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Clfd S.D. vs Clfd Area Ed. Assoc

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CLEARFIELD AREA SCHOOL DISTRICT -vs- CLEARFIELD AREA EDUCATION
ASSOCIATION etal

CA

CLEARFIELD AREA SCHOOL DISTRICT,
Petitioner,

V.

CLEARFIELD AREA EDUCATION ASSOCIATION and SCOTT A. COLLINS,
Respondents

**IN THE COURT OF COMMON PLEAS
CLEARFIELD COUNTY, PENNSYLVANIA**

NO. 00 - 1091 - 00

CIVIL ACTION - LAW

Description of Document:

Petition to Vacate Labor Arbitration Award

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FILED

SEP 05 2000

William A. Shaw
Prothonotary

**DAVID S. MEHOLICK, COURT ADMINISTRATOR
CLEARFIELD COUNTY COURTHOUSE
CLEARFIELD, PA 16830
814-765-2641, EXT 5982**

CLEARFIELD AREA SCHOOL
DISTRICT,

Petitioner,

V.

CLEARFIELD AREA EDUCATION
ASSOCIATION and
SCOTT A. COLLINS,

Respondents

IN THE COURT OF COMMON PLEAS
CLEARFIELD COUNTY, PENNSYLVANIA

NO.

CIVIL ACTION - LAW

ORDER

AND NOW, this ____ day of _____, _____, it is hereby
ORDERED and DECREED that the Arbitrator's Opinion and Award dated August 7, 2000,
is contrary to law and, therefore, is hereby vacated.

BY THE COURT:

J.

CLEARFIELD AREA SCHOOL
DISTRICT

Petitioner

vs.

CLEARFIELD EDUCATION
ASSOCIATION and
SCOTT COLLINS

Respondents

: IN THE COURT OF COMMON PLEAS
: CLEARFIELD COUNTY, PENNSYLVANIA
:

: CIVIL DIVISION
:

: NO.
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PETITION TO VACATE LABOR ARBITRATION AWARD

NOW COMES Petitioner, Clearfield Area School District, by and through its attorneys, ANDREWS WAGNER & BEARD, by Carl P. Beard, Esquire and Andrew J. Kennedy, Esquire and, pursuant to the provisions of the Uniform Arbitration Act – 42 Pa.C.S.A. § 7301 et seq., submits the within Petition to Vacate Labor Arbitration Award, stating in support thereof as follows:

1. Petitioner, Clearfield Area School District ("School District") is a School District organized and existing pursuant to the laws of the Commonwealth of Pennsylvania, having its principal administrative offices at 4387 River Street, Clearfield, PA.
2. Clearfield Education Association ("Association") is a labor organization affiliated with the Pennsylvania State Education Association, which is recognized as the exclusive representative for collective bargaining of the professional employees of the School District.
3. Scott Collins was the Grievant in the grievance arbitration involved with the instant appeal.

4. The School District and the Association are parties to a Collective Bargaining Agreement effective July 1, 1999 through June 30, 2002. (See Appendix A attached hereto and incorporated herein).
5. The Collective Bargaining Agreement provides, pursuant to the Public Employee Relations Act (PERA), 43 P.S. § 1101.903, for arbitration of certain provisions of the Agreement.
6. Two positions became available at the Clearfield Area High School due to the retirement of two female physical education teachers who taught female students. The School District posted these vacancies on June 30, 1999.
7. Respondent Scott Collins, a member of Respondent Association, applied for a transfer to the High School for the physical education position and his transfer request was denied, since the position required supervision of female students in the locker room.
8. The positions were filled by two (2) female physical education instructors, one who applied for the position and the second who was transferred to the position by the District.
9. On July 16, 1999, Mr. Collins filed a grievance against the School District, seeking to be transferred. The grievance was denied through the grievance process and proceeded to arbitration.
10. A hearing was held on April 26, 2000 before Arbitrator Philip Parkinson.

11. By an award dated August 7, 2000, the Arbitrator sustained the Association grievance, ordering Collins to be transferred to the position. (See Appendix E attached hereto and incorporated herein).
12. By letter of August 24, Arbitrator Parkinson issued a modified Arbitration Award. See Appendix F, attached hereto and incorporated herein.
13. Arbitrator Parkinson awarded the position to Collins despite the fact that as a male teacher it is improper for him to supervise the girls locker room.
14. For that reason, Collins was not qualified for the position and the Petitioner did not violate the Collective Bargaining Agreement in denying his transfer to the position.
15. Arbitrator Parkinson's award therefore is irrational and clearly violates the essence of the Collective Bargaining Agreement.
16. To be upheld an arbitrator's award must be based on the essence of the Collective Bargaining Agreement.

This court announced the "essence" test as the standard of review for appeals of arbitrators' decisions in Community College of Beaver County v. Society of the Faculty, 473 Pa. 576, 375 A.2d 1267 (1977). Under this standard, an arbitrator's award must derive its essence from the collective bargaining agreement to pass judicial review.

Mifflinburg Area Educ. Ass'n ex rel. Ulrich v. Mifflinburg Area School Dist.,

724 A.2d 339, 342, 555 Pa. 326 (Pa. 1999).

17. Arbitrator Parkinson's decision is clearly without basis in the Agreement. The decision of Arbitrator Parkinson is without foundation in and does not flow from the Collective Bargaining Agreement.

18. The Arbitrator's opinion and award are erroneous and should be vacated for the following reasons:

A. The Award is contrary to law such that had it been a verdict of a jury that the Court would have entered a different judgment or entered judgment notwithstanding the verdict under 42 Pa.C.S.A. § 7302.

B. The arbitration award does not draw its essence from the terms of the Collective Bargaining Agreement ;

C. The arbitration award is contrary to law;

19. The Petitioner's exhibits, including the Collective Bargaining Agreement, Transcript of Hearing with accompanying exhibits, each party's brief to the Arbitrator, and the Arbitrator's Opinion and Award are submitted with this Petition for this Court's review.

WHEREFORE, Petitioner Clearfield Area School District respectfully requests that pursuant to the provisions of the Uniform Arbitration Act – 42 Pa.C.S.A. § 7301 et seq., and the Public Employee Relations Act – 43 Pa.C.S.A. § 1101.101 et seq., the arbitration award dated August 7, 2000 be vacated.

Respectfully submitted:

ANDREWS WAGNER & BEARD



Carl P. Beard, Esquire
Pa. I.D. No. 33479
Andrew J. Kennedy, Esquire
Pa.I.D. No. 80913
Attorney for Petitioner
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P.O. Box 1311
Altoona, PA 16603-1311
(814) 943-3304

Date:

CLEARFIELD AREA SCHOOL
DISTRICT

Petitioner

vs.

CLEARFIELD EDUCATION
ASSOCIATION and
SCOTT COLLINS

Respondents

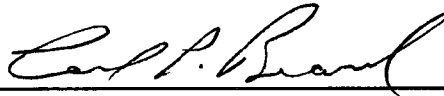
: IN THE COURT OF COMMON PLEAS
: CLEARFIELD COUNTY, PENNSYLVANIA

:
: CIVIL DIVISION

: NO.
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VERIFICATION

I, Carl P. Beard, Esquire of the law firm of ANDREWS, WAGNER & BEARD, 3366 Lynnwood Drive, P.O. Box 1311, Altoona, Pennsylvania 16603-1311, verify that the statements made in the foregoing Petition to Vacate Labor Arbitration Award are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.



Carl P. Beard, Esquire

Date:

VERIFICATION

I verify that the statements made herein are true to the best of my knowledge, information, and belief. I understand that any false statements made herein are subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

William L. Winder

William L. Winder

Printed Name

Date: September 5, 2000

CLEARFIELD AREA SCHOOL
DISTRICT

Petitioner

vs.

CLEARFIELD EDUCATION
ASSOCIATION and
SCOTT COLLINS

Respondents

: IN THE COURT OF COMMON PLEAS
: CLEARFIELD COUNTY, PENNSYLVANIA

: CIVIL DIVISION

: NO.

CERTIFICATE OF SERVICE

I, Carl P. Beard, Esquire of the law firm of ANDREWS, WAGNER & BEARD,
3366 Lynnwood Drive, P.O. Box 1311, Altoona, Pennsylvania 16603-1311, on behalf of
Clearfield Area School District, hereby certify that the Petition to Vacate Labor
Arbitration Award was served this 5th day of September, 2000,
addressed as follows:

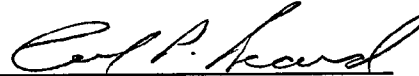
Original VIA HAND DELIVERY

Clearfield County Courthouse
230 E. Market Street
Clearfield, PA 16830

A true and correct copy to:

Randall C. Rodkey, Esquire
300 Penn Traffic Building
319 Washington Street
Johnstown, PA 15901-1668

ANDREWS WAGNER & BEARD



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ARBITRATION EXHIBITS

Joint #1	7/1/99 Agreement	Appendix A
Joint #2	Grievance Packet	
Joint #3	Position Notice for Position	
District #1	1998-99 Physical Education and health Schedule	
District #2	Timing Schedule	
District #3	Packet of documents	
District #4	1999-2000 Physical Education and Health Schedule	
Association #1	12/16/96 Position Description	
	Transcript of 4/26/2000 Hearing	Appendix B
	District Brief in Arbitration Proceeding	Appendix C
	Association Brief in Arbitration Proceeding	Appendix D
	8/7/2000 Decision of Arbitrator Philip Parkinson	Appendix E
	8/24/2000 Modified Decision of Arbitrator Parkinson	Appendix F

AGREEMENT

Between

CLEARFIELD AREA SCHOOL DISTRICT

And

CLEARFIELD EDUCATION ASSOCIATION

July 1, 1999 to June 30, 2002

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PREAMBLE

The Board of School Directors of the Clearfield Area School District and the Clearfield Education Association believe that the development and operation of educational programs of the highest quality for the benefit of the students and the community is a common responsibility which requires, for its effective discharge, consultation among the Board, the Superintendent and Administrative Staff, and other members of the Professional Staff speaking through their elected representatives. Since these groups have the same ultimate aim of providing the best educational opportunity for all pupils enrolled in the schools consistent with community resources, relations must be established and maintained which are based upon the common interest and the concept of education as a public trust and a professional calling.

The Board of School Directors, the Superintendent, the Administrative Staff, and other members of the Professional Staff can best attain their common objectives and discharge their common responsibilities if each utilizes the ability, experience, and judgment of the others in formulating policies and making decisions that involve matters of mutual concern and which affect the quality of the District's educational program. It is the purpose of this Agreement to set forth the standards governing such matters of mutual concern to the parties.

This Agreement is made and entered into by and between the Board of School Directors of the Clearfield Area School District, hereinafter referred to as the "Board" and the Clearfield Education Association, hereinafter referred to as the "Association."

ARTICLE I ASSOCIATION RIGHTS

A. Recognition

The Clearfield Education Association is hereby recognized by the Clearfield Area School District as the exclusive bargaining agent for the employees as listed on the Certification of Representative Number PERA-R-230-10 under the conditions of Pennsylvania Law (Act 195, 1970) providing for collective bargaining for public employees.

B. Term of Agreement

The term of this agreement will begin when signed by both parties and continue in force and effect July 1, 1999, to June 30, 2002. Any changes to the agreement expiring June 30, 1999, become effective July 1, 1999, unless otherwise noted.

It is agreed that either or both parties may initiate talks relative to a successor agreement by November fifteenth (15th) of the year preceding the expiration of this agreement, but in no case will negotiations commence later than January tenth (10th) of the year in which the agreement terminates.

Requests for the meeting to initiate talks will be submitted in writing by either party through the Office of the Superintendent according to Article I., Section E. A meeting time, date and place will be set by mutual consent at the conclusion of each negotiation session for the next negotiating meeting.

C. Maintenance of Membership

1. The Board agrees that all employees who are presently members of the Association shall be subject to the "Maintenance of Membership" provision as defined in Article III, Subsection (18) of the Public Employee Relations Act, Act 195, as follows: "Maintenance of membership means that all employees who have joined an employee organization or who join the employee organization in the future must remain members for the duration of the Collective Bargaining Agreement so providing with the proviso that any such employee or employees may resign from such employee organization during a period of fifteen (15) days prior to the expiration of any such agreement."
2. The Board agrees to assure the Association of proper collection of membership fees under the following conditions:
 - .1. Members having authorized payroll deductions of annual membership fees will be entitled to have such fees deducted in ten (10) equal installments commencing in September of the membership year. The employer should receive the listing of those wishing payroll deduction by September fifteenth (15th), otherwise the agreement is void.
 - .2. Members resigning prior to the completion of their membership obligations will have any balance of dues retained by the Board and forwarded to the Association.
 - .3. Employees committed to maintaining membership by a signed agreement and who pay fees by a method other than payroll deduction hereby authorize the Board to deduct in the November pay those unpaid fees necessary to bring such member up to date and thereafter to deduct according to the authorized payroll deduction plan in effect for that school year.

The Association will notify the Board of such a situation no later than November fifteenth (15th).
 - .4. The Board will provide to the President of the Association a complete alphabetical listing of professional employees with addresses, phone number, teaching assignments and building locations by the opening day of school for the current school term.

D. Fair Share

Each non-member in the bargaining unit represented by the Association shall be required to pay a fair share fee as provided for by Act 84 of 1988. The District and the Association agree to comply with all the provisions of said law. The Association agrees to extend to all non-members the opportunity to join the Association

E. Improvement of Instruction

1. The Board will establish policy and support measures to assure an atmosphere conducive to learning. The Board expects the maintenance of such policy to be the responsibility of the entire staff, which includes administrators.
2. The Board and the Clearfield Education Association are committed to general improvement in the quality of instruction by reducing, wherever feasible and practicable, class size and teacher load.
3. Participation in workshops, seminars, travel experiences and other like meetings organized to promote the general improvement of the schools and/or professional advancement will be encouraged by both the Board and the Association. Arrangements for these activities will be worked out cooperatively by the Board and the Association.
4. The Board and Administration will continue to involve professional employees on committees regarding curriculum and instruction. Further, building- and district-level liaisons will continue in order to promote a quality educational program.

