

**IN RE ARBITRATION BETWEEN:**

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**NORTH ST. PAUL/MAPLEWOOD EDUCATION ASSOCIATION**

**and**

**ISD #622, NORTH ST PAUL MAPLEWOOD SCHOOLS**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS CASE # 07-PA-0016**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**August 24, 2007**

IN RE ARBITRATION BETWEEN:

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North St. Paul/Maplewood Education Association,

and

DECISION AND AWARD OF ARBITRATOR  
BMS CASE # 07-PA-0016  
Wakefield Grievance matter

ISD #622, North St. Paul/Maplewood Public Schools,

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**APPEARANCES:**

**FOR THE ASSOCIATION:**

William Garber, attorney for the Association  
Lynn Wakefield, Grievant  
Larry Intvold, negotiator  
Dennis Fendt, Pres. NSPMOEA  
Al Rieper, Member Rights Chair NSPMOEA  
Susan Vento, Educ. MN Field Staff  
Jess Ann Glover, Educ. Field Staff

**FOR THE DISTRICT:**

Karen Kepple, attorney for the District  
Keith Gray, HR Director  
Tom Harrold, Principal – Skyview Middle School  
Carol Erickson, Principal Skyview Elementary

**PRELIMINARY STATEMENT**

The hearing in the above matter was held on July 17, 2007 at 9:30 a.m. in the Offices of ISD #622 in North St. Paul, Minnesota. The parties filed post-hearing Briefs dated August 17, 2007 at which point the record was considered closed.

**ISSUE PRESENTED**

Whether the District violated the agreement between the parties when it assigned the grievant to her former position as a 5<sup>th</sup> grade teacher at Skyview Elementary under these facts and circumstances? If so what shall the remedy be?

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2005 through June 30, 2007. Article XII provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. There were no procedural or substantive arbitrability issues raised by the parties.

## **ASSOCIATION'S POSITION:**

The Association's position was that the District violated Article X, Section 2, when it involuntarily assigned the grievant to her former position at Skyview Elementary after having assigned her to a vacated position at Skyview Middle School. In support of this the Association made the following contentions:

1. The Association pointed out that the underlying facts are virtually undisputed. The grievant had been assigned as a 5<sup>th</sup> grade teacher at Skyview Elementary School for several years. When teacher Linda Recchio left to go to another state she requested and was granted a leave of absence. Ms. Recchio was a 6<sup>th</sup> grade teacher at Skyview middle School. The District posted the vacancy as a “one year only” position and the grievant applied for it.

2. The grievant knew that she was taking the risk that Ms. Recchio would return from her leave but felt that she would not given her circumstances. Ms. Recchio did not in fact return from the leave and eventually left the District. The Association’s position as noted above is that once that happened, the grievant’s position effectively became a permanent one and that the District violated the contract by involuntarily reassigning her to her former position as a 5<sup>th</sup> grade teacher.

3. The Association points to Article X, Section 2, which provides as follows:

Teachers shall be informed of the tentative school, grade, and subject area assignment upon being employed by the District. Teachers will be assigned only to classes in fields in which they are licensed to teach. A teacher’s assignment shall continue unless modified due to emergency or modified according to the provisions of this Article. A teacher’s assignment may be modified through internal building assignment by written notice one week prior to the first posting, provided any teacher’s rights under Article XI (*Unrequested leave of absence*) are not abridged regarding the following year’s assignment. When a teacher temporarily replaces a teacher on leave of absence, and is displaced by the returning teacher, the displaced teacher shall be reassigned to the provisions of this Article, based on the last non-temporary assignment held.

4. The Association argued that the District acknowledged that there was neither an emergency justifying the involuntary assignment of the grievant to her former position at Skyview Elementary nor was her assignment modified in accordance with the provisions of Article X. The Association asserted that under these facts, the assignment could only have been modified under the specific provisions set forth in Article X, section 2 and neither of those condition were present here.

5. Moreover, the Association pointed to the last sentence of the section regarding what happens when a teacher takes a temporary assignment and is displaced if the teacher returns. The Association asserted that this language applies to the situation where a teacher leaves and another teacher takes that position on a temporary basis and the first teacher then returns from that leave. In that scenario, the second teacher would be reassigned to his/her original position. However, that scenario did not occur here and the provisions of the final sentence do not therefore apply. The Association argued that what does apply are the provisions of the second sentence of Article X, sec. 2 which provide that a “teacher’s assignment *shall* continue unless modified due to emergency or modified according to the provisions of this Article.” (Emphasis added.)

6. The Association further pointed to Appendix C of the contract and asserted that there is no “temporary” or “one year only” teaching assignment provided for under this contract. That language is essentially a blank copy of the general teaching contract between the teachers and the District. The only positions identified in that language are that of “regular teacher” and “substitute teacher,” i.e. one working less than a full year or who is working due to some emergency. There is no provision for temporary teacher or for some sort of one year only teaching position. Thus, the Association asserts, the provisions of Article X, section 2 apply to require that the assignments must continue unless modified in accordance with that language, which were not present in this case.

7. Thus even though the grievant knew that the position was a one year only position, all that meant was that if the original teacher returned within a year from her leave, she could be reassigned to her former teaching position as a 5<sup>th</sup> grade teacher. It does not mean that the District gets to violate the clear provisions of the agreement that requires that a teacher's assignment *shall* continue.

8. The Association put on considerable testimony regarding the negotiation history of this provision and pointed out that the negotiations for it culminated in its inclusion in the contract as far back as the 1985-87 contract. The Association also pointed out that the provisions of Appendix C were added to the contract to make it clear that there is no provision for "temporary teacher" in this contract and that the notion of a one year teacher was stricken from the contract with the addition of Appendix C.

9. The Association asserted that the posting for the one year only position is and has always been regarded as advisory; i.e. to let the teacher applying for the position know that there is a chance that the position may only be for a year and that if the original teacher returned from leave, he/she could be displaced. The grievant knew this but took the chance that Ms. Recchio would not return as she had already left the state with her family and by all appearances had relocated to Florida.

10. The Association countered the District's claim that the Management Rights clause governs by pointing to the clear provisions of Article X and Appendix C. The Association argued strenuously that these provisions govern the result and take precedence over general Management Rights language.

11. Finally, the Association pointed to several instances where either this exact scenario or something very similar occurred. The Association introduced several instances involving teachers who left and were replaced where the posting was for one year only. The original teachers did not return from leave and the replacement teachers were allowed to keep that position. The Association argued that this amounts to a binding past practice or at least solid evidence of the parties' understanding of what this contract provision means.

12. The essence of the Association's argument is the language in Article X, Section 2 that requires that a teacher's assignment shall continue unless modified by emergency or through the provisions of Article X. It was agreed that neither scenario occurred here thus requiring that the grievant be allowed to remain in her 6<sup>th</sup> grade position at Skyview Middle School.

The Association seeks an award ordering the District to reinstate the grievant to her position as a 6<sup>th</sup> grade teacher at Skyview Middle School for the 2007-08 school year.

**DISTRICT'S POSITION:**

The District's position was that there was no contract violation and maintained that the management rights clause gave it the unfettered right to re-assign the grievant to her former position at Skyview Elementary. In support of these positions the District made the following contentions:

1. The District also pointed out that the facts are virtually undisputed insofar as they related to the grievant's position and what happened to give rise to this grievance. Ms. Recchio left on a one-year leave but did not return. The grievant took the position but did so with the very clear understanding that it was for one year only. There was no guarantee that the position would be permanent nor any expectation or representation of that. In fact, it was quite the opposite.

2. The District argued that while there is no contractual provision for a temporary teacher, there is no provision that the one-year only notation on the posting was "advisory." The District asserted that the notion of an advisory posting was first raised at the arbitration hearing. In fact, the one-year only posting is a condition of the position so that any teacher taking the job knows it is for one year only and places them on clear notice that they have no rights to the job after that.

3. The District asserted that the language of Article X does not contemplate this scenario at all and contains no provision for what happens if the original teacher does not return from leave. The District asserted that under general labor contract interpretation principles, the Management Rights clause governs unless there is a clear specific contractual provision limiting management's right to assign, select and direct the work force. Here no such provision exists and is thus an unfettered right to re-assign the grievant since Ms. Recchio did not return to her 6<sup>th</sup> grade teaching position.

4. Moreover, the District raised an issue of fundamental fairness. The District asserted that, contrary to the assertion by the Association, people understand the one year only posting to mean just that and typically do not apply for them internally because they simply know they are temporary and for one year. Accordingly, most of the time these postings are filled from the outside due to that clear understanding. If these rules were allowed to change now, the grievant would in effect be getting something to which she is not entitled and would be getting something that others with greater seniority might otherwise have applied for had they known of this radical change in the rules. More senior people might well have applied for this position if the Association's interpretation had been known prior to this grievance. It was not and the grievant is now in a substantially better position since she would be allowed to jump ahead of more senior people who might have applied for this job. The bottom line for the District is that everyone clearly knows that a one-year only position does not guarantee anything and that you can be re-assigned to your former job once the year is up.

5. The District put on evidence to show instances where that scenario has occurred in counter to the Association's evidence. The District argued that it has in fact re-assigned teachers to their old positions in situations like this, i.e. where the original teacher left but did not return after the leave and where the teacher placed in that position for the year was then re-assigned back to their former teaching position. In those instances the Association never grieved it and no one raised an issue. The District argued that this factor shows clear understanding by the teachers and the Association that teachers can be re-assigned to their former positions in these scenarios.

6. Moreover, any time when that did not happen and the one year teacher was allowed to stay in the original teacher's position, it was simply because the building Principal made a decision to leave that person there due to staffing needs; it was in no way to set any sort of binding precedent or create a right not otherwise specifically granted in the labor agreement.

7. The essence of the District's position is that there is no specific provision governing this result and that there was no anticipation of this in the contract language. Accordingly, the general management rights clause governs the result and allows the District to assign a temporary teacher to that person's former position in these types of scenarios. Moreover, the District placed the grievant on very clear notice that this position was for one year only – they could not have been clearer with her. There is no provision limiting its right to assign the grievant to her former position in this scenario.

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

### **DISCUSSION**

As noted above, there was virtually no dispute over the operative facts that gave rise to this grievance. The grievant had been assigned as a 5<sup>th</sup> grade teacher at Skyview Elementary School and had held that position for many years. Ms. Linda Recchio had been assigned as a 6<sup>th</sup> grade teacher at Skyview Middle School and took a one-year leave of absence from that position. She did not return from that leave and apparently relocated with her family to another state. She has subsequently terminated employment with the District.

Skyview Elementary and Skyview Middle School are apparently housed under one roof but are regarded as separate schools for purposes of this discussion. There was no dispute about that at the hearing. Skyview Elementary goes through grade 5 while the middle school apparently starts at grade 6. Thus for purposes of this grievance the schools are regarded as separate.

The District apparently originally posted the Recchio vacancy without the one-year only language in it but that was rectified. The Association did not raise a serious issue about this and it was clearly placed on the second posting. This is the one the grievant saw and applied for. She testified that she clearly knew that this job was posted as one year only but that she understood that to mean that if Ms. Recchio were to return she could be bumped back into her 5<sup>th</sup> grade position at the elementary school. She testified that she wanted to move up to the middle school for various reasons and felt this was a good time to make that move.

She further testified that she knew of Ms. Recchio's personal situation and that she had moved to another state with her family and that she was unlikely to return. Based on this she was willing to take the risk that Ms. Recchio would not return. She testified that her understanding was that she would have the 6th grade position unless Ms. Recchio were to return from her leave for some reason.

There was testimony from both sides regarding situations that each claimed was similar. The Association asserted that there have been several instances in the past where teachers have taken a leave of absence and other teachers within the District have taken those positions on a one-year only basis. The underlying teacher did not return and the teacher that took the spot was allowed to retain that position. There were several of these and the evidence suggested that there was some truth to the Association's position here.

The District countered that those instances were nothing more than the building principals exercising managerial discretion to allow that particular teacher to remain in that particular job due to staffing or other reasons. The District also pointed to situations where the opposite occurred – i.e. where the underlying teacher left and did not return and the teacher that took the job on a one year only basis did not stay in that position but was rather returned to their former position. The District argued that those instances were not grieved by the Association and asserted that this shows a certain affirmative understanding that the language did not say what the Association claims it says.

The Association responded by noting that it was not aware of these and that the teachers in those instances did not assert their rights under the labor agreement for some reason. The Association asserted that this does not bind them to a particular interpretation of the agreement however and that it, like all parties to a labor agreement, are free to enforce the agreement as it sees fit. Simple failure to grieve something, especially in the instance where the Association did not know of it, is not binding.

A review of these situations reveals that in neither instance could it be shown that there were the necessary elements of a binding past practice. There were apparently situations where the teachers were allowed to stay and others where the teachers were re-assigned. This case must therefore proceed on a reading of the language of the labor agreement itself to try to divine the intent of the parties as applied to these facts.

The main basis for the District's argument is that the Management Rights clause found at Article III, section 1 and 4 reserve to the District all rights not specifically limited by the terms of the agreement. That language provides that "except as otherwise provided in this master Contract and Statutes of the State of Minnesota, the Association recognizes that the School Board has the authority to manage and direct in behalf of the public all operations of and activities of Independent School District #622 to the extent authorized by law." Further Section 4 provides that "the foregoing enumeration of the School Board rights and duties shall not be deemed to exclude other inherent management rights and management functions not expressly reserved to the School Board herein. All management rights established by the School District by Statute (including those in PELRA) and not abrogated by this Master Contract shall continue to reside in the School District."

The District's argument is well taken in that generally all rights reside in management except as limited or modified by the terms of a labor agreement. If it were the case that there was no limitation contained in the labor agreement, the District would certainly prevail - except that here, there is.

Article X section 2 as noted above creates a set of obligations that require that the teacher's assignment "shall continue" unless modified by emergency or modified pursuant to the other provisions of Article X. It was agreed that no such emergency existed nor was there any attempt made to comply with the terms of Article X to modify the assignment. The District relied almost entirely upon the argument that the language of Article X did not apply to this situation and that the terms of the posting would work to defeat the grievant's claim.

The evidence showed that there is no provision for "temporary teacher" in this District and that this was specifically negotiated out of the agreement several contracts ago. The Association's witnesses were credible and provided probative and convincing evidence of this fact. Moreover, the terms of Article X, section 2 could not be clearer: it requires that the teacher's assignment "shall continue." It further provides that the assignment is by school and grade – just as was done here.

The District argued quite strenuously that the posting made it clear that this was for a one year position and that anyone reading it knew that they had no entitlement to anything more permanent. This was refuted by the evidence that showed that anyone applying for such a position knows that the job is not permanent *if* the underlying teacher decides to return to his or her former position. In fact there is specific language dealing with just that scenario in this agreement. Had Ms Recchio returned from her leave there would have been no question that the grievant would have been re-assigned. That did not occur however and one must therefore fall back to the only other language in the agreement that covers this – i.e. the language that provides that the assignment "shall continue" as noted above. The only reasonable interpretation of that language is that the assignment in fact is permanent unless modified by emergency, by compliance with the terms of the remainder of Article X or if the underlying teacher returns from the leave. None of these things occurred here and the clear language of the agreement therefore governs the result.

There was furthermore no showing that the 6<sup>th</sup> grade position to which the grievant was assigned was not an “assignment” within the meaning of the language. The District’s position is based almost exclusively on the argument that the posting made it a one-year position. The contract language however dictates a contrary result and it is not for the arbitrator to change either the language or its clear meaning in this context. That is for the parties to negotiate for themselves.

The District raised an issue of fundamental fairness and argued that other, more senior teachers might have applied had they known or suspected that it would have been a permanent position if Ms. Recchio decided not to return. Initially this is highly speculative and it simply cannot be known who would have applied for this. Moreover, anyone taking the job knows that there is some risk they will not have the position for more than a year and that is quite possibly the reason more people do not apply for them.

Further, while the District argued that most of these positions are filled from the outside, the evidence noted above showed that in many instances that is not the case. Indeed, there are instances where teachers apply from the inside as well. Finally, and most importantly, fairness aside, the language of the agreement governs the result in a labor case and here the language operates to support the Association’s position in this matter. Simply stated, the agreement requires that an assignment “shall continue” unless one of three specific conditions are met, none of which occurred here.

Accordingly, the grievance is sustained and the District is directed to reinstate the grievant to the position of 6<sup>th</sup> grade teacher at Skyview Middle School to the grievant for the 2007-08 year.

### **AWARD**

The grievance is SUSTAINED. The District is ordered to reinstate the grievant to her position as a 6<sup>th</sup> grade teacher at Skyview Middle School for the 2007-08 school year.

Dated: August 24, 2007

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Jeffrey W. Jacobs, arbitrator