

IN THE MATTER OF THE ARBITRATION BETWEEN

Education Minnesota, Greenway Local 1130

-and-

BMS Case No. 14PA0132

ISD 316, Greenway, Minnesota

ARBITRATOR: Christine D. Ver Ploeg

DATE & PLACE OF HEARING: December 14, 2013
February 24, 2014
Greenway High School
Coleraine, Minnesota

RECEIPT OF POST-HEARING BRIEFS: March 17, 2014

DATE OF AWARD: April 17, 2014

ADVOCATES:

For the UnionNicole Blissenbach
Education Minnesota
41 Sherburne Ave.
St. Paul, Minnesota 55403For the EmployerJohn Colosimo
Colosimo, Patchin, Kearney & Brunfelt
301 Chesnut St.
Virginia, Minnesota 55792

Becky Dimich, Brenda Larson and Julie Vekich, GRIEVANTS

ISSUE

Did the District violate the parties' Agreement by the method by which it unilaterally reassigned three bargaining unit members? If so, what shall be the remedy?

BACKGROUND

This case has been brought by Education Minnesota, Greenway Local 1130 (hereinafter “Union”) on behalf of three elementary school teachers who are employed by ISD 316, Greenway (hereinafter “District”). The Union is their exclusive representative.

This arbitration stems from the Union’s challenge to the method by which the District unilaterally reassigned these three bargaining unit members to different elementary school grade levels. The Union submits that the method by which the District made these assignments violated the parties’ collective bargaining agreement. The District submits that it did not.

The facts in this case are not in dispute. In the summer of 2013 a teacher retired, leaving a sixth grade language arts opening in Greenway school. Rather than post that assignment, the District did the following:

1st, assigned a 4th grade teacher from Van dyke to that 6th grade arts opening at Greenway for the current school year.

2d, assigned a 5th grade teacher from Greenway to the now open 4th grade class at Vandyke.

3d, assigned a 1st grade teacher from Vandyke to the now open 5th grade class at Greenway.

4th, posted the now open 1st grade class at Vandyke.

The Union claims that the above process violated the parties’ Agreement in that the District involuntarily transferred or unilaterally reassigned three teachers to positions already filled by other teachers, failed to post a vacant position, and posted a position that was occupied by an existing teacher and was, therefore, not vacant.

The Union submits that Section 5, Seniority, E. Transfers and/or Promotions, required the District to post the sixth grade arts opening to permit bargaining unit members bid for it based upon seniority, and that the openings thereby created should similarly have been posted and opened to the bidding process. Absent expressly enumerated situations, open positions must be posted and awarded based upon seniority unless the District can demonstrate "good and sufficient reason" to circumvent seniority, a decision which is subject to the grievance process.

Furthermore, the Union submits that at the end of this chain the District did not have the right to assign a teacher to a position already occupied by a current teacher.

By contrast, *the District argues* that Section 5E, which directs that transfers and/or promotions to “positions” must be made by seniority, does not apply to the facts of this case because the teaching assignments now at issue were never “positions” within the meaning of the contract. Instead, the District submits that section 5E applies only to transfers to a vacant or newly created opening to a bargaining unit member’s other areas of *licensure*. That is, a teacher in the elementary schools holds the position of “Elementary Education” within which he or she is assigned, at the District’s discretion, to a teaching assignment such as third grade. There is no such thing as a third grade licensure and hence there is no such thing as a third grade “position.” Thus, the District argues that the contract process does not apply when a bargaining unit member seeks to move from teaching one elementary grade to another.

The parties were unable to resolve their differences concerning the issues related to these events in earlier steps of the grievance process, and have agreed that the Union’s two grievances are now properly combined and brought before this arbitrator for resolution. A hearing was held on these matters on December 14, 2013, and continued by teleconference call on February 24, 2014. The parties submitted post-hearing briefs which this arbitrator received on March 17, 2014, at which time the record in this hearing was closed.

RELEVANT CONTRACT LANGUAGE

The Parties’ current Collective Bargaining Agreement provides in relevant part:

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...the selection, direction, and the number of personnel including the right to... Transfer....

B. The Union recognizes the right and obligation of the Board to efficiently manage and conduct the operation of the school district within its legal limitations and its primary obligation to provide educational opportunity for the students of the school district.

SECTION 4. DEFINITIONS

C. Teacher: The word “Teacher” shall mean all persons in the appropriate bargaining unit as defined by the PELRA and employed by the Board in a position for which the person must be licensed by the State of Minnesota...

SECTION 5. SENIORITY

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 1-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 reassigned or terminated as dictated by position availability.

7. Teachers shall not be considered for reassignment to a position presently occupied by existing staff member unless they have bumping rights or unless that teacher has applied for and been assigned to another position.

F. Emergency Transfers: Emergency transfers may be made in case of vacancies during the school year. Such transfers shall be made in accordance with the rules of seniority and such transfer shall become involuntary with the least senior certified staff member if no teacher with more seniority accepts. The Superintendent of Schools shall notify the affected teacher(s) of the reasons for such transfer.

SECTION 7. GENERAL PROVISIONS

D. Notice of Work Assignments: Principals are to inform the teachers, as soon as possible, in writing, if there is to be any change in a teacher's workload or assignment.

PARTIES' EVIDENCE AND ARGUMENTS

Decision in this case turns on the meaning to be given "position" in Section 5E1 and Section 5E2. Together those two provisions require that bargaining unit employees be given notice and opportunity to bid on "all vacancies and newly created *positions*." (Emphasis added). The parties have not defined that term in their Agreement and they disagree as to its meaning.

Union's Argument: The Union, which bears the burden of proof in this case, argues that "position" means a teacher's current teaching assignment. Under this interpretation when a teaching assignment becomes vacant e.g., because of a retirement, the District must post it and permit interested teachers with the appropriate licensure to bid on it by seniority. By the same token, a teacher has a right to his/her current elementary grade level position and cannot be reassigned by the District or dislodged absent specified circumstances. Such circumstances

include an emergency or being bumped by a more senior teacher who has previously been dislodged from his/her own position/assignment per the contract process. The Union points to past practice and argues it is compelling. It also distinguishes high school assignments by noting that at the high school level a teacher's "position" is, for example, "Social Studies 9-12." Thus, assigning a teacher to 12th Grade Social Studies one year and 9th Grade Social Studies the next, or variations thereof, constitutes keeping the teacher within the same position. The high school can be differentiated because of electives and fluctuating classroom needs.

In this case the Union argues that the District violated the collective bargaining agreement by doing the following:

1st, the District unilaterally assigned a 4th grade teacher from Vandyke Elementary to the 6th grade arts position at Greenway Elementary that had been made vacant by a retirement. The Union submits that this position should have been posted and all interested teachers holding the appropriate licensure should have been permitted to use their seniority to bid for it.

2d, the District unilaterally assigned a 5th grade teacher from Greenway to the now open 4th grade class at Vandyke. Again, the Union submits that this position should have been posted and all interested teachers holding the appropriate licensure permitted to bid for it using their seniority.

3d, the District assigned a 1st grade teacher from Vandyke to the now open 5th grade class at Greenway. Again, the Union submits that this position should have been posted and all interested teachers holding the appropriate licensure permitted to bid for it using their seniority.

4th, posted the now open 1st grade class at Van Dyke.

In the preceding chronology the District also violated the parties' Agreement, Section 5.E.7, by reassigning a teacher to a position presently occupied by an existing staff member.

The Union seeks a remedy whereby the District shall be ordered to (1) post all vacant and newly created positions in accordance with the contract; (2) refrain from posting positions that are occupied by current teachers and are, therefore, not vacant; and (3) at the start of the 2014-15 school year return Becky Dimich to the fifth grade position, Brenda Larson to the fourth grade position, and Julie Vekich to the first grade position, and any positions that become vacant as a result of this will be posted in accordance with the contract.

District's argument The District argues that "position" means a teacher's area of licensure, and thus it has the right to assign an Elementary Education licensed teacher to any K-6 class without going through the contract process. That is, the District argues the posting/seniority requirements apply only when a teacher moves from one type of license (K – 6) to another (for example, an art position). In this case the 2013 retirement created only an elementary position vacancy, it did not create a sixth grade arts vacancy. Thus, a teacher licensed in Elementary Education and already teaching at an elementary grade level did not have the right to bid for that elementary vacancy because he/she already held an elementary position. In short, teaching at a given grade level is not a position but is simply an assignment.

