, Exec. Dir. of Human Resources  
Dennis Peterson, Superintendent

**PRELIMINARY STATEMENT**

The hearing in the matter was held on June 3, 2010 at 10:00 a.m. and July 22, 2010 at 8:30 a.m. at the Minnetonka School Service Center, 5621 Highway 101 South, Minnetonka, Minnesota. The parties submitted post-hearing Briefs dated August 6, 2010 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties' collective bargaining agreement covering period from July 1, 2007 to June 30, 2009. Article IV sets forth the grievance procedure. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

**ISSUE**

Whether the District violated Article X of the labor agreement when it refused to transfer grievant Joe Ricke to the new teaching position known as the STEM position? If so, what shall the remedy be?

## RELEVANT CONTRACTUAL PROVISIONS

### ARTICLE I

Section A Teacher: Shall mean all persons in the appropriate unit employed by the Minnetonka Public Schools District No. 276 in a position for which the person must be licensed by the Minnesota Department of Education and who are “public employees” as defined by P.E.L.R.A., as amended; but shall not include persons excluded from the definition of “teacher” contained in P.E.L.R.A.

### ARTICLE II – SCHOOL BOARD RIGHTS

Section A, Managerial rights, Subd. 1. The Association recognizes that the Employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

Subd. 2. The Association recognizes the right and obligation of the Employer to efficiently manage and conduct the operation of the School District within its legal limitation and its primary obligation to provide educational opportunity for its students.

Section C. Reservation of rights. The foregoing enumeration of Employer rights and duties shall not be deemed to exclude other inherent rights and functions not expressly reserved herein.

### ARTICLE X: TEACHER TRANSFER

#### Section A. Definitions

Subd. 6. Vacancy. A vacancy exists under the following conditions:

a. Any teaching assignment which results from the Employer creating or adding a position.

#### Section B Procedures

Subd. 1 Posting – Round I: On March 15 (or the first duty day when March 15<sup>th</sup> is a non-duty day) the district will post individual postings of all open positions for the following school year for five (5) duty days at designated areas in all instructional sites and the District Service Center. ...

Subd. 2 Application – Round I: Applicants must submit a written application addressing the criteria for each position for which they want to be considered.

b. When two or more applicants are equally qualified using the posting criteria, the applicant with the most seniority in the area of licensure will be granted the position.

Subd. 3 Postings – Round II. The second round of postings will take place on or before April 16 (or the first duty day when April 16<sup>th</sup> is a non-duty day) and follow the process outlined in Round I.

Subd 4 Applications – Round II. The application process will be the same as Round I with the following additions: \*\*\*

d. April 30 will be the date for notification of outcomes

Subd 5 Round III. If Round III is required it will follow the process outlined in Round II using May 1<sup>st</sup> and May 15<sup>th</sup> as the beginning and ending dates.

## ASSOCIATION'S POSITION

The Association took the position that the District violated the provisions of Article X when it refused to hire grievant Joe Ricke into the newly created STEM position in the District and instead hired a probationary teacher who had less seniority. In support of this the Association made the following contentions:

1. The Association noted that the grievant is the second most senior teacher in the District and is licensed by the State of Minnesota as a K-12 Industrial Arts teacher. He is also licensed to teach Industrial Arts, which is the "old" name for what is now called Technology Education. Ricke is licensed to teach Industrial Arts/Technology Education to students from Grades Kindergarten through 12. See Tr. at 84-86, 92-93 and Joint Exhibit 5. He has spent years teaching Tech. Ed. at the junior high level and in fact has been teaching virtually the same kind of course as the STEM class is, to 8<sup>th</sup> graders for 10 years. The grievant asserted that he is eminently qualified to teach the new STEM position, (which stands for Science, Technology, Electronics and Math,) to 6<sup>th</sup> graders. The Association noted that there is no specific licensure from the State to teach STEM and that the grievant's licensure should be sufficient to allow him to teach that class.

