

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

WEST DePERE SCHOOL DISTRICT

and

WEST DePERE EDUCATION ASSOCIATION

Case 36  
No. 52051  
MA-8824

Appearances:

Mr. Lawrence J. Gerue, Program Director, Bayland Teachers United, 1136 North  
Military Avenue, Green Bay, Wisconsin 54303, on behalf of the Association.

Mr. Dennis W. Rader, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street,  
Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, on behalf of the  
District.

ARBITRATION AWARD

According to the terms of the 1994-95 collective bargaining agreement between the West DePere School District (hereafter "District"), and the West DePere Education Association (hereafter "Association" or "Union"), the parties jointly requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding the District's failure to assign Candy Heiderscheid to the District Reading Specialist position for the 1994-95 school year. The Commission appointed Sharon A. Gallagher to hear and resolve the dispute. A hearing was held at West DePere, Wisconsin on March 22, 1995. A stenographic transcript of the proceedings was made and received by the undersigned on April 13, 1995. The parties submitted their initial and reply briefs to the undersigned by June 9, 1995. The record was thereupon closed.

STIPULATED ISSUES:

The parties stipulated that the following issues should be determined in this case:

Was Candy Heiderscheid given proper notice of her teaching position for the 1994-95 school year?

Did the District violate the collective bargaining agreement when it did not assign Candy Heiderscheid to the District Reading Specialist position for the 1994-95 school year?

If the District violated the contract, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE XVII - VACANCIES

- A. The Superintendent's office shall announce via personal memo teaching positions and co-curricular vacancies to qualified teachers within the school system thereby allowing them to make application for such vacancy and have first consideration. Application for vacancies must be made in writing within three (3) school days of notification. (Seven (7) days during summer). . .

. . .

ARTICLE XV - ASSIGNMENTS, TRANSFERS, REASSIGNMENTS  
AND STAFF REDUCTION

- A. Teachers will be notified of their teaching assignments and, as far as practicable, their extra-curricular assignments, for the following school term, prior to the end of the current school term. If changes must be made after this date, the teacher(s) will be notified immediately and given an opportunity to discuss the matter with the administration.

. . .

- C. Involuntary transfer and reassignment.
  - 1. Where an involuntary transfer or reassignment is necessary, the teacher(s) involved will be given an opportunity to meet with the Superintendent or his/her delegate and be given reasons for the transfer or reassignment.
  - 2. When an involuntary transfer or reassignment is necessary, a teacher's area of competence, major or minor field of study, length of continuous service in the District, length of service in the building, grade or subject from which transfer or reassignment is contemplated, and other relevant factors will be

considered in determining which teacher is to be transferred or reassigned.

3. Notice of intent of involuntary transfer or reassignment will be given to the teacher(s) prior to the end of the present school term except in cases of emergency.

. . .

#### BACKGROUND:

The District and the Association have had a collective bargaining relationship for many years. The 1972-73 collective bargaining agreement contained the following language regarding vacancies:

#### ARTICLE X - VACANCIES

- A. The superintendent's office shall announce via appropriate intra-school means staff and co-curricular vacancies so that qualified personnel within the school system can make application for such vacancies.
- B. Qualified personnel will be given an equal opportunity for extra pay assignments during the school year. Qualified employees of the local school district, will be given first consideration for summer employment.

Also contained in the 1972-73 labor agreement was the following language regarding assignments and involuntary transfers:

#### ARTICLE XI - ASSIGNMENTS

- A. Teachers will be notified of their teaching assignments and extra-curricular assignments by June 30. If changes must be made after June 30, the teacher will be notified immediately about the change. . . .

. . .

- E. In-voluntary Transfer -- When an individual transfer or

reassignment is necessary the teacher or teachers involved will be given an opportunity to meet with the superintendent or his delegate and be given reasons for his transfer or reassignment.

During negotiations for the 1973-74 labor agreement, the parties mutually agreed to change the above-quoted language to the following:

ARTICLE XII - ASSIGNMENTS, TRANSFERS, REASSIGNMENTS,  
AND STAFF REDUCTION

A. Teachers will be notified of their teaching assignments and, as far as practicable, their extra-curricular assignments, for the following school term, prior to the end of the current school term. If changes must be made after this date, the teacher(s) will be notified immediately and given an opportunity to discuss the matter with the administration.

. . .

E. Involuntary Transfer and Reassignment

1. Where an involuntary transfer or reassignment is necessary, the teacher(s) involved will be given an opportunity to meet with the superintendent or his delegate and be given reasons for his transfer or reassignment.

2. When an involuntary transfer or reassignment is necessary, a teacher's area of competence, major or minor field of study, length of continuous service in the District, length of service in the building, grade or subject from which transfer or reassignment is contemplated, and other relevant factors will be considered in determining which teacher is to be transferred or reassigned.

3. Notice of intent of involuntary transfer or

reassignment will be given to the teacher(s)  
prior to the end of the present school term  
except in cases of emergency.

. . .

