Sugerman #2

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR-MANAGEMENT ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Employer

-and-

Union

Opinion and Award of Arbitrator Donald F. Sugerman

Gr: Employee 1

OPINION

I

STATEMENT OF THE CASE

This case involves a matter of contract interpretation; the facts are not, for the most part, disputed.

The Employer operates the public school system. Because a large percentage of its housing stock is rental units, it is a somewhat transient area community. The student population has been declining, due in part to the transient nature of its population, in part to the increased presence of charter schools, and in part from other factors. These elements make it difficult to predict, with any degree of certainty, what the school population will be from one year to the next.

The Union is the exclusive, recognized bargaining representative for all certified personnel under contract (including teachers, the classification involved in this proceeding) employed by the Employer.[1] The Employer and the Union have had successive collective bargaining agreements. The one implicated here is effective for the period August 30, 2006 — August 29, 2007 ("Agreement" or "CBA").

Employee 1 ("Employee 1" or "Grievant")[2] - has been a kindergarten teacher in the Employer for several years. Employee 1 had on file with the Employer a transfer request (to move from the Childcare Center ("Childcare Center") – where all of the District's kindergarten

[1] It appears that substitute teachers are not under contract and therefore not in the bargaining unit.
[2] After an individual is fully identified, s/he will subsequently be referred to only by surname or title.

classes are housed) – to an elementary school. Despite this, the Employer hired and placed two substitute teachers at Elementary School A ("Elementary School A").[3] It is the failure of the Employer to honor Employee 1's transfer request that is the subject of this grievance. Employee 1, however, is only the nominal Grievant inasmuch as the Union filed the grievance as a "class action."

There are four elementary schools (Elementary School A, Elementary School B, Elementary School C and Elementary School D) in the District. In the 2005-2006 school year, Grievant submitted a request to transfer from Childcare Center to one of the elementary schools.[4] The CBA provides that such a request is to remain operative for one year and may be renewed annually thereafter.

Before the end of the 2005-2006 year, Director 1, Executive Director of Human Resources, determined that the projected enrollment at Elementary School A would mandate a reduction of two teachers at that school. Accordingly, when the year ended, the Employer involuntarily transferred two teachers from regular class rooms to special education classes at Elementary School A. [5]

The CBA requires Director 1 to meet with the Union President in the first week of May to report on the staffing plans, including layoffs, leave requests, etc., for the ensuing year. Director 1 met with Union President, President 1, on May 4, 2006. As of that date there were no elementary school vacancies within the Employer. And none was projected for the 2006-2007 year.

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[3]The terms "temporary" and "substitute" are used interchangeably.
[4]The request was not entered into evidence. The Union states that Employee 1 was the senior teacher seeking a transfer.
[5]Both teachers were State certified to teach special education.

On August 30, 2006, the new CBA between the Union and Employer went into effect. It includes the last sentence/paragraph of 8.220. The first teacher workday of the 2006-2007 year was September 5, 2006. School for students began the next day. Director 1 believed his enrollment projections were accurate for staffing purposes, but as a fail-safe, he had two substitute teachers available at Elementary School A, in the event the number of students required additional classes.

On the first day of school, the enrollment at Elementary School A necessitated that both temporary teachers be in classrooms. One room had nineteen students; the other had twenty. For the first four weeks, enrollment in these classes fluctuated, but only slightly, averaging 23 and 22 students on a daily basis, respectively.[6] On September 27 (the fourth Wednesday of the month and the date for the official enrollment figures for each district, called "State Count Day"), enrollment at Elementary School A had risen by forty-three students. The two classrooms with temporary teachers were going to be permanent for the year. The Employer filled one of those spots with a teacher displaced from another elementary school (Elementary School B); it filled the second vacancy with one of the substitute teachers.

On October 2, 2006, the Union filed the grievance in this case citing violations of Article 8, Vacancies, Transfers, and Promotions of the CBA. It was a class action because of its potentially far reaching effect — beyond that of the one individual (Employee 1) who was named. The grievance proceeded through the intermediate steps, and when the parties were unable to resolve the dispute, the Union moved it to arbitration.

[6] In the two class rooms the numbers varied by one or two students from Sept. 6 - Sept. 22. These were about the size of other full class rooms. It cannot be discerned from the records whether the slight changes in the population were the result of new students being added, movement within the school, or a combination thereof.

