

IN THE MATTER OF ARBITRATION BETWEEN

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Education Minnesota - Greenway Local #1330,  
Union,

and

Independent School District No. 316, Greenway  
Public Schools, Coleraine, Minnesota,  
Employer.

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OPINION AND AWARD

Sutherland Transfer Grievance  
BMS Case No. 11-PA-1093

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

February 23, 2012

HEARING SITE:

Coleraine, Minnesota

HEARING DATES:

December 14, 2011

RECORD CLOSED:

January 9, 2012

REPRESENTING THE UNION:

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REPRESENTING THE EMPLOYER:

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## **JURISDICTION**

The hearing in this matter was held on December 14, 2011. The undersigned was selected to serve as arbitrator pursuant to the parties' collective bargaining agreement ("Agreement") and the procedures of the Minnesota Bureau of Mediation Services. The parties submitted a contract application dispute to arbitration. No procedural issues were raised. Both parties were afforded a full opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs, duly received on January 9, 2012, which closed the record, and the matter was taken under advisement.

## **ISSUES**

The instant grievance arose when the Employer refused to allow a teacher to transfer into a vacant position that was announced in July of 2010 because she was in the midst of serving her initial 3-year probationary period pursuant to Minnesota law. The parties proposed different statements of the issues in their post-hearing briefs as follows:

### The Union's proposal

Did the School District violate Section 5.E. of the Collective Bargaining Agreement when it refused to assign Ms. Toni Sutherland, a current staff member, to an open position for which she posted and was properly licensed to teach? If so, what is the remedy?

### The Employer's proposal

Whether the school district violated the Collective Bargaining Agreement (CBA) by refusing to allow Toni Sutherland, a probationary teacher, to take another position different than that for which she had been hired and assigned?

## **RELEVANT CONTRACT PROVISIONS**

### **SECTION 1. RECOGNITION**

\* \* \*

- C. This Agreement constitutes the full and complete Agreement between the school district and the exclusive representative representing the teachers of the district. The provisions herein relating to the terms and conditions of employment supersede any and all prior Agreements, resolution, practices, school district policies, rules or regulations concerning terms and conditions of employment inconsistent with these provisions.

\* \* \*

## **SECTION 2. BOARD RIGHTS**

- A. The Union recognizes that the Board is not required to meet and negotiate on matters of inherent managerial rights and 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; the selection, direction, and the number of personnel including the right to hire, recall, transfer, promote, demote, suspend, discipline and discharge employees for good and sufficient reasons in accordance with Minnesota statutes.

\* \* \*

## **SECTION 3. TEACHER RIGHTS**

- A. Nothing contained in this Agreement shall be construed to limit, impair, or affect the right of any teacher or his/her representative to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment or circumvent the rights of the Union.

\* \* \*

## **SECTION 4. DEFINITIONS**

\* \* \*

- C. Teacher: The word "Teacher" shall mean all persons in the appropriate bargaining unit as defined by the PELRA<sup>1</sup> and employed by the Board in a position for which the person must be licensed by the State of Minnesota; but shall not include superintendent, assistant superintendent, principals, and assistant principals who devote more than 50% of their time to administrative or supervisory duties, confidential employees, supervisory employees, essential employees, and such other employees excluded by law.

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<sup>1</sup>The Minnesota Public Employment Labor Relations Act, Minn. Stats. Chapter 179A.01-.25

- F. Other Terms: Terms not defined in this Agreement shall have those meanings as defined in the PELRA of 1971 as amended.

\* \* \*

## **SECTION 5. SENIORITY**

\* \* \*

- B. The seniority date for a new teacher after February 8, 1995 shall be the date of hiring by the Board or the first day of work, whichever occurs first. A break due to resignation shall terminate seniority.
- C. Seniority shall apply strictly in event of reduction in employment, transfers, promotions or any consolidation or school reorganization that affects employment of existing staff.