The District agrees that if a teacher in an elementary position, also licensed to teach Math 7 - 12, became aware of and wanted to apply for a vacant or newly created math position, that would trigger the process set forth in Section 5E. But that is not this case.

The District also notes that the high school freely moves e.g., social studies teachers from one grade to another, depending on fluctuating enrollment needs, and it does so without objection.

DISCUSSION AND DECISION

The Union freely acknowledges that school districts traditionally have the right to assign elementary school teachers to different grade levels, and it also acknowledges that there may be good reasons to reassign a teacher from one grade level to another. However, the Union submits that this collective bargaining agreement has, in Section 5, Seniority, altered that traditional management right. The result is that these bargaining unit members *do* have a continued right to their current positions, e.g., teaching third-grade. Moreover, absent specifically delineated circumstances, the District must fill vacant or newly created positions using the contract bidding process.

By contrast, the District points to its expressly stated inherent management right to, among other things, determine transfers, and to “efficiently manage and conduct the operation of the school district within its legal limitations and its primary obligation to provide educational opportunity for the students of the school district.” Section 2, Board Rights.

Thus, this case raises the question whether the District has bargained away its traditional right to assign elementary school teachers to different grade levels, and that question in turn depends upon how the term “position” is defined. The Union, which bears the burden of proof in this case, argues that a vacant or new “position” subject to Section 5.E’s processes refers to a teacher’s current teaching assignment, e.g., teaching third-grade. The District disagrees, arguing that “position” means a teacher’s area of licensure and thus Section 5.E’s processes do not apply when assigning teachers within the Elementary Education “position.”

In finding that the Union has met its burden of proof, I have considered the following:

1. What guidance does the contract language provide in this matter?

Nowhere does this Agreement define the term “position” and the parties’ conflicting yet plausible arguments demonstrate that the term is ambiguous. Thus, it is necessary to look further to ascertain its meaning. To do this we first consider the contract as a whole.

The District reasonably relies upon its expressly stated inherent management right to, among other things, determine transfers and to “efficiently manage and conduct the operation of the school district within its legal limitations and its primary obligation to provide educational

opportunity for the students of the school district.” Section 2, Board Rights. The District argues that this means it has the right to unilaterally assign teachers to different grade levels within the Elementary Education “position.” This interpretation is further reinforced by the Union’s acknowledgment that school districts traditionally have this right.

However, the District’s arguments are overcome when Section 5.E’s provisions are considered in conjunction with other contract provisions. It is a well-established principle of contract interpretation that contract language is determined in relation to the contract as a whole. Terms are to be interpreted in a way that will give effect to all provisions because contract language must mean something.

In this case the District’s interpretation of the meaning of “positions” would, among other things, nullify the Agreement’s emergency transfer language. Section 5F provides:

Emergency Transfers: Emergency transfers may be made in case of vacancies during the school year. Such transfers shall be made in accordance with the rules of seniority and such transfer shall become involuntary with the least senior certified staff member if no teacher with more seniority accepts. The Superintendent of Schools shall notify the affected teacher(s) of the reasons for such transfer.

If the District already had the right to involuntarily transfer teachers at its discretion, there would be no need for this language.

In addition, the use of the word “position” in other provisions in Section 5 can reasonably be construed as suggesting that a position is unique to a person. For example, section 5.E.7 refers to positions presently occupied by an existing staff member. If “position” was limited to a teacher’s licensure area, it would be virtually impossible to find a position not presently occupied by an existing staff member.

Other contract provisions suggest that the term “position” is not synonymous with “licensure.” For example, Section 4.C defines a teacher as one “employed by the Board in a position for which the person must be licensed by the state of Minnesota.” The use of both terms suggests that they are not interchangeable; each can be interpreted as having a different meaning.

By the same token, Section 5.E.10 states that certain subdivisions of Section 5.E do not apply to extracurricular “positions.” Use of the word position in this context cannot mean licensure because there is no licensure for extracurricular positions.

By contrast, the District points to Section 7.A as evidence that it has the right to reassign teachers within their areas of licensure without adhering to Section 5's processes and seniority requirements. That provision states:

SECTION 7. GENERAL PROVISIONS

- A. Notice of Work Assignments: Principals are to inform the teachers, as soon as possible, in writing, if there is to be any change in a teacher's workload or assignment.