A hearing was held on June 12, 2007, at which time the parties had the opportunity to make opening statements, examine and cross-examine sworn witnesses, present documentary evidence, and submit post-hearing briefs. On the basis of all the evidence, including arguments, I issue this Opinion and Award.

Other facts will be discussed as necessary.

II

ISSUES PRESENTED

The Union presents the issues as:

1. Did two vacancies exist at Elementary School A at the start of the 2006-07 school year?
2. Did Grievant have a contractual right to be transferred to one of those vacant positions?
3. Were Grievant's contractual rights violated when she was refused her request for a transfer to one of the vacancies at Elementary School A?
4. Did the Employer violate Article 8, Section 8.220 of the CBA?

The Employer presents the issues as:

1. Was there a vacant elementary teaching position prior to the start of the 2006-07 school year?
2. If there was a vacancy, did the CBA require the Employer to place Grievant in that position?

The issues will be restated as follows:

Was there a vacancy for a regular teacher at Elementary School A at the beginning of the 2006-2007 school year? If so, did the Employer violate the CBA by failing to honor Employee 1's transfer request and install her in the position? If it did, what is the appropriated remedy?

III

APPLICABLE PARTS OF THE CBA

The CBA provides in pertinent part:

8.000 VACANCIES. TRANSFERS, AND PROMOTIONS

8.100 Vacancies

For purposes of this Agreement, a vacancy shall be defined as any position within the bargaining unit presently unfilled, position(s) filled during the previous year on a temporary basis, and newly created positions.

Vacancies shall be filled according to the applicable procedures and criteria in Section 8.110.

Section 8.110 Filling of Vacancies

Vacancies occurring within the bargaining unit after the May staffing meeting shall be filled with the applicant having the greatest bargaining unit seniority, provided they meet the proper certification, N.C.L.B. requirements and qualifications as defined in Section 9.160.

8.120 Posting of Vacancies

Whenever a vacancy is posted, the following procedure shall be used. The board shall publicize such vacancy by posting in every building where teachers work, by notifying the Union Unit President, posted on district-wide email, and by such other means as the Board shall deem desirable. No such opening shall be filled, except in the case of an emergency, until such opening shall have been posted for at least ten (10) teacher work days; provided, however, that any such vacancy which occurs between the end of the last teacher work day in a school year and the first teacher work day of the following school year shall be posted for at least fourteen (14) days in the Board office and a copy of the posting shall be sent to the Union Unit President. Any teacher may apply in writing for said opening within the above time limit.

A vacancy that occurs after the beginning of the school year is not subject to the posting and hiring procedures above, but may be filled on a temporary basis. If this vacancy is expected to continue for the following year, it will be posted by June 1st of the current school year and filled in accordance with Section 8.110 and 8.120. By June 1st, or after the May staffing meeting, whichever is sooner, a list of potential vacancies for the upcoming school year will be sent to the Union President.

8.200 Transfers

8.210 Definition

A transfer is defined as a move from one building to another. . . .

8.220 Voluntary Transfer Requests: Normal Procedure

A teacher may request a transfer at any time. A request for a transfer shall be made in writing to the Executive Director of Human Resources. A request for a transfer shall be kept on file for a one-year period and may be renewed in writing each year by the teacher. Such a request will be considered for all pertinent vacancies whether or not they are posted, including vacancies posted.

Except for [certain specified positions, not relevant here], . . .a transfer may be effected without a posting provided that the teacher selected had a letter on file expressing interest in the position.

When filling vacancies by voluntary transfer after the May staffing meeting(s), applicants with the highest seniority, who have a request for transfer on file, shall have their transfer request granted provided they are certified and qualified in accordance with 9.160. . .[7] (All emphasis in italics added)

18.251 Powers of Arbitrator

18.251.1 The Arbitrator shall have no power to add, subtract from, alter or modify any terms of this Agreement.

IV

SUMMARY OF THE PARTIES' ARGUMENTS

EMPLOYER: The Grievance is untimely because it was not taken up by the Grievant with an administrator and because the Union did not file it within twenty days of the occurrence giving rise to it, as required by the CBA.

Assuming the grievance is timely, pursuant to Article 7 of the CBA, the Employer must maintain certain class sizes depending on the grade level. The Class Size Committee must meet by the State Count Day to examine class size. Additionally the CBA requires the

[7] Grievant was certified and qualified to teach all elementary grades.

Executive Director of Human Resources to meet with the Union to report on staffing plans. The CBA also requires that vacancies which occur after the May staffing meeting shall be filled with the most senior, qualified bargaining unit member. A vacancy which occurs after the beginning of the school year is not subject to the posting and hiring procedures of Article 8.110, but may be filled on a temporary basis.