\* \* \*

- E. Transfer and/or Promotions:
1. A written notice of all vacancies and newly created positions, including administrative positions, which occur during the period school is in session, shall be posted in each building. Upon posting of such dated notice, any teacher interested in filling such vacancy or newly created position shall make a written application to the Superintendent of Schools no more than ten days from the date of posting notice of such vacancy or newly created position.
  2. When vacancies or newly created positions occur during the summer period that school is not in session, teachers shall be notified by mail, directed to their current address, of such vacancy or newly created position and shall be given a reasonable opportunity, in no event to be construed to constitute more than 20 days to apply for such position before it is filled by any applicant from outside the system.
  3. Notice of vacancy or newly created positions shall include a listing of required academic qualifications and certification. All written applications received by the Superintendent of Schools, within the time limitations, shall be considered prior to the issuance of a contract to a teacher outside of the school system.

4. a. The district agrees that a staff member applying for said opening shall be assigned to that position if certificated at the time of the posting. That teacher shall successfully complete a one-school-year probationary period. If more than one teacher applies, the most senior teacher shall be assigned.
- b. An administrator may assign a teacher lower on the seniority list for good and sufficient reasons subject to the grievance procedures.
5. A successful probationary period for a transferred or promoted teacher shall be defined as reasonably fulfilling the duties applied to the posted job description as determined by the building principal after formal evaluation process.
6. If a teacher's probationary period is deemed unsuccessful, that teacher shall return to his/her original position, if it exists, or to a like position if it does not exist, in the district, and if the probationary teacher has the proper seniority. The teacher holding that former position shall be re-assigned or terminated as dictated by position availability.

\* \* \*

10. Subdivisions 4, 5, 6 of this section (E) shall not include administrative or extra-curricular positions.

\* \* \*

G. Unrequested Leave of Absence/Termination:

1. In the event of unrequested leave of absence due to reduction in enrollment, consolidation, financial limitations, or abolishment of position, teachers affected shall be carried on the seniority list for a period of five (5) years and shall be rehired if an opening should occur for which they are qualified.
2. Teachers shall be rehired on the basis of their seniority in the system.
3. The five-year period shall commence at the termination of the contract year.

\* \* \*

## **SECTION 21. TEACHER EVALUATION**

### **A. Tenured Teachers:**

[Five numbered provisions omitted]

### **B. Probationary Teachers:**

[Ten numbered provisions omitted]

\* \* \*

## **SECTION 28. GRIEVANCE AND ARBITRATION PROCEDURE**

\* \* \*

### **B. Procedure:**

\* \* \*

Step 4: If the Union or employee is dissatisfied with the decision of the Board, the grievance may be submitted to arbitration provided that arbitration is not to extend to matters not deemed arbitrable under the existing Public Employment Labor Relations Act.

\* \* \*

(c) The arbitrator shall be bound by and must comply with all of the terms of this Agreement. He/she shall have no power to delete or modify the provisions of this Agreement. \* \* \*

\* \* \*

## **BACKGROUND AND SUMMARY OF THE EVIDENCE**

The facts leading to the instant grievance are largely undisputed. The Employer announced a vacancy for a 1.0 FTE<sup>2</sup> First Grade teaching position during the summer of 2010 for the 2010-2011 school year. Because school was not in session, the vacancy was announced by an email to the teaching staff on July 26, 2010.

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<sup>2</sup> Full Time Equivalent

The named grievant, Toni Sutherland, had been hired to fill a .8 FTE Kindergarten position for the 2010-2011 school year along with a .2 FTE Title 1 teaching position. At the time, Sutherland was within the first three consecutive years of her first teaching experience in Minnesota. According to Minnesota law<sup>3</sup>, a new teacher is on probationary status during this initial teaching experience. In accordance with the law, a probationary teacher's contract may be non-renewed "... as the school board shall see fit."

Sutherland saw the position announcement and submitted a written application for it in accordance with Section 5. E. of the Agreement. Sutherland was the only staff member to apply for the First Grade position and she did possess the requisite teaching license for it at the time of her application. However, the Employer refused to consider Sutherland for the position solely because she was a probationary teacher. Instead, the Employer went on to hire a teacher for the position from outside of the school district.

The Union's basic position is that Section 5. E. of the Agreement does not exclude probationary teachers from the vacancy-filling procedure. The procedure is open to "any teacher" who holds the proper license.

