

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TOMAHAWK EDUCATION ASSOCIATION

and

TOMAHAWK SCHOOL DISTRICT BOARD OF
EDUCATION

Case 42
No. 51203
MA-8529

Appearances:

Mr. Gene Degner, Director, WEAC UniServ Council No. 18, on behalf of the Association.

Drager, O'Brien, Anderson, Burgy & Garbowicz, by Mr. Steven C. Garbowicz, on behalf of the District.

ARBITRATION AWARD

The above-entitled parties, herein "Association" and "District", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Tomahawk, Wisconsin, on August 29, 1994. The hearing was transcribed and both parties filed briefs and reply briefs which were received by December 5, 1994.

Based upon the entire record, and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to agree on the issue, I have framed it as follows:

Did the District violate Article 16, Section F, of the contract when it refused to transfer grievant Sue Mielke to a Learning Disabilities' position at the Middle School and, if so, what is the appropriate remedy?

DISCUSSION

Mielke is employed mainly as a teacher for the emotionally disturbed in grades 9-12 in the District's High School.

In April, 1994, 1/ the District posted a Learning Disabilities (EEN) position for its Middle

School which provided in pertinent part:

. . .

The School District of Tomahawk has one middle school learning disabilities position open due to transfer. According to the Master Agreement, employees presently under contract with the District may make application for transfer to this position. Application for the position does not automatically guarantee appointment to the position.

The successful applicant for this position will be assigned to the Tomahawk Middle School and be responsible to the Middle School Principal and Director of Pupil Services. Basic responsibilities include those duties normally assigned to a Middle School learning disabilities (EEN) position including promotion and modeling of the Middle School philosophy, a working knowledge of instructional technology, the ability to work successfully with classroom teachers, and provide support for the learning disabled child in the regular classroom. The successful applicant must be qualified to and accepted as a coach in at least one of the following positions:

- Basketball, High School Head, Boys (1)
- Basketball, High School, Junior Varsity, Boys (1)
- Basketball, High School, Freshman, Boys (1)
- Basketball, Middle School Head, Boys (1)
- Basketball, Middle School Assistant, Boys (3)
- Track, Middle School Assistant, Boys (1)
- Cross Country, High School, Assistant (1)
- Football, High School, Assistant (1)
- Golf, High School, Assistant (1)
- Hockey, High School, Assistant (1)
- Volleyball, High School, 9th Grade (1)
- Volleyball, High School, Middle School (2),
- Basketball, Middle School Assistant, Girls (2)
- Softball, High School Assistant, Girls (1)

The successful applicants for this position must have a valid Wisconsin Teaching Certificate which includes certification for grades 6-12 in the areas of learning disabilities. In addition, the successful applicant must have more than a general knowledge of

computers, their use by students and staff, and computer laboratory use.

In order to be considered for this position, professional staff employees must:

1. Notify the District Administrator, in writing, of his or her interest in the position prior to the posting expiration date.

In addition to those requirements already listed, professional staff employees should understand that the contents of their personnel files (including evaluations, etc.), currency of training, supervisors recommendations, and the employment interests and goals of the district will be considered in the decision making process. (Emphasis added).

Mielke - who has been employed by the District for about seven years and who holds a learning disabilities' license and a cognitive disabilities' license - bid for that position but was ultimately turned down because she had no prior coaching experience and because, in the District's eyes, she was unqualified as a coach. The District concedes that Mielke was otherwise qualified for the posted teaching position based upon her teaching credentials and experience, but asserts that it was imperative to fill about 18 coaching vacancies which then existed. That is why it imposed similar coaching requirements for the ten or so other teaching vacancies it posted at that time. The District acknowledges that it never asked Mielke whether she would be willing to perform any coaching duties.

In this connection, District Administrator Curtis G. Powell testified that the District was then experiencing severe problems in filling vacant coaching positions; that this problem led to him issuing a set of recommendations which the District's Board of Education subsequently adopted; and that he thereafter insisted that applicants for about ten vacant teaching positions fill some of those vacant coaching positions. 2/ He also said that this was "an opportunity to meet the needs of our student body. . ." which told him what he needed "in terms of coaching positions and teaching positions" and that he might impose a similar coaching requirement for future teaching transfers and that he would turn down anyone who could not coach.

Powell admitted that with "hindsight" it would have been possible to grant Mielke the posted position and to have the new teacher perform the cross-country coaching duties he assumed when he, rather than Mielke was awarded the Hearing Disabilities' position at the Middle School.

Mielke subsequently filed a grievance on May 18 protesting her non-selection, at which

time she stated that she did not wish to coach.

In support of her grievance, the Association mainly argues that the contractual "Standards Clause" prohibits the District from imposing a coaching requirement when filling internal transfers; that when read in its entirety, the contract establishes that teaching duties are totally unrelated to coaching assignments; and that the District's "denial for transfer does not muster the test for reasonableness". As a remedy, the Association requests that Mielke be awarded the Middle School Learning Disabilities position which pays the same as her current position. That is why it is not seeking any backpay.

The District, in turn, contends that it retains the right under Articles 2 and 16(F) of the contract to determine who is qualified to fill a vacant position and that it properly exercised that discretion here when it decided that Mielke was unqualified because of her inability to serve as a coach. It also claims, "There is nothing in the contract that prohibits the Board from posting a position in whatever fashion and with whatever qualifications they deem necessary for the best interests of the District."

