



or "Lakeville") and Education Minnesota Lakeville (hereinafter "EML" or "Union") provides for an appeal to final and binding arbitration of a properly processed grievance through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the School District and EML (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services ("BMS"). A hearing in the matter convened on November 26, 2013, at 12:30 p.m. at the Crystal Lake Education Center, 16250 Ipava Avenue, Lakeville, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions.

The Parties' legal counsel elected to file electronically post hearing briefs, with receipt by the Arbitrator no later than December 20, 2013. The post hearing briefs were submitted in accordance with that deadline date. The Arbitrator then exchanged the briefs electronically to the Parties' legal counsel on December 21, 2013, after which the record was considered closed.

**ISSUES AS DETERMINED BY THE ARBITRATOR**

1. Is the grievance involving Former Teacher Erin Carson moot on the basis that she has resigned from employment with the Employer?

2. Alternatively, if the grievance involving Ms. Carson is not moot, did the Employer violate the 2011-13 Collective Bargaining Agreement by choosing not to return Ms. Carson to her previous teaching assignment but rather assigning her to social studies position for the 2013-14 school year following a one-year leave of absence without pay? If so, what is the appropriate remedy?
3. With respect to Teacher Brandice Hansmeyer, did the Employer violate the 2011-13 Collective Bargaining Agreement by assigning her to a science position for the 2013-14 school year that was different from her teaching assignment in the 2012-2013 school year? If so, what is the appropriate remedy?
4. With respect to Teacher Kathleen Nechanicky, did the Employer violate the 2011-13 Collective Bargaining Agreement by assigning her to an English position for the 2013-14 school year that was different from her teaching assignment in the 2012-2013 school year? If so, what is the appropriate remedy?

#### **BACKGROUND**

There were separate grievances filed by Erin Carson, who at the time of the filing of her grievance was a teacher on an approved one-year leave of absence. Teachers Brandice Hansmeyer and Kathleen Nechanicky also filed separate grievances.

The grievances were properly appealed to final and binding arbitration by EML. The BMS was notified and they supplied a list of arbitrators and assigned the pending grievances to BMS Case No. 14-PA-0111 and BMS Case No. 14-PA-0112. The Parties agreed to consolidate the grievances into one arbitration hearing before the Arbitrator. The Arbitrator will treat each case separately since the facts are not the same for all three

grievances and the applicable contract language may or may not apply to each of the three grievances.

**ERIN CARSON GRIEVANCE**

**STATEMENT OF THE FACTS**

Ms. Carson is licensed to teach 1-6 Elementary Education, 5-8 Social Studies, and 7-12 Social Studies. (Employer Exhibit #20). She was initially hired as a .6 social studies teacher at Century Junior High School. The School District subsequently transitioned from Junior High Schools to Middle Schools.

During the 2011-12 school year, Ms. Carson requested and was granted a leave of absence for the 2012-13 school year in order to complete her dissertation. Prior to her leave of absence, Ms. Carson taught in the School District for 12 years.

In the 2011-12 school year, Ms. Carson was a social studies teacher at Century Middle School ("Century") assigned to teach four sections of eighth grade social studies and one section of seventh grade social studies. Before she left for her approved leave of absence, she had a conversation with her principal at the time, Catherine Gillach, who assured her that upon her return she would still be teaching four sections of 8<sup>th</sup> grade social studies and one section of 7<sup>th</sup> grade social studies.

During Ms. Carson's leave of absence during the 2012-2013 school year, Alexander Mundt, a probationary teacher, taught the same sections previous taught by Ms. Carson.

On January 16, 2013, Ms. Carson notified School District Executive Director of Administrative Services Tony Massaros that she intended to return from her leave of absence for the 2013-14 school year. (Union Exhibit #16). Mr. Massaros confirmed receipt of Ms. Carson's e-mail and informed her that no further notification was required. Id.

While Ms. Carson was on approved leave of absence, Chris Endicott was assigned to be the principal at Century. Principal Endicott was subsequently informed that Ms. Carson intended to return to her teaching position at Century.