The Employer's basic position is that Section 5. E. is not intended to create transfer rights for teachers in their initial probationary period.

Sutherland was not interested in pursuing the grievance much beyond its initial filing. She did not attend the arbitration hearing nor did she provide any testimony by written statement or telephone. Nonetheless, the Union asserted its right to advance the grievance to obtain an arbitral interpretation of the pertinent Agreement language. For the remedy, the Union seeks only a finding that the Employer violated the Agreement when it refused Sutherland's application for the disputed position. Essentially, the Union's objective in pursuing the grievance is to obtain the equivalent of a declaratory judgment in its favor on the language.

According to the Union's evidence, Section 5. E. had never before been applied to block a new probationary teacher, in his or her first teaching experience, from transferring into newly created or vacant positions. The Union provided the testimony of three witnesses who sought to establish how Section 5. E. had been applied in the past. They described five past situations where

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<sup>3</sup> Minn. Stats. Ch. 122A.40 Subd. 5.

probationary teachers had been allowed to “post into” other positions. “Post into” is the terminology commonly used to describe applying for and being assigned into a position that has been announced, or “posted,” in accordance with Section 5. E. 1. or 2.

Two of the Union’s example situations were based entirely on hearsay. Of the three others, the Employer introduced documentary evidence that two of them were factually incorrect. The two teachers had actually been non-renewed prior to vying for the positions they were assigned. In addition, one of the two occurred during the summer of 2009 when the Employer’s staffing situation was “... in complete disarray.” A new shared superintendent<sup>4</sup> came into his position in the summer of 2009 and found three vacancies in the building principal ranks as well as a number of teacher vacancies that required immediate attention due to the impending start of the next school year. Only the circumstances surrounding one of the proffered past examples went unchallenged for lack of knowledge. The experience of the Employer’s witnesses did not begin before the summer of 2009. The one unchallenged example was estimated by a Union witness to have occurred sometime around the year 2000.

According to the Employer’s witnesses, they were not aware of any prior examples where a probationary teacher in his or her first teaching experience was allowed to transfer to a new position as a matter of right under Section 5. E.

The Employer provided testimony from its superintendent as well as a now-retired former superintendent from the St. Louis County schools to explain how they believed the three-year, first-teaching-experience probationary period is intended to be conducted. They described the criticality of the evaluation process during those three years as well as the practical difficulties that would ensue if such a teacher were allowed to move around to two or more positions during the evaluation period. They described how such movement could jeopardize the teacher’s ability to have the kind of successful probationary period that is necessary for the acquisition of “tenure” or continuing contract rights. Disruptions to the evaluation process through changes of positions could increase the likelihood that the probationary teacher’s contract would be non-renewed.

According to the testimony of the former St. Louis County superintendent, in his opinion, the Employer did not violate the Agreement by disallowing Sutherland the transfer she requested.

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<sup>4</sup> The superintendent actually has served as superintendent for two separate school districts since coming to the job in the summer of 2009.

He acknowledged, however, that the language of the Agreement, on its face, could permit a probationary teacher with greater date-of-hire seniority to outbid a tenured teacher with continuing contract rights for a vacant position. He further opined that such an anomaly would be “horrific.”

## **OPINION AND FINDINGS**

At issue in the instant grievance is the propriety of the Employer’s refusal to assign a teacher on probationary status for his or her first teaching experience in Minnesota to a vacant position pursuant to Section 5. E. for which the teacher was properly licensed.

Although both parties claimed the support of past practice for their respective positions, that evidence is insufficient. Neither body of evidence portrayed the qualities of clarity, consistency, longevity, and repetition necessary to establish a binding interpretation of Section 5. E. by past practice.

Unfortunately, the evidentiary record is also lacking any meaningful evidence of bargaining history for Section 5. E. According to the testimony, the language is decades old and was free of any change during that span of time.

Absent persuasive evidence of practice or bargaining history, the arbitrator’s analysis is left with only the Agreement language itself for examination. The undersigned is also mindful of the strictures of Section 28. B. Step 4 (c) which is repeated here:

The arbitrator shall be bound by and must comply with all of the terms of this Agreement. He/she shall have no power to delete or modify the provisions of this Agreement.

