

AMERICAN ARBITRATION UNION

In the Matter of Arbitration between CASE: McCORMICK #1

UNION

- and

SOMEPLACE BOARD OF EDUCATION

A hearing in the above captioned matter was held before Arbitrator Robert A. McCormick in SOMEPLACE, Michigan on August 26, 1981. The hearing was closed on August 26, 1981

**Issues:**

1. Is the school district required to transfer teachers involuntarily to assure the retention of those teachers with the most seniority?
2. What is the extent of the school district's duty to post job vacancies?

RELEVANT CONTRACT PROVISIONS

ARTICLE XVIII

SENIORITY AND REDUCTION IN PERSONNEL

A. Seniority: Seniority in the SOMEPLACE Public Schools starts with the date the Board approved the employment in a certified position. Any teacher shall have seniority from the last date of hire in the SOMEPLACE Publ: Schools.

B. The term seniority as hereinafter used shall first be length of continuous service with the SOMEPLACE Public Schools. . .

C. Seniority within the school system shall secondly be determined by the date of permanent (continuing, life, etc.) certification and third: by the date of the provisional certification as issued by the State of Michigan.

D. Each year the Board shall prepare a seniority list and transmit a copy of the same to the UNION on or before the 1st day of November, and shall be updated by May 1. If the UNION is in disagreement on one or all parts of the seniority list and if mutual agreement between the parties cannot be reached on the disagreement, the UNION may use the grievance procedure.

E. Necessary reduction of Personnel:

1. It is hereby specifically recognized that it is within the sole discretion of the Board to reduce the educational program and curriculum when economic necessity dictates.

2. In order to promote an orderly reduction in personnel when the educational program and curriculum is curtailed, the following procedure will be used:

a. Probationary teachers shall be involved in the reduction first when any teacher who has acquired any seniority and whose position has been curtailed is certified to perform the services of the probationary teacher.

h. In the event tenured teachers' services must be involve in reduction, it will be on the basis of seniority of certification and classification as expressed in Section B and C above. It is expressly understood that the UNION shall have the right to review the reduction list prior to notification of the individuals involved. After the reduction list has been prepared by the Board, the UNION and Board shall review said list and attempt to resolve any or all conflict. In the event a choice must be made between the teacher with the same or equivalent seniority, the knowledge, skill, efficiency on the job, physical fitness, or such other criteria as the UNION and Board may adopt may be used in mutually determining the choice. In the event of a dispute concerning the reduction list, the UNION shall have the right to file a written grievance thereon seventy-two (72) hours after the termination of the meeting during which such review will have taken place.

## ARTICLE VIII

### TEACHING ASSIGNMENTS

To assure fairness and guarantee full consideration of the individual teacher's interest, the following assignment procedures are provided:

A. Teachers shall not be assigned outside the scope of their teaching certificates and their major field of study except by mutual consent. This shall be temporary and for good cause. . .

B. Each teacher shall, on or before May 15th of each year, notify the District in writing of his/her intent to, or not to, return to SOMEPLACE the next fall. All returning teachers shall be notified in writing not later than the last week of school of their specific teaching assignment. In the event a change in assignment is to be made at anytime, the District will notify the UNION and will consult with the affected teacher(s).  
. . .

## ARTICLE IX

### VACANCIES, PROMOTIONS, AND TRANSFERS

#### Definitions:

Vacancy - \_\_\_\_\_ The condition existing when a professional position has been opened, vacated, created or restored.

Change in assignment - \_\_\_\_\_ The condition existing when a teacher's assignment is changed within his/her building.

Transfer - \_\_\_\_\_ The condition existing when a teacher's duty station is changed from one building to another.

A. The District recognizes that it is desirable in making assignment to consider the interests and aspirations of its teachers. Requests by a teacher for transfer to a different class, building, or position shall be made in writing on forms furnished by the District, one copy of which shall be filed with the District Central Office, and two copies returned to the teacher. The application shall set forth the reasons for transfer, the school, grade, or position sought, and the applicant's academic qualifications. Such requests shall be-renewed once each year to assure active consideration by the District.

