

**THE MATTER OF ARBITRATION BETWEEN**

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<b>AFSCME COUNCIL 65,</b>	)	
	)	
<b>Union,</b>	)	
	)	
<b>and</b>	)	<b>WILLIAMS REASSIGNMENT</b>
	)	<b>GRIEVANCE</b>
	)	
<b>NASHWAUK-KEEWATIN SCHOOLS,</b>	)	
<b>ISD NO. 319,</b>	)	
	)	
<b>School District.</b>	)	<b>BMS Case No. 16-PA-0280</b>
	)	
	)	
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Arbitrator:	Stephen F. Befort
Hearing Date:	July 14, 2016
Post-hearing briefs received:	August 26, 2016
Date of Decision:	September 14, 2016
APPEARANCES	
For the Union:	Sarah Lewerenz
For the Employer:	Gregory S. Madsen

**INTRODUCTION**

AFSCME Council 65 (Union), as exclusive representative, brings this grievance claiming that Nashwauk-Keewatin Schools, Independent School District No. 319 (School District), violated the parties' collective bargaining agreement and a grievance settlement agreement by reassigning Mark Williams from a day shift maintenance position to an afternoon shift maintenance position. The School District contends that the grievance is not arbitrable and, in any event, that it has the inherent managerial right to make work assignment decisions. The

grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

### ISSUE

1. Is the grievance arbitrable?
2. If so, did the School District violate the parties' collective bargaining agreement by reassigning the grievant from a day shift assignment to an afternoon shift assignment?

### RELEVANT CONTRACT LANGUAGE

#### ARTICLE IV RECOGNITION

Section B.

**Inherent Managerial Rights:** The exclusive representative recognizes that the School District is not required to meet and negotiate regarding matters of inherent managerial policy, which include but are not limited to such areas of discretion or policy as the functions and programs of the District, its overall budget, utilization of technology, the organizational structure, and selection, direction, and number of personnel.

**Reservation of Managerial Rights:** The foregoing enumeration of rights and duties shall not be deemed to exclude other inherent management rights and management functions not expressly reserved herein, and all management rights and functions not expressly delegated in this Agreement are reserved to the School District.

#### ARTICLE VIII POSTINGS AND VACANCIES

Section A.

Notice of all vacancies, including temporary vacancies, and newly created positions shall be posted internally for 7 days on employees' bulletin boards, said employees shall be given seven (7) days' time in which to make application to fill said vacancies or new position's [sic]. After that time the vacancies may be posted externally. Said vacancies shall be filled on the basis of seniority, qualifications, ability, and physical fitness. Selection is to be made at the discretion of the District. A trial period of time, not to exceed thirty (30) days, shall be given the employee for the purpose of determining his/her qualifications, unless he/she is obviously not qualified.

The School Board shall make the determination as to whether or not the applicant possesses the necessary qualifications.

\* \* \*

Section C.

In filling job vacancies and new positions under this article, preference shall be given to the senior, qualified employee. In judging an employee's qualifications for the job, the following factors shall be considered:

Seniority	Efficiency
Ability to perform related work	Past experience
Attitude	Physical qualifications
Aptitude	Appropriate license(s)
Versatility	

## ARTICLE X GRIEVANCE PROCEDURE

Section C.

**Definitions and Interpretations:**

Subd. 1. **Extension:** Time limits specified in this Agreement may be extended by mutual written agreement.

Subd. 2. **Days:** Any reference to days regarding time periods in this procedure shall refer to working days. A "working day" is defined as all week days not designated as holidays by state law.

Subd. 3. **Computation of Time:** In computing any period of time prescribed or allowed by procedures herein, the date of the act, event, or default for which the designated period of time begins to run shall not be included. The last day of the period so computed shall be counted, unless it is a Saturday, a Sunday, or a legal holiday, in which event, the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

Subd. 4. **Filing and Postmark:** The filing or service of any notice or document herein shall be timely if it is personally served or if it bears a certified postmark of the United States Postal Service within the time period.

\* \* \*

Section D.

**Time Limitation and Waiver:** A grievance shall not be valid for consideration unless the grievance is submitted in writing, signed by the grievant, to the

School District's designee, setting forth the facts and the specific provision(s) of the Agreement allegedly violated and the particular relief sought within twenty (20) days after the date that the first event giving rise to the grievance occurred. Failure to file any grievance within such period shall be deemed a waiver thereof. Failure to appeal a grievance from one level to another within the time periods hereinafter provided shall constitute a waiver of the grievance. An effort shall first be made to adjust an alleged grievance informally between the employee and the School District's designee.

\* \* \*

#### Section G.

**Arbitration Procedures:** In the event that the employee and the School Board are unable to resolve any grievance, the grievance may be submitted to arbitration as explained herein:

Subd. 1. **Request:** A request to submit a grievance to arbitration must be in writing signed by the aggrieved party, and such request must be filed in the office of the Superintendent within ten (10) days\* following the decision in Level III above.

\* \* \*

Subd. 2. **Prior Procedure Required:** No grievance shall be considered by the arbitrator which has not first been duly processed in accordance with the grievance procedure and appeal provisions.

\* \* \*

Subd. 7. **Jurisdiction:** The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before him/her pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written Agreement; nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlined herein; nor shall the jurisdiction of the arbitrator extend to matters of inherent managerial policy which shall include, but are not limited to, such areas of discretion or policy as the functions and programs of the School District, its overall budget, utilization of technology, the organizational structure, and selection, direction, and number of personnel. In considering any issue in dispute, the arbitrator's order shall give due consideration to the statutory rights and obligations of the School District to efficiently manage

and conduct its operation within the legal limitations surrounding the financing of such operations.

### **FACTUAL BACKGROUND**

Mark Williams has worked as a maintenance employee with the School District since 2012. He initially was employed as a temporary maintenance helper and bid on a permanent position that was posted in October 2014. The School District awarded the permanent position to another, less senior employee, claiming that the other employee was better qualified for the position in question.

On October 23, 2014, the Union filed a grievance on Mr. William's behalf challenging that decision. Approximately one week later, the School District posted another permanent maintenance position at the high school. The posting included the requirement of a second class boiler's license and listed the hours as part of the day shift rotation. Mr. Williams was the only applicant for this position although he did not have the requisite boiler's license. The parties initially agreed that Mr. Williams would be given the position subject to the understanding that he would obtain the license within the next month. Subsequently, the School District withdrew the boiler's license requirement, and the parties entered into a written agreement on December 2, 2014 by which Mr. Williams was appointed to the position in exchange for withdrawing the October 23 grievance.

Mr. Williams worked the day shift maintenance job at the high school for the remainder of the school year. On June 15, 2015, Superintendent Richard Lahn informed Mr. Williams that he was being reassigned for the 2015-16 school year to the second, or afternoon, shift effective September 8, 2015. Superintendent Lahn testified that he decided to replace Mr. Williams with another custodian, Christina Mattson, who Lahn described as being both more senior and a better

performer. Apparently, Mattson had considered applying for the day shift position when posted, but was dissuaded by the boiler license requirement. Once that requirement was removed, Mattson expressed the belief that she should be assigned to the day shift position. Both Lahn and prior School District Business Manager Mark Case described performance deficiencies in how Mr. Williams handled the high school building's boilers and in removing ice and snow from the school's sidewalks.

The Union filed a second grievance on June 29, 2015 challenging the School District's reassignment decision. The School District denied the grievance at step 3 of the grievance procedure on September 29, 2015. By the terms of the parties' collective bargaining agreement, this denial triggered a ten-day window during which the Union could submit a written request for arbitration.

The parties disagree as to whether this timeline was met. The Union introduced a letter signed by Union representative Mark Mandich and addressed to the new Superintendent, Lance Northey, dated October 1, 2015, which stated as follows:

We have an arbitration committee with the Director, Associate Director and two lawyers. They meet once a month. They will see if it is worthy to go to arbitration. I will send an arbitration list. I will keep you in the loop. Please give the union a copy.

Superintendent Northey testified at the arbitration hearing that he never received this letter and that he never saw its contents until he received arbitration-related correspondence from the Union's attorney on January 27, 2016. Council 65 Executive Director Steve Preble testified that the Union's long-time secretary, Edonna Spokely, who is now retired, was very competent and that she undoubtedly mailed the letter to the School District. Preble also testified that Mr. Mandrich, who was ill and did not testify at the hearing, made it clear during grievance discussions that the Union would take this matter to arbitration if it was not voluntarily resolved.