The social studies curriculum shifted for the 2013-14 school year due to changes in the graduation standards established by the State of Minnesota. Geography, which had previously been taught to seventh and eighth grade students, was now the eighth grade course. American History would now be taught in seventh grade, and Minnesota History in sixth grade. (Employer Exhibit #14). In determining course and section assignments in the social studies department, Principal Endicott had four teachers who were accustomed to teaching geography, but, due to the curriculum realignment, could only assign two teachers to do so. Id. After receiving input from the social studies department, Principal Endicott made course and section assignments based on a number of factors, including interest and experience with the subject matter and grade level, to determine

the best fit for course and section assignments for the 2013-14 school year.

Specifically with respect to Ms. Carson, Principal Endicott received feedback that she was a nurturing, caring teacher with experience working with sixth graders. He determined that, of the social studies teachers, she was the best fit for two sections of sixth grade social studies. (Employer Exhibit #14). Principal Endicott sent his proposed course and section assignments to the entire social studies department on April 12, 2013. This e-mail shows that Ms. Carson was being assigned three sections of 7<sup>th</sup> grade social studies and two sections of 6<sup>th</sup> grade social studies for the 2013-2014 school year. (Employer Exhibit #15).

Unfortunately, Ms. Carson's did not receive this e-mail as there were mutual e-mail problems. (Employer Exhibit #15). Accordingly, on May 1, 2013, Ms. Carson learned through a colleague that Principal Endicott assigned her to teach three sections of 7<sup>th</sup> grade social studies and two sections of 6<sup>th</sup> grade social studies at Century for the 2013-2014 school year. Ms. Carson was surprised by the assignment because she assumed she would have the same course and section assignment she had prior to her leave of absence.

Principal Endicott reasonably assumed that Ms. Carson had received the April 12, 2013 e-mail, and knew of her proposed

course and section assignment prior to the final posting. On the other hand, Ms. Carson was dismayed that Principal Endicott never consulted with her prior to implementing the change, a fact that Principal Endicott confirmed.

Principal Endicott gave Ms. Carson's previous classroom assignment to Teacher Stacy Lurtsema, a less senior teacher to Ms. Carson. (Union Exhibit #16).

On May 17, 2013, the Union filed a written grievance on behalf of Ms. Carson seeking the remedy that she be "placed back into the assignment which she held in 2011-12 before her LOA..." (Joint Exhibit #2).

One week before teacher duties began for the 2013-14 school year, Ms. Carson decided to accept a teaching job in the Northfield School District, and resigned her teaching position with Lakeville. She testified that she did so for "many reasons," including that it was closer to her home, she was not happy and frustrated with her new course and section assignment in the School District, and she felt that she needed a change.

#### **ANALYSIS OF THE EVIDENCE**

The School District argues that Ms. Carson's grievance is moot, since she resigned at the beginning of the 2013-14 school year. The Union concedes that it is not seeking to have Ms. Carson return to her previous assignment, but rather EML seeks a determination that a teacher returning from a one-year leave has

the contractual right under Article 12, Section 8, paragraph 4 to return to his or her previous assignment, which in this context, means a specific area and grade level. Consequently, the Union alleges that since this dispute concerns a matter of Contract interpretation, and the dispute is likely to recur again absent a decision on the merits, the grievance is not moot, and the Arbitrator should rule on the merits.

The Union cites court and arbitration decisions that support the accepted definition of a "moot case" as being "a case in which the matter in dispute has already been resolved and hence, one not entitled to judicial intervention unless the issue is a recurring one and likely to be raised again between the parties." Black's Law Dictionary (6<sup>th</sup> Ed. 1990) (citing Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974)); ISD No. 810 and Plainview Education Association, 84-PP-571-A (Rotenberg, 1984), citing Elzie v. Commissioner of Public Safety, 298 N.W.2d 29, 32 (1980); Rio Rancho Public Schools, 132 LA 977 (Keyl, 2013).