Judy Michaels, a member of the Association negotiations team since the 1970's, stated that during these negotiations, the parties discussed how vacancies were being filled in the District. Ms. Michaels stated that the word "qualified", which appeared in Section B of the vacancies provision of the 1973-74 labor agreement, meant that the teacher merely had to be certified in order to be deemed qualified for an open position. Michaels stated that no other meaning was attached to the word "qualified" during the parties' negotiations. Michaels also stated that it was her belief, based upon negotiations for the 1972-73 collective bargaining agreement, that the phrase "first consideration" meant that internal bargaining unit candidates would be given the opportunity to go through the hiring process. Michaels refused to say that if there were two or more bargaining unit members who were qualified/certified for a vacancy, that seniority would then control to determine who received the position. Rather, Michaels stated that seniority would "play a role" in the hiring process. Michaels stated that the phrase "first consideration" in fact, meant that the internal staff would be given the first opportunity to be considered for an open position, and that they would be allowed to go through the hiring process. This, Michaels stated, meant also that notice should be given to internal candidates first before notice of an opening was given to the public.

On cross-examination, Michaels admitted that she did not recall specifically that the parties agreed that the phrase "first consideration" meant that staff had to be notified before non-staff were notified of an opening. In addition, Michaels admitted that she could not recall if the parties ever discussed the issue raised by this case -- when the District should notify employees, newspapers, or universities of vacancies. Michaels admitted that "first consideration" does not mean that the internal applicant will necessarily receive any vacancy that he/she applies for. Michaels stated that giving an internal applicant an automatic interview does give that person a priority over outside people who are screened before they are allowed to receive an interview. Michaels stated that the intent of these provisions was to give all staff applicants an interview. Finally, Michaels admitted that the District has hired outside applicants and refused to give vacancies to internal employees who have applied for those same positions.

In the 1981-82 collective bargaining agreement, the parties made the following further changes in Article XVII - Vacancies:

- A. The superintendent's office shall announce via personal memo teaching positions and co-curricular vacancies to qualified teachers within the school system thereby allowing them to make application for such vacancy and have first

consideration.

Application for vacancies must be made in writing within three (3) school days of notification. (Seven (7) days during summer)

- B. Qualified teachers will be given an equal opportunity for extra pay assignments during the school year. Qualified teachers of the local school district will be given first consideration for summer employment.

Former Board of Education President Donald Wilmet, stated that he had served on the Board's negotiating team for approximately 15 years beginning in the 1970's. Wilmet stated that his recollection of the usages of the terms "qualified" and "first consideration" were that "qualified" meant that the Board had the right to consider a variety of things in determining whether a candidate for an opening was qualified. Wilmet stated that he believed that the District had the right under the language it negotiated into the contract in 1973-74 and thereafter, to hire applicants from outside the District even if employees had certifications for the openings.

Neither the District nor the Union offered any notes regarding collective bargaining negotiation meetings for the 1972-73, 1973-74 or 1981-82 labor agreements.

FACTS:

The Grievant, Candy Heiderscheid, has been employed by the District since 1979 in various positions. From 1979 to 1994, Heiderscheid was employed as a Reading Specialist at the District, primarily working with seventh through twelfth graders. In 1985 through 1994, Heiderscheid worked in the District's Learning Lab, again with grades seven through twelve and in 1993-94 with grades 9-12 only. At various times between 1979 and 1994, Heiderscheid also taught seventh and eighth grade reading classes including core classes teaching reading skills, reading classes, individual remediation instruction and skill units. In 1993-94, Heiderscheid taught two hours per day at the middle school, one hour as a resource person and one hour as a guided activity/study hall monitor.

Sometime in mid-May 1994, high school principal Mark Sheedy told Heiderscheid that he was relatively certain 1/ that the Learning Lab would be eliminated for 1994-95, and that he was also similarly certain that Heiderscheid would have to be reassigned to teach History at the High School, and to work with "At-Risk" students at the High School if the Learning Lab were eliminated. At that time, the Board of Education had not made any final decision regarding elimination of the Learning Lab.

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1/ Heiderscheid stated that Sheedy used the term "75% certain" during this conversation. Sheedy denied using this term.

On or about May 22, 1994, Heiderscheid received a copy of a document entitled "Teacher Assignments - 1994-95, West DePere High School". This document listed the names of 12 teachers and their classes, prep times, assigned duties and supervision duties and the total number of sections each teacher would be responsible to teach. Heiderscheid's name did not appear anywhere on this three-page document except in parentheses on the bottom of pages one and two of the document, indicating she had received a copy of the document. The document listed class sections, prep times and total sections to be taught by "Teacher A". It was understood by Heiderscheid and the District that the District believed that Heiderscheid would take the position of "Teacher A" in 1994-1995, teaching a total of seven class sections in Social Studies and two "At Risk" sections with one preparation period. This is the only notice that Heiderscheid received before the end of the 1993-94 school year regarding her 1994-95 teaching assignment.

In early July, 1994, Heiderscheid read in the DePere Journal that the Board of Education had decided at its June meeting to eliminate the Learning Lab for 1994-95. On July 14, 1994, District Secretary Thiesfeldt typed and sent out all notices regarding the K-12 Reading Specialist opening -- to staff, the newspaper and university placement centers. Thiesfeldt stated it has been her normal procedure to mail out all items on the date she types them and that she believed she typed the K-12 Reading Specialist notices on July 14 and sent them out that day, following her normal procedure.