2. In February or March of 2009, the two middle school principals met with faculty at the middle schools and told them about upcoming changes to the middle school curriculum, including adding a mandatory one-quarter 6<sup>th</sup> grade STEM class at both middle schools. Tr. at 26, 96, Union Exhibit 6. In addition, the Association noted that the new 6<sup>th</sup> grade STEM class was not part of the mandatory full-year Math Curriculum or the mandatory full-year Science Curriculum for 6<sup>th</sup> graders. Tr. at 162-163.

3. The Association cited the provisions of Article X as follows:

### Section B Procedures

Subd. 1 Posting – Round 1: On March 15 (or the first duty day when March 15<sup>th</sup> is a non-duty day) the district will post individual postings of all open positions for the following school year for five (5) duty days at designated areas in all instructional sites and the District Service Center. ...

Subd. 3 Postings – Round II. The second round of postings will take place on or before April 16 (or the first duty day when April 16<sup>th</sup> is a non-duty day) and follow the process outlined in Round I.

4. The Association noted that the postings were late and that the posting for the STEM job was not made until May 4, 2009 with a closing date of May 8, 2009. The posting was therefore deficient under the terms of the language. Further, the Association cited to a separate provision of Article X and noted that the new STEM position fell squarely within the language of Article X, subd. 6 as a “vacancy” since the District created a new position. The Association noted that District witnesses acknowledged as much during their testimony.

5. The Association finally pointed to Article X, Section B, Subd. 2, (b), cited above and asserted that the District violated that part of the labor agreement when it failed to hire a senior teacher into the STEM position. Mr. Ricke was far more senior to Ms. Demers and the Association argued that she should never have even been considered since at the time of her hire into the STEM position she was a probationary teacher without continuing contract status. See, Joint Exhibit 4. The Association argued that the grievant’s licensure of Industrial Arts really is in fact just a renaming of the now newer “tech ed.” license and is effectively the same thing. As such, Mr. Ricke was the only person who should have been considered for the STEM position under the terms of the labor agreement at Article X.

6. The Association noted that the District essentially tailored the posting to Ms. Demers’ licensure and further alleged that the District knew well in advance of the posting that she was going to get the job. The District sent her and one other teacher out of state to attend STEM training and did not allow Mr. Ricke to attend that training even though he certainly could have.

7. When the grievant was interviewed for the position he was never told nor was there any indication at those interviews that the interview was somehow a “mistake,” as the District later alleged in the Superintendent’s July 29, 2009 letter. In fact, the grievant was told he did well in the interviews and would be able to teach the STEM course. It was not until much later that the grievant was told that he should not have been interviewed at all and that Ms. Demers was “a better fit.”

8. The Association alleged that even though the grievant did not possess the requisite licensure per the posting it was obvious that the District manipulated the process to tailor the new position to a specific person. The District asserted that Ms. Demers was the person the District wanted in this position and in fact sent her to STEM training long before the new position was even created. The association asserted most strenuously that the District circumvented both the letter and the spirit of the labor agreement by sending two junior teachers to STEM training in North Carolina, passing over the grievant, who could easily have gone and could have taught the STEM class. Tr. at 30-31.

9. The Association noted that only two candidates, Ms. Demers and the grievant, were interviewed and that the grievant was told that he was qualified for the job by both interviewers. Ms. Demers was selected as the “stronger candidate” but that should never have been one of the criterion since she was a probationary teacher and had far less seniority than the grievant. If the grievant was truly qualified as he had been told at the interview he should have been hired due to the provisions of Article X. The Association asserted that the grievant is qualified and that the State’s nomenclature of the “Industrial Arts” license should not govern and that he is qualified by licensure to teach STEM.

10. The Association argued that the District wanted Ms. Demers to teach the STEM class all along and never gave the grievant a fair chance to get that position. Further, the grievant has never been told that he could not legally teach the STEM class under the State’s licensure. All he was ever told was that his licensure did not meet the qualifications as set forth on the job posting.