The doctrine of mootness exists to prevent courts and arbitrators from issuing advisory opinions and to ensure that their role is only to determine actual controversies. In re McCaskill, 603 N.W.2d 326, 327 (Minn. 1999). In general, if effective relief is impossible or a decision on the merits is unnecessary, a claim should be dismissed as moot. Christopher

v. Windom Area School Bd., 781 N.W.2d 904, 911 (Minn. App. 2010), citing In re Application of Minnegasco, 565 N.W.2d 706, 710 (Minn. 1997).

It is unnecessary to render a decision on the merits of this grievance because Ms. Carson voluntarily waived any rights to arbitration of her grievance when she resigned from employment with the School District. Even if the Arbitrator agrees with the Union's position that Ms. Carson was entitled to return to the same classroom assignment (i.e., four sections of eighth grade social studies and one section of seventh grade social studies at Century), Ms. Carson is not entitled to teach as she has resigned from employment with the School District. Accordingly, even if Ms. Carson succeeds on her claim, there is no remedy that can be awarded due solely to Ms. Carson's decision to voluntarily resign.

The doctrine of mootness does not require dismissal of a claim that is "capable of repetition yet evades review." Christopher, 781 N.W.2d at 911-12. The Union acknowledges there is no remedy available to Ms. Carson, but claims her grievance is not moot because it meets the exception to the mootness doctrine of being capable of repetition yet evading review. It is true that the situation is capable of repetition since any time a teacher returns from a voluntary leave of absence, she or he may be assigned to teach different classes or numbers

of sections within his or her area of licensure. However, the Arbitrator disagrees with the Union's claim that this situation will continue to evade review.

If a similar fact situation repeats involving a teacher returning from a leave of absence, there is nothing inherent in the Contract that would prevent that affected individual from filing a grievance as to the assignment to teach different classes or numbers of sections within his or her area of licensure. The sole reason this grievance evades review is Ms. Carson's unilateral, voluntary resignation from employment with the School District.

The Union claims that the School District's decision to assign Ms. Carson to different classes or number of sections would have a chilling effect in which teachers would be afraid to take leaves of absence because they would be uncertain of their assignment when they returned. This may or may not be true. This is why it is of utmost importance that each case as to classes or numbers of sections within his or her area of licensure area upon the teacher's return from leave of absence should be reviewed by the specific and unique facts surrounding the assignment. It would be inherently unfair for the Arbitrator to deny Ms. Carson's grievance on the merits of her claim and have that decision govern all future assignments from leave of absences for all other teachers, when Ms. Carson's

unique fact situation would be different from the other teachers.

In this case, it was the conduct of Ms. Carson that rendered her grievance moot. Where the only reason this particular case cannot be reviewed is due to the unique, unilateral act of Ms. Carson's resignation from the School District, the situation itself will not perpetually evade review for future teachers taking leaves of absence and then returning to their classroom assignments.

**AWARD**

The grievance and requested remedy sought by the EML on behalf of Ms. Carson that a teacher returning from a one-year leave of absence has a right to return to his or her previous assignment, which means a specific area and grade level, is hereby denied since her grievance was declared by the Arbitrator to be moot.

**Brandice Hansmeyer and Kathleen Nechanicky Grievances**

Brandice Hansmeyer and Kathleen Nechanicky both teach at Kenwood Trail Middle School ("Kenwood Trail"). Ms. Hansmeyer is in her 18th year with the School District, and Ms. Nechanicky is in her 25th year with the District.

Ms. Hansmeyer is licensed to teach 5-9 Science and 7-12 Earth and Space Science. (Employer Exhibit #22). She was initially hired as a .8 FTE Science teacher at Kenwood Trail

Junior High in 1996. (Employer Exhibit #17). When hired by the School District in 1996, Ms. Hansmeyer was assigned to teach eighth grade earth science. For the past 17 years, including the 2012-13 school year, Ms. Hansmeyer has taught eighth grade earth science. Prior to the 2013-14 school year, Ms. Hansmeyer taught five sections of eighth grade earth science at Kenwood Trail.