On July 16, 1994, Heiderscheid received the following notice in the mail:

TO: Qualified Staff 7/14/94  
FROM: Randy T. Freese  
RE: Vacancy Notice

In accordance with Article XVII of the Master Agreement, please be advised of the following vacancy:

K-12 READING SPECIALIST - WI #317 required

Interested staff wishing consideration should apply in writing to Mr. Freese by 4:00 p.m. Friday, July 22, 1994.

After receiving this notice, Heiderscheid was contacted by several staff members who indicated that an advertisement had been placed by the District in the Green Bay Press-Gazette on Friday, July 15, 1994 advertising the same position. 2/ That advertisement read as follows:

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2/ On July 14, 1995, the District also sent notification of the K-12 Reading Specialist opening

SCHOOL DISTRICT of West DePere is seeking K-12 Reading Specialist. WI license #317 required. . . Mail letter of application, resume, transcripts, credentials, and copy of license to: Randy T. Freese, Superintendent. . . Postmark through July 29, 1994.

Heiderscheid submitted her application for the position by July 20, 1994. One other District teacher, Jim Bienash, also applied for the K-12 Reading Specialist job. Neither Heiderscheid nor Bienash was required to submit resumes, transcripts, credentials, or copies of their licenses to the District, as were external applicants, in order to be considered for the position.

The District submitted documentary evidence which indicated that it received 15 applications for the K-12 Reading Specialist position: Heiderscheid and Bienash were internal applicants, the other 13 were outside applicants. Superintendent Randy Freese stated that 11 of the 15 applicants were properly licensed. The four unlicensed outside applicants and two other outside applicants who had poor backgrounds were eliminated from consideration after an initial check of their applications. The District decided to interview four applicants. Both Heiderscheid and Bienash automatically received an interview. The seven outside applicants competed on paper for two interview slots.

The job description for the District Reading Specialist position, which appears in the District's policy manual reads as follows:

. . .

- QUALIFICATIONS:
1. Must meet the requirements as set forth by the Department of Public Instruction.
  2. Should have at least three (3) years of elementary teaching experience.

REPORTS TO: Curriculum Director

JOB GOAL: To perform those activities which are necessary to achieve a comprehensive reading curriculum directed at meeting the reading needs of all students, K-12.

PERFORMANCE RESPONSIBILITIES:

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to University Placement Centers in the Midwest.

1. Promote an awareness of and interest in reading on the part of staff, students, and community.
2. Assist the staff in identifying reading strengths/weaknesses of students.
3. Demonstrate current reading methods, practices and materials upon request.
4. Assign student placement in appropriate materials/programs through formal and informal evaluation methods.
5. Assume responsibility for planning and conducting reading inservice.
6. Provide assistance to curriculum committees concerning textbook readability, vocabulary and concept development, and the development of study skills.
  
7. Plan and administer supplemental reading support programs. (e.g., RIF Program, book fairs, Reader's Theater)
8. Assist teachers in the development of supplemental materials which will facilitate student mastery in key areas of the curriculum.
9. Plan and provide instruction on reading/learning skills for 7/8 grade students in content classes.
10. Coordinate and provide instruction of Learning Lab Activities for grades 7-12.
11. Develop and coordinate remedial reading activities, K-3.
12. Provide assistance to administrators in interpreting and implementing the district reading program.
13. Assist the curriculum director in conducting an annual evaluation of the reading curriculum.
14. Perform such other tasks and

responsibilities as may be assigned by the superintendent.

**TERM OF EMPLOYMENT:**

Salary and length of work year as per Master Agreement.

**EVALUATION:** Performance of this job will be evaluated annually by the Curriculum Director.

**APPROVED:** 10/15/80

**REVISED:** 3/16/89

**READOPTED:** 4/17/89

The District conducted interviews on August 3, 1994. Present for the District at each interview were Superintendent Freese, Principal Jane Paluch, and Curriculum Coordinator/Director of Instruction Jim Lamal. Each candidate was asked the same group of questions. The interviews lasted approximately 45 minutes each. Heiderscheid stated that during the interview, she was first informed of the District's desire to hire someone who had previous experience on a District-wide level as a Reading Specialist. Neither Heiderscheid nor Bienash had such experience, according to this record.

After Heiderscheid was interviewed for the K-12 Reading Specialist position, she stopped at the High School and spoke to Principal Sheedy. Sheedy stated that if she (Heiderscheid) did not get the Reading Specialist position, she would be teaching World History and working with "At-Risk" students at the High School in the 1994-95 school year. 3/

Heiderscheid stated that she believed that at some point in time, Superintendent Freese had promised her the Reading Specialist position if its prior incumbent retired or left the District. Heiderscheid stated, however, that she could not recall when or where Freese made this promise to her. Heiderscheid stated, in addition, that former High School Principal Hoerning and current High School Principal Sheedy had both promised her that she would receive the District Reading

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3/ Heiderscheid admitted that she was aware that in other situations people have received notice of their teaching assignments at the end of the school year, but because of developments in the summer, they have ended up teaching different assignments after receiving corrected notification of their assignment at a late date. Heiderscheid stated that she was aware that the District had hired people from the outside for District openings, and has refused to put internal applicants in those positions. Heiderscheid stated that she felt that the requirement that a successful candidate have District-wide Reading Specialist qualifications and experience should have been listed on the original posting that she received in July, 1994. However, Heiderscheid admitted that the prior incumbent of the position had District-wide experience and taught lower-level elementary reading as a regular part of his job before he retired in 1994.