11. The Association asserted that the inherent fallacy of the District's position is amply demonstrated by how many times their position has changed over time. First, they posted the position late. Then the District interviewed Mr. Ricke and told him he did a "good job" in the interview. Next the District argued that there never really was a vacancy under the terms of the language but later admitted that there was under the terms of Article X. Later they told Mr. Ricke that the District made a mistake and should not have interviewed him at all because he did not have the correct licensure per the terms of the posting.

12. Further, at various times, the District argued that Article X did not apply because there is not a specific license to teach STEM. The District has also argued at different times that Article X was only one way to fill teacher vacancies and did not bind the District at all; almost as if Article X did not exist. Moreover, the District argued that the grievant was not qualified to teach 6<sup>th</sup> Grade STEM because he did not have the licenses listed in the District's posting.

13. Finally, the District should never have considered Ms. Demer's for the vacancy because she was not a continuing contract teacher and had no rights under Article X. Thus it was she who should not have been interviewed for the job, not the other way around. The grievant is certainly qualified both by experience and by actual licensure and he was told that by the very interviewers who later told him he should not have been interviewed at all. The sole piece of evidence to support the District's position is that the grievant did not have the necessary licensure per the posting but the timing of the posting demonstrates the District's feeble attempt to guide this STEM job to a particular individual. The Association asserted most strenuously that the posting followed the decision to hire a particular person rather than the other way around – the decision to hire should be based on the licensure and qualifications needed for the job. The Association asserted that none of the latter occurred in this case.

14. The Association argued that unless this grievance is granted, Article X will be rendered meaningless. Such a result would allow the District to post or not post vacancies whenever it feels like it, and allow it to advertise externally whenever it feels like it and manipulate the licenses to justify hiring whoever it wishes for a position.

The Association requests that the Arbitrator sustain the grievance and find that the District violated Article X of the CBA when it failed to hire Ricke for a position for which he was qualified and to which he was entitled. The Union requests that the District be directed to transfer Ricke to the 6<sup>th</sup> grade STEM position, effective immediately. The Association further asked the arbitrator retain jurisdiction to determine back pay and contractual benefits issues.

**DISTRICT’S POSITION:**

The District’s position is that there was no contract violation and that the grievant did not have the licensure for the STEM position. In support of this the District made the following contentions:

1. The District asserted that the posting was not late as the Association asserted since the Board and the District had not determined to even have a STEM position until after the time frames set forth in Article X. The District also noted that there is no requirement that a position must be posted if there is no position to post. Here there was no violation of the agreement due to the timing of the posting since the Board had not authorized the new STEM position until May 2009. Even the Association’s witnesses acknowledged that the alleged “lateness” of the posting did not under these facts constitute a violation of the contract. Tr. at 76.

2. The District fervently denied that there was some sort of “fix” in the determination of which teacher to hire. Ms. Demers both possessed the necessary licensure to hold the STEM position, was clearly the better fit after the interviews and was the only person with the required qualifications and licensure to apply for the job.

3. The District further asserted that the posting set forth very specific criteria for the STEM position as follows: “License Required: K-6 or 1-6 elementary education OR 5-8 science and/or math.” There is no dispute that the grievant did not have that licensure and that Ms. Demers did.

4. The District pointed to the provisions of Article X, Section B, subd. 2 as follows:

When two or more applicants are equally *qualified using the posting criteria*, the applicant with the most seniority in the area of licensure will be granted the position. (Emphasis added)

The District acknowledged that while this provision gives certain preference to senior teachers over junior and probationary teachers or external candidates, it does so only to those who are “qualified using the positing criteria.” The District asserted that there are thus two criteria for preference under Article X; that the applicant be qualified and that they be senior to other applicants. Obviously, if the applicant does not possess the necessary licensure the question of seniority is not involved.

Here, the grievant was the sole continuing contract teacher to apply for the STEM position. Thus, the District was faced with the situation where it had one person who was qualified for the position and one who was not. Seniority does not apply under those circumstances.