Kate Eisenthal has been the principal at Kenwood Trail since 2009. During that time, Principal Eisenthal has received negative feedback from numerous teachers, parents, students, and classroom paraprofessionals that Ms. Hansmeyer did not effectively engage with her students. Each year, Principal Eisenthal has received requests from parents that their children not be placed in Ms. Hansmeyer's classes. As a result, in the spring of 2011, Principal Eisenthal requested that Ms. Hansmeyer move to sixth grade, where the curriculum is physical science. Ms. Hansmeyer refused the request.

Principal Eisenthal also observed Ms. Hansmeyer in her classroom during scheduled performance evaluations on October 31, 2012 and February 1, 2013. (Employer Exhibit #13). Principal Eisenthal noted concerns about Ms. Hansmeyer's ability to build a rapport with the eighth grade students in her classroom and specifically identified a lack of engagement with students. Id.

While Ms. Hansmeyer is licensed to teach physical science, she explained to Principal Eisenthal that she was less familiar with the curriculum, due to having taught exclusively earth science for the past 17 years. In addition to Ms. Hansmeyer's experience teaching earth science, she had focused primarily on earth science in her college career, developed numerous labs and other classroom activities specific to earth science, and participated in extensive professional development related to that subject.

No positions in Kenwood Trail's science department were eliminated or reduced between the 2012-13 and 2013-14 school years. (Employer Exhibit #6, p. 3). The total number of sections for all grades has remained the same, and there have been 4.6 full-time equivalent positions ("FTEs") in the department for both years. Id.

Despite Ms. Hansmeyer's expressed interest in continuing to teach eighth grade earth science, Principal Eisenthal assigned her to teach five sections of sixth grade physical science for the 2013-14 school year, and assigned Tim Leighton to teach the five sections of earth science that Ms. Hansmeyer had previously taught. At the end of the 2013-14 school year, Ms. Hansmeyer was number 270 on the School District-wide seniority list, and is the most senior member of the science department at Kenwood Trail. (Union Exhibit #17).

At the end of the 2012-13 school year, Mr. Leighton was number 395 on the seniority list. (Union Exhibit #17). He holds licenses in 5-9th grade science, and 7-12th grade life science. (Employer Exhibit #6). When hired by the School District, Mr. Leighton was assigned to teach 7th grade life science, and had taught this grade and subject for 13 years. Id.

On May 17, 2013, the Union filed a grievance on behalf of Ms. Hansmeyer alleging a violation of the Contract's prohibition on involuntary transfers. (Union Exhibit #2, pp. 3-4). Ms. Hansmeyer seeks to be reinstated to teaching eighth grade earth science.

Ms. Nechanicky holds licenses in 5-8th grade communication arts/literature, and 1-6th grade elementary education. (Employer Exhibit #21). She originally taught elementary school and has spent the past eight years as an English teacher at Kenwood Trail. Throughout her time at Kenwood Trail, Ms. Nechanicky's course and section assignment has been five sections of sixth grade communications.

In the spring of 2011, the English department at Kenwood Trail created a grid of proposed teacher assignments for the following school year, which they gave to Principal Eisenthal. The proposed grid kept Ms. Nechanicky teaching five sections of sixth grade communications. Principal Eisenthal met with Ms.

Nechanicky and requested that Ms. Nechanicky teach three sections of sixth grade communications and two sections of seventh grade communications. Ms. Nechanicky told Principal Eisenthal that she did not wish to change her assignment. Ms. Nechanicky's assignment was not changed at that time.

No positions in Kenwood Trail's English department were eliminated or reduced between the 2012-13 and 2013-14 school years. (Employer Exhibit #6, p. 6). The total number of sections for all grades has remained the same, and there have been 7.6 FTEs in the department for both years. Id.

When scheduling, Principal Eisenthal considers how courses are distributed among various teachers. She attempts to equalize the number of "preps," meaning the different courses a teacher must teach, within each department. (Employer Exhibit #10).

When the English department initially met to discuss recommendations for how courses and sections would be assigned for the 2013-14 school year, Ms. Nechanicky indicated her desire to continue teaching exclusively sixth grade communications. After the departmental meeting on April 11, 2013, the English department submitted a grid to Principal Eisenthal that included the recommendation that Ms. Nechanicky be assigned to five sections of sixth grade communications, resulting in assigning her one prep.

As a result of Ms. Nechanicky being proposed for one prep, Brent Anderson, another teacher in the English department would be assigned to three preps by virtue of the proposed grid. Mr. Anderson, was concerned about the workload involved with preparing three separate courses. Mr. Anderson contacted Principal Eisenthal with a proposed alternative course and section assignment developed between Mr. Anderson and Meghan Scott, the chair of the English department, which was agreed to by the English department, excluding Ms. Nechanicky. (Employer Exhibit #23). By assigning Ms. Nechanicky to three sections of sixth grade communications and two sections of seventh grade communications, every member of the English department would have two preps. Although Ms. Nechanicky was concerned about the amount of work two preps would require, as an administrator, Principal Eisenthal was concerned about the amount of stress that would result from assigning three preps to one teacher, Mr. Anderson.

Principal Eisenthal ultimately determined that the School District's students would be best served by assigning Ms. Nechanicky and Mr. Anderson each two preps. Therefore, at Mr. Anderson's request, Principal Eisenthal changed his assignment for the 2013-14 school year to two sections of seventh grade language arts and three sections of sixth grade communications, two of which had previously been taught by Ms. Nechanicky.

Notably, there is no teacher currently assigned to the course and section assignment Ms. Nechanicky taught during the 2012-13 school year. (Employer Exhibit #11).

At the beginning of the 2012-13 school year, Ms. Nechanicky was number 93 on the School District-wide seniority list, and is the most senior member of the English/Language Arts department at Kenwood Trail. (Union Exhibit #17).

At the end of the 2012-13 school year, Mr. Anderson was number 647 on the School District-wide seniority list. (Union Exhibit #17). He holds licenses in 5-8th grade communication arts/literature, 7-12 grade English/Language Arts. (Employer Exhibit #6, p. 7). In the 2012-2013 school year, he taught two sections of 7th grade communications, two sections of 7th grade literature, and one section of Response to Intervention. Id.

On May 17, 2013, the Union filed a grievance on behalf of Ms. Nechanicky claiming a violation of the Contract prohibition on involuntary transfers and seeking a remedy of assigning Ms. Nechanicky to five sections of sixth grade communications. (Union Exhibit #2, pp. 5-6).

The School District denied the grievances filed by the EML on behalf of Ms. Hansmeyer and Ms. Nechanicky at every level of the contractual grievance procedure. (Union Exhibit #2, pp. 7-11). After the denial at Level 3, EML moved them to arbitration according to Article 10, Section 8 of the Contract. Id.

## **ANALYSIS OF THE EVIDENCE**

The function of an arbitrator in interpreting a contract is to determine the intent of the parties. The interpretation of a contract must first begin with the language itself that the parties agreed to during collective bargaining. Clear and unambiguous contract language is expected to be applied as the reasonable and common usage of the terms would dictate. National Can Corp., 77 LA 405 (1981); Selig Mfg. Co., Inc., 71 LA 86 (1978). A contract clause is not ambiguous if the arbitrator can determine its meaning with no other guide than knowledge of the simple facts on which, from the nature of the language in general, its meaning depends. An arbitrator cannot "ignore clear-cut contractual language" and he "may not legislate new language, since to do so would usurp the role of the labor organization and the employer." Clear Coverall Supply Co., 47 LA 272, 277 (1966). Moreover, any attempt by the Arbitrator to "usurp" the role of the Parties would be in direct violation of Article XI, Grievance Procedure, Section 8, Arbitration Procedures, Subd. 8, Jurisdiction, of the Contract, wherein "[t]he jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment defined herein and contained in this written agreement..."

Thus, the Arbitrator is confined to the interpretation and application of the Collective Bargaining Agreement. If,

however, the Contract language is unclear or undefined, the Arbitrator must look to extrinsic evidence to determine the Parties' intent and reasonable expectations. These extrinsic factors include bargaining history, past practice, and other provisions in the Contract.