Specialist position when its previous incumbent retired. Heiderscheid stated that Hoerning spoke to her approximately two years ago. Heiderscheid failed to state the circumstances under which Sheedy promised her the K-12 Reading Specialist position.

Robert Hoerning, an employe of the District from 1959 through 1993, stated that when he was High School Principal, he never promised Heiderscheid the District Reading Specialist position when its incumbent retired. Hoerning stated that he did not recall any specific conversations regarding this issue, but that he would not have promised a position to someone given the nature of the interview process that had been established by District Administrator Freese. Hoerning stated that Freese insisted upon issuing proper postings, and conducting group interviewing, resulting in group consensus regarding the successful candidate for a position. Hoerning stated that there was no way under Mr. Freese's procedures that he could have promised Heiderscheid the District Reading Specialist position.

Hoerning indicated that under former Administrator Richtman, he had hired teacher Dickhut after she had indicated that she was interested in receiving the Media Director/Librarian position. Hoerning stated that he spoke to Dickhut about the job and that he then called Richtman and told him that he recommended Dickhut for the job. Ms. Dickhut received the position. 4/

Although under former Administrator Richtman the District regularly issued postings to inside candidates as well as outside candidates, Hoerning stated that there was more of a policy to hire inside the District under Richtman than has been so under District Administrator Freese. Finally, Hoerning stated that he did not recall employes filing any grievances during his tenure over being denied vacancies.

High School Principal Mark Sheedy denied that he ever told Heiderscheid that she would be assigned to the District Reading Specialist position when it opened up in 1994. Sheedy stated that he attempted to timely notify Heiderscheid of her 1994-95 teaching position. He stated that the only notification he gave her of this assignment was the May 22, 1994, document she received regarding tentative teaching positions for 1994-95 in which she was described as "Teacher A". Sheedy stated that at the time that this document issued, no staffing assignments had been finalized by the Board of Education.

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4/ Rachel Dickhut stated that in 1988, she applied by letter for the Media Director/Librarian position at the District. Dickhut insisted that she was never interviewed for the position. but stated that she spoke to principal Hoerning about the position. Dickhut stated that Hoerning was only interested in what certifications she possessed. Dickhut stated that she possessed four certifications for the position: Librarian, Media Director, Media Technician and Media Specialist. Dickhut also stated that no one else employed by the District applied for the position, although there was one more senior person who could have applied. Thus, Dickhut apparently received the position of Media Director/Librarian for the District, based solely upon Principal Hoerning's recommendation to former District Administrator Richtman.

The District ultimately hired Maureen Musgrove to fill the District Reading Specialist position. Ms. Musgrove had the proper license, ten years of experience at the elementary level, District-wide Reading Specialist experience, an outstanding teacher's award and was ranked first on her interview by all members of the District's interview team.

#### PAST PRACTICE EVIDENCE:

The District submitted evidence regarding the manner and procedure by which it selected both successful applicants for regular teaching positions as well as successful applicants for summer school positions and extra-curricular positions. This evidence spanned a period of time from approximately 1981 to date. The evidence can be summarized as follows.

In June, 1987, a second grade teaching position was posted. There were three internal applicants for the position (teachers Perron, Hansen and Wagner). Teacher Wagner was transferred to the second grade opening. Mr. Wagner was less senior than one of the two internal applicants, but more senior than the other. In July, 1987, a sixth grade teaching

position opened. Teachers Perron and Wagner applied for the opening. In August, 1987, the District hired from the outside to fill this position, hiring teacher Marcia Schmidt. In early August, 1987, a first grade teacher resigned. Teachers Perron and Etter applied for the position. Perron was more senior to Etter. Perron received the position. In late August, 1987, the District decided to increase the number of first-grade classes it offered from four to five sections. Teacher Toni Etter was considered for the position, but the District hired from the outside to fill the slot, hiring Joan Stencil. In August, 1988, a first-grade position was posted. District teachers Klipstine and Fairchild applied for the position. Teacher Klipstine was selected for the first-grade opening. Klipstine was junior to Fairchild. An additional first-grade teacher was hired to fill Klipstine's former position. That person was hired from the outside over teacher Fairchild. In April, 1989, two positions were posted by the District: a fifth-grade full-time position and a half-time kindergarten position. There were no District applicants for the part-time kindergarten position. Therefore, the District hired from the outside for that position. There were two internal applicants for the fifth-grade position: Jim Bienash and Greg Plamann. Plamann was selected to fill the fifth-grade position, although he was junior to Bienash. A fifth-grade position was posted in August, 1989, due to a resignation of a teacher. There were no District applicants for the position and the District hired from the outside. In April, 1990, the District issued notices for a first-grade position opening and a fourth-grade position opening. There were two District teachers who applied for the fourth-grade position opening: Glenn Fitzgerald and Jim Bienash. However, the District hired from the outside to fill the fourth-grade position, hiring Greg Plamann, who was then no longer a District employe, for the position. There were no District applicants for the first-grade position, and the District hired from the outside to fill that position. In 1991, a High School Counselor position opened. There was one internal applicant, but that person did not receive the position, and the District hired someone from the outside to fill that position. During the school year, 1993-94, a sixth-grade teaching position opened. On October 19, 1993, the District issued a notice to staff that this opening was available. Teachers Glenn Fitzgerald and Greg Plamann applied internally. After the interviews but before the District had made its decision, teacher