Notwithstanding the limited nature of the evidentiary record, several considerations emerging from the language of the whole Agreement lead rather straightforwardly to the interpretation that a probationary teacher, similarly situated as Sutherland was, is not excluded from the transfer rights established by Section 5. E.

First, nothing in Section 5. E. excludes a probationary teacher from accessing its transfer provisions. Section 5. E.1. explicitly refers to “... any teacher interested ...” in filling a vacancy. It does not say it is limited to tenured teachers or continuing contract teachers. Similarly, Section 5.E.2. does not limit summertime notifications of vacancies to tenured teachers or continuing

contract teachers. Finally, Section 5. E.4.a. contains no exclusionary terminology to limit its scope only to tenured teachers.

Second, Section 5. E.10. is an exclusionary provision that applies to some positions. If probationary teachers were intended to be excluded, one would expect to see some appropriate reference here. But there is none. Indeed, even the Employer's superintendent acknowledged that Section 5 is silent with respect to the exclusion of probationary teachers.

Third, Sections 5. B. and C. provide for the acquisition of seniority in accordance with date-of-hire after February 8, 1995 and that such seniority shall apply "strictly" to transfers. Neither provision excludes probationary teachers from their scope.

Fourth, Section 1. C. clearly provides that any school district policy is superseded by the terms of the Agreement to the extent of any inconsistencies. Therefore, to the extent Section 5. E. grants rights to "... any teacher ...," it follows that those rights would supersede any district policy that would exclude probationary teachers from exercising those rights.

Fifth, Section 21 of the Agreement contains different evaluation provisions depending on whether a teacher is tenured or probationary. This ostensibly shows that the parties who negotiated the language of Section 5. E. knew how to differentiate between probationary teachers and tenured teachers if they actually intended to do so.

Finally, the undersigned is further aware that PELRA prohibits the instant Agreement from containing any provisions that are contrary to Minnesota law<sup>5</sup>. The law that governs the probationary period for first-teaching-experience teachers is Minn. Stats. 122A.40, Subd. 5. However, careful review of its text fails to reveal any limitation upon the ability of such a probationary teacher to change positions during the three-year period. It follows, therefore, that it is not contrary to Minnesota law for a probationary teacher to access the transfer rights of Section 5. E.

The Employer also contended that the Agreement references to "teacher" are intended to exclude probationary teachers. For an example, it noted that Section 5. G., which pertains to Unrequested Leave of Absence, does not explicitly exclude probationary teachers when it merely follows the provisions of Minn. Stats. 122A.40, Subd. 11. The Employer maintained, in its opening statement at arbitration, that nowhere does that law use the term "probationary teacher" either.

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<sup>5</sup> Minn. Stats. 179A.20, Subd. 2.

Review of that subdivision of the law, however, shows that it does make reference to “probationary teachers” in several places. Indeed, in subparagraph (d), the law actually provides for the retention of a junior probationary teacher over a more senior teacher with continuing contract rights if placing the probationary teacher on unrequested leave of absence would violate an affirmative action program.

The foregoing considerations compel the finding that the Employer did violate the Agreement as alleged in the grievance. No proper basis has been demonstrated in the evidence for having denied Sutherland assignment to the First Grade position in question.

Notwithstanding the foregoing finding, the undersigned would be remiss if he did not acknowledge the practicalities that must be taken into account by any probationary teacher who chooses to avail herself or himself of the transfer rights of Section 5. E. The Employer’s testimony rather dramatically described the jeopardy such position transfers might pose to the evaluative process as well as the successful completion of the probationary period. Nonetheless, the practical considerations identified do not overcome the teachers’ transfer rights under the Agreement.

#### **AWARD**

The grievance is sustained in accordance with the Opinion and Findings. The Employer did violate Section 5. E. of the Agreement when it refused to assign Ms. Sutherland to the open position for which she applied and was licensed to teach. In accordance with the Union’s request, no further remedy is provided.



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Gerald E. Wallin, Esq.  
Arbitrator

February 23, 2012