5. The District argued that since the grievant did not have the licensure set forth in the posting and Ms. Demers did, that alone ends the story. Further, there is nothing that limits the District’s right to establish the licensure required for any position - the management rights clause specifically grants that right to the District. Even the Association’s witnesses acknowledged that the person hired must be qualified for the position, Tr. at 65-66, and that the District has the inherent right to establish the licensure and other requirements for a position. Tr. at 74, 77.

6. The District asserted that the creation of the STEM position was the culmination of a two year process and that the course is quite different from the traditional Technology Education and Industrial Arts courses offered to 7<sup>th</sup> and 8<sup>th</sup> grade students. Those classes traditionally emphasize specific technology education skills, such as electronics, drafting and metals, whereas STEM focuses on creating educational experiences to empower students with skills that could not be outsourced or automated. STEM courses emphasize critical thinking skills, collaboration skills, creativity skills and the ability to take information and to apply it. Tr. at 86, 133-134 and testimony of Principals Bill Jacobson and Pete Dymit.

7. Further, the job reflected the need for a teacher who was familiar with the 6<sup>th</sup> grade physical science curriculum and 6<sup>th</sup> grade math curriculum already being taught in the Minnetonka Public Schools. At the same time, the job demanded someone skilled and trained to teach 6<sup>th</sup> graders. The District was adamant that the STEM position requires a specific sort of skill set and licensure and that teaching at this level is very different than high school. The District asserted that the grievant, while certainly a competent and able teacher in his area of licensure, is not qualified per the posting nor does he have the right kind of experience to teach STEM as does Ms. Demers.

8. The District further asserted that Ms. Demers is fully qualified to teach STEM. The State's STARS report indicated no discrepancies for the 2008-09 year, meaning that there were no issues raised by Ms. Demers teaching STEM that year. Further, after interviewing her, District witnesses who interviewed her were convinced that she was not only qualified for this position but was a "better fit" for the job. She possessed teaching background in science and math, which included seven years of teaching middle school math and three years of teaching middle school science. Tr. at 147. Equally significant, she had taught both math and science at the 6<sup>th</sup> grade level in the Minnetonka Schools and was thus familiar with both the content and rotation of the courses. Tr. at 147-148. In fact she did an excellent job over the past year and more than amply justified the decision to hire her.

9. The District's main argument was that the grievant was not qualified per the posting for the position but also asserted that there is no provision in Article X or anywhere else in the contract that foreclosed or precluded the School District from simultaneously posting the 6th grade STEM position and accepting applications from other internal or external job candidates.

10. Further, there is nothing in the labor agreement that precludes a probationary teacher from being considered for a vacancy or a new position. The sole limitation is that seniority must be considered only as provided in Article X section B as set forth above. Here since the senior applicant did not possess the requisite licensure, the District was free to hire the other candidate.

11. The District asserted that the arbitrator cannot substitute his judgment for which teacher is qualified – that decision is specifically reserved to the District to establish the qualifications for the position, the licensure for the position and to determine which candidate would be the best fit for the job. All these decisions are well within the District's inherent managerial discretion and cannot be disturbed by the Association or the arbitrator – to do so would be to substitute the arbitrator's judgment for the District's and would constitute "dispensing his own brand of industrial justice."

12. The District finally noted that the grievant still has not made any effort to obtain the necessary licensure to take the STEM position for the 2010-11 year and cannot be awarded the job even though he has had ample opportunity to get a more appropriate license for this job.

The District seeks an award denying the grievance in its entirety.

#### **MEMORANDUM AND DISCUSSION**

The grievant has been a teacher in the Minnetonka School District for 17 years. He has also taught in other school districts and worked in private industry. Tr. at 85-87. He is licensed to teach Industrial Arts and is licensed to teach Industrial Arts/Technology Education to students from Grades K through 12. Tr. at 92-93, Joint Exhibit 5. He is also licensed in High School Electronics Occupations and High School Teacher-Coordinator Trade and Industry Cooperative. He does not however possess a K-6 or 1-6 elementary education or 5-8 science and/or math license.

The evidence showed that the District did not make a final determination of whether to implement and create the STEM position until early May 2009. Once the District had made that determination the evidence showed that it followed the posting requirements of Article X. The Association alleged at one point that there were deficiencies in the procedure used for the posting but the evidence showed that there was no violation in these facts. Moreover, it was not clear what remedy would have been available on these facts even if there had been, but on this record that question is moot since the Association witnesses acknowledged that there was no violation of that part of the provisions of Article X. See Tr. at p. 76.

The STEM (Science, Technology, Engineering and Math) position, which is the subject of this matter, grew out of a two-year review of the District's middle school curriculum as requested by the School Board. Tr. at 130-131. The evidence further showed that the STEM position was indeed different from other positions in the past. The District provided credible testimony and evidence that STEM is about more than "just" math or science or technology courses and was designed to "intended ... to connect the curriculum of math and science and give it an additional flavor of engineering and technology—not necessarily technology education, but technology—to tie all those together. ... Our students at the 6th grade level did not need an additional technology education course, but they needed something that connected all of those disciplines." Tr. at 227-228.

It was clear that STEM was geared toward 6<sup>th</sup> graders; as opposed to students of a different age and grade level and that this was a critical piece of the STEM course. The evidence showed that the educational needs of an 11 or 12 year old are very different from a student who is 13 for example and who may be in 7<sup>th</sup> or 8<sup>th</sup> grade. There was thus a need to have a teacher experienced with that grade level and with that academic discipline.

Because of this different focus and different goals, the STEM class sought to create practical experiences for students to apply the existing 6<sup>th</sup> grade math and science curriculum. As a result, the license requirements for the job reflected the need for somebody who was familiar with the same 6<sup>th</sup> grade physical science curriculum and 6<sup>th</sup> grade math curriculum already being taught. At the same time, the job demanded someone skilled and trained to teach 6th graders. For those reasons the District established the licensure requirements for the new STEM position as set forth in the posting.

As in any contract interpretation matter the starting point is of course the contract language. The Association relies heavily on the provisions of Article X and asserted that “a vacancy” was created per the provisions of Article X, subd. 6. The Association further relied on the provisions of Section B subd. 2 (b) requiring that seniority be used to fill any such vacancy where applicants are equally qualified. The basis of the Association’s argument appeared to be that the grievant was qualified in reality, even though his license did not meet the requirements set forth in the actual posting.

The other prong of the Association’s argument is that the District essentially tailored the posting to Ms. Demers’ licensure and that the District was engaged in a clever subterfuge to avoid the seniority requirements of Article X. The Association argued that the District’s actions in sending Ms. Demers to special STEM training in North Carolina, coupled with the suspicious change of the Districts position over time on this case demonstrate an arbitrary set of actions that should be rejected.

The District asserted that there were “other avenues for qualified teachers who wish to apply for new positions. ... Thus, the agreement does not give only one way to access a new position.” This is a somewhat curious position since Article X appears to provide exactly the way to access a new position. On this record that District’s position on this question found little support in the Agreement. There was little question that the new STEM position was a “vacancy” within the meaning of Article X Section A Subd. 6(a) and that the provisions of Section B set forth the required procedures for filling such a vacancy. The District did not expound much on what other “avenues” there were for filling a vacancy, but on this record the provisions of Article X appear to be the only avenue provided to do so.

Having said that however, the clear and unambiguous language of Article X Section B Subd. 2 (b) on its face does not support the Association's position here. First, there was no question that the District retained the right to establish the qualifications and the licensure requirements to be placed in the posting for a vacancy under Article X. The Managements Rights clause fully supports the District's position on this point. Further, there is no limit in Article X on that right; in fact the provision requiring that the applicant be "qualified using the posting criteria" further supports the District's position on this point.

The Association argued that in reality, the grievant's license should be sufficient to enable him to teach the class. The clear contract language does not allow the arbitrator to substitute his judgment for what the qualification or licensure requirements should be. The District has the inherent managerial right to establish those criteria and they were clearly set forth on the posting. The District also has the inherent right to determine the requirements for the STEM class and how to teach it.