Plamann withdrew his application. The District then hired from the outside, hiring Nancy Stacie over District teacher Fitzgerald. No grievance was filed by Fitzgerald regarding this matter. In May, 1994, a first-grade position was posted. Two District teachers applied for the position, Jennifer Steagall and Tim Willems. Steagall, who was junior to Mr. Willems was selected to fill the position. Willems stated at the instant hearing that after he interviewed for the first-grade opening, District Administrator Freese told him to wait, that there was another position that would be opening. Willems then applied for the next open position, in June, 1994, a fourth-grade position. Only District teachers Willems and Glenn Fitzgerald applied after receiving notice. Willems, who has more seniority than teacher Fitzgerald, was given the fourth-grade position. The District did not require Willems to submit to an additional interview to receive the position. 5/

In regard to the extra-curricular/summer school openings, the evidence revealed the following. Sheedy stated that in 1993, a physical education position and a varsity basketball position opened. Two District employees applied for these positions and several outside candidates were interviewed along with the two internal candidates. Sheedy indicated that the District hired from the outside for both of these positions, passing over the two internal applicants, and that no grievance was filed regarding the matter. In 1991, two wrestling coach positions opened. After posting these, the District hired two outside applicants, passing over two internal applicants who had applied for these positions. In 1990, Jeanne Jauquete, applied to teach basic communications in the summer school that the District offered. Ms. Jauquete was a District teacher at the time, but she was not selected. The District hired from the outside for this position. Also for the summer school of 1990, a District drama position opened. District teachers Jauquete, Janet Mellberg and David Sladek applied for the summer school position. Mr. Sladek was hired for that position although Mrs. Mellberg and Ms. Jauquete were senior to him. In 1992, the head varsity soccer coach position opened. One District teacher applied for the position, however, the District hired from the outside to fill this position. The District posted a basic communications position opening for the summer school of 1992. District teacher Jauquete and Jane Johnson applied for the position. Ms. Johnson, who was junior to Ms. Jauquete, was hired.

Union President Toni Etter stated that she sent out a survey to 102 District teachers, asking if any of them had been denied a transfer in favor of an outside applicant. Etter stated that of all of those asked, only two teachers indicated that this had happened to them.

#### POSITIONS OF THE PARTIES:

##### Association:

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5/ According to the District documents, Ms. Steagall was selected for the first-grade position before teacher Willems was selected for the fourth-grade position.

The Association noted that the District Reading Specialist decided to retire in July, 1994. Pursuant to Article XVII, the District notified three staff members that they had the appropriate certification requirements to fill the District Reading Specialist position -- including Heiderscheid and Bienash. However, a newspaper ad appeared in the Green Bay Press-Gazette before the grievant Heiderscheid received her notice of the opening. Thus, the District violated the seven-day notice requirement of Article XVII(A), in the Union's view. In addition, the Union noted that the District added a new requirement at the interview stage, that the successful applicant would have to have District-wide Reading Specialist experience. This, the Union asserted, was unfair to all internal applicants, including Heiderscheid. The District also violated Article XVII, Section C, (3), when it failed to notify Ms. Heiderscheid of her teaching assignment before the end of the 1993-94 school year. The Union noted that no "emergency" situation existed (and none was claimed by the District on the record in this case), to excuse the District from informing Heiderscheid of her teaching assignment at the end of the 1993-94 school year.

The Union urged that the phrase "first consideration" should have a special meaning here. The Union noted that the District claimed that the only meaning for the above-quoted phrase was that internal applicants should receive an interview automatically without going through the entire screening process. However, the Union observed that the common definition of "first" is "before all others" and that "consideration" can be defined as "careful thought or attention" or "a factor informing a judgment". The Union further observed that in the District's July 14 notice, it addressed the notice of opening to "qualified staff". Thus, the Union urged, the more logical interpretation of the phrase "first consideration" is to read it as meaning "first preference".

The Union asserted that there had been several violations of the labor agreement demonstrated in this case. The Union contended that the District failed to timely notify internal applicants of the K-12 Reading Specialist opening, that the District failed to properly notify Heiderscheid of her teaching assignment prior to the close of the 1993-94 school year, that the District failed to properly notify Heiderscheid of her reassignment to teach Social Studies and "At-Risk" students for 1994-95. The Union argued that the District demonstrated a lack of interest in following the labor agreement by its having advertised in the newspaper for the K-12 Reading Specialist prior to internal qualified staff receiving their notifications of the opening.

Thus, the Association suggested that, as Heiderscheid had not received her notice of reassignment until August 3, 1994, the District should be ordered to compensate Heiderscheid for the extra time she spent between August 3 and the start of the school year on August 25, 1994, to prepare for her reassignment. In addition, the Union sought an award placing Heiderscheid in the K-12 Reading Specialist position for the 1995-96 school year and any other relief deemed appropriate.