F. Meet and Discuss

A meeting with the Board or representatives thereof will be arranged within fifteen (15) days of such request. The Board will notify the Association of time and place of such meeting within seven (7) days of the original request. Meetings may be arranged on shorter notice by mutual agreement. Special meetings will be arranged through the Office of the Superintendent.

G. Information

The Board will make available to the Association the same information that is supplied to the School Board members. Such information as committee reports and Board minutes will be provided thirty (30) minutes prior to the Board meeting. All other public information which is in the keeping of the Board and pertinent to the operation of the school system will be made available to representatives of the Association upon request.

H. **Bulletin Boards**

The Association will have the right to use building bulletin boards to post material it deems in the interest of the Association or its members. The Head Teacher of each elementary building will exercise discretion as to the appropriateness of such materials if posting is in the areas frequented by students. Posting in secondary buildings will be confined to faculty room bulletin boards.

I. **General Meetings**

During the general session of the first professional day of each school year the Association will be afforded thirty (30) minutes to meet with all new professional employees. The Association will also be afforded an opportunity to make announcements (not to exceed fifteen (15) minutes) at any or all professional meetings.

J. **Released Time**

1. Released time will be provided for the operations and functions of the Association. For such released time, the Association agrees to reimburse the employer for the cost of securing a substitute.
2. Whenever any representatives of the Association or any employees participate during working hours in negotiations or grievance proceedings, if authorized by the Superintendent, they shall suffer no loss of pay.

K. **Savings**

Any alteration in teaching conditions, benefits, and policies now in effect and/or as covered in this agreement shall be subject to grievance action.

L. **Severability**

If any provision of this agreement is held to be contrary to law, then such provision will be deemed valid only to the extent permitted by law, but all other provisions of this agreement will continue in full force and effect. The parties will meet not later than thirty (30) days after any such holding for the purpose of renegotiating the provision or provisions affected.

ARTICLE II EMPLOYEE RIGHTS

A. School Year

1. School Calendar - Recommendations for inclusion in the school calendar by the Association will be presented no later than March 15th of the preceding year. No school year will commence before August 20th nor end after June 15th of the subsequent calendar year without the consent of the Association. Once the calendar has been adopted, it may not be extended except by mutual consent or to make up lost days over which the employer has no control.
2. Work Year - The work year will not exceed 183 days. One of those days shall be designated as the opening or in-service day prior to enrolling students for the year. One day will also be designated as an in-service day to be held on the day prior to or immediately following school closing.

B. Teaching Hours, Load, and Conditions

1. The school day will not begin before 7:30 AM and not end later than 3:45 PM. No school day will exceed seven (7) hours and twenty (20) minutes in length, which includes thirty (30) minutes duty-free lunch period. Any employee may agree to an earlier starting time or later quitting time, by mutual consent.
2. Teachers will make reasonable effort to fulfill their professional obligations before leaving the building. The obligations will include and be limited by the following:
 - .1 Appointments for the parent conferences after school and during planning periods scheduled with the teacher's consent. This provision does not apply to I.E.P. conferences;
 - .2 Any meetings after instructional hours will not exceed sixty (60) minutes;
 - .3 A maximum of three (3) meetings per month outside of instructional hours may be held. Notice for such meetings will be given two (2) days in advance. All meetings will be limited to Monday after school for Middle School and High School.
3. The work week for grades 6-12 will include:
 - .1 No more than six (6) hours and fifty (50) minutes per day not including thirty (30) minutes duty free lunch.
 - .2 No less than five periods for planning per week.

.3 Non-instructional periods as assigned. A non-instructional responsibility shall be defined as a non-academic supervision of students in an instructional area or some other area of the building. These specified areas would normally be in the hallway, reasonably adjacent to the teacher's own classroom. Responsibility for restrooms will rest with teachers assigned to those areas; however, teachers will not be stationed in the restrooms. Teachers will not be assigned to supervise students in the food serving area of the cafeteria, but may be assigned to the area designated as the student lounge. A teacher shall not be offered a period of teaching assignment in lieu of the non-instructional responsibility. Supervised study will not exceed a ratio of one teacher per forty-five (45) students.

.4 Teachers shall be assigned to no more than 260 minutes of instruction per day, which would include labs. Any assignments beyond 260 minutes per day will be compensated at the rate of 1/7 of the per diem rate. It is understood that assignment during activity period to sponsor a club or organization, to supervise a subject area or laboratory, or such other similar responsibility is part of the normal workday and, as such, does not require any additional reimbursement. The extra class will be in lieu of a planning period.

C. **Evening Obligations**

Obligations, which require the teacher to return to school in the evening, include the following:

1. Parent visitations - not to exceed the following each year:
 - .1 Elementary (K-5) Level – Three (3) one-half (1/2) hour visitation periods per year will be attended.
 - .2 Middle School (6-8) Level – Two (2) one and one half (1 ½) visitation periods per year will be attended.
 - .3 High School (9-12) Level – One (1) two (2) hour visitation period per year will be attended.
2. The Head Teacher will designate representatives to attend the PTA/PTO Business Meetings to a maximum of six (6) meetings.

D. **Absence from Meetings**

Reasonable requests to be excused from meetings enumerated in B and C above, will be honored.

E. **Substituting**

Teachers may agree to substitute for fellow teachers under the following circumstances:

1. A teacher may agree to substitute for another teacher without reimbursement so long as the absent teacher does not suffer loss of wages nor deduction from sick leave for such absences.
2. A teacher will be reimbursed \$22.50 for each period of substitution for other teachers.
3. Teachers who are asked and consent or volunteer to teach an extra class will be reimbursed at the rate of one seventh (1/7) of his/her per diem salary. The extra class will be in lieu of a planning period.
 1. The assignment and acceptance of an extra class of extended length (greater than ten (10) days) will be given to the employee with the greatest amount of seniority as described by Article II., Paragraph L. For the purposes of this provision, however, seniority is limited to the department in which the class occurs.
4. Teachers volunteering to substitute may also choose the option of accumulating six (6) periods of substitution without reimbursement and receive, in lieu thereof, a day (Compensatory Time) for which they may be absent without loss of pay. The use of such compensatory time shall be limited to the conditions and restrictions pertaining to personal leave days. At the conclusion of each school year the employee will receive payment for portions of a day remaining.

In no case will a teacher be expected to substitute against his/her wishes, either with or without reimbursement. However, in the event of an extreme emergency and a substitute cannot be obtained, a teacher may be assigned during his/her planning period with a reimbursement as set forth above.

F. **Duty Free Lunch**

All professional staff members will have a one-half (1/2) hour duty-free lunchtime as provided by law.

G. **Teaching Stations**

Insofar as possible, classroom teachers will not be required to change teaching stations more than three (3) times during a school day.

H. **Leaving Buildings**

Professional employees may leave the building without requesting permission during their scheduled duty free lunch and/or their planning periods. The teacher will inform the office of his or her departure. It is understood that every effort will be made to minimize time out of the building during planning periods, since this time is intended for instructional planning purposes.

I. **Planning Time**

1. Elementary plan time shall be without responsibility for the supervision of students and will be no less than the planning time of other professional staff members (middle and high school).
2. Employees at the elementary level will be granted no fewer than thirty (30) consecutive minutes planning time at some time during the day.
3. Regular elementary teachers may also leave their classes for planning purposes while instruction in art, music, physical education, or library science is being conducted by specialists who are certified teachers.
4. Middle school (6-8) professional staff will have no less than five (5) plan periods per week.
5. The high school professional staff will have no less than five (5) plan periods per week.

J. **Non-Teaching Duties**

1. The Board and the Association acknowledge that a teacher's primary responsibility is to teach and that his/her energies should be utilized to this end. Non-teaching assignments will be limited to the following:
 - .1 Elementary (K-5)
 - a. Collection of cafeteria and milk envelopes will be done on the first day of the week and, in case of a child's absence, the collection will be made the following day. After recording information from the envelopes, they shall be sent to the Head Teacher, who will be responsible for sending them to the proper authority. Monthly totals of

school lunches will not be the responsibility of the professional employee.

- b. Picture money will be received by the teacher and sent daily to the Head Teacher, who will be responsible for sending it to the proper authority.

.2 High School (9-12)

- a. All professional staff will help to supervise or assist in one (1) of the following end of year activities: Baccalaureate, Commencement or Graduate's Reception, Prom, Senior Breakfast, or General End-of-the-Year Committee.

.3 Other Non-Teaching Assignments

- a. Unless separate remuneration is made, every effort will be made to keep cafeteria, sidewalk, street crossing, bus loading and unloading responsibilities to a minimum and equitably distributed among staff.

- .4 Daily attendance will be reported to the office by the employee. State registers will be maintained by the office.

K. **Vacancies, Qualifications, and Assignments**

- 1. **Vacancies** - All staff vacancies ninety (90) school days or more in duration, including newly created positions and supplementary employment, must be announced to all staff members and an opportunity given to all qualified personnel to apply for a vacant position. Professional staff members will be given priority for such positions except that athletic supplemental positions will be given to the most qualified applicants as determined by the Board. Where it is determined that qualifications are equal, seniority in the school district shall prevail.

Announcement of such available positions must clearly state qualifications necessary, and a job description will be available in the Superintendent's office. Such announcements must be made at least two (2) weeks prior to filling the vacant positions.

- .1 During the school year, such notice will be published in a bulletin and distributed to each building.
- .2 During the period school is not in session, the employer will notify any interested members of the Bargaining Unit of any vacancies that occur in

their area of certification, provided they leave a stamped, self-addressed envelope in the Superintendent's Office at the end of each school year.

- .3 Request for reassignment must be made to the principal within one (1) week from the time of the initial notification.
 - .4 An active and current file will be maintained and reviewed periodically in the Superintendent's Office for those employees requesting said changes in employment.
 - .5 Applications for advertised positions will be available in the Superintendent's Office.
 - .6 The Board has the discretion to delay the reassigned employee's movement into the new position until the first day of the next semester.
2. Request for Reassignment - Teachers may request reassignment to any position that will be vacant for ninety (90) days or more in their area of certification.
 3. Reassignments between Buildings - Building to building reassignment of teachers will not be made without sufficient notice and mutual agreement.
 - .1 Thirty (30) day notice, except in an emergency, will be given to teachers when a reassignment is to be made.
 - .2 The teachers involved in reassignment will have the opportunity to discuss this with the administrator in charge so that the rationale for the move can be understood.
 - .3 Where staff vacancies may incur a chain of transfers, transfer days will be set by the CEA President and the Superintendent no sooner than ten days after the close of the posting periods.
 - .4 Staff members interested in the vacancies, which occur in their area of certification, will be present at the transfer day or will provide a written proxy to the CEA President or another member to apply on their behalf. All transfers are to be filled according to seniority.
 - .5 A transfer day for all vacancies occurring between the last day of the school year and two weeks prior to the beginning of the next school year will be held two weeks before the school year begins.
 4. Available Candidates - Teachers should make the Board aware, through the office of the Superintendent, of any qualified candidate for any open position.

5. Certification - The Board and the Association agree that a person employed will be properly certified. The minutes of the Board meetings will contain a statement regarding the certification of each new employee.
6. Substitutes - Each building principal or head teacher will maintain a current list of available substitutes, along with their degree and area of certification. Such information will be forwarded by the Superintendent to the head teacher. The Association may secure a copy in the Superintendent's office. In consultation with the principal or head teacher, the teacher may recommend the substitute.
7. Teaching Schedule - All teachers will be provided with a tentative assignment for the ensuing year no later than the last day of school in the Spring. Changes that become necessary throughout the summer months will be communicated promptly to the person(s) involved, but in no case later than thirty (30) days prior to the opening of school, except in an unforeseen circumstance. In the event that a teacher's assignment is changed within the thirty (30) days prior to the opening of school, he/she shall be offered one (1) additional inservice day to use for preparation.

L. Seniority

1. Definitions - Seniority means the status of employees with respect to total length of continuous service with the employer. Seniority shall be computed from the employee's first day worked following the most recent date of hire.
2. Accrual - Seniority shall continue to accrue during:
 - .1 Time loss because of an occupation-related accident or disease compensable under existing law.
 - .2 Suspensions, furloughs, and all approved leaves of absence.
 - .3 The use of sick leave.
 - .4 Time spent as a full-time substitute immediately preceding employment as a full-time employee.
3. Tie In Seniority - In the event two or more employees begin work on the same date, their seniority rank shall be determined by lottery, unless one employee has more service in the District in a professional position as a permanent substitute contiguous to receiving a regular contract.
4. Uses of Seniority - All reassignments, transfer, and furloughs will be made with due process and, if not voluntary, will be based on District seniority. This shall be accomplished with the least number of assignment changes.

- .1 Changes of assignment within a building's subgrouping (level, team, or department) will be made only after consultation between the principals and teachers involved. If there are no volunteers, teachers with the least District seniority within the building, then, within the level, team or department will be reassigned.
- .2 Transfers from building to building will be made only after consultation between the principals and teachers involved. If there are no volunteers, teachers with the least District seniority will be transferred to a vacant position in another building.
- .3 Furloughing of staff will take place only after all avenues of avoiding suspension have been pursued, i.e. reassignment or transfer (considering cross-certification). The district will then furlough the teacher(s) with the least district seniority.
- .4 Temporary professional employees hired after August 31, 1996, shall have no bidding rights to a vacant position. However, they shall possess the right to bump a less senior employee in their area of certification if their position is eliminated.

M. Evaluation

1. All monitoring or observation of the work performance of a professional employee will be conducted openly and with full knowledge of the employee in accordance with the Professional Employee Evaluation and Rating Policy adopted in 1974, or subsequently adopted evaluation policy.
 - .1 The Board agrees to use the PDE-5501 form as the method of recording professional evaluations. It also agrees to eliminate any use of numerical ratings. Seniority rights acquired within the District will prevail if all teachers are rated satisfactory, as there will be no substantial difference in ratings.
 - .2 No negative or unsatisfactory evaluation of an employee shall be made unless the evaluator has made specific suggestions for improvement in writing.
 - .3 Employee's work evaluation shall be based solely on personal observation by the evaluator.
2. No professional employee will be required to submit to evaluation by any person except those authorized to do so by the Pennsylvania Public School Code of 1949, as amended.