I have considered this argument but find that unlike the earlier provisions cited, which would have no meaning if the District's interpretation is accepted, this provision can be reconciled with the Union's interpretation. A teacher's work assignment may be changed as a result of these Section 5.E processes, and this section simply requires clarification and confirmation of such changes.

For these reasons I find that the contract, when read as a whole, supports the Union's position in this case.

2. *Past Practice*

The evidence demonstrates that the parties' past practice also supports the Union's arguments in this case. There was no evidence that the District has ever involuntarily transferred an elementary teacher from one grade level to another. In fact, the only examples of moving a teacher without following the contract process were those provided by Union witnesses and each took place by agreement of the Union.

By contrast the evidence reveals that it has been common for teachers to move from one elementary grade level position from another, and that they have done so per Section 5.E's bidding process, often referred to as "posting into a position." That process typically occurs at the end of the year, when the District posts openings for the following school year. A Union exhibit titled "INTERNAL JOB POSTINGS, TEACHING VACANCIES, 2013-2014 School Year" demonstrates that the District identifies vacancies by specific grade level, e.g., "First grade teacher (1.0 FTE) Vandyke Elementary."

To expedite filling teaching vacancies the District often utilizes "mass posting meetings" to streamline the process. At such meetings all teachers interested in an open position attend to

express their interest and the most senior individual is assigned to it. This process is repeated until all current teachers have expressed their interest in the resulting vacant positions, whereupon the left over positions are then posted for external candidates. This mass handling of the chain reaction created following the filling of an initial position is obviously more efficient than posting each vacant position for 10 days.

Finally, the District offered evidence that it frequently reassigns teachers in the high school. However, those assignments are not involuntary transfers; they are course changes within a position assignment. High schools have a wider array of electives and course options than is the case in the elementary schools. As a result, high school teachers are assigned to a range of grade levels within each subject area. Thus, it is not unusual to assign a Science 9-12 teacher to different grade levels depending upon enrollment needs. The teacher's position is that of Science 9-12.

3. Management Rights

The District argues that denying it the right to assign elementary teachers within their Elementary Education licensure denies it the right to provide students with the best education possible. For example, the elementary school principal persuasively identified several educationally compelling reasons why she might want reassign an elementary teacher from one grade level another. Indeed, the reasons she articulated for having done so in the instant cases were, on their face, reasonable.

Nevertheless, the evidence demonstrates that these bargaining unit members do have a contractual right, absent expressly identified circumstances, to enjoy the stability of remaining within their current positions. The District *does* have the right to “assign a teacher lower on the seniority list” but it can do so only “for good and sufficient reasons” which are “subject to the grievance procedures” and thus potentially subject to arbitration. Section 5.E.4b.

It would be unfortunate if the District had “good and sufficient reasons” to assign a teacher outside of the contract process – as may well have been the case in these transfers – and felt chilled from doing so or routinely found itself dragged into arbitration to defend its decision. However, that is what the contract provides. On a more positive note, the Union has previously

demonstrated its willingness to accommodate the District in such situations. There has been no indication that the Union would be unreasonable in the future.

Moreover, it can be expected that the “good and sufficient reasons” standard will be broadly construed in the context of the District’s otherwise broad management rights and obligations “to efficiently manage and conduct the operation of the school district...” and its “primary obligation to provide educational opportunity for the students....” Section 2.B

Finally, it should be noted that a teacher who posts or claims an open position through Section 5.E’s transfer process is required to serve a one-year probationary period. Section 5E4a. If the probationary period is unsuccessful, the teacher can be returned to his/her original position or to a like position if the original position does not exist. Section 5E6.

AWARD

For the above reasons these grievances are sustained. District shall (1) post all vacant and newly created positions in accordance with the contract; (2) refrain from posting positions that are occupied by current teachers and are, therefore, not vacant; and (3) at the start of the 2014-15 school year return Becky Dimich to the fifth grade position, Brenda Larson the fourth grade position, and Julie Vekich to the first grade position, and any positions that become vacant as a result of this will be posted in accordance with the contract.

April 17, 2014



Christine D. Ver Ploeg