District:

The District argued that the contract language regarding how vacancies should be filled is

clear and unambiguous. Thus, the District urged that the undersigned, in order to find the true intent of the parties, may not rewrite the contract. Rather, the arbitrator should give effect to the thought clearly expressed by the written words of the labor agreement. The District noted that by its interpretation of "first consideration", the Union has asked the Arbitrator to guarantee that internal applicants will receive vacant positions. The District argued that under the contract language as written, District teachers need only be given the first opportunity for consideration in the hiring process, and that the final decision must ultimately rest with the Board of Education. In this regard, the District observed that the parties' use of the word "consideration", and not a stronger word, supports its arguments in this case.

The District also contended that its interpretation of the term "first consideration" was supported by the testimony of both the Association and Board witnesses at hearing. In addition, the District urged that it has applied the disputed language in a manner consistent with the District's interpretation over many years. Thus, the District asserted that there is no basis on this record for the Association's assertions that "qualified" means "certified" and that the Union failed to prove that the phrase "first consideration" means that an internal applicant must receive a vacant position over an outside applicant. Finally, the District observed that a prior arbitration award between the parties also supports its interpretation of the phrase "first consideration".

The Association asserted that the Grievant and other internal staff did not receive timely notice of the vacancy in this case. In this regard, the District noted that the evidence showed that all notices were sent out on July 14, 1994. In any event, the District observed that the Grievant made a timely application for consideration for the opening, and that the District should not be held responsible for postal delays.

The District asserted that the person hired to fill the position is more qualified than Grievant Heiderscheid. The District pointed out that judging qualifications is management's exclusive domain, and that challenges to management's judgment in these areas may only succeed if the employer's decision is arbitrary, capricious, discriminatory, clearly wrong, or made in bad faith. The District noted that Heiderscheid admitted herein that she was not qualified for the position if it included a District-wide Reading Specialist experience and lower-level elementary teaching experience. Heiderscheid also admitted that she would not have applied for the position had she known of these additional qualifications. Thus, the District urged that Maureen Musgrove, the outside applicant who was chosen for the position, and who was rated first by all of the interviewers for the position, was better qualified for the opening than was Heiderscheid.

The District asserted that Heiderscheid received timely notification of her reassignment for 1994-95. The District noted that Heiderscheid got her teaching assignment document before the end of the school year, 1993-94. Because nothing was finalized before the end of the school year by the School Board, the District lacked certain information which would have allowed it to give Heiderscheid a definite teaching assignment for the school year, 1994-95. The District urged that the contract requires only that the District notify employees of an intent to transfer or reassign them

prior to the end of the school year. Actual notice of a reassignment is not required by the labor agreement. Because Heiderscheid received all information that Principal Sheedy possessed as well as notice that she might be reassigned prior to the end of the 1993-94 school year, the District asserted that it had met its obligation under the labor agreement. In all of these circumstances, the District urged that the grievance should be denied and dismissed in its entirety.

REPLY BRIEFS: 6/

Association:

The Association urged that District Administrator Freese's definition of "first consideration" was neither corroborated by Board representative Wilmet nor by Union representative Michaels. The Union observed that Freese's definition of this term is simply too restrictive and that it virtually ensures that internal candidates for openings will be passed over

for vacant positions and that the District will merely go through the motions and perfunctorily consider internal applicants. The Union agreed that the contract language is clear and unambiguous, but that Freese's definition of "first consideration" simply did not comport with the clear language of the agreement.

The Union asserted that "first consideration" must mean that the District must give internal applicants more than a meaningless interview. Rather, the District is obliged to carefully scrutinize internal applicants and give them preference over outside applicants under the language of the labor agreement. The Association urged that it never asserted that internal applicants must be guaranteed a vacant position. Finally, the Association contended that the District's decision to add the additional requirement that a successful applicant must have District-wide Reading Specialist experience clearly shows that the District's decision to hire Musgrove was arbitrary, capricious, clearly wrong and made in bad faith.

District:

The District asserted that the Association's dictionary definitions of "first consideration" were incomplete: other dictionary definitions of "consideration" indicate that this term can be defined as "a factor in forming a judgment or decision". The District asserted that the Association's contention that qualified internal applicants should be granted a vacancy before outside applicants are even considered, is not supported by past practice or the other record

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6/ On July 19, 1995, the undersigned received a letter from the Union objecting to the District's unflattering characterizations (in its reply brief) of Union President Toni Etter. I have not considered these characterizations in reaching the Award herein.

evidence. The District noted that the contract does not guarantee internals who are qualified/certified a vacancy, and that the contract says nothing about the use of seniority in filling vacancies. The District reiterated that it is within the Employer's province to set and judge the qualifications of applicants. The District observed that District managers decided that District-wide experience and elementary Reading Specialist experience were essential qualifications for the successful applicant, and that Heiderscheid possessed neither of these qualifications.