Obviously had another more senior teacher applied for this who had the proper licensure per the posting, the result would likely have been very different. On this record however, only the grievant and Ms. Demers applied for this job. Thus, even though the grievant possesses a wealth of experience as a teacher he is simply not "qualified using the posting criteria" within the meaning of Article X and therefore is not entitled to the seniority provisions of that language.

Moreover, as noted by the State's STARS report, there were no licensure problems reported with Ms. Demers teaching the STEM class. While this fact alone would not provide sufficient proof for either party's case, it added credence to the District's position that her license was appropriate and that there was nothing arbitrary or capricious about licensure requirements established by the District.

Further, there is nothing in the labor agreement that excludes a probationary teacher from being considered for hire into a new position. The contract defines teacher as “all persons in the appropriate unit employed by the Minnetonka Public Schools District No. 276 in a position for which the person must be licensed by the Minnesota Department of Education and who are ‘public employees’ as defined by P.E.L.R.A., as amended; but shall not include persons excluded from the definition of ‘teacher’ contained in P.E.L.R.A.” Article I, Section A. Sections B and C further define full time and part time teacher depending on the number of hours they work but there is no apparent exclusion for probationary or non-containing contract teacher.

P.E.L.R.A. defines “teacher” as follows: M.S. 179A.03: Subd. 18. Teacher.

“Teacher” means any public employee other than a superintendent or assistant superintendent, principal, assistant principal, or a supervisory or confidential employee, employed by a school district:

(1) in a position for which the person must be licensed by the Board of Teaching or the commissioner of education; or

(2) in a position as a physical therapist or an occupational therapist.

Article X does not delineate between probationary and continuing contract teachers. Thus, the fact that Ms. Demers was, at the time, a probationary, i.e. non-continuing contract teacher did not preclude her from being considered. As noted herein, if there had been other teachers with more seniority who possessed the requisite licensure and qualifications the seniority provisions would have come into play and the result here different. This decision is of course limited to these facts.

To be sure, the District could well have and should have handled this whole scenario better. It was certainly confusing to the grievant and the Association to have granted the grievant an interview, apparently told him he had done well there and then later tell him it was an error to have interviewed him at all and that he was not qualified. The grievant’s ire at the communication and with the way this was done was understandable and perhaps even justifiable. The question here was whether there was a violation of the agreement in either the way the posting was done – and there was not – or in the establishment of the licensure requirements as set forth on the posting – and there was not there either.

The Association argued that denying this grievance will render Article X meaningless. There is no support for this argument. This grievance is about the facts giving rise to this grievance – nothing more or less and it is based on the factual finding that the grievant was not qualified within the meaning of that language due to his licensure. Article X still contains significant provisions about how to fill a vacancy or accomplish transfers. It still contains the seniority language as set forth above and is in no way rendered meaningless by this decision nor has it been amended or modified in any way.

Finally, there was no evidence that the District’s actions were violative of the contract in “tailoring” the license requirements to Ms. Demers’ license. The District denied the notion that there was any conspiracy and indicated that they established the job first, posted the requirements and that only two people applied for it. On this record, there was insufficient evidence that the District acted arbitrarily or capriciously. The licensure requirements set forth on the posting were hardly oddly special – they were for “K-6 or 1-6 elementary education OR 5-8 science and/or math.” This is not an unusual licensure and while there was no direct evidence on this point, it was presumed that a great many teachers in the Minnetonka District possess those licenses – and that the grievant simply did not. On this record even if the District had groomed Ms. Demers for the position, there was no evidence that it violated the contract in the way in which the posting and hiring process were completed.

Obviously if a more senior teacher with the requisite licensure had applied, the District would have been required to comply with the seniority provisions of Article X. Here however because the grievant did not possess the requisite licensure per the posting, those seniority provisions did not apply. Accordingly, because the grievant lacked the requisite qualifications using the posting criteria, and for the reasons set forth above, the grievance must be denied.

## **AWARD**

The grievance is DENIED as set forth above.

Dated: August 17, 2010

Minnetonka Schools and Education MN - Award

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Jeffrey W. Jacobs, arbitrator