Projecting enrollment is a difficult task, especially with open schools of choice, a transient community, and the availability of charter schools. The CBA sets the requirements for filling vacancies which occur after the May staffing meeting, but those procedures do not necessarily apply to vacancies created after the beginning of the school year. During the summer, the Employer projected a reduced enrollment at Elementary School A. That reduction would require the elimination of two teaching positions. The Employer, however, had two substitute teachers available for Elementary School A on the first day of school in case the enrollment was greater than projected. By the time of the State Count Day, enrollment at Elementary School A required two additional classes be maintained. Filling those positions did not require the Board to transfer Grievant because the vacancies were not known until after the first day of the 2006-2007 school year. According to the CBA, the Employer is not required to follow the procedures outlined in Sections 8.100 and 8.220 because of the language in Section 8.120. Therefore the grievance should be denied.

UNION: The two excess positions at Elementary School A that the Employer had projected in May did not materialize. It is incorrect to say that the vacancies did not exist until the State Count Day because the Employer had the two temporary teachers available on the first day of school and those teachers had classes of nineteen and twenty students, respectively, that day. Therefore the vacancies existed prior to the opening of school.

Because the two involuntarily transferred teachers did not request to return to their former classrooms, their transfer rights are not applicable to this grievance.

Grievant had a properly executed request for transfer on file. Therefore, since she was the most senior, qualified teacher at that time, and because a vacancy existed prior to the beginning of the school year, the Employer violated the CBA by not transferring Grievant to that position. The grievance should be sustained.

V

DISCUSSION

The Employer argues that the grievance is procedurally defective because the Union failed to raise the issue with the appropriate administrator and because it did not file the grievance within twenty work days of the occurrence of the alleged violation.[8]

Article 18 of the CBA provides in pertinent part:

> 18.210 In the event that a teacher believes there is a basis for a grievance, he/she shall first discuss the alleged grievance with his/her appropriate administrator either personally of accompanied by his/her Union representative.
>
> 18.220 If, as a result of the informal discussion . . .a grievance still exists, it shall be reduced to writing within ten (10) work days after discussion . . . or in any event not later than twenty (20) work days after the occurrence of the alleged violation .. .

The Grievant did not discuss this matter with an administrator. But she was not the party filing the grievance. Under the terms of the Agreement, it appears that such discussion is required if the teacher is the moving party. This, however, does not apply when it is the Union that is pursuing a class action grievance. Perhaps this is why 18.220 provides that, "in any event" a grievance must be filed "not later than twenty (20) work days after the occurrence of the alleged violation . . ."

The first day teachers were to report for the 2006-2007 year was September 5 with students arriving the following day. Assuming the Union became aware of the alleged violation on the first work day, it would have had twenty work days, or until October 3, to file its

[8] Issues of procedural arbitrability, e.g., whether the grievance was filed in a timely manner, whether a grievance was moved from one step to the next in accord with the agreement, etc., are for the arbitrator to decide. John Wiley & Son v. Livingston, 376 U.S. 543 (1964). Issues of substantive arbitrability, e.g., whether the parties have agreed to submit the particular dispute to arbitration, are for the courts to decide. Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962). The issues in the instant case fall into the former category.

grievance.[9] I conclude, therefore, that the grievance filed on October 2, 2006, was timely.

Even were I to find the grievance to be filed untimely, the Employer's argument would nevertheless fail for reasons of its own timeliness. Because the Employer did not claim the grievance was untimely at any of the intermediate stages of the grievance procedure, it waived its right to do so. Finally, I note that the claim of timeliness was first made by the Employer in its post-hearing brief. Fundamental fairness and due process requires that the party against whom a claim of timeliness is made be given an opportunity to respond. For the above reasons, the Employer's contention that the grievance is not arbitrable for reasons of procedural timeliness must be denied.

The next question to be decided is whether the facts, which required the Employer to have two substitute teachers available on the first day of the school year at Elementary School A, leads to the conclusion that a vacancy was created within the terms of the CBA.

Each school year presents a challenge to the Employer when it comes to staffing requirements. The Employer has a "schools of choice" program, that enables parents to decide which schools their children will attend. Additionally, the population in the Employer is somewhat transient and lastly, the Employer does not know, with certainty, how many of its students will leave to enroll in charter schools or for other reasons.