The Parties agree that the controlling Contract language in the resolution of Ms. Hansmeyer and Ms. Nechanicky grievances is found in Article XVIII, Assignments and Transfers, which limits the conditions under which the School District may involuntarily transfer a teacher, and also sets forth procedural requirements the District must follow when an involuntary transfer takes place. This Contract language reads as follows in relevant part:

Section 1. Assignments: The district will assign all continuing contract teachers and probationary teachers the district plan to continue in service for the next year. Teachers will only be assigned to positions for which they are licensed.

Section 2. Voluntary Transfer: A teacher is voluntarily transferred when a vacancy exists and teacher who has been or is eligible for assignment requests and is granted a transfer to the vacant position.

The teacher must have appropriate license for the vacant position and must meet the criteria for voluntary and involuntary transfer as enunciated in Article XVIII, Section 5 of the contract.

Section 3. Involuntary Transfers: A continuing contract teacher may be involuntarily transferred to another position when lack of enrollment indicates that a position must be eliminated.

Prior to an involuntary transfer taking place, the teacher must be duly licensed for the position, the district must have requested an appropriately licensed volunteer for the position, the teacher to be involuntarily transferred must be the least senior if all other criteria as enunciated in Article XVIII, Section 5 are essentially similar.

Subd. 1. Purpose: The purpose of this Section is to establish the procedures to be followed by ISD 194 in making an involuntary transfer of a teacher from one school building to a vacant position in another school building. An involuntary transfer shall not be used as a punitive measure against a teacher.

Subd. 2. Selection for Transfer: A teacher may only be involuntarily transferred to a vacant position for which such teacher is both qualified and licensed by the MDE. A teacher shall be deemed to be "qualified" for the purpose of this Section only if such teacher is appropriately licensed by the MDE and has a currently valid license (other than a limited or provisional license) to teach in such subject matter or field. However, an ECFE teacher may only be involuntarily transferred to another ECFE position.

Before making an involuntary transfer from any school building, ISD 194 will seek a volunteer from among those teachers in such building who are licensed for the vacant position. If no volunteer is found pursuant to the criteria for selection, as set forth in Section 5, the teacher who is appropriately licensed for the vacant position who is lowest on the seniority list at the site shall be transferred.

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Section 5. Criteria for Voluntary Transfer: The employer shall make every reasonable effort to grant applications for voluntary transfers to the extent that such applications are consistent with the educational requirements of the district. If more than one (1) teacher who is eligible has applied for a vacant position, selection for transfer shall be based on the following criteria:

- Seniority
- Educational training
- Related experience

The order of the above criteria does not signify priority or weight EXCEPT that, in the case of a voluntary transfer in which all other criteria are the same the teacher highest on the seniority list shall be preferred. In the case of an involuntary transfer in which all other criteria are the same the teacher with the lowest seniority shall be preferred.

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One core area of disagreement between the Parties is over the definition of "position" as used in Article XVIII. Although the term "position" is used throughout Article XVIII, there is no definition for that term anywhere in the Contract. To add confusion to the intent of the term "position" in Article XVIII, the School District admits that the terms "position" and "assignment" are used interchangeably throughout the Contract. Consequently, the plain language referencing the term "position" in Article XVIII is not clear as to its intended meaning and certainly is not conclusive as to whether "position" means a "position as a teacher" and "course and section assignment" refers to the courses and number of sections assigned to an individual teacher, as alleged by the School District, or whether "position" means a specific subject area and grade level, which has been the EML's interpretation.

The School District alleges that the "Purpose" language contained in Article XVIII, Section 3, Subdivision 1 ("The

purpose of this Section is to establish the procedures followed by ISD 194 in making an involuntary transfer of a teacher from one school building to a vacant position in another school building.") is clear and unambiguous and mandates only one reasonable interpretation: the involuntary transfer section applies solely in the case where a teacher is involuntarily transferred from one school building to another.