The District noted that even if Heiderscheid received her notice of the opening after July 15, 1994, the fact that the District advertised the opening before Heiderscheid knew of it did not actually disadvantage Heiderscheid. The District noted that the contract evidenced no intent by the parties to have internal applicants processed first and that if none were found qualified only thereafter would external candidates be assessed and interviewed. The fact that external applicants were given additional response time for application is not relevant to this case, in the District's view.

The District pointed out that it is in its interest as well as the teacher's interest to give each teacher as much advance notice as possible of their reassignment. The District asserted that Principal Sheedy did this and met the contractual obligations of the District by notifying Heiderscheid of the possibility of her reassignment in 1994-95. As Heiderscheid had admitted, it is not uncommon for District teachers to be reassigned prior to the commencement of a new school year. Therefore, the District contended that since there were no provisions in the contract and no practice to support the Association's request for a monetary award for Heiderscheid's preparation for her new classes reassigned in August, 1994, such an award would be entirely inappropriate. In all these circumstances, the District sought denial and dismissal of the grievance in its entirety.

#### DISCUSSION:

The first question that must be resolved here is whether the Grievant was properly notified of her 1994-95 teaching assignment. It is clear on these facts that before the end of the 1993-94 school year, the District had not finally decided whether or not it would eliminate the Reading Lab for the following school year. Due to this uncertainty, Heiderscheid was listed as "Teacher A" on the teaching assignment document she received on May 22, 1994. Article XV, Sec. A states,

1. Teachers will be notified of their teaching assignments . . . prior to the end of the current school term. If changes must be made after this date, the teacher(s) will be notified immediately and given an opportunity to discuss the matter with administration . . .

In my view, the May 22, 1994 "notice" to Heiderscheid of her teaching assignment for the 1994-95 school year was insufficient. In this regard, I note that Heiderscheid's name was not listed on the teaching assignment document. Rather, the District listed a "Teacher A" on the document and gave Heiderscheid a copy of the document, apparently explaining that if the Reading Lab were eliminated for 1994-95, Heiderscheid assignment would be that of

"Teacher A." As the language of Article XV, Sec. A is clear on its face, I find that the District failed to properly notify Heiderscheid of her teaching assignment prior to the end of the 1993-94 school year. The conditional notice given by the District was insufficient.

However, it is clear on the facts of this case that there was a great deal of uncertainty regarding whether the Board of Education would decide to eliminate the Reading Lab for 1994-95, and what, if any, affect that would have on District teachers' assignments. I note that Heiderscheid was aware of the possibility that she would be involuntarily reassigned to teach World History and At-Risk classes through several conversations she had had with Principal Sheedy prior to May 22, 1995. In addition, Heiderscheid also admitted that in June, 1995, she became aware that the Board of Education had formally decided at its monthly meeting to eliminate the Reading Lab. Because she had received the May 22nd document, Heiderscheid was then also aware that she would most likely be reassigned to teach World History and At-Risk classes for 1994-95. Thus, it is clear that at least by the end of June, 1995, the District had voted to eliminate the Reading Lab so that it had definite information that Heiderscheid would have to be reassigned for 1994-95.

Article XV, Sec. C requires that the District give teachers "notice of intent of involuntary transfer or reassignment . . ." before the end of the current school year. In my view, the phrase "notice of intent" means that the District must notify teachers that it intends to reassign or transfer them. This language does not mean that the District must give each teacher who will be involuntarily reassigned or transferred, specific notice of their new teaching assignment before the end of the school year. However, the facts of this case show that the District failed to give Heiderscheid notice of her actual teaching assignment prior to the end of the school year under Article XV, Sec. A, and that the District failed to give Heiderscheid timely notice of its intent to involuntarily transfer or reassign her pursuant to Article XV, Sec. C (3). It is significant that the District did not attempt to prove that an emergency situation existed to justify the District's waiting until early August, 1994, to actually notify Heiderscheid of her teaching assignment for the 1994-95 school year (which began on August 22, 1994). In all of the circumstances of this case, the District violated Article XV by the manner in which it notified Heiderscheid of the "change" in her teaching assignment for 1994-95. 7/

The major issue in this case involves whether the District violated the labor agreement when it failed to assign Heiderscheid to the District Reading Specialist position for 1994-95. The Union has argued that because the District has historically sent vacancy notices to all District teachers who have the certifications required to fill an opening, that this necessarily means that the District has thereby judged those teachers to be "qualified" to fill any vacancy for which they are certified. The Union also presented bargaining history evidence that the parties intended to equate the term "certified" with "qualified" by their choice of words in Article XVII.

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7/ I note that after May 22, 1995, Heiderscheid did not file a grievance regarding the District's failure to notify her with certainty of her 1994-95 teaching assignment. The District did not object to the timeliness of Heiderscheid's raising this issue.

None of this evidence, when considered along with the other record evidence in this case, is persuasive. In this regard, I note that labor relations professionals would never substitute the word "certified" for the word "qualified". Also, the employees of the District were represented by a trained WEAC representative during negotiations surrounding Article XVII. In addition, the Union failed to prove that the parties actually discussed and clearly intended to equate "certified" with "qualified" during any contract negotiations that have occurred. Thus, in these circumstances, the parties must be presumed to have intended that the ordinary meaning of the term "qualified" should apply.