At the end of the 2005-2006 year, Director 1 estimated that Elementary School A's student population will decline to the point that it would have an excess of two assigned teachers. It did, however, need two special education teachers at the school. Consequently the Employer involuntarily transferred two Elementary School A teachers from regular classrooms to special

[9]Under accepted rules of construction, "the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included." Rule 6(a) of the FRCP. Twenty days from September 6, excluding Saturdays and Sundays is Oct. 3.

education. The Employer correctly points out that under the CBA, these teachers had the first right to return to regular classrooms. It cites this as a reason for denying the grievance. This contention is not persuasive. While the two teachers may have had the right of return, it was not automatic. They had to request such a return and neither did so. The argument itself, suggests that there were "vacancies" to which those teacher could have returned had they wanted.

Director 1 described Elementary School A principal, Principal 1, as one of the best, if not the best elementary principal, in determining how many students would be returning to her building and how many of their siblings and other new students would be enrolling. This stems from Principal 1's practice of personally contacting each family to learn of their plans. Thus, the number of students enrolling at Elementary School A was often close to the principal's estimates.

Director 1 also testified that approximately a week before school opened, the Employer would have the numbers from schools of choice and from transfers to charter schools. It would then notify building principals of the anticipated number of students. When Principal 1, learned of the numbers, she asked Director 1 if she could have her two teachers back. Director 1's response was something to the effect of "Wait until school starts. I said it was no problem. We'll put subs there and if kids materialize, we could put the two regular teachers back, so it would be a natural transition."[10] Since teachers of special education are in great demand – currently not the case for elementary teachers – it is unclear just how this natural transition was to be accomplished.

[10] This language is taken from my notes of the hearing, the official record of the proceeding.

Much of the Employer's evidence consisted of showing how difficult it is to predict the number of students in each grade from year to year. I recognize the great difficulty in this endeavor. That said, however, the difficulty of predicting the number of students has no bearing on whether the district had a vacancy at the opening of school, when it utilized two, and then retained one, substitute at Elementary School A.

The CBA defines a vacancy "as any position within the bargaining unit presently unfilled . . ." This conforms to the dictionary definition: [11] A vacant position which an employer hopes to fill, including part-time and casual job openings."" With the start of school, it was clear that there would be two unfilled teaching positions at Elementary School A. One was ultimately filled by a teacher "excessed" and transferred from another school. The other was filled by a substitute.

The pivotal question is whether the Agreement permits a substitute to be hired for the year when a regular teacher has a transfer request on file. To answer this, it is necessary to consider circumstances in which a temporary employee is used for what is a regular slot. Some guidance is found in exclusions from the term "vacancy." While not necessarily all inclusive, the following listing by Chavrid and Kuptzin is a comprehensive categorization of such exclusions:

> (1) jobs held for employees who will be recalled; (2) jobs to be filled by transfer, promotion, or demotion; (3) jobs held for workers on paid or unpaid leave; (4) jobs filled by overtime work which are not intended to be filled by new workers; (5) job openings for which new workers were already hired and scheduled to start work at a later date; and, (6) jobs unoccupied because of labor-management disputes." [12] (Emphasis supplied)

There were two vacant positions at the school and a transfer request from Employee 1 on file.

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[11] Roberts' Dictionary of Industrial Relations, Third Ed., The Bureau of National Affairs, Inc., Washington, D.C.,1986, p. 324

[12] ibid at p. 324

That the Employer might not know with certainty that the teachers would be needed permanently until the State Count Day does not affect this interpretation. Certainty with respect to a vacancy is not critical. Every year the Employer posts vacancies in anticipation of needing teachers.

An analogy may be helpful to explain this point. If, based on the number of eighth grade students taking Spanish, the Employer recognized the need for a high school Spanish teacher, but failed to hire one at the beginning of the school year, it would be hard pressed to argue that such a vacancy existed only after the opening of school or on the State Count Day when it confirmed the actual number of students taking the course. This argument is not dissimilar from the one the Employer offers in this case.[13]

Additionally, the language of the Article 8 supports the above conclusion. The CBA provides that "vacancies shall be filled according to . . . Section 8.110." Section 8.110 provides: “vacancies occurring within the bargaining unit after the May staffing meeting shall be filled . . ." with the applicant having the greatest seniority, assuming the person is qualified. The first criteria the Board must use in filling a vacancy, assuming more than one applicant with appropriate certification, is seniority.