The School District further argues that its interpretation is supported by the language in Article XVIII, Section 3, Subdivision. 2. There, the Parties stated that "[b]efore making an involuntary transfer from any school building..." The School District argues that if the involuntary transfer language truly applied to all transfers, there is no way to reconcile this language stating that the transfer is to be "from" a school building.

It is an accepted arbitral principle that, when interpreting contract provisions, arbitrators must give effect to all clauses and words, and avoid interpretation that would give effect to certain language but render other language meaningless. To that end, the School District's assertion that the "Purpose" language is unambiguous fails to take into account the language's placement in Article XVIII, Section 3. Notably, the "Purpose" language appears after two initial paragraphs in Section 3 that describe the conditions necessary for an

involuntary transfer to occur, and the process for carrying out an involuntary transfer. The unusual placement of Article XVIII, Section 3, Subdivision 1, following two general paragraphs about involuntary transfers, makes this Purpose language ambiguous, in which case other recognized sources of contract interpretation are necessary to determine the intent of the Parties.

One recognized extrinsic aid to contract interpretation is bargaining history. City of Rosebug, 97 LA 262, 267-69 (1991); Shauer Mfg. Corp., 94 LA 1116, 1120 (1990). The circumstances leading up to the change in the "Purpose" language in the 2007-09 contract strongly support EML's interpretation of the scope of involuntary transfers.

Starting in the 1987-89 contract and continuing until 2007, the "Purpose" language in Article XVIII, Section 3, subdivision 1 read: "The purpose of this Section is to establish the procedures to be followed by the employer in making an involuntary transfer to a vacant position." During this time, there was mutual agreement between the Parties that the involuntary transfer criteria applied when teachers were required to transfer within their own buildings. In fact, EML President Donald Sinner testified that after the initial contract change in 1989-91, and until the School District began to face financial troubles in 2007, involuntarily transferring a

teacher outside of his or her school building had not been contemplated. President Sinner further testified that the only reason for adding the "Purpose" language "from one building to a vacant position in another building" was to ensure that if such transfers were necessary, they would follow the same requirements as transfers within buildings.

President Sinner's explanation of the Parties' bargaining intent is very credible. He is the only witness from either Party who was involved in the negotiations over the 2007-09 contract. Further, the School District did not offer any alternative explanation as to why the EML would agree to restrict the application of favorable contract language. It is difficult to believe that the change in the "Purpose" language would be "non-controversial" if the intention of both Parties was to limit the language's application to solely building-to-building transfers.

Also supporting President Sinner's explanation is the fact that when the "building-to-building" language was added, two new paragraphs were also added before Article XVIII, Section 3, Subdivision 1. The two new paragraphs at the very beginning of Article XVIII, Section 3 are almost identical to the language that comes after Subdivision 1.

"It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any

part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect." Elkouri & Elkouri, How Arbitration Works (BNA, 6<sup>th</sup> Ed.) pp. 463-466 (quoting John Deere Tractor Co., 5 LA 631, 632 (1946)).

Clearly, for the words of Article XVIII, Section 3, Subdivision 1 to have any intended effect, the appearance of this nearly identical language needed to appear twice in the same section since it applies to two different types of involuntary transfers. The two paragraphs above Article XVIII, Section 3, Subdivision 1 apply to involuntary transfers within a building, and the two paragraphs below Subdivision 1 apply to involuntary transfers from one building to another. Article XVIII, Section 3, Subdivision 1 demarcates the initial two paragraphs from the language in Article XVIII, Section 3, Subdivision 2. This is the only reasonable interpretation that gives effect to all the language in Article XVIII, Section 3. The School District's interpretation would render the critical language of Article XVIII, Section 3 meaningless and without effect, while the Union's interpretation is one which gives this provision a reasonable and effective meaning.

Another important extrinsic aid in this case is the practice of the Parties as it applies to the Contract language in dispute. Past Practice is a recognized aid in contract

interpretation, and one that carries great weight in resolving dispute contract language.

Both Parties presented evidence regarding how the School District typically approaches the assignment of teachers. The School District argues that the specific classes and number of sections a teacher is assigned by District's middle schools and high schools does not constitute an involuntary transfer.