3. The professional employee will be given a copy of the written report on any evaluation within ten (10) school days. Either the employee or the person making the evaluation may request a conference after such a report has been given.
4. Appointment for observation other than by school personnel will be handled through the principal or head teacher. Notification will be given to the teacher involved, who has the right to deny such a request.
5. An employee shall have the right to review all the contents of his/her file and be afforded the opportunity to reproduce any or all of the contents at the employee's expense. The employee also has the right to have representatives of the Association present during such a review. Confidential information will not be part of this file.
6. No file or record derogatory to the employee will be maintained other than that file which is available to the employee.
7. No complaint against a teacher will be made a part of any record or file without the teacher's knowledge and opportunity for rebuttal.

N. **Absence Due to Illness**

1. **Absence Without Pay** - A teacher who is unable to teach because of personal illness or disability and who has exhausted all sick leave and eligibility for sabbatical leave, if applicable, will be granted a leave of absence without pay for a period of one (1) year from the date of exhausting all other leave privileges.
2. **Job Related Injury** - Absence due to job related injury incurred in the course of a teacher's employment shall not be charged against the teacher's sick leave days and the Board shall pay to such teacher the difference between his/her salary and the benefits received under the Worker's Compensation Act of Pennsylvania, with a limitation of the maximum of thirty (30) days for which the Board shall be liable.
3. **Accounting** - Upon request, teachers will be given a written accounting of accumulated sick leave and the accumulation of personal days used.
4. **Childrearing Leave** - The parent, upon the birth or adoption of a child, will be given the option to take a temporary leave of absence not to exceed one (1) year.
5. **Benefits** - The Board agrees to maintain in effect any fringe benefits, which can be maintained while the employee is on authorized leave. In cases where the

leave is without pay (District payroll), the employee will reimburse the school district for the cost of maintaining such benefits in effect if the carrier approves.

6. Return from Leave - Upon return from authorized leave, the employee will be returned to precisely the position, which he/she held prior to the leave. Extra duty responsibilities will be held for only one year. In the event the position formerly held has been eliminated or altered, the employee, by seniority rights, may claim the position most comparable to the one previously held.

O. **Protection of Employees**

1. Unsafe and Hazardous Conditions - Teachers will not be required to work under unsafe or hazardous conditions nor perform tasks, which endanger their health, safety or well being.
2. Reasonable Force - While on school premises, a teacher may use such force as is reasonably necessary to protect himself/herself from an unprovoked attack by a pupil, to protect another person or property, to quell a disturbance threatening physical injury to others, or to obtain possession of lethal weapons upon the person of the pupil.
3. Financial Loss - In the event any professional employee is charged as a result of performing his/her professional duties, the Board will make every effort to assist the employee to recover or minimize any financial loss suffered by him/her if the action is dismissed or a decision is rendered in his/her favor.
4. Personal Property - The Board will make a reasonable effort to help employees recover cost of personal property stolen or destroyed in connection with his/her employment, providing school policy has been followed.
5. Just Cause - No professional employee will be dismissed, reduced in rank, professional status or compensation without just cause. This will in no way restrict or deny the professional employee's or temporary professional employee's rights under the School Code.
6. Transporting Students - No member of the Bargaining Unit will be required to transport pupils in other than school owned vehicles.
 - .1 School nurses, guidance counselors and Title I home visitors are authorized to use personal vehicles to transport pupils in the performance of their regular duties with the School District. All employees authorized to use private vehicles for school use will be reimbursed for mileage at the rate approved by the Internal Revenue Service.

- .2 No member of the Bargaining Unit will be required to maintain a minimum amount of automobile insurance, other than required by law, to drive a personal vehicle to, on, and from school property and during school hours except those privately owned vehicles being used on authorized school business.
- .3 During the period of this contract, the Board agrees to make the professional employee an additional insured under the non-owned portion of their automobile liability policies to the limits of \$200,000.00 per person and \$1,000,000.00 per accident for bodily injury and \$50,000.00 property damage attributable to the use of the privately owned vehicle being used on authorized school business; such authorization to be given only those professional employees for whom documentary evidence of primary liability coverage of \$50,000.00 per person and \$100,000.00 per accident for bodily injury and \$10,000.00 property damage is held by the Board.
- .4 The Board also agrees to carry an accidental death policy in the amount of \$50,000.00 for those public employees traveling in a motor vehicle on school business as per the above authorization.

P. **Required Meetings**

The Association recognizes the supervisory right of the Board and the rights of supervisory and administrative personnel to enter into consultation with any employee at any time; however, when any professional employee is required to appear before the Superintendent, Board or any committee thereof concerning any matter which could adversely affect the continuation of that employee in his office, position of employment or the salary or any increments pertaining thereto, then he will be given prior written notice of the reasons for such meeting or interview, and will be entitled to have a representative of the Association or legal counsel present to advise him/her during such meeting or interview. If an employee is suspended pending charges and decision is later rendered in his favor, the employee will be reinstated with accrued service time and compensation for that time away from employment.

That if the principal has consultation with any employee at any time that could result in the imminent suspension or discharge, then the principal must give notice that the employee can have CEA representation if he/she so desires.

ARTICLE III - EMPLOYEE BENEFITS

A. Paid Leaves of Absence

1. During the period of this contract, teachers shall be entitled to the following leaves of absence with full pay each school year:

- .1 Personal Leave - Professional employees will receive three (3) days of personal leave, accumulative to seven (7). The teacher is required to give a request three (3) days in advance (not a reason). In any school year when the employee's leave accumulates to more than four (4) up to a limit of seven (7), the employee must either use the days in excess of four (4) or exercise one of the following options:

- a. Receive \$50.00 per day for those days in excess of four (4);
 - b. Convert the unused personal days (those in excess of four (4) to sick leave. The days converted to sick leave will not be deducted from the total accumulated sick leave for retirement or death benefit.

The days of leave are subject to the following conditions:

- c. The three (3) days notice or ratio per building may be waived in cases of extreme emergency.
 - d. Each request must be dated and will be honored on the following ratio:
 - .1 If 1-20 teachers are employed in the building, two (2) teachers may take personal leave;
 - .2 21 or more teachers are employed in the building, seven (7%) percent of the number of teachers employed in that building may take personal leave on the same day.

These will be granted on a "first come -- first served" basis.

- .2 Legal Leave - Time necessary for appearance in any legal proceedings connected with the member of the Association's employment or with the school system at the request of the Board except in litigation against the school district.

- a. In the event an employee is selected for jury duty, the employer will pay the difference between the amount received for such service and the per diem salary of the employee.

B. Unpaid Leaves of Absence

1. Employees will be eligible for leave without pay and subject to the conditions set forth below:
 - .1 Leaves for those purposes and to the limits authorized in the School Code.
 - .2 A leave of absence for two (2) years will be granted to any employee for the purpose of serving the Association either as a full-time officer or on its staff.
 - .3 A maximum leave of two (2) years will be granted for foreign study or teaching positions. Such leave will be authorized only after completion of five (5) years of service to the District.
 - .4 The Board will grant non-paid leave for any employee to serve one term in any governmental office to which he/she may be elected.

C. Insurance Provisions

1. Medical Insurance

The employer will maintain medical insurance as is in operation under Blue Cross Plan Code 363 and Blue Shield Plan Code 865 and as currently provided under Group #51765-01 or comparable thereto. Such coverage will be available to all members of the bargaining unit. In the case of spouses who are both employed as professionals by the District, only one shall be entitled to primary coverage, and the other shall be covered as a dependent only. In consideration of this, any family affected will receive an annual payment of \$1,000. This payment will be made the last pay in June of each year. In the event that the relationship which provides the coverage for the dependent spouse is terminated through death, divorce, or other event, the dependent spouse shall be entitled to reinstate his/her own primary coverage without a lapse in benefits. In such case, the \$1,000 June payment shall be pro-rated to account for the time during which the employee was carried as a dependent during that year. Any bargaining unit member may choose the aforementioned option by signing a waiver of employer paid hospitalization premiums. Further, no alteration in carrier or coverage will be made without knowledge and consent of the Association Executive Committee who shall not unreasonably refrain from granting such consent. The maximum reimbursement amount for major medical is \$1,000,000.

2. Dental Insurance

The employer will maintain Dental Insurance as provided by Blue Cross/Blue Shield Plan IV or comparable thereto. Such coverage, including single, two-party and three-party will be available to all members of the bargaining unit.

Further, no alteration in carrier or coverage will be made without the knowledge and consent of the Association. Any alteration will be in accordance with the provisions for alteration included in III. C., Paragraph 1 above.

3. Prescriptions

The employer will maintain prescription insurance equal to that provided by the Blue Cross/Blue Shield plan. Such coverage, including single, two-party and family plans will be available to all members of the bargaining unit with a \$5.00 deductible for generic drugs and \$10.00 deductible for brand name drugs. This will include a mail order drug plan.

4. Life Insurance

The present Group Term Life Insurance will be maintained at \$35,000.00 Group Term Life.

5. Income Protection

.1 Benefits Payable - A daily benefit equal to seventy percent (70%) of an employee's daily rate of pay, to a maximum benefit of \$100.00 per work day, will be paid beginning with the first workday following expiration of all accumulated sick leave, but not prior to the (21st) workday of disability. During each period of disability, benefits are payable for the workdays of total disability which fall within two (2) years for sickness and five (5) years for accident.

.2 Integration with other Income Benefits - The daily benefit payable from this plan will be reduced by the amount of any of the following benefits for which the employee qualifies upon his application:

- a. Any wage, salary, or other income received from a present or past employer, including salary received while on Sabbatical Leave.
- b. Any governmental (federal, state, or political subdivision thereof) disability or retirement benefit, including Public School Employees' Retirement System of Pennsylvania and Social Security (both primary and dependent benefits). If the Social Security Act is amended to

increase the Old Age, Survivors, and Disability Insurance benefits from this plan, the benefits being received from this plan will not be affected by such increase.

- c. Workers' Compensation, Occupational Benefit Law or similar legislation.
- d. Any disability insurance plan for which the school district makes a contribution or provides payroll deduction.

If the employee is entitled to a Monthly Benefit under this plan and to "Other Income Benefits" and if the sum of the Scheduled Monthly Benefit specified under the Schedule of Benefits and "Other Income Benefits" for the same month exceeds an amount equal to seventy percent (70%) of the monthly salary of the employee, the Monthly benefit payable under this plan will be the Scheduled Monthly Benefit reduced by the amount of such excess. For this purpose, "Other Income Benefits" shall include all other income benefits to which the employee becomes entitled (whether or not the employee applies for such benefits) under:

- .1 any disability insurance plan for which his employer makes contribution or provides payroll deductions,
- .2 any wage, salary, or other income received from his past or present employer,
- .3 Workers' Compensation Law, Occupational Disability Benefit Law, or similar legislation or
- .4 any governmental (federal, state, or political subdivision thereof) disability or retirement plan, including Social Security (both primary and dependent benefits) and the benefits payable under the provisions of the Public School Employees' Retirement System.

If, however, the Social Security Act is amended so as to increase the Old Age, Survivors and Disability Insurance benefits after the employee became entitled to receive Monthly Benefits hereunder, "Other Income Benefits" shall not include the amount of such increase affected during this current period of disability.

- 6. Continued Insurance Benefits - Each employee retiring or furloughed from the service to the Clearfield Area School District may, upon payment of premiums or a prorated share of the trust cost, continue to receive all insurance benefits

provided in the collective bargaining agreement and all improvements in subsequent agreement until said employee attains the age of 65.

C. Employee Sponsored Provisions

1. Educator's Income Protection Plan – This plan is available to the full-time employees of the school district by means of payroll deductions.
2. Tax Sheltered Annuity – This plan is available to all full-time employees district by means of payroll deduction under authority of action by the Board in its November 23, 1964 meeting.
3. Community Projects – The Board, upon signed authorization by the employee, will provide payroll deductions of monthly pledges to community projects such as United Way, Industrial Aid, etc.

D. Other Employee Benefits

1. Severance Pay – Any employee whose service is terminated by death or retirement is eligible for severance pay equal to thirty dollars (\$30.00) per day of unused sick leave while in the employ of the Clearfield Area School District in accordance with retirement policies of the Public School Code, Section 1122. This provision will not become part of the contract of the employee.

Notification of Termination – The employee must notify the Board of intention to retire by May fifteenth (15th) or within sixty (60) days of retirement, if retirement is necessitated during the school year due to disability. This sixty (60) day requirement would be waived in the case of an emergency enforced retirement. This retirement benefit will be paid no later than June 30th following retirement. In the case of death, the beneficiary will be paid within sixty (60) days of the death of the employee.

2. Military Service – Military service time for which the employee is eligible to purchase retirement will also be regarded as service time for establishing proper step on the salary schedule including eligibility for service increments.
3. Early Retirement Benefit - Any employee with twenty-five (25) or more credit years of service in the retirement system, and at least ten (10) years of service to the Clearfield Area School District will be eligible for the following termination benefit:

- .1 The employee may choose to receive \$10,000.00 as the full termination benefit within thirty (30) days of service termination, or

.2 Payment of hospitalization coverage to age 65 to include spouse if appropriate and dental coverage at the option of the employee. Total benefit under this second option shall not exceed \$12,000.

.3 This provision shall expire on June 30, 2002.

ARTICLE IV. EMPLOYEE SALARIES

A. Base Salaries

1. Base salary shall be defined as those salaries appearing in Article IV. A., Schedule of Base Salaries. The base salary of current bargaining unit members will be determined by the Step Placement Scale (see Appendix A). The District, at its discretion, may place new hires who have service outside the District on the salary schedule on any step up to the employee's years of service. For example, if a new hire has six years' service in another district, the employer may hire that employee on any step of the salary schedule from Step 1 to Step 6. When properly certified personnel cannot be obtained to fill a position, and the same is demonstrated, the Employer may deviate from the foregoing and place new hires on the salary schedule as needed. The Employer shall not act arbitrarily or capriciously in such cases.
2. After 1989-90, a full step of service will be added to the employee's salary schedule placement if the person has completed at least ninety-two (92) or more days of service during the prior year. This relates only to employees under contract and those hired immediately after a full time substitute position in the District.

SCHEDULE OF BASE SALARIES

1999-2000		2000-2001		2001-2002	
1	25,500	1	27,000	1	28,000
2	27,551	2	28,500	2	29,500
3	31,086	3	31,500	3	32,000
4	33,766	4	33,766	4	33,766
5	34,666	5	34,816	5	35,416
6	35,896	6	36,046	6	36,646
7	36,876	7	37,026	7	37,626
8	37,846	8	37,996	8	38,596
9	38,816	9	38,966	9	39,566
10	39,796	10	39,946	10	40,546
11	40,766	11	40,916	11	41,516
12	41,736	12	41,880	12	42,486
13	42,716	13	42,866	13	43,466
14	43,688	14	43,836	14	44,438
15	44,656	15	44,775	15	45,400
16	45,636	16	45,775	16	46,390
17	46,606	17	46,705	17	47,360
18	47,586	18	47,705	18	48,206
19	48,556	19	49,055	19	49,665
20	50,702	20	51,495	20	52,495

B. Service Increments

All professional employees will receive service or anniversary increments of \$100.00 at the completion of thirteen (13) years, fifteen (15) years, twenty (20) years, twenty-five (25) years, and thirty (30) years of service.

C. Professional Growth Increments

1. Non-Graduate Program – Post Bachelor of Science in Education (Level I) and Non-Master's degree programs and/or Inservice credits will be reimbursed at the rate of \$100.00 increments at the completion of eight (8), sixteen (16), and twenty-four (24) credits for professional growth or permanent certification.
2. Graduate Program – Approved Master's Degree Program will receive one hundred dollars (\$100.00) increment at the completion of six (6), twelve (12), eighteen (18), twenty-four (24), and thirty (30) credits inclusive. The earned Master's Degree will receive one thousand-two-hundred-fifty dollars (\$1,250.00) and the earned Master's Equivalent will receive seven hundred dollars (\$700.00) above the Bachelor's Degree salary. Requests to receive salary adjustments under this section must be submitted with proper verification no later than the 15th of September or the 15th of February for the second semester, which will be prorated for the year.

Note: The accumulated amount receivable for credits under C.1 and C.2 will not exceed \$600.00.

3. Post-Graduate Program – Beyond Master's Level

- .1 For the achievement of each fifteen (15) graduate level credits (#400 or above) the employee will receive three hundred dollars (\$300.00) to a maximum of forty-five (45) credits (\$900.00). Any employee now receiving monies under this provision, as determined by previous definition or interpretation, will not suffer reduction of those monies.
- .2 For the achievement of each ten (10) inservice, or any combination of inservice and post-baccalaureate credits, the employee will receive one hundred fifty dollars (\$150.00) up to maximum of sixty (60) credits (\$900.00).
- .3 Seven hundred-fifty dollar (\$750.00) increment after completion of a doctorate degree. This increment is in addition to those acquired above.
4. Increments awarded consistent with the above Qualification in 1983-84 or thereafter cannot be disallowed. Any increments already awarded, correctly

or incorrectly, cannot be reduced unless such award was the result of the employee supplying false documentation.

D. Statement of Salary

At the end of each school term, the employee will be given the following information:

1. Base salary for the following school term.
2. Number of unused sick leave days.
3. Accumulated personal days.

E. Employment Beyond School Work Year

Those employees who are employed for the entire calendar year because of seasonal activities, as well as those who are requested by the Board or administrative staff to work beyond the regular contract, will be compensated at a daily rate of 1/183 of the employee's base salary for each day of employment to a maximum of 220 days.

F. Curriculum/Staff Development

Teachers shall be compensated at the rate of twelve dollars (\$12.00) per hour for curriculum/staff development activities.

G. Individualized Educational Program

During the normal workday, released time shall be authorized at the discretion of the supervisor. The supervisor shall also have the discretion to authorize development of IEP's and conferences with parents outside the normal workday to be paid at the rate of \$15 per hour, up to a maximum of 40 hours.

In addition, up to eight hours or one day during the summer shall be approved at the discretion of the supervisor for scheduling, to be paid at the rate of \$15 per hour.

H. Additional Duty

Employees who are contracted to work on a school district sponsored project beyond the school work year will be paid an hourly wage of twelve dollars (\$12.00) per hour. This includes Saturday School and/or Extended Day Suspension.

I. **Trainer/Instructor**

Trainer/instructor for staff development, adult education, summer school, incarcerated students, homebound instruction, summer music, and driver education shall be compensated at the rate of fifteen dollars (\$15.00) per hour. Consideration will be given for additional hours required for planning purposes.

J. **Miscellaneous Supplementals**

Employees who perform duties of additional need that are not included in the list of activities, but that have been approved by the administration shall be compensated eight dollars (\$8.00) per hour.

K. **Loss of Salary**

Loss of salary resulting from absenteeism will be computed on a per diem rate of 1/183 of the employee's professional salary. Employee's receiving Supplemental Payments will likewise have their income reduced by the cost to the district for replacement services.

L. **Payment of Salary**

Employees will have the option of receiving their pay in ten or twelve equal installments. Those selecting the ten-pay option will receive their pay on the last Friday or the last working day of each month, whichever comes first. The final payment will be made on the closing day of the school year. Those choosing the twelve-pay plan will likewise be paid on the last Friday or the last working day, whichever occurs first, with the exception of June, July, and August when payments will be made on the last Friday of each month.

M. **Tuition Fees**

1. **Post-Baccalaureate Credits** - Tuition fees of seventy dollars (\$70.00) per post-baccalaureate credit will be reimbursed to members of the bargaining unit who satisfactorily complete courses. Such courses must qualify for college credit or have the approval of Central Intermediate Unit #10. Such credits must qualify for permanent certification credit or be in the area of certification.
2. **Masters, Doctorate and Post-Graduate Credits** - Credits in an approved Master's or Doctorate Program or for Graduate Level courses in the employee's teaching/certification area will be reimbursed at ninety percent (90%) of the cost of the credit with a maximum payment of one hundred-sixty dollars (\$160.00) per credit. Graduate level courses outside the employee's discipline will be reimbursed at one hundred dollars (\$100.00) per credit but must have prior approval of the Superintendent.

3. Payment - Credit reimbursement shall be made in October, March, and June. Payments will be made on the basis of a receipted voucher for the school attended, and the applying teacher showing source of payment and a college transcript or grade sheet.
4. Return to Employment - Failure of a teacher to return to employment in the District at the beginning of a school term will relieve the District of obligation for payment for post-baccalaureate credits begun after the close of the preceding school term.
5. Payment from Other Sources - Credits that are paid for or partially paid for by another source will not qualify for reimbursement to the extent that payment is made.

N. **Athletic School Events**

Persons with duties at athletic or other school events will be compensated at the rate of twenty (\$20.00) per event. Bargaining unit employees will be given priority when assignments are arranged. All bargaining unit members will receive a complimentary pass to all school events inclusive in this clause.

Article V. EXTRA PAY FOR EXTRA DUTY

A. Building and Class Related Activities

	1999-00	2000-01	2001-02
Department Chair			
More than two (2) but less than six (6) persons	1,413	1,462	1,513
Six (6) persons –	1,557	1,611	1,668
plus \$ for each person over six (6)	69	72	74
Head Teacher			
Base –	2,176	2,252	2,331
plus \$ for every room over three (3)	141	146	151

Definition of Every Room Over Three: This would be an additional classroom of students with a full-time teacher. In order for a teacher to qualify as a full time teacher, he/she must spend at least 75 percent of his/her instructional time within the building of one head teacher for a full student school year (180 days).

Note: Salary for head teacher with over three (3) rooms and department chairpersons with over (6) department members will also receive the appropriate increases for the duration of the contract.

B. Non-Class Related Activities

	1999-00	2000-01	2001-02
Dramatics Coach	1,088	1,126	1,165
Per major production			
Assistant Dramatics Coach	621	643	665
Per major production			
Musical Dramatics Coach	1,200	1,242	1,285
Per major production			
Assistant Musical Dramatics Coach	800	828	857
Per major production			

	1999-00	2000-01	2001-02
Show Choir Advisor	900	932	964
H.S. Music Advisor	5,594	5,790	5,993
H.S. Flags/Majorettes	2,659	2,752	2,848
M.S. Music Advisor	1,244	1,288	1,333
Yearbook Advisor	2,171	2,247	2,326
Assistant Yearbook Advisor	800	828	857
H.S. Newspaper Advisor	800	828	857
Student Council Advisor			
High School	1,398	1,447	1,498
Middle School	555	574	594
Elementary (each except 2 at Clearfield)	300	311	321
Bus Ramp Supervisor	3,728	3,859	3,994
Cafeteria Supervisor	3,728	3,859	3,994
Class Advisor			
Grade 9	700	725	750
Grade 10	800	828	857
Grade 11	1,000	1,035	1,071
Grade 12	900	932	964
Planetarium Coordinator	2,953	3,056	3,163
Detention Supervisor	3,728	3,859	3,994
M.S. Media Coordinator	3,728	3,859	3,994
H.S. Media Coordinator	3,728	3,859	3,994
Elementary Media Coordinator	3,728	3,859	3,994
Elementary Media Assistant Coordinator	1,000	1,035	1,071
Mentor	555	574	594

C. Athletics

	1999-00			2000-01			2001-02		
	1	2	3	1	2	3	1	2	3
<u>Football</u>									
Head Coach	4,476	5,034	5,594	4,633	5,210	5,790	4,795	5,393	5,993
Varsity Assistant	2,363	2,659	2,952	2,446	2,752	3,055	2,532	2,848	3,162
Junior Varsity	2,113	2,376	2,637	2,187	2,459	2,729	2,264	2,545	2,825
9 th Grade	2,113	2,376	2,637	2,187	2,459	2,729	2,264	2,545	2,825
7 th /8 th Grade	1,491	1,677	1,865	1,543	1,736	1,930	1,597	1,796	1,998
Elementary	422	n/a	n/a	437	n/a	n/a	452	n/a	n/a

	1999-00			2000-01			2001-02		
	1	2	3	1	2	3	1	2	3
<u>Basketball – Boys/Girls</u>									
Head Coach	4,476	5,034	5,594	4,633	5,210	5,790	4,795	5,393	5,993
Varsity Assistant	2,363	2,659	2,952	2,446	2,752	3,055	2,532	2,848	3,162
Junior Varsity	2,113	2,376	2,637	2,187	2,459	2,729	2,264	2,545	2,825
9 th Grade	2,113	2,376	2,637	2,187	2,459	2,729	2,264	2,545	2,825
7 th /8 th Grade	1,491	1,677	1,865	1,543	1,736	1,930	1,597	1,796	1,998
Elementary	422	n/a	n/a	437	n/a	n/a	452	n/a	n/a
<u>Wrestling</u>									
Head Coach	4,476	5,034	5,594	4,633	5,210	5,790	4,795	5,393	5,993
Varsity Assistant	2,363	2,659	2,952	2,446	2,752	3,055	2,532	2,848	3,162
Junior Varsity	2,113	2,376	2,637	2,187	2,459	2,729	2,264	2,545	2,825
9 th Grade	2,113	2,376	2,637	2,187	2,459	2,729	2,264	2,545	2,825
7 th /8 th Grade	1,491	1,677	1,865	1,543	1,736	1,930	1,597	1,796	1,998
Elementary	422	n/a	n/a	437	n/a	n/a	452	n/a	n/a
<u>Baseball</u>									
Head Coach	2,363	2,659	2,952	2,446	2,752	3,055	2,532	2,848	3,162
Varsity Assistant	1,619	1,821	2,023	1,676	1,885	2,094	1,734	1,951	2,167
Junior Varsity	994	1,118	1,242	1,029	1,157	1,285	1,065	1,198	1,330
<u>Track</u>									
Head Coach	2,736	3,077	3,418	2,832	3,185	3,538	2,931	3,296	3,662
Varsity Assistant	1,619	1,821	2,023	1,676	1,885	2,094	1,734	1,951	2,167
Middle School Head	905	1,014	1,130	937	1,049	1,170	970	1,086	1,211
Middle School Asst.	714	806	894	739	834	925	765	863	957
<u>Golf</u>									
Head Coach	2,363	2,659	2,952	2,446	2,752	3,055	2,532	2,848	3,162
<u>Swimming</u>									
Head Coach	2,736	3,077	3,418	2,832	3,185	3,538	2,931	3,296	3,662
Assistant	1,619	1,821	2,023	1,676	1,885	2,094	1,734	1,951	2,167
Var. Asst./Diving	904	1,017	1,130	936	1,053	1,170	969	1,090	1,211
<u>Cross Country</u>									
Head Coach	2,363	2,659	2,952	2,446	2,752	3,055	2,532	2,848	3,162
Varsity Assistant	1,619	1,821	2,023	1,676	1,885	2,094	1,734	1,951	2,167
<u>Volleyball – Girls</u>									
Head Coach	2,363	2,659	2,952	2,446	2,752	3,055	2,532	2,848	3,162
Varsity Assistant	1,619	1,821	2,023	1,676	1,885	2,094	1,734	1,951	2,167
Junior Varsity	994	1,118	1,242	1,029	1,157	1,285	1,065	1,198	1,330
<u>Cheerleader</u>									
Fall Varsity Football	828	n/a	n/a	857	n/a	n/a	887	n/a	n/a

	1999-00			2000-01			2001-02		
	1	2	3	1	2	3	1	2	3
Fall Varsity Assistant	518	n/a	n/a	536	n/a	n/a	555	n/a	n/a
Grade 9/Middle Sch.	414	n/a	n/a	428	n/a	n/a	443	n/a	n/a
Winter Var. Bsktball.	725	n/a	n/a	750	n/a	n/a	776	n/a	n/a
Winter Var. Wrest.	725	n/a	n/a	750	n/a	n/a	776	n/a	n/a
Winter Var. Asst.	518	n/a	n/a	536	n/a	n/a	555	n/a	n/a
Grade 9/Middle Sch.	414	n/a	n/a	428	n/a	n/a	443	n/a	n/a
<u>Softball – Girls</u>									
Head Coach	2,363	2,659	2,952	2,446	2,752	3,055	2,532	2,848	3,162
Assistant	1,619	1,821	2,023	1,676	1,885	2,094	1,734	1,951	2,167
Junior Varsity	994	1,118	1,242	1,029	1,157	1,285	1,065	1,198	1,330
M.S. Head	905	1,014	1,130	937	1,049	1,170	970	1,086	1,211
M.S. Assistant	714	806	894	739	834	925	765	863	957
<u>Soccer</u>									
Head Coach	2,363	2,659	2,952	2,446	2,752	3,055	2,532	2,848	3,162
Varsity Assistant	1,619	1,821	2,023	1,676	1,885	2,094	1,734	1,951	2,167
Junior Varsity	994	1,118	1,242	1,029	1,157	1,285	1,065	1,198	1,330
M.S. Head	905	1,014	1,130	937	1,049	1,170	970	1,086	1,211
M.S. Assistant	714	806	894	739	834	925	765	863	957
<u>Tennis-Boys&Girls</u>									
Head Coach	1,619	1,821	2,023	1,676	1,885	2,094	1,735	1,951	2,167
<u>Asst. Athletic Dir.</u>	3,200	3,600	4,000	3,312	3,726	4,140	3,428	3,856	4,285
<u>Photographer</u>	n/a	n/a	1,651	n/a	n/a	1,651	n/a	n/a	1,651

D. **Guidelines**

1. The Head Coach of each sport, with approval of Board and Administration, shall place people at the levels he/she feels they will be most effective taking into consideration experience, performance, and responsibility.
2. The salary for any newly created position filled by an Association member will be negotiated by the Board and the Association.
3. No one can hold more than two extra pay for extra duty positions, unless a position cannot be filled by the staff. In this case, additional positions above two (2) will be declared open by the staff member holding the positions on a yearly basis.
4. All extra curricular duties held by non-members of the professional staff will be declared open annually.

5. Coaches, as recommended by the head Coach of each activity, may receive payment of salaries for themselves and their staffs by either of the following methods:
 - .1 They may opt to have their payments made of the remaining pay periods commencing with the month in which that activity is initiated. It would be the duty of the Head Coach to notify the business office of such commencing.
 - .2 They may choose to be paid during the duration of the activity or sport. The Head Coach must notify the business office of the initiation and conclusion of the activity.

ARTICLE VI. GRIEVANCES

A. Definitions

1. "Grievance" will mean a complaint by a professional employee or a group of the same, that there has been a violation, misinterpretation, or misapplication of this agreement, any policy, rule, order, or regulation of the Board of School Directors.

B. General Principles

1. Nothing contained in this grievance procedure will be construed to deny any professional employee his constitutional rights.
2. The failure of a professional employee to proceed to the next step of the grievance procedure within the time limits set forth will be deemed to be acceptance of the decision previously rendered and will constitute a waiver of any future appeal concerning the particular grievance. The failure of an administrator at any step to communicate his decision to the professional employee within the specified time limits will permit the employee to proceed to the next step. The number of days indicated at each level should be considered as maximum and every effort should be made to expedite the process.

The time specified may, however, be extended by mutual agreement in writing by the authorized representative of each party.

3. In the event of a professional concern is filed on or after May 15, the person or persons initiating the alleged grievance may, at their option, choose to substitute the term "calendar days" in place of "school days" at all steps of the grievance procedure, in order to expedite the process over the summer months. The choice of this option must be made in writing along with the initial presentation of the alleged grievance.
4. A professional employee may seek and use the assistance of a designated representative of a voluntary professional organization at any step in the presentation and/or appeal of any grievance. Such assistance will include, but not be limited to, the direct representation of a professional employee at all steps of the grievance procedure including the calling of witnesses.
5. The Board will use every means at its disposal to assure to every professional employee the unobstructed use of this grievance procedure without fear of reprisal or without prejudice in any manner to his professional or employment status.

C. Grievance Procedure

In the event a dispute arises between the Association and the Board concerning a violation, misinterpretation, or misapplication of this agreement, any policy, rule, order, or regulation of the Board, the parties agree that the following grievance procedure shall be used to resolve the dispute:

1. Step One – Person or persons initiating the alleged grievance shall present the grievance in writing to the first level supervisor within five (5) school days after its occurrence. The written grievance shall indicate the date of the grievance and define in specific terms the manner which the aggrieved party was harmed, injured, or suffered loss. Before action is taken on the alleged grievance, an oral conference between both parties shall be held within two (2) school days. The first level supervisor shall reply to the grievance in writing within five (5) school days after the oral conference.
2. Step Two – If the action in Step One above fails to resolve the grievance to the satisfaction of the affected, the grievance shall be referred to the Office of the Superintendent within five (5) school days after receipt of written reply in Step One.
Before action is taken on the alleged grievance, an oral conference between both parties shall be held within five (5) school days. The Superintendent shall reply to the grievance in writing within five (5) school days after the oral conference.
3. Step Three – In the event that the aggrieved professional employee is not satisfied with the disposition of his/her grievance at Step Two, and if he/she desires further action, he/she may within ten (10) school days after receipt of the response at Step Three, request a review by the Board of School Directors. The Board of School Directors will have twenty (20) calendar days to conduct a hearing, with all involved parties present, on the matter. Within ten (10) school days of the hearing, the Board shall inform the aggrieved party in writing of the disposition of the grievance. A copy will be sent to the President of the Association.
4. Step Four – If the Board and grievant are unable to agree upon a disposition of the grievance, the Association may request arbitration of the grievance by filing a notice with the Superintendent, which notice must be received within twenty (20) school days after the decision in Step Three is received or due.

The parties shall within five (5) school days of the notice to proceed to arbitration attempt to agree on a mutually acceptable arbitrator. If the parties fail to agree on an arbitrator, both parties must request within twenty (20)

school days of the notice to proceed to arbitration that the Pennsylvania Bureau of Mediation submit a list of seven (7) possible arbitrators.

The parties shall, within seven (7) school days of the receipt of said list, select an arbitrator by alternately striking one name from the list until one name remains. The Employer shall strike the first name.

The arbitrator shall have no power or authority to add to, subtract from, or modify the provisions of this agreement in arriving at a decision of the issue or issues presented and shall confine his decision solely to the application and interpretation of this agreement.

The decision of the arbitrator shall be final and binding on both parties, except where the decision would require an enactment or amendment of a State statute, in which case it shall be binding only if such statute is enacted or amended. The arbitrator shall be requested to issue his decision within thirty (30) days after the hearing or receipt of the transcript of the hearing.

All the time limits contained in this Section may be extended by mutual agreement.

During the summer, days shall mean weekdays that the main office is open.

All fees and expenses of the arbitrator shall be divided equally between the parties. Each party shall bear the cost of preparing the presentation of its own case. Either party desiring a record of proceedings shall pay for the record and make a copy available without charge to the arbitrator.

D. Rights of Teacher's to Representation

Any aggrieved person may be represented at all stages of the grievance procedure by himself/herself, or at his/her option, by a representative selected or approved by the Association.

E. Rights of the Association

The Association shall have the right to be present and to state its views at all stages of the Grievance Procedures.

F. Form for Filing of Grievance

Name of Complainant _____ Date Filed _____

Home Address _____

Home Telephone No. _____ No. of Years in
School System _____

Name of School and
School Address _____

Principal _____ School
Telephone No. _____

Building Representative _____

Provisions of Master Agreement/School Policy alleged violated:

Statement of Grievance (specific terms or manner in which grievant was harmed):

Action Requested:

Signature of the Complainant

Article VII NO LOCK OUT - NO STRIKE

A. No Lock Out - No Strike Provision

Both parties agree to faithfully abide by the provisions of the Public Employee Bargaining Law, Act 195. As a condition of the various provisions of this agreement to which the parties have agreed, the Board pledges that it will not conduct, or cause to be conducted, a lock-out during the term of this agreement, and the Association pledges that members of the Association will not engage in strike (as the term is defined in Act 2195) during the term of this agreement.

SIGNATURES

IN WITNESS WHEREOF, the parties to this Agreement, intending to be legally bound hereby, have caused this Agreement to be executed by their proper officers.

CLEARFIELD AREA SCHOOL DISTRICT

By James B. Davis
Signature
President
Title

Attest:

Thomas Regmon

CLEARFIELD EDUCATION ASSOCIATION

By Marianne McCloskey
Signature
President
Title

Attest:

Garry N. Barton

Signed this 15th day of November, 1999.

APPENDIX A

Clearfield Area School District Step Placement

Contract Step	COMPLETED YEARS OF SERVICE			
	1998-1999	1999-2000	2000-2001	2001-2002
1	0	0	0	0
2	1	1	1	1
3	2	2	2	2
4	3	3	3	3
5	4-5	4	4	4
6	6	5-6	5	5
7	7-8	7	6-7	6
8	9-10	8-9	8	7-8
9	11-13	10-11	9-10	9
10	14-15	12-14	11-12	10-11
11	16	15-16	13-15	12-13
12	17-18	17	16-17	14-16
13	19	18-19	18	17-18
14	20-21	20	19-20	19
15	22	21-22	21	20-21
16	23-24	23	22-23	22
17	25	24-25	24	23-24
18	26-27	26	25-26	25
19	28-29	27-28	27	26-27
20	30+	29+	28+	28+

Clearfield Area School District

ADMINISTRATIVE OFFICES

POST OFFICE BOX 710 438 RIVER STREET
CLEARFIELD, PENNSYLVANIA 16830
814-765-5511 FAX 765-5515

The following is a side letter between the Clearfield Education Association and the Clearfield Area School District. This side letter was developed as a result of the most recent negotiations for a new successor contract running from July 1, 1999 through June 20, 2002.

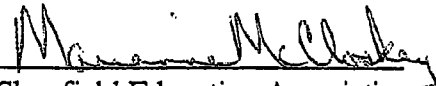
As part of the give and take exchange, a new provision was arrived at under Article III, B.1. of the contract that eliminates double coverage in those cases of spouses who are both employed as professionals by the District. It is understood and agreed that based upon the contract language that only one shall be entitled to primary coverage and the other should be covered as a dependent only. In consideration of this, any family affected will receive an annual payment of \$1,000.

After this language had been negotiated between the parties, the Association inquired as to whether the "opt out" payment could be made available to any bargaining unit member.

The discussions surrounding the addition of this phrase arose in situations where professional employees of the District may have spouses (non-District employees) who have paid medical or health insurance through another employer and the bargaining unit member may want to take advantage of the provision where spouses are employed as professionals by the District.

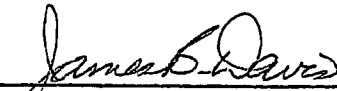
In so doing, certain questions arose as to what the impact, if any, would be of permitting any bargaining unit member who did not have a spouse employed as a professional employee to take advantage of the "opt out" provision.

Accordingly, it is the intent and understanding between Clearfield Area Education Association and Clearfield Area School District that in the event that the language "**any bargaining unit member may choose the aforementioned option by signing a waiver of employee paid hospitalization premiums**" would have the impact causing all members of the bargaining unit to be taxed for the health insurance premium cost, it is understood that the aforementioned bolded phrase would be null and void permitting the remainder of the provision, Article III, B.1. to survive.


Clearfield Education Association

Date

11/15/99


Board of School Directors

Date

11/15/99

ARBITRATION PROCEEDING

* * * * *

IN RE: CLEARFIELD EDUCATION
ASSOCIATION

vs.

CLEARFIELD AREA SCHOOL
DISTRICT

GRIEVANCE: Awarding of Vacancy,
Scott A. Collins

BEFORE: PHILIP PARKINSON,
Arbitrator

HEARING: Wednesday, April 26, 2000
10:10 a.m.
Clearfield School District
Administration Building
Mill Road
Clearfield, PA

WITNESSES: Scott A. Collins,
Edward Wilson Vokes,
Patricia Smith, John Law,
Judy Nisewonger,
William Wunder

Reporter: Heather E. Diemer

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A P P E A R A N C E S

RANDALL RODKEY, ESQUIRE

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Johnstown, PA 15901

COUNSEL FOR THE EDUCATION

ASSOCIATION

CARL BEARD, ESQUIRE

3366 Lynnwood Drive

P.O. Box 1311

Altoona, Pa 16603

COUNSEL FOR THE SCHOOL DISTRICT

I N D E X

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WITNESS: Scott A. Collins

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WITNESS: Edward Wilson Vokes

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WITNESS: Judy Nisewonger

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E X H I B I T S

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One 7/1/99 agreement 7

Two Grievance packet 9

Three Position notice for position 9

Association Exhibits:

One 12/16/96 position Description 28

District Exhibits:

One '98-'99 phys. ed. and health schedule 81
Two Timing schedule 86
Three Packet of documents 93
Four '99-'00 phys. ed. and health schedule 95

6
1 P R O C E E D I N G S
2 -----

3 ARBITRATOR PARKINSON:

4 This is a grievance
5 involving the Clearfield
6 Education Association and the
7 Clearfield School District. At
8 the outset, I would like to ask
9 you if you have any exhibits
10 you'd like to submit as jointly
11 agreed to exhibits.

12 ATTORNEY RODKEY:

13 I suppose. I didn't
14 really discuss this with Carl.
15 Probably a copy of the
16 grievance.

17 ARBITRATOR PARKINSON:

18 And what about the
19 contract, the collective
20 bargaining agreement?

21 ATTORNEY RODKEY:

22 The collective
23 bargaining agreement would be
24 Joint One if he has a copy of
25 it.

7
1 ATTORNEY BEARD:

2 We have the current one.

3 ATTORNEY RODKEY:

4 It's effective from this
5 year through.

6 ARBITRATOR PARKINSON:

7 This is the agreement
8 between the Clearfield Area
9 School District and the
10 Clearfield Education
11 Association dated July 1, 1999
12 to June 30, 2002. This will be
13 Joint One.

14 (Joint Exhibit One marked
15 for identification.)

16 ATTORNEY RODKEY:

17 We have what I'll
18 suggest as Joint Exhibit Two
19 which would be the grievance
20 packet. It's dated July 16th,
21 '99. Attached to that I have a
22 July 21st letter from Tim
23 Meckey, the middle school
24 principal, denying the
25 grievance; a July 21st letter

8
1 from Patricia Smith, the
2 superintendent discussing ---
3 or to Pat Smith, I'm sorry,
4 from Sue Nagle, our grievance
5 chairman, moving the grievance
6 on to the next level. Then we
7 have an August 18th, 1999
8 letter from the District signed
9 by Pat Smith, superintendent,
10 setting the board level
11 hearing.

12 What is not in the
13 packet is the letter that Mr.
14 Beard provided me with this
15 morning, which is addressed to
16 Mr. Collins. He does not
17 recall receiving the letter and
18 none of our Association people
19 do. And it's an August 1st
20 letter from Ms. Smith giving
21 her response at the
22 superintendent's level. I
23 don't have additional copies of
24 that at this point, so we did
25 --- well, we'll have that, take

9
1 Mr. Collins'. So that would be
2 collectively Joint Two.

3 (Joint Exhibit Two marked
4 for identification.)

5 ARBITRATOR PARKINSON:

6 I want to go off the
7 record because I want to take a
8 few minutes to look through
9 these.

10 OFF RECORD DISCUSSION

11 ATTORNEY RODKEY:

12 One final thing then,
13 Mr. Parkinson, the posting
14 notice for the position
15 involved. That would be
16 Exhibit Three.

17 (Joint Exhibit Three marked
18 for identification.)

19 ARBITRATOR PARKINSON:

20 We have Joint Exhibit
21 Three as being the revised
22 posting notice of July the 2nd
23 of '99. Does that conclude the
24 joint exhibits?
25

ATTORNEY RODKEY:

Yes.

ARBITRATOR PARKINSON:

Do you have any stipulations you'd like to offer?

ATTORNEY RODKEY:

None that I'm aware of.

ARBITRATOR PARKINSON:

We'll proceed then with the case. If you have opening remarks, this would be the time.

ATTORNEY RODKEY:

Just briefly. You had an opportunity to review the grievance and it fairly well sets forth the nature of the case.

This is a grievance filed as a result of the Grievant, Mr. Collins, not being granted a vacancy position as a high school phys. ed. instructor for which he applied. The posting is Joint

11

Exhibit Three, which is an amended posting or revised. And I think it was revised only to add the fact that there were two high school phys. ed. vacancies available.

The Grievant will testify that in response to the posting he applied for one of the two positions.

The positions were filled, one by a Jackie Morrison, who is a more senior teacher than Mr. Collins, the second position was filled by a Jana Grant who is a less senior instructor to Mr. Collins.

The collective bargaining agreement provides, on page nine, I believe, Paragraph K under Article Two, I think it is, that professional staff members will be given priority for position. And where qualifications are

equal, seniority in the District will prevail. It also provides that announcement of available positions clearly state qualifications necessary and that a job description be available to the superintendent's office.

As the Arbitrator can determine from looking at the postings, there were no qualifications set forth. The Grievant will testify that he is a certified health and phys. ed. instructor. And our position is that based on the posting, based on the job description, based on the collective bargaining agreement, he should have been granted the transfer to fill the vacancy.

ARBITRATOR PARKINSON:

Thank you. Mr. Beard, do you have opening remarks?

13

ATTORNEY BEARD:

Sure. I believe the issue is just a little more complicated just looking through page nine of the collective bargaining agreement. What you have here is a school district, a high school, it has about a thousand, a little over a thousand students who are split somewhat equally between about 501 boys and about 504 girls or vice versa.

Back in 1998, we had two resignations and retirements from the District. Two female phys. ed. instructors at the high school had retired. Actually, the District had to go about the task of filling those positions. What the District has done in this particular instance is to look to the educational needs of the

District. I know Mr. Rodkey has cited a contract provision that this simply says seniority shall prevail.

But I think it's important for the Arbitrator to also keep in mind that on page one of this agreement there is a preamble that actually talks about decisions and working towards goals and objectives that are in the best interest of the students and the programs throughout the District.

The heart of the matter is is that the District has never completely bargained away its ability to determine the qualifications for a position here in the District. And I think that case law in Pennsylvania, especially the springboard cases under Brickhouse and some of the its

progeny has indicated that ability on the part of an employer.

In this particular case, Mr. Collins had applied for a phys. ed. position at the high school. The District previously had, I guess, two and a half positions up there that were occupied by females that were then and are now. The District had indicated that it was not meant to grant this request for a transfer to the high school and that this was communicated by the superintendent, Mr. Collins.

I noted there have been discussions between the parties. There have been board-level hearings in regard to this particular issue and the employer believes in the best interest of the District it has the ability to carry out

its programs in the manner it deems fit.

As far as the issues go, I think it's going to be very patent and clear, when we go through some of the testimony, that the locker room, which is one of the issues here for coverage, is an extension of the classrooms.

Over the years I've had tons and tons of cases where everybody says that it's the province of the professionals from the time the students enter into that time slot until they leave, it's the province of the professional employee. The time is counteracted as instructional time and the District believes that by having Mr. Collins there it cannot carry out its program.

And essentially the District's position has also

been made quite clear that he is not qualified for the position based on the operational needs of that particular position. And we can put on the testimony of the superintendent as well as individuals who are familiar with the programs and they themselves who are phys. ed. instructors.

ARBITRATOR PARKINSON:

Thank you. Proceed now with the witnesses.

ATTORNEY RODKEY:

I just might state at this point, Mr. Parkinson, that probably a large part of our case will be put on in rebuttal as we have not been provided, or at least have never received, the District's response under date of August 1st until this morning. We had anticipated some of the things

1 that they might say, so I want
2 to reserve probably the largest
3 part of my case for rebuttal.

4 ARBITRATOR PARKINSON:

5 We'll proceed then.

6 ATTORNEY RODKEY:

7 I'll call Mr. Collins.

8 Do you want the witnesses
9 sworn?

10 ARBITRATOR PARKINSON:

11 Sure. Go ahead, swear
12 them all, everybody that is
13 going to testify.

14 WITNESSES SWORN EN MASSE

15 SCOTT A. COLLINS, PREVIOUSLY SWORN,
16 CALLED TO TESTIFY

17 DIRECT EXAMINATION

18 BY ATTORNEY RODKEY:

19 Q. State your name for the record,
20 Mr. Collins?

21 A. Scott A. Collins.

22 Q. And you are the individual
23 Grievant in this case; is that
24 correct?

25 A. Yes.

19

1 Q. What is your certification as a
2 teacher with the Commonwealth of
3 Pennsylvania?

4 A. I possess a kindergarten
5 through 12th grade health and phys.
6 ed. teaching certificate.

7 Q. When were you hired by the
8 District?

9 A. Six years ago.

10 Q. And what year would that be
11 then? I'm not very good at math.

12 A. '93-'94 school year.

13 Q. Okay. Were you hired as a
14 health and phys. ed. teacher?

15 A. I was hired as an eighth grade
16 health instructor my first
17 employment, yes.

18 Q. And that was in what building?

19 A. The high school.

20 Q. So you taught eighth grade
21 health for how long?

22 A. Four years.

23 ARBITRATOR PARKINSON:

24 Did you say it was in
25 the high school?

1 A. In the high school, yes.

2 BY ATTORNEY RODKEY:

3 Q. Were you then moved to the
4 middle school building?

5 A. When the eighth grade moved to
6 the middle school building, I had to
7 transfer into the middle school
8 building, yes.

9 Q. And when did that happen?

10 A. Last year was our first year
11 back.

12 Q. And was there a reorganization
13 within the District for reconfiguring
14 in the school?

15 A. The new elementary school was
16 completed so our middle school housed
17 a large portion of the elementary
18 students and that vacated the eighth
19 grade.

20 Q. So eighth grade went from the
21 high school to the middle school?

22 A. Yes.

23 Q. Once in the middle school, what
24 did you then teach?

25 A. I'm on an every-other-day

21

1 rotating basis for health and phys
2 ed.

3 Q. What does phys. ed. involve?

4 A. Teaching male and female
5 students that I have in my health
6 class and it's a variety of
7 individual and team activities.

8 Q. Traditionally include what we
9 come to think of as gym, gym classes?

10 A. Yes.

11 Q. How many students do you have,
12 Scott?

13 A. Approximately 25 to 30 per
14 class.

15 Q. And how many classes?

16 A. I teach five.

17 Q. And is that phys. ed?

18 A. Health and phys. ed.

19 Q. How many phys. ed. classes do
20 you teach?

21 A. Again, five. It's the every
22 other day.

23 Q. So health one day, phys ed. ---
24 ?

25 A. Yes.

1 Q. So you have 25 to 30 per class;
2 is that correct?

3 A. Yes.

4 Q. And are they male and female?

5 A. Correct. Yes.

6 Q. Just tell us a little bit of
7 what the physical education
8 curriculum involves, what sort of
9 hands-on stuff?

10 A. We pretty much parallel with
11 the traditional fall time, winter
12 time, spring time sports, soccer,
13 gymnastics, softball. There's some
14 lead-up games, there's warm-ups. It
15 varies with the weather. I also work
16 with two other professionals who have
17 sixth and seventh grade. And I sort
18 of correspond with sharing equipment
19 at the same time.

20 Q. Do you have both males and
21 females in your classes?

22 A. Yes.

23 Q. What's the approximate
24 breakdown between male and female?

25 A. 50/50. I would say that is

1 fair.

2 Q. Okay. And is there locker room
3 time involved before and after your
4 phys. ed. classes?

5 A. As far as changing clothes
6 prior to class and at the end of
7 class?

8 Q. Right.

9 A. Yes.

10 Q. And you're able to deal with
11 that both for the male and for the
12 female students; is that correct?

13 A. I go into the male locker room
14 and one of the females --- there is
15 another instructor that does the
16 supervision.

17 Q. So the gender differences are
18 provided for; is that correct?

19 A. Yes.

20 Q. How much time is spent in the
21 locker room before and after the
22 class?

23 A. Approximately three to five
24 minutes, four minutes is usually a
25 very appropriate time. We find that

1 the more time that is granted in
2 there, the more off-task behavior
3 occurs. So the less the better.

4 Q. And what's the purpose of the
5 time in the locker room before and
6 after class?

7 A. Changing clothes.

8 Q. Did you give an estimate?

9 A. Yes, three to five, four, it
10 varies.

11 Q. Okay. What's the length of
12 class?

13 A. Forty-two (42) minutes.

14 Q. Is that the same in the high
15 school; if you know?

16 A. I believe so.

17 Q. When did you become aware of
18 the phys. ed. vacancy in the high
19 school?

20 A. We are provided with updated
21 posting of vacancies through various
22 means and I became aware of the
23 reference of the notice by checking
24 at the middle school that the
25 postings are commonly on the bulletin

1 board.

2 Q. I'm going to show you what's
3 been marked Joint Exhibit Three and
4 ask you if that's the posting that
5 you were made aware of?

6 A. That would be it, yes.

7 Q. And without reading the whole
8 thing, we can all do that, but down
9 under the positions there's grade
10 one, two, three and so forth. And
11 then the last position is high school
12 health/phys. ed. teacher; is that
13 correct?

14 A. That's correct.

15 Q. Anywhere on the document that
16 refers to what qualifications would
17 be necessary for that?

18 A. No, just high school phys. ed.
19 position.

20 Q. All right. When you saw the
21 posting, what did you do in response
22 to that?

23 A. I jotted a brief letter of
24 interest to that and I submitted that
25 to the personnel director.

Q. Okay. And who would that be?

A. Mr. Bob Rishel is that person.

Q. And what happened after that, Scott?

A. I attended the transfer days to fill the position and that position was not brought up at that transfer day. So there was no transfer time for that and that was held at the middle school library that day.

Q. All right. So the position wasn't even discussed at transfer day?

A. No.

Q. What did you do after that or what happened next?

A. I approached Mr. Rishel and asked him why it was not and that was when he summoned Ms. Smith to discuss the matter.

Q. And did you learn that you weren't going to be offered the position?

A. Yes.

Q. And who was given the two

27

positions? Who were the teachers?

A. At that date of the transfer, I was only aware of Jackie Morrison.

Q. And she's a more senior teacher to you?

A. Yes.

Q. When did you learn who the other position was given to?

A. Towards the end of the summer. I do not have a specific date, but it was prior to the school year starting.

Q. And I do believe we all agree it was Jana Grant; is that correct?

A. Yes.

Q. And she is a less senior teacher to you?

A. Correct.

Q. Did you have any other discussion with the District before filing the grievance or what did you do then?

A. I just followed the due process and contacted the union representative and we started with

the building level grievance and that was held with Mr. Tim Meckey.

Q. Okay. And we've also introduced the grievance, Scott, and it's been agreed to. Now, Scott, I'm going to show you what I'll label Association Number One. And that is entitled, Clearfield Area School District Position Description. It's dated December 16th, 1996.

(Association Exhibit One
marked for identification.)

BY ATTORNEY RODKEY:

Q. Do you have that in front of you?

A. Yes.

Q. And is this the position description for the teacher of physical education?

A. Yes.

Q. And did you review this prior to today's hearing?

A. No, I did not.

Q. Okay. Then there are the questions.

29

A. I mean, I am aware of it, but not this specific one.

Q. You're aware of the job description?

A. Yes.

ATTORNEY RODKEY:

And we may have to have Mary --- do you have any objection to this, Carl? I can have Maryann testify as to how we got it.

ATTORNEY BEARD:

No. Are you just going to show it to him and ask him questions?

ATTORNEY RODKEY:

I don't even know if I'm going to ask him any questions about it. I'm just going to put it in.

ARBITRATOR PARKINSON:

Any objection?

ATTORNEY BEARD:

No.

ATTORNEY RODKEY:

I won't try to qualify it. We just move the admission of Association Number One.

ARBITRATOR PARKINSON:

You may cross examine.

CROSS EXAMINATION

BY ATTORNEY BEARD:

Q. Mr. Collins, just going back here when you first started to testify, you indicated that the students have about three to five minutes for changing clothes.

A. Uh-huh (yes).

Q. Is that three to five minutes at the beginning and three to five minutes at the end?

A. That would be yes. I have the tendency to give a little bit more time, so I'd say three to five. It's probably three minutes at the beginning of class. It's not a fashionable time that they can just dress with their attire. At the end the students return back to their classroom, take a little personal

31

pride, you know, to dress for the balance of the school, so that would be more of the four to five minutes as the post-class.

Q. Okay. And during that period of time that they're changing, where are you?

A. Supervising and a variety of places depending on if I have other staff members monitoring the gymnasium. I might be in the hallway. I might be in my office. I shouldn't say my office, it's Mr. Billotte's office, so a variety of places.

Q. Who is with the kids at that time?

A. Myself or one of the other phys. ed. instructors.

Q. Are you just in the office?

A. What's that?

Q. Do you just stay in the office or do you circulate through the locker room?

A. You have a tendency to develop

a rapport with the students that you know where there could be trouble or there may not be trouble, so ---.

Q. Now, you said that more time in there there's a potential for off-task behavior. When you say off-task behavior, what do you mean? What are you referring to?

A. Not dressing. They have a tendency --- just talking with my fellow colleagues at the middle school and the high school level, and learning from my mentors, I would say, a lot more junior high, the sixth, seventh and eighth grade levels versus the high school.

Q. And you said that you circulate to --- because of this rapport because of trouble. When you say trouble, trouble like undressing trouble or trouble with the students?

A. Just horseplay.

Q. Have you had to intervene with regards to horseplay?

A. Rarely (sic).

33

Q. When the horseplay occurs, do you intervene with the students in correcting the problems, discussing it with students?

A. They know that they are given a copy of the classroom policies and procedures at the beginning of the school year. And, you know, the conversing would be the same as horseplay in the classroom.

Q. Okay. But my question was, when the students engage in horseplay, how do you stop them from engaging? Do you say, hey, stop it or do you go up and talk to them about it?

A. There's usually an excuse with that behavior.

Q. So would you agree with me then that your presence is necessary there for safety reasons?

A. Yes.

Q. Now, when you say that you engage in the sports, when you're down there, do you talk to the

1 students at any time as they're
2 staging, getting ready to go out the
3 door to wherever you're going to go
4 and say, hey, today we're going to go
5 out and we're going to play flag
6 football. We're going to do some
7 things I want you guys to keep in
8 mind. We're going to do the
9 following, you got these tags on
10 here. I don't want you guys tackling
11 people, provide instruction to them
12 in the staging area before you go up?

13 A. I have a sympathetic squad and
14 they have a set time. And it's just
15 like a classroom, if they're not in
16 their squad position at a certain
17 time they get marked tardy. I
18 usually check their attire. I do
19 policies and procedures that we're
20 going to be using today. It could be
21 a safety feature, it could be an
22 instructional part of the game, the
23 activity and then usually follow into
24 warm-up stretching and then engage in
25 the actual behavior.

1 Q. Now, you say the 42 minutes,
2 though, how much is the passing time?

3 A. From one class to another?

4 Q. Yes.

5 A. Three minutes.

6 Q. Three minutes.

7 A. That's what we use at the
8 middle school.

9 Q. And as it relates to the time
10 that they walk into the door to begin
11 to get ready for gym until the time
12 they get back and they actually leave
13 the gym class, that is all counted as
14 instructional time; correct? Portal
15 to portal, it's all instruction time?

16 A. I do not consider it
17 instruction. I do not consider my
18 instructions until I have them seated
19 in their squad.

20 Q. Did you ever have to break up a
21 fight in the locker room?

22 A. No.

23 Q. Arguments?

24 A. No.

25 Q. Now, when you teach phys. ed.

1 to the various students, you're
2 familiar with special needs kids?

3 A. Yes, I am.

4 Q. Do you have some special needs
5 students that you provide given
6 instruction or phys. ed. instruction?

7 A. Yes, I do. They are mostly
8 mainstreamed into the regular
9 setting. I have anywhere from life
10 skills to emotional students to lower
11 educational ability students for the
12 physical instructions.

13 Q. Do any of those students bring
14 any child-specific aides with them to
15 sit on in some of the gym classes
16 with them?

17 A. I have had a deaf boy last
18 year, that was the only time. To
19 sign him, he would have --- the aide
20 would come in. But other than that,
21 no.

22 Q. Now, as I understand your
23 request so I have this, what you're
24 requesting the Arbitrator to do is to
25 grant the transfer request to the

1 high school; is that correct?

2 A. Correct.

3 Q. And I think you indicated in
4 your testimony that Jana Grant, who
5 is less senior, currently occupies
6 the position that you seek; correct?

7 A. Yes.

8 Q. Now, do you know how many phys.
9 ed. instructors there are at the high
10 school right now?

11 A. Four.

12 Q. Four. Jana Grant; correct?

13 A. Yes.

14 Q. She's a female?

15 A. Correct.

16 Q. The other one was Morrison?

17 A. Jackie Morrison.

18 Q. Female?

19 A. Yes. And her duties are split
20 from phys. ed. and swimming and
21 physical education, personally
22 swimming activities, so it's ---.

23 Q. And then the other two that are
24 up there?

25 A. Willie Vokes, again he does

1 physical education and swimming.

2 Q. What is his name?

3 A. Willie Vokes, V-O-K-E-S.

4 Q. Male?

5 A. Yes.

6 Q. And the other one?

7 A. Harold Short.

8 Q. And that's it?

9 A. Yes. There's other faculty
10 members that are certified but do not
11 have ---.

12 Q. Are you aware that there's
13 approximately 500 boys and 500 girls
14 up at the high school?

15 A. Yes.

16 ATTORNEY BEARD:

17 Is there any dispute on
18 these facts, I mean, as to how
19 many teachers there are, how
20 many boys and how many girls as
21 to how many teachers? Do we
22 have to go through that with
23 testimony?

24 ATTORNEY RODKEY:

25 Get it in now or get it

1 in later.

2 ATTORNEY BEARD:

3 Some of that stuff I
4 thought we stipulated to.

5 ATTORNEY RODKEY:

6 I don't have any dispute
7 over the number of ---.

8 ATTORNEY BEARD:

9 I don't know if we can
10 expect the teacher to know all
11 of those numbers. Maybe the
12 superintendent can give us some
13 of that information.

14 BY ATTORNEY BEARD:

15 Q. Now, Mr. Collins, going through
16 your request, if your request was
17 granted by this Arbitrator, that
18 means Ms. Grant goes somewhere else,
19 I would assume to a middle school
20 position.

21 A. I guess that would be the
22 administrator's ---.

23 Q. And then you would have
24 yourself and two other individuals,
25 two other males and one female phys.

1 ed. instructor; correct?

2 A. Yes.

3 Q. Well, how are you going to
4 cover the supervision of the girls'
5 locker room?

6 A. I would not be in the girls'
7 locker room.

8 Q. Why not?

9 A. I think it's very
10 inappropriate.

11 Q. You think it is appropriate?

12 A. Inappropriate. I think common
13 knowledge is the gender privacy.

14 Q. Well, who's going to do that
15 then?

16 A. Do what?

17 A. The supervision in the girls'
18 --- who's going to provide that
19 supervision, that six to ten minutes
20 that you testified before in the
21 middle school. Who's going to be
22 there?

23 A. I would assume the female
24 physical education instructor.

25 ATTORNEY BEARD:

1 Arbitrator Parkinson,
2 can you give me two minutes
3 just to confer with the high
4 school principal to see what
5 the actual operation is here?

6 ARBITRATOR PARKINSON:

7 Okay.

8 SHORT BREAK TAKEN

9 ATTORNEY BEARD:

10 Just a couple more.

11 BY ATTORNEY BEARD:

12 Q. Just going back, you indicated,
13 I think, as far as your testimony,
14 you had a meeting with Mr. Meckey in
15 regard to your grievance?

16 A. Uh-huh (yes).

17 Q. Mr. Meckey is the middle school
18 principal?

19 A. He's my current principal, yes.

20 His reply was that since it is a
21 high school teaching matter he could
22 not really resolve anything and it
23 was just the due process to start
24 with the next step.

25 Q. Was anybody else present at the

meeting besides you? I beg your pardon?

A. Sue Nagle.

Q. Anybody else besides Sue Nagle?

A. No.

Q. The superintendent?

A. No.

Q. In addition to being a phys. ed. instructor, do you engage in any coaching activities?

A. High school wrestling.

Q. When you met with Mr. Mackey, isn't it true that you told him one of the reasons that you wanted to get up to the high school was to facilitate your coaching of the high school boys wrestling team?

A. No.

Q. You never said that?

A. Since day one I've tried to keep my coaching separate from my teaching profession and I have never indicated that as a personal issue.

Q. It would make it real convenient if you could be up there;

43

right?

A. Yes.

Q. Is there a lot of distance between the two schools?

A. About 15 minutes drive with traffic.

Q. One other issue. You indicated that you went to transfer day and I take it that you were shocked that you weren't --- didn't get the position. Is it fair to say you were shocked?

A. I was concerned that the position was not even brought up. They did all of the transfers for the elementary positions and I was waiting my turn for the high school phys. ed. job and it was never mentioned.

Q. Do you recall receiving a voice mail message from the District prior to transfer day informing you that you would not receive the transfer?

A. From the District?

Q. Yes. Somebody left a voice

mail message on your answering machine at home that you would not be granted the transfer to the high school.

A. I've had numerous contacts with a variety of people but not particularly on the transfer.

Q. But did you recall, prior to transfer day, a phone call from the School District informing you ---?

A. I do not specifically remember the actual School District, no.

Q. You don't recall telling them you were out of town, and you got home late, and in response they told you the voice mail message was left at your house?

A. I received a phone call but from the School District, no.

Q. Well, who did you get a phone call from?

A. From Ms. Nisewonger. I have talked to John Long about the position several times.

Q. So prior to going to transfer

45

day, you had no idea that you were not going to get ---?

A. No. I believe that I had no idea that it was --- I was not going to receive this position.

Q. Now, after this thing worked its way through the process, did you ever meet with anybody afterwards, after you met with Mr. Mackey to discuss your grievance?

A. I have talked to --- not specific meetings, but I have talked to the high school administrative staff, yes, I have.

Q. Have you ever spoken to Mr. Smith about your denial of the transfer request?

A. Just from our formal meetings.

Q. And at those formal meetings, was there a discussion as to why you did not get the transfer?

A. Because I was not qualified to provide quality instruction.

Q. Okay. And that came from Mrs. Smith?

1 A. I believe so, yes.

2 Q. Okay. Do you have Ms. Smith's
3 August 1st letter in front of you
4 there?

5 A. Yes.

6 Q. That's part of Joint Two?

7 A. Yes, Two. Yes.

8 Q. Could you just take a moment
9 and look that over?

10 WITNESS REVIEWS DOCUMENT

11 BY ATTORNEY BEARD:

12 Q. The reasons given by Ms. Smith
13 at your meeting, are those basically
14 the same reasons that appear in this
15 letter?

16 A. Yes.

17 Q. And if I heard you correct, you
18 say you never got this letter?

19 A. I cannot recall. I mean, my
20 summertime is very transient, so ---.

21 Q. You could have gotten it?

22 A. I could have. I do not
23 remember.

24 ATTORNEY BEARD:

25 Is there a problem as to

1 whether he got it or not? I
2 thought it was already
3 submitted as a joint exhibit.
4 Is that going to be an issue?

5 ATTORNEY RODKEY:

6 No. If the letter was
7 written, we were somewhat of
8 the stance that there had never
9 been a written response to any
10 of the grievance levels. The
11 Association president, the
12 Association grievance person,
13 was unaware of the letter and
14 we were --- there was never a
15 written response from the board
16 level and we were just a little
17 bit surprised to see it this
18 morning. That's all.

19 ATTORNEY BEARD:

20 I don't have any further
21 questions.

22 REDIRECT EXAMINATION

23 BY ATTORNEY RODKEY:

24 Q. Just a few questions on
25 Redirect, Scott. On this issue of

1 the coaching, did you indicate to the
2 District that you saw this transfer
3 to the high school as a career
4 enhancement to you as a physical
5 education instructor?

6 A. Older age group. One
7 particular area right now is
8 presently the health and phys. ed.,
9 it would just be a phys. ed.
10 position. You know, I take my dues
11 at the younger level and I would like
12 to take the challenge of working with
13 an older age group.

14 Q. Now, you indicated that right
15 now in the middle school you just
16 have eighth grade students; is that
17 correct?

18 A. That's correct.

19 Q. Male and female?

20 A. Yes.

21 Q. What are the average ages of
22 the eighth grade students?

23 A. Thirteen (13), 14.

24 Q. Some even go older?

25 A. Some 15. I've had as old as

1 17, but that's rare.

2 Q. Now, you indicated that about
3 half of them are boys, half are
4 girls; correct?

5 A. Yes.

6 Q. Now, you are in the locker room
7 when necessary with the boys. Does
8 that mean the girls are free to go
9 amuck and do whatever they want to in
10 the locker room?

11 A. No. The other female
12 instructor covers the eighth grade
13 school girls. I take care of the boys
14 and she takes care of the girls.

15 Q. So there's a mechanism in place
16 in the District where the female
17 phys. ed. students are supervised and
18 the male phys. ed. students are
19 supervised in the locker room?