B. The Board declares its support of a policy of filling vacancies, including vacancies in supervisory positions, from within its own teaching staff. Whenever a vacancy arises from within or is anticipated, the person in charge of personnel shall promptly post notice of same on a bulletin board in each school building and furnish a copy to the president of the UNION or his/her designee. The teachers may apply for the opening created during the school year, for the following year, within fifteen (15) days after posting. No teacher may apply for a transfer for any given vacancy and expect to be transferred during the year. Teachers will be transferred at the end of the school year if acceptable for the vacancy which occurs. They shall receive notification regarding the disposition of the application by June 30th. Any vacancy created during the school year is to be filled by qualified personnel as quickly as possible.

Vacancies shall be filled on the basis of the experiences, competency and qualifications of the applicant, length of service in the District, and other relevant factors. Each vacancy, including a supervisory position shall be posted with an accompanying job description. An applicant with less service in the District shall not be awarded such position unless his

qualifications shall be substantially superior. The District shall have the right to make transfers in case of emergency, to prevent undue disruption of the instructional program, and to utilize personnel to serve the students in the best possible manner. The District shall notify the affected teacher of the reasons for such transfer in writing. ...

## A R T I C L E   I I

### NEGOTIATIONS PROCEDURES

A. This agreement expressly embodies all agreements written and oral between the District and the UNION and is intended to cover all matters which were raised or could have been raised by either of the parties at the time of negotiations.

#### FACTS

In late spring, 1981, as a result of the failure of the Governor's tax proposal as well as the renewal of school millage and the defeat of the additional millage, certain reductions in the educational program of the SOMEPLACE Public Schools were necessitated. The District Board of Education (hereinafter referred to as District or Board) promulgated a plan which described the curriculum to be offered and the number of teaching positions to be filled.

In all, the District transferred thirty-nine(39) teachers to other teaching positions and an additional thirty-eight (38) teachers to the Office of Personnel. Of those transferred to the Office of Personnel approximately 36 were eventually laid off. In selecting those teachers to be laid off the District followed seniority within the District except where the most senior teacher was either not certified to teach the subject matter to be offered or, in some cases, where the subject matter was outside the teacher's major field of study. When these exceptions occurred seniority within the District was not followed.

In certain "specialized" areas of instruction such as Band, Home Economics and Industrial Arts, more senior teachers who were certified to teach at that instructional level were sometimes laid off while other less senior

teachers for whom the "specialized area" had been a major field of study were retained. A distinction was made between reassignment and transfer of teachers in these "specialized" areas and, for example, reassignment or transfer to early elementary positions. In some circumstances teachers were transferred out of the High School and the Middle School to early elementary positions when the more senior teacher was certified and had some experience within the early elementary grades even if the position was not within the teacher's major field of study.

Special education was an additional area in which the District did not follow strict seniority. A number of Special Education teachers had transferred into other classroom situations at their own request and reduction of teaching staff by seniority within certification would have resulted in a number of those persons returning to positions they no longer desired.

Regarding the issue of whether the District was obligated to post the vacancies created by the curricular changes and attendant transfers and layoffs, the evidence indicates that the practice of the District has been to post only newly created positions or vacancies created by the addition of a class to the curriculum. Otherwise, when a vacancy occurs, the practice has been that the principal of the affected school, together with representatives of the Office of Personnel would review the applications of teachers requesting transfer and others who were certified and otherwise qualified for the position.

Although this is the first year in which the District has had to lay off tenured teachers, on one previous occasion, in 1975, the District transferred teachers for whom no positions were available to other position for which they were certified. Then, as now, the positions to which they

were transferred were not posted. Neither have assignments made at the end of the year been part of the posting process.

#### UNION POSITION

The UNION argues that the plain language of Article XVIII requires that teachers be laid off according to seniority taking into account the certification of the teacher. Section E(2)b of the Article, they say, directs that tenured teachers be laid off first according to length of continuous service with the District. In the event two or more teachers have the same length of continuous service, and only then, may the District consider other factors. The UNION finds further support for this interpretation in the changes in language from prior contracts between the parties.

Article VIII, they say, does not prohibit a teacher from teaching outside his/her major field of study. In fact, they note, the District's assignments made on June, 12, 1981 place certain teachers in courses outside their major field of study.