Section 8.120 continues with posting requirements. It begins, "Whenever a vacancy is posted, the following procedure shall be used. . . . A teacher, however, may apply for the opening within the time limit. The second paragraph of section 8.120 provides that a vacancy that occurs after the beginning of the school year is not subject to the posting, but may be filled on a temporary basis. The paragraph gives the Board leeway with regard to the posting and hiring procedures if a vacancy occurs after the beginning of the school year when a teacher

[13] One could also argue that it would be an incredibly disruptive business practice to wait until the State Count Day to hire teachers for vacancies that were apparent before or on the opening of the school year.

is unexpectedly absent, either temporarily (leave of absence) or permanently (retirement, quit, termination, or death).

Article 8 also contains transfer (both voluntary and involuntary) definitions and requirements. A teacher may request a voluntary transfer, but the request shall be made in writing and shall be kept on file for a year. Assuming a request is on file, the CBA provides ' [A request on file] will be considered for all pertinent vacancies whether or not they are posted . ."

In that statement, only two words could be in question — "will" and "pertinent." I note that with regard to voluntary transfers, the parties employed the word "will." According to *Black's Law Dictionary*[14] both "will" and "shall" invoke the mandatory. The dictionary defines "will" as "an auxiliary verb commonly having the mandatory sense of 'shall' or `must' .[15] "Pertinent," according to the *American College Dictionary*,[16] means "applying to the matter at hand."[17] Giving the language regarding voluntary transfers its normal and customary meaning, I conclude that the Board is obligated to consider a transfer request when there is a vacancy. There is no evidence that it did so in the instant case.

The second paragraph of the section states that "[e]xcept for [specified positions], a transfer may be effected without a posting provided that the teacher selected had a letter on file expressing interest in the position." This language has the same effect as the language on which the Board relies. Neither a vacancy which occurs after the beginning of the school year nor a transfer requires the Board to post the job before it is filled.

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[14]Black, Henry Campbell, West Publishing Co, St. Paul, MN, 1951.
[15] Ibid at 1771.
[16]Barnhart, C.L., Ed., The American College Dictionary, Random House, New York, 1960.
[17]lbid at p. 905

The third paragraph of Section 8.220 further supports this conclusion. It states "When filling vacancies by voluntary transfer after the May staffing meeting(s), applicants with the highest seniority . . . shall have their transfer request granted . ."

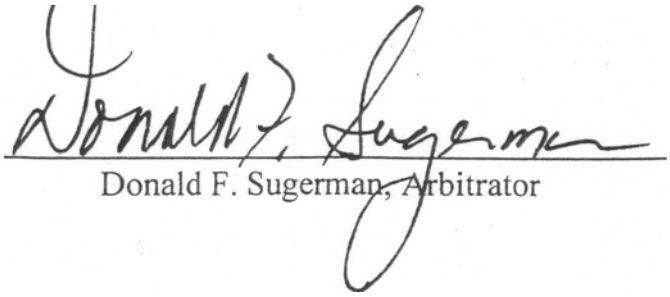
Clearly the Employer realized, or should have known, immediately prior to the opening of school that two additional teachers would be needed at Elementary School A. It did not offer to return either of the displaced teachers to the classroom. Neither teacher sought such a return. There was a vacancy and Employee 1, whose transfer request was file, was entitled to the position. Accordingly, the grievance is sustained.

SUMMARY: The goal of an arbitrator is twofold: To carry out, to the extent it can be discerned, the mutual intention of the parties in crafting the language they employed and, if possible, to give effect to all of the provisions of the agreement. 8.110 merely says that after the May Staffing meeting, a vacancy will go to the applicant with the greatest seniority. 8.120 (11 1) says when there is a posting, no opening will be filled until after the posting period(s). 8.120 ('[[2) says a vacancy after the start of the school year is not subject to the posting and hiring procedures above, but may be filled on a temporary basis. By implication, the procedures set forth below, including 8.220 (113), are not exempted and apply.

AWARD

For the reasons discussed above, the grievance is granted. Upon renewed request for the 2007-2008 school year, Grievant shall be placed in the position she should have been awarded the previous year, a class at Elementary School A or at another elementary school mutually agreed upon between the parties. A blanket injunction against violating the CBA sought by the Union cannot be granted inasmuch as most cases are driven by their unique factual situations.

This case is no exception. The decision is limited to the facts: Employee 1 had a transfer request on file at the opening of school year and there was a vacancy for which she had applied. She was entitled to fill that position.



Donald F. Sugerman, Arbitrator

August 22, 2007