20 A. Yes.

21 Q. And Mr. Beard asked you, how
22 would you handle that in the high
23 school?

24 A. I would assume the same as
25 currently in the middle school.

Q. Now, you said in the locker room that's used for changing clothes; correct?

A. Yes.

Q. Things like attendance roll call, instruction, policies explanation, that's done in squads?

A. Yes. Yes, because it's a ---.

Q. And so I'm clear, the squad is out in the gym or outdoor area where the activity is going to take place.

A. Yes.

Q. That's not a locker room activity?

A. Correct.

Q. Actually, Jana Grant, did she actually apply for this job or was she transferred into it?

A. I believe it was an involuntary transfer.

Q. Who's Harold Short?

A. He's a current high school health --- or phys. ed. --- I'm sure he has a health and phys ed. degree. He's our department chair at the

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high school.

Q. And he's had female gym classes in the high school; is that correct?

A. That's correct.

Q. Who's Willie Vokes?

A. He's also a health and swimming instructor at the high school.

Q. And do you know him personally?

A. Yes, I do.

Q. He's a male?

A. Yes.

Q. And has he also had female phys. ed. classes in the past?

A. Yes.

Q. Somehow the locker rooms are covered when the male teachers have a female class?

A. Correct.

Q. Did you ever get a written response from the board level, I think it's level three or step three of the grievance procedure?

A. No, I did not.

Q. Never up to today?

A. The only way that I found out

from the board level was just from Ms. McCloskey coming out to say it was denied.

Q. And that was from the meeting?

A. From the meeting.

Q. Did she ever receive a letter?

A. No. I'm not aware of that.

ATTORNEY RODKEY:

That's all I have.

ARBITRATOR PARKINSON:

Recross?

ATTORNEY BEARD:

No further questions.

ARBITRATOR PARKINSON:

Okay. Thank you, Mr.

Collins.

ATTORNEY RODKEY:

We'd like to call Willie

Vokes at this time.

OFF RECORD DISCUSSION

EDWARD WILSON VOKES, PREVIOUSLY

SWORN, CALLED TO TESTIFY

ARBITRATOR PARKINSON:

It's W-I-L-L-I-E?

A. It's actually Edward Wilson,

53

but very few people know me by Edward.

DIRECT EXAMINATION

BY ATTORNEY RODKEY:

Q. We got your name, Willie. What do you do for the District here?

A. I'm the health/physical education teacher currently at the high school.

Q. Okay. Had you taught in the middle school as well?

A. Yes. I started out at the junior high level and then we went to the middle school philosophy and I was at the middle school and am currently at the high school.

Q. How long have you been employed by the District in this capacity?

A. Twenty-eight (28) years.

Q. Can you tell us how many years in the middle school and then in the high school, roughly?

A. Well, in reality it's been back and forth. And I used to teach some high school classes and then back to

1 the middle school and then we moved
2 the middle school eighth grade
3 students up to the high school. So
4 it's probably been about 12 years in
5 the middle school and probably the
6 rest, 16 years as a combination of
7 high school and eighth grade.

8 Q. Okay. Tell me, Mr. Vokes, when
9 you were in the middle school, did
10 you teach both boys' and girls'
11 physical education?

12 A. Correct. I did.

13 Q. How as the locker room issue
14 handled at that time?

15 A. There was an aide that was
16 hired. I had specifically boys phys.
17 ed. classes and then I had all girls
18 phys. ed. classes. And during the
19 girls' phys. ed. classes, there was
20 an aide that was hired. In the few
21 years that we did it that way, there
22 were different aides that were hired
23 different dates.

24 Q. And currently to date in the
25 high school, has the District used

1 what they referred to as locker room
2 monitors to cover gender differences
3 in the phys. ed.?

4 A. There's one there today.

5 Q. So there's always been a way
6 for the District to provide coverage
7 for a girls' locker room when there
8 was a male phys. ed. teacher; is that
9 correct?

10 A. Correct.

11 Q. Now, what are you currently
12 teaching in the high school?

13 A. I teach three periods of
14 swimming and the rest physical
15 education, swimming being co-
16 educational.

17 Q. Meaning boys and girls?

18 A. Boys and girls. We have a new
19 policy that the school board passed
20 that everyone that graduates from
21 Clearfield Area High School will have
22 one swimming class. And we try to
23 get that in in the ninth grade year.
24 So most of the swimming classes are
25 ninth grade students and they are

1 both male and female.

2 Q. How many students would be in a
3 swimming class?

4 A. We try not to take more than 20
5 because of the recommendations by the
6 American Red Cross.

7 Q. And the swimming then is part
8 of the phys. ed. curriculum?

9 A. It is, yes.

10 Q. But it's mostly done in the
11 ninth grade?

12 A. Yes.

13 Q. Is locker room involved with
14 the swimming?

15 A. Yes. There is --- obviously, I
16 have to change into a bathing suit
17 and I have to come out for roll call.
18 And then afterwards, in taking a
19 shower, getting the chlorinated water
20 off them. And, you know, there's
21 probably more time than in the
22 regular phys. ed. spent in the locker
23 room, especially after class.

24 Q. How do you deal with the girls'
25 situation in the locker room?

1 A. I listen.

2 Q. Okay.

3 A. I go into the boys' locker
4 room. If there's a problem, if I
5 hear excessive noise, I'll go into
6 the

7 boys' locker room, find out what's
8 going on. And the girls' locker
9 room, the biggest problem we've had,
10 smoking. And with that problem
11 addressed to the girls, I ask the
12 lady phys. ed. teachers if they would
13 check on it for me once in a while.

14 It's happened twice so far this year.

15 Q. How long has the physical co-ed
16 swimming classes existed in the
17 District?

18 A. Ever since the swimming pool
19 has been at Clearfield High School,
20 since 1975 I think it is.

21 Q. And the gender differences
22 between boys and girls and yourself
23 as the swimming instructor has always
24 been handled without a problem; is
25 that correct?

1 A. Correct.

2 Q. Okay. Now, you are a physical

3 education instructor?

4 A. Yes.

5 Q. Both in the high school and has

6 been in the middle school?

7 A. Correct.

8 Q. Is there any meaningful locker

9 room differences between the swimming

10 class and the phys. ed. class?

11 A. Not that I know of.

12 Q. I don't think you saw this

13 letter. I'm not sure if we showed it

14 to you. It's the August 1st letter

15 from Ms. Smith to Mr. Collins. I'd

16 like you to take a look at that.

17 It's part of Joint Exhibit Two. Do

18 you see towards the bottom it's

19 talking about the locker room being

20 part of the classroom setting and 15

21 to 20 minutes of instruction being

22 involved? You've heard that?

23 A. Yes.

24 Q. Would you tell the Arbitrator

25 the realities of what happens in the

1 locker room?

2 A. We try to limit the number of

3 minutes in the locker room to try and

4 keep the students moving so that

5 they're not fooling around, as Scott

6 alluded to earlier. And I give them,

7 at the swimming pool --- at the

8 swimming pool the most is ten

9 minutes. And I give them ten

10 minutes. Basically for the females

11 because they do take a little more

12 time to dry their hair. They're

13 using makeup and putting their makeup

14 on and things like that. So I give

15 them ten minutes at the end of the

16 class.

17 Boys in physical education

18 class, more like six minutes, seven

19 minutes. And that's usually from the

20 time we're out on the field coming

21 back. So they probably have about

22 four minutes. I would say four

23 minutes in the locker room. That's

24 what we try to strive for.

25 Q. And that's to get back into

1 their normal clothing?

2 A. Yes. Well, as a matter of

3 fact, the boys, we shower.

4 Q. So is there instruction going

5 on in the locker room?

6 A. No, not really.

7 Q. Things like attendance, roll

8 call, instruction for what they might

9 be doing that day, when do you do

10 that?

11 A. I do that in the gymnasium or

12 outside when we line up for roll

13 call.

14 Q. So since 1975 there's been no

15 problem supervising the girls in the

16 co-ed swimming program with you being

17 a male instructor?

18 A. You know, like I said, with the

19 smoking, things like that, that's

20 been a problem. But usually a phone

21 call over to the girls phys. ed.

22 office, and they'll come over.

23 They'll check things out.

24 Q. Is that the way things have

25 been done since 1975?

1 A. Yes. I think that's when we

2 first started swimming.

3 Q. Who is Harold Short?

4 A. He is my associate male

5 physical education teacher at the

6 Clearfield High School.

7 Q. And do you know, has he had all

8 female phys. ed. classes in the past?

9 A. Yes, he has.

10 Q. And in some way the locker room

11 situations have been covered; is that

12 correct.

13 A. Yes.

14 Q. Now, one of the female phys.

15 ed. students --- or teachers in the

16 high school is Ms. Jana Grant; is

17 that correct?

18 A. That's correct.

19 Q. Have you, in fact, as a male,

20 covered her classes from time to time

21 this year?

22 A. Yes. I have, yes.

23 Q. And what happened with the

24 locker room, if you know?

25 A. I listen outside. She has

1 softball games and she has to be
2 excused early and seventh period I'll
3 have a plan and they'll ask me to
4 cover her class for her. And I enjoy
5 that, so yes, I get the equipment and
6 the girls, we go outside and we
7 participate and come back in. And I
8 have --- I don't know of any problems
9 that I have had in the locker room.

10 Q. So somehow we're getting
11 through the locker room issue; are we
12 not?

13 A. Yes.

14 Q. And did you not tell me that a
15 Michael Sciabica ---?

16 A. Michael Sciabica (corrects
17 pronunciation).

18 Q. How do you spell that?

19 A. S-C-I-A-B-I-C-A.

20 Q. And who is he?

21 A. He's currently the Spanish ---
22 one of the Spanish teachers at the
23 high school.

24 Q. And has he also covered her
25 classes?

1 A. Yes.

2 Q. And he's a male?

3 A. Yes.

4 Q. So your philosophy, and which I
5 think you passed down to Mr. Collins,
6 is to keep the locker room time to an
7 absolute minimum; is that correct?

8 A. Correct.

9 Q. And is that for the purpose of
10 changing the clothes and getting
11 students back into ---?

12 A. Exactly. If you give them too
13 much time, then they have a tendency
14 to fool around, you know, play with
15 other people's books and things like
16 that, so yes.

17 Q. And are you aware personally
18 that even the current list of
19 substitutes for the physical
20 education program are all males?

21 A. Yes, I am.

22 Q. Okay. So if there is needed
23 coverage for a female phys. ed.
24 student, that's being provided by a
25 male sub?

1 A. Correct, today for Ms. Grant.

2 Q. And are there locker room
3 monitors hired by the District or
4 provided from time to time?

5 A. As I said, there's one there
6 today, Ms. Williams.

7 Q. So the District is successfully
8 dealing with gender differences and
9 has since at least 1975?

10 A. I think so.

11 Q. And they dealt with it in the
12 middle school where there has always
13 been co-ed phys. ed. programs?

14 A. Not always, but, you know, that
15 I've experienced there's been a lot
16 of them, yes.

17 Q. A majority, in fact, of co-ed
18 phys. ed in the middle school?

19 A. There's been quite a ---.

20 Q. Quite a number?

21 A. Recently. As of recently, yes.

22 OFF RECORD DISCUSSION

23 ATTORNEY RODKEY:

24 Just one final thing.

25 BY ATTORNEY RODKEY:

1 Q. I think you did say this, Mr.
2 Vokes. Before swimming now, the
3 locker room situation with the
4 swimming is co-ed and there are no
5 aides or monitors hired, that is just
6 working with you as the male swimming
7 coach?

8 A. This is correct. And as a
9 matter of fact, I only teach half a
10 day in the swimming pool. The other
11 half of the day is Ms. Morrison,
12 okay, Jackie Morrison. She teaches.
13 And, of course, her being female,
14 there are males. And she has asked
15 me to come down a couple of times to
16 check on the boys in the locker room.

17 But yes, it's the same way. There's
18 one of us without anybody in the
19 other locker room, female and male.

20 ATTORNEY RODKEY:

21 You may cross examine.

22 CROSS EXAMINATION

23 BY ATTORNEY BEARD:

24 Q. Going back to days at the
25 middle school, you said that an aide

1 was hired and a few years you did it
2 that way, some aides have come and
3 gone? How long ago was that?

4 A. That was in the early '90s.

5 Q. Early '90s?

6 A. '91, '92.

7 Q. And then it was discontinued.

8 A. I believe so. That's when I
9 moved up to the high school.

10 Q. Do you know who the
11 superintendent was when this was
12 discontinued?

13 A. No.

14 Q. Okay. Now, you mentioned a
15 locker room monitor. Isn't it true
16 that that's not an everyday thing?

17 A. As far as?

18 Q. Locker room monitor?

19 A. The only time that we have a
20 locker room monitor is usually when
21 there's a sub. And, of course, we
22 have --- it would only be in a
23 situation with the female teacher
24 because we have no female subs. So
25 we have to have a male sub and then

1 they hire a monitor.

2 Q. But there isn't a, quote,
3 somebody on the District's payroll on
4 a regular, continuing basis who is a
5 locker room monitor?

6 A. Not that I know of, not since
7 '90, '91, '92.

8 Q. Now, you said the biggest
9 problem was smoking and you also said
10 and things like that. What are
11 things like that when you say smoking
12 and things like that?

13 A. Broken glass in the locker
14 room. You know, they drop something,
15 glass gets broken, somebody has to
16 clean it up. Fights, I can't
17 remember the last fight I've had in
18 the locker room. Girls are
19 definitely more mature than the boys.

20 So there's definitely less in the
21 girls' locker room. Boys, I can't
22 remember the last fight that was in
23 the boys' locker room.

24 Q. You had indicated, as it
25 relates to swimming, you try to give

1 girls ten minutes at the end of the
2 period?

3 A. Correct.

4 Q. What about in the beginning of
5 the period?

6 A. The beginning of the period, I
7 probably give them, after the late
8 bell rings, two minutes.

9 Q. Ever given three or four?

10 A. Occasionally. There's always a