The UNION further argues that Article IX is irrelevant to this controversy since all teaching assignments, by mutual contract interpretation, terminate at the end of each school year. In the alternative, if Article IX is deemed applicable, the UNION urges that the reduction in force necessitated by fiscal circumstances be considered an emergency. Accordingly, in that situation, the District has the right to make the transfers urged by the UNION.

Finally, as regards the issue of the posting of vacancies, the UNION argues that the contract language in Article IX(B) together with the definition of vacancy in that same article requires the posting of every professional position which has been opened, vacated, created or

restored. Inasmuch as every assignment in the district is terminated at the end of each academic year, the UNION argues that all positions, including those created by the layoffs in this case, should have been posted in accordance with the procedure described in Article IX.

#### DISTRICT POSITION

The District argues that the contract permits consideration of both certification and qualification in selecting teachers for layoff. The UNION position, they argue, would necessitate teachers being assigned to positions outside their major field of study and in which they have no experience.

The District, having determined the curriculum to be offered for the 1981-82 school year, selected teachers for layoff according to seniority within the district. They deviated from that order only where a more senior teacher was either not certified or not qualified, in their opinion, to teach the subject matter offered.

Article VIII(A), they point out, requires that teachers not be assigned outside their major field of study except by mutual consent. Under the circumstances present here, the District, in fact, in an effort to follow seniority, consented in some, but not all, situations to assign teachers outside their major field of study.

The District argues that Article XVIII does not require transfers to accommodate seniority. If, in the alternative, Article XVIII is read to include a requirement to transfer and reassign, Article IX mandates that it do so only in the event of an emergency and that it consider each teacher's interests and aspirations in so doing. Moreover, the District argues that Article IX gives them the right to consider "the experiences [sic], competency and qualifications of the applicant" as well as length of service in the District and other relevant factors.

As regards the posting grievance, the District points out that it has not, in past practice, posted jobs made vacant by the District's reassignment of teachers. They have done so only when positions were newly created. In effect, they argue, the UNION's position would require the District to post all positions every year and would, therefore, eliminate the District's right, on its own, to make teaching assignments.

#### DISCUSSION

The first issue presented here is the contractually required order for laying off tenured teachers. It is undisputed that the Board has the sole right to establish the curriculum to be offered. Indeed, by Article V(A) of the contract, the parties agreed that

. . . the District reserves and retains full rights, authority and discretion to control, supervise and manage the operation of all schools and the educational process and to make all decisions and policies not inconsistent with the terms of this Agreement."

The parties further agree that in assigning teachers to the courses to be offered that seniority should be followed so long as the most senior available teacher is certified in the area. Indeed, according to applicable Michigan law,

"A contract with a teacher shall not be valid unless the person holds a legal certificate of qualification at the time the contractual period begins."<sup>1/</sup>

It is at this juncture that their interpretations of the contract differ. The UNION argues that certification is the only criterion that qualifies seniority within the district. The District argues that it may consider other factors such as major field of study together with seniority and certification in assigning a teacher to an available position

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<sup>1/</sup> M.C.L.A. § 380.1231(4).



The concern of the District is that teachers not be placed in courses of instruction for which they are certified but have little or no experience or major course of study. For example, all teachers within the district are certified to teach all subjects in grades seven and eight. Thus, if the District offers certain courses of instruction such as band, instrumental music, industrial arts, home economics, etc. at the seventh or eighth grade level, all teachers would be legally certified to teach those courses even though they might not otherwise be qualified. As a result, the reduction of teaching personnel in the order of seniority within certification would place certain teachers in classes for which, while certified, they may have little or no experience or acumen.

A second difficulty for the Board concerned those teachers in the Special Education program. There, a number of teachers had, in recent years, requested reassignment due to the stress of employment in that field. By reassignment on June 12, at least in the case of Ms. PEAR and apparently others, these teachers were not transferred in accordance with seniority back to positions which they did not desire and in which they felt ineffective.

These concerns and considerations, however commendable, are not the criteria the parties have agreed to in selecting tenured teachers for layoff.

Article XVIII E (2)(b) states that tenured teachers' services will be reduced "on the basis of seniority of certification and classification as expressed in Section B and C above." In turn, Sections B and C define seniority first to be the length of continuous service, second by date of certification, and third by date of provisional certification.

That length of continuous service with the district shall be the primary guide to layoff is reaffirmed later in Section E(2)(b) of the

same Article: "In the event a choice must be made between the teacher [sic] with the same or equivalent seniority, the knowledge, skill efficiency on the job, physical fitness, or other criteria as the UNION and Board may adopt may be used in mutually determining the choice. . . ." <sup>2/</sup>

But for the words "of certification and classification", no ambiguity would be presented by this language. A review of the recent history of the contract language in question, however, persuades me that this language is a superfluous carryover from prior contract language. In addition, the development of the current language from its antecedents lends further support to the UNION's position in this matter.

In the 1971-72 and the 1972-73 contracts between the parties, the comparable article said:

E(2) (b) (b) In the event tenured teachers' services must be involved in reduction, it will be on the basis of seniority of certification and classification as expressed in Section C above.

The sections defining seniority said:

- B. The term seniority as hereinafter used shall first be length of continuous service with the SOMEPLACE Public Schools . . .
- C. Seniority within the school system shall second be determined by certification as approved by the Department of Education of the State of Michigan, and shall thirdly be determined by years of continuous employment in grades K-8 and by subject matter identified on the teachers certificate in grades 7-12.

Thus, the date of hire was not relevant to reduction in force questions. For layoff purposes, the least senior teacher would be laid off within certification, in two classifications:

- a. K-8 : on the basis of length of service, and

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2/ This language not only shows that criteria other than seniority may only be used in the event of two teachers having the same or equivalent seniority, it indicates that in the event of equal seniority the criteria to be used and, indeed, even the teacher to be laid off, must be mutually agreed upon.

b. 7-12: within the subject matter.

Here, subject matter as a criterion for consideration was dropped by the parties though the term "of certification and classification" was retained. Section E(2)(b) of the 1975-77 contract reads:

In the event tenured teachers' services must be involved in reduction, it will be on the basis of seniority of certification and classification as expressed in Sections B and C above.

This section defining seniority reads:

- B. The term seniority as hereinafter used shall first be length of continuous service with the SOMEPLACE Public Schools . . .
- C. Seniority within the school system shall secondly be determined by the date of permanent (continuing, life, etc.) certification and thirdly by the date of the provisional certification as issued by the State of Michigan.

Thus, Section B is referred to for the first time in this contract. At this point, it is clear that length of service becomes the sole criterion for layoff of tenured teachers.

After 1975, all contracts require that length of service be the sole criterion, absent ties, for the reduction of tenured teachers. I have concluded that the language "of certification and classification" has been carried over from the 1971-72 and 1972-73 contracts. It is superfluous when viewed in **conjunction** with the current definition of seniority. I have further concluded that by adding the language regarding the length of service as the criterion in layoff beginning in 1975 that the parties determined that seniority should no longer be modified by length of service within a subject matter.

The District argues that Article VIII prohibits them from assigning teachers outside their major field of study except by mutual consent. However, in making assignments on June 12, the District, in an effort to

follow seniority, assigned some, but not all teachers to classes outside their major field of study. The District also points out that Article IX calls for consideration of teachers' interests and aspirations in filling vacancies and requires that vacancies be filled on the basis of experience, competency, qualifications and other factors.

Whatever procedures used and the criteria considered in making assignments and filling vacancies may be in the normal course of events, they cannot be looked to in a situation where the teaching staff is being reduced. The position taken by the Board arrogates to them the unilateral right to consider criteria other than seniority in the layoff of tenured teachers. There is no evidence to indicate that the UNION has ceded to the Board this right. To interpret this contract as giving the Board the right to consider a teacher's major field of study, experience, desire or other criteria would render Article XVIII a nullity. In the words of one arbitrator,

It is axiomatic in contract construction that an interpretation which 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. 3/

Conversely, this decision, rather than rendering Articles VIII and IX meaningless, recognizes that their operation is limited to non-layoff situations.

Counsel for the Board cites three cases in support of their position. I have carefully considered the cases and found them inapposite. In each of the cases, the issue was whether the order of recall of laid off teachers violated the provisions of the Teachers' Tenure Act.<sup>4/</sup>

In

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<sup>3/</sup>Quoted in Elkouri and Elkouri, How Arbitration Works, Third Edition at page 308.

<sup>4/</sup>MCL § 38.105; MSA § 15.2005.

Chester v. Harper Woods School District,<sup>5/</sup> \_laid off teachers claimed their statutory rights were abrogated when the school board hired teachers with less seniority for available positions for which the laid off teachers were certified. The statute **provided:**

Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified.

The court concluded that the term "qualified" contemplated a level of competence above and beyond certification.

In Maciak v. Centerline Public Schools<sup>6/</sup> \_the laid off teacher claimed that her contractual as well as statutory rights had been violated when a less senior teacher was given a position for which she was certified. There, in addition to the statutory language looked to by plaintiffs in Chester, the contract called for three considerations in the reappointment of laid off faculty:

The first factor was seniority. The second factor was certification. ... The testimony...is undisputed that for certain specialties; physical education, art, etc., placement was limited to those teachers with a major or minor in the specialty area. 7/

The position claimed was in physical education. The State Tenure Commission concluded that by contract as well as by law, the plaintiff was not entitled to the available position. As with Chester, supra, there were requirements by statute and/or contract requiring that teachers be qualified as well as certified to claim the right to be recalled by seniority. That additional criteria is not present in this case either by contract or law.

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<sup>5/</sup>87 Mich. App. 235.

<sup>6/</sup>State Tenure Commission docket number 78-18.

<sup>7/</sup>Id. at p. 2.

Finally, in Valesano v. Board of Education of the White Pine School District,<sup>8/</sup> the laid off teacher sought to require the Board to change its curriculum arrangement to facilitate the recall. There, the teacher contended the Board should have divided a position and hired a teacher on a part time basis to accommodate her desire and ability to teach the other half of the position. The Commission noted that the Board had a policy of offering full time positions when possible and that it was necessary to do so to attract applicants. The Commission concluded that a school board was permitted, but not required, by state law to alter its teaching assignments to accommodate the plaintiff in that case. The UNION here does not demand the District alter its curriculum, only that within the curriculum to be offered, courses be assigned on the basis of seniority so long as the most senior teacher is certified.

The UNION further claims that upon determining the educational program to be offered for the 1981-82 school year, the Board was obligated by contract to post every position within the district. However, having argued that the Board is obligated to follow seniority in filling the available classes, the UNION cannot thereafter be heard to claim the right of teachers to bid for those positions. Their argument as to the primacy of seniority in layoff, and my decision in this case, would make the posting of such jobs unnecessary.

The evidence reveals that at the end of each school year the District has assigned positions for each ensuing year. The contract in Article VIII B states;

All returning teachers shall be notified in writing not later than the last week of school of their specific teaching assignment.

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<sup>8/</sup>State Tenure Commission docket number 78-47.

By established past practice, the District has made these assignments without posting each position.

In view of the contract language, the position of the UNION and the practice in the district, I have concluded that the term vacancy as used in Article IX B does not encompass every position annually assigned.

#### AWARD

In rendering this decision and award, I am fully cognizant of the difficulties it may present for the District, its students and many of its teachers. I have further noted in the preface to the contract, the parties recognize that

The Board of Education and the UNION are determined that children of SOMEPLACE will receive the best possible education and ...that human talent is the most important resource that the District possesses.

While it is my hope that the parties will continue to explore arrangements in furtherance of that purpose, I am constrained in my duty as Arbitrator to interpret the contract the parties have voluntarily entered.

Accordingly, I have concluded that the UNION's grievance regarding the order of layoff is meritorious and that the District must assign teachers to available positions only in accordance with seniority so long as the most senior teacher is legally certified to teach the subject matter to be offered. I have further concluded that the District was not obligated to post the assignments to be made, and therefore, the grievance regarding the District's failure to do so is denied.



Robert A. McCormick

Date: September 2, 1981  
Detroit, Michigan