There were five middle school and high school principals who testified about the manner in which he or she assigned teachers to teach specified classes and numbers of sections. Generally, the procedures are similar in that the principals inform the department chairs how many sections of each departmental course will be needed. They seek input from the relevant department chair about how the department's courses will be staffed. With this input, the principal then makes final decisions about what courses staff will teach and how many sections are assigned. All of the principals testified the final course and section assignments were made by them and were not subject to limitations in the Contract.

The Union claims that the School District has conceded that the involuntary transfer language applies to the assignment of courses and sections. In this case, EML produced numerous examples of EML challenging secondary and elementary grade level reassignments as "involuntary transfers" that did not comply

with Article XVIII, Section 3. EML filed grievances in 2005 and 2007 over School District-proposed transfers of elementary and/or middle school teachers to different grade levels within their buildings. Each of these cases were resolved prior to arbitration, with teachers either agreeing to the transfer or being returned to their previous grade level. At no time did the School District assert that Article XVIII, Section 3 did not apply. Even after the "Purpose" language changed in the 2007-09 contract, EML grieved the involuntary transfer of Katie Fedora from 8th grade to 6th grade communications. No School District representative ever asserted to the EML that Article XVII, Section 3 was inapplicable to this proposed within-building transfer, nor is there any documentation to that effect.

Although these disputes did not reach the arbitration level and did not result in formal grievance settlement agreements, the consistent pattern of rescinding proposed grade-level changes in response to EML grievances is highly indicative of a mutual understanding between the Parties that Article XVIII, Section 3 applied to these situations. Not until the 2013-14 school year did the School District proceed with an involuntary grade-level transfer over the teacher and the Union's objections.

It is clear from the evidence with respect to bargaining history and practice that never before the instant grievances

has the School District asserted that Article XVIII, Section 3 only applies when a teacher is transferred outside his or her building. The School District has only recently adopted a restrictive interpretation of Article XVIII, Section 3, which was done without the consent of the EML and contrary to the Contract.

Clearly, the teaching schedule changes in Ms. Hansmeyer and Ms. Nechanicky's grade levels were subject to Article XVIII, Section 3, and there should be little dispute that the District did not comply with the section's requirements. In fact, Mr. Massaros conceded that Ms. Hansmeyer and Ms. Nechanicky's transfers would not meet the requirements of the first two paragraphs in this section since the requisite conditions for involuntary transfers did not exist (i.e., lack of enrollment, elimination of positions).

Even if the prerequisites for an involuntary transfer had existed, neither Ms. Hansmeyer nor Ms. Nechanicky should have been the individuals required to accept different assignments. While it is undisputed by the Parties that the School District solicited volunteers, and that both teachers were appropriately licensed to teach the new classes, the final requirement of the second paragraph in Article XVIII, Section 3 is that the incumbent and successor teachers be compared in the Article XVIII, Section 5 criteria of seniority, educational training,

and related experience, with seniority serving as the tie breaker.

It is also undisputed that Ms. Hansmeyer and Ms. Nechanicky had more educational training and related experience in their preferred grade levels than the teachers who assumed them this year. Further, because Ms. Hansmeyer and Ms. Nechanicky are more senior than the teachers who replaced them, Article XVIII, Section 3 should have allowed them to retain the classes they taught in the 2012-13 school year.

While it appears that the School District's reasons for transferring Ms. Hansmeyer and Ms. Nechanicky had some validity, the School District cannot circumvent the Contract language in Article XVIII, Section 3 to transfer them without their consent. Neither Ms. Hansmeyer nor Ms. Nechanicky gave the School District consent to involuntarily transfer them to different teaching assignments.

**AWARD**

The grievances filed by EML on behalf of Ms. Hansmeyer and Ms. Nechanicky are sustained. The School District shall return Ms. Hansmeyer to five sections of eighth grade earth science for the 2014-15 school year, and shall return Ms. Nechanicky to five sections of sixth grade communications for the 2014-15 school year.

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Richard John Miller

Dated January 24, 2014, at Maple Grove, Minnesota.