## **POSITIONS OF THE PARTIES**

### **Union**

The Union contends that this grievance is arbitrable for two reasons. First, the Union claims that it mailed a letter to the School District within the agreement's ten-day window raising the possibility that the Union would advance this matter to arbitration. Second, the Union points out that Mr. Mandich expressly told School District representatives at the third step meeting that the Union would take the dispute to arbitration if a voluntary resolution was not achieved. Turning to the merits, the Union relies on the December 2, 2014 grievance settlement which specifically appointed Mr. Williams to a day shift maintenance position in exchange for withdrawing the earlier October 23, 2014 grievance. The Union argues that this agreement effectively became part of the parties' collective bargaining agreement and could not be unilaterally abrogated by the School District just six months later. Finally, the Union maintains that the School District's transfer of Mr. Williams to an afternoon position was not supported by the contract's just cause provision.

### **School District**

The School District also asserts two arbitrability arguments. The School District first claims that it never received the Union's purported letter within the agreement's ten-day timeframe. The School District further maintains that the letter was deficient in any event because it did not expressly request the submission of the grievance to arbitration. With respect to Mr. William's job transfer, the School District contends that both state law and the parties' agreement preserve the District's full discretion to determine work schedules and assignments. In addition, the School District argues that to the extent that the Union's position is predicated on

the terms of a grievance settlement agreement rather than the terms of the collective bargaining agreement, the dispute lies outside of arbitral jurisdiction.

## **DISCUSSION AND OPINION**

### **Arbitrability**

In general, arbitrators recognize a presumption of arbitrability, thereby placing the burden of proof on the party claiming the absence of jurisdiction. ELKOURI AND ELKOURI, HOW ARBITRATION WORKS 5-27 (7<sup>th</sup> ed. 2012). In this instance, the School District asserts two arguments against arbitrability, both of which are discussed below:

#### **1. The Missing Letter**

The Union maintains that it sent a letter signed by Mr. Mandich and dated October 1, 2015 to the School District that raised the possibility of arbitration. If sent, this letter would comply with the agreement's time requirements. Superintendent Northey, however, claims that he never received this letter.

The evidence in support of each contention is as follows: Union Executive Director Preble testified that Union secretary Edonna Spokely was a very capable and reliable employee, and, based on that track record, he expressed the opinion that she likely did mail the letter to the School District. The Union, however, did not elicit testimony from either Ms. Spokely or Mr. Mandich. For the School District, Superintendent Northey testified that he never received the letter. The direct evidence, accordingly, provides more support for the School District's position.

#### **2. The Letter's Message**

The letter purportedly sent on October 1, 2015 contained the following message:

We have an arbitration committee with the Director, Associate Director and two lawyers. They meet once a month. They will see if it is worthy to go to arbitration. I will send an arbitration list. I will keep you in the loop. Please give the union a copy.

The School District argues that this letter, even if timely sent, does not constitute a written “request to submit a grievance to arbitration” as required by Article X, Section G, subd. 1. At most, the School District contends, the language suggests that the Union may decide to request arbitration at some later date. The Union, on the other hand, while acknowledging that the letter could have been better written, asserts that it should be deemed sufficient to signal the Union’s interest in proceeding to arbitration.

I am generally hesitant to deny a grievance on procedural grounds. But the procedural deficiencies in this case are too substantial to ignore. The Union offers no direct evidence that the October 1, 2015 letter was actually sent. And the letter’s message, even if sent, does not request a submission to arbitration. As the leading treatise on labor arbitration states, the failure to observe clear time limits for filing and prosecuting grievances “generally will result in dismissal of the grievance if the failure is protested.” ELKOURI & ELKOURI, HOW ARBITRATION WORKS 5-29-30 (7<sup>th</sup> ed. 2012). I conclude, accordingly, that this grievance is not arbitrable.

### **The Merits**

Because the grievance is not arbitrable, it is unnecessary to determine whether the School District’s transfer of Mr. Williams violated the substance of the parties’ collective bargaining agreement.

**AWARD**

The grievance is denied on the grounds that it is not arbitrable.

Dated: September 14, 2016

  
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Stephen F. Befort  
Arbitrator