The overwhelming evidence produced by the District regarding how it has filled vacancies in the past (since the early 1980's), supports a conclusion that the District has consistently judged the qualifications of both internal applicants and outside applicants. In this regard, I note that on 12 occasions the District selected outside applicants for vacancies, specifically rejecting internal applicants for those vacancies. In all the circumstances, 8/ the Union has failed to prove that the District gave up its management right to set and judge the qualifications of all applicants for vacancies.

In regard to the arguments made by the parties concerning the proper interpretation of the term "first consideration," I disagree with the parties: the term itself is ambiguous and open to various interpretations. The parties' quotation of various dictionary definitions of this term are of limited help in this case. Any or all of them could reasonably apply. In these circumstances, the parties' true intent must be determined from analyzing the available parole evidence of bargaining history and past practice.

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8/ I do not find that the Association grievance regarding notices of "potential" vacancies is relevant to this case. The gravamen of that case as well as its settlement, appear to deal with the fact that notices of vacancies should be issued when the District is certain and has actual vacancies available. In addition, the fact that the District has sent notices of openings addressed to "qualified staff" in the past, does not necessarily mean that the District thereby judged such staff qualified for these positions.

Regarding the bargaining history, the contract language contained in expired labor agreements is of no assistance in determining the intent of the parties when they agreed upon the current language. Also, Union Representative Michaels stated that in contract discussions, the Union understood that the term "first consideration" meant that the District teachers would have the right to go through the hiring process as well as the right to receive notices of vacancies relevant to them. Significantly, Michaels refused to state that "first consideration" meant that employees must automatically be awarded all vacancies for which they apply. Michaels' testimony was supported both by District and Union witnesses, and no convincing evidence was proffered to contradict it. 9/ The record evidence demonstrates that the parties did not make clear an intention that "first consideration" meant that District employees must automatically receive any position for which they are certified and for which they have applied.

The Union has argued that "first consideration" must mean that internal applicants must be notified and their applications completely processed before the District may begin to consider outside applicants. I find that the evidence failed to support this assertion. The record fails to reveal any evidence regarding when the District has notified staff in the past of vacancies. In this case it is reasonable to conclude, based on the evidence, that the District sent all notices out on the same day, July 14th. In this regard, I note that the District's secretary, Thiesfeldt, testified that she followed her normal business procedure in sending out the notices all on the same day they were typed. 10/

The Union asserted that Administrator Freese' interpretation of "first consideration" was too narrow, only giving staff who have appropriate certifications notice of vacancies, and automatic interviews without the need to submit all credentials and transcripts and without being subject to elimination through the initial screening process. However, the Union failed to prove that the District has applied some broader meaning to the term "first consideration.". Rather, the evidence of past practice in this case showed that during the years since Mr. Freese has been District Administrator, Freese has applied his interpretation of "first consideration" without drawing any grievances from the Union. If the parties had intended internal applicants to be preferred over outside applicants in the hiring process, they could have drafted clear contract

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9/ I note that current Union President Etter's beliefs regarding the meaning of the term "first consideration" were based upon her personal opinion. She was not present during negotiations when this language was agreed upon.

10/ The fact that Thiesfeldt stated it was possible that she did not follow her normal procedure does not detract from her other statements that she believed she followed her normal procedures regarding the notices.

language to reflect that intention. They did not do so.

The Union urged that the District unfairly added the additional qualifications of District-wide Reading Specialist experience and lower elementary teaching experience at the interview stage. An analysis of the K-12 Reading Specialist position description, however, shows that such experience was listed therein and clearly required for the position. In addition, Ms. Heiderscheid admitted that she was aware that the prior incumbent of the K-12 Reading Specialist position had the experience required by the position description, that he worked on a District-wide level for years and that he had regularly taught lower-level elementary reading classes. In these circumstances, and given the fact that the notice for the opening received by Heiderscheid and sent to the public were not contradictory, I can find no specific or overall unfairness in the District's insistence that the successful candidate possess District-wide Reading Specialist experience and experience teaching lower-level elementary reading classes. Finally, I note that Heiderscheid admittedly did not have this experience and that the candidate selected by the District, Ms. Musgrove, had all of the experience and qualifications the District was looking for in a K-12 Reading Specialist.

Based upon the relevant evidence and argument in this case and the above analysis thereof, I issue the following

#### AWARD

Candy Heiderscheid was not given proper notice of her teaching position or of the change in her teaching assignment for the 1994-95 school year. The grievance is therefore sustained on this point. As the time for notice to Heiderscheid for 1994-95 has passed, no remedy for Heiderscheid is meaningful. 11/ The District, however, is ordered to follow the language of the contract regarding notice of assignments and notice of intent of involuntary transfer or reassignment in the future.

The District did not violate the collective bargaining agreement when it did not assign Candy Heiderscheid to the District Reading Specialist position for 1994-95. The grievance is therefore denied and dismissed in this regard.

Dated at Madison, Wisconsin this 10th day of August, 1995.

By Sharon A. Gallagher /s/  
Sharon A. Gallagher, Arbitrator

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11/ The Union urged that Heiderscheid should be compensated for extra time she spent in preparing to teach her 1994-95 classes, as a remedy for the District's violation. There is no contractual support for granting such a remedy and the Union's request for this remedy is denied.