In resolving this issue, we must first consider Article 2 of the contract, entitled "Management Rights Clause", which states in Section C therein that the District retains the following rights:

...

"The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards and judgment, employee performance."

...

The resolution of this issue also turns on the use of the word "qualified" found in Article 16, Section F, of the contract, which provides, inter alia:

...

- F. If a vacancy occurs and the district decides to fill the vacancy, the district shall fill said vacancy with a qualified bargaining unit member if that member can be made available and applies for the position. State certification does not necessarily imply that the person is qualified. The district retains the sole right to determine if a person is qualified.

. . .

On its face, this language is silent as to whether coaching duties can be considered in filling vacancies and whether a teacher can be deemed "unqualified" solely because of a lack of coaching experience and/or a perceived inability to coach. The remainder of the contract similarly does not expressly address the precise issue.

But, the Association makes a persuasive case to the effect that the contract as a whole treats coaching assignments differently than regular teaching duties and that the reference to "qualified" in Article 16, Section F, carries forward this dichotomy by only referring to teaching vacancies - a point reaffirmed by the fact that the other provisions in Article 16 only refer to teaching positions, rather than teaching and coaching provisions. Given these other provisions in Article 16, it is thus incumbent for the District to clearly establish that coaching duties are a proper criteria under Article 16, Section F, in determining whether someone is qualified for a teaching position. That, it has not done.

Instead, the District mainly relies on Article 2 which gives it the right to determine the "policies affecting the selection of employees. . ." This right, though, is not absolute since Article 2 also provides in Section A therein that the management rights clause is "in no way to replace or nullify any of the expressed provisions of the master agreement presently in effect." Hence, the District's right to judge employe qualifications when filling vacancies cannot negate the provisions of Article 16 which provide that in doing so the District can only look at a teacher's teaching, as opposed to coaching, qualifications.

Indeed, that apparently has been the practice for about the last 20 years. That is why teachers Marcia Sattelberg and Karen Torkelson testified without contradiction that the District never before has ever determined that a teacher is unqualified for a transfer solely because of coaching considerations. Hence, it appears that before Mielke's grievance the term "qualified" in Article 16, Section F, was construed to only refer to a teacher's qualifications qua teacher, rather than teaching qualifications and coaching abilities.

As a result, this prior practice was covered by Article 6 of the contract, entitled "Standards Clause", which states:

"Except as this Agreement shall hereinafter otherwise provide, all wages, hours and conditions of employment that are mandatory subjects of bargaining, applicable on the effective date of this agreement to employes covered by this Agreement, as established by the rules, regulations and/or policies of the Board in force on said date, will continue to be applicable during the term of this agreement."

The District therefore violated this proviso and Article 16, Section F, when it unilaterally imposed a new coaching requirement which was wholly unrelated to an applicant's teaching ability in the classroom. For while the District has wide latitude in determining a teacher's teaching qualifications, it cannot reject an otherwise qualified teacher merely because he/she does not have certain qualifications which are wholly unrelated to what goes on in a classroom.

The District cites two arbitration cases for its contrary proposition: Fond du Lac County, Case 107, No. 42385, MA-5673 (1990); City of Brookfield, Case 77, No. 44207, MA-6211 (1990).

In Fond du Lac, Arbitrator Stuart Levitan ruled that the County did not violate the contract when its posting for a foreman's position listed the duties of either a Screed Operator or Gradall Excavator. In doing so, however, he stated, at page 5, "Had the County incorporated into the new foreman positions duties clearly unrelated to the essential nature of the job -- e.g., that the foreman would also serve as a building custodian or welder -- the Union's challenge would have more merit." Here, that is exactly what the District has done by adding coaching duties which are clearly unrelated to the essential nature of the posted teaching position.

In City of Brookfield, Arbitrator Lionel L. Crowley ruled that the City did not violate the contract when it determined that a senior employe was qualified to fill a vacant dispatcher position even though she was not totally familiar with it because "she had the skill and ability to do the job and needed a short time to become acquainted with the job". That case therefore is not on point since it did not center on an employer's attempt to disqualify an otherwise qualified employe because of extraneous job requirements.

The District also argues that sustaining the grievance would prevent it from "changing curriculum, adding teachers to fill new positions, or any of the myriad of changes that can occur between negotiations. . ." I disagree. The ruling here is limited to the facts of this case which turn on whether the District can unilaterally impose a new requirement which goes outside of a teacher's classroom qualifications. As a result, there is no need to now determine just how far the Standards Clause goes regarding wholly unrelated issues.

As a remedy for this contract violation, the District is required to immediately offer Mielke the posted Learning Disabilities' position at the Middle School. Mielke's transfer to that position at this point in the school year may cause some disruption to the education being offered to the children affected. But, any such disruption will have been caused entirely by the District since it is wholly responsible for the current set of affairs. Mielke therefore will have to decide for herself whether she wishes to effectuate the transfer now rather than at the beginning of the next school year.

In order to resolve any questions which may arise over application of this Award, I shall

retain my jurisdiction for at least thirty (30) days.

In light of the above, it is my

AWARD

1. That the District violated Article 16, Section F, of the contract when it refused to transfer grievant Sue Mielke to the Hearing Disabilities' position at the Middle School.

2. That as a remedy, the District shall immediately offer to transfer Mielke to that position and it henceforth will no longer make coaching a criteria in determining how to fill vacant teaching positions.

3. That I will retain my jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin this 16th day of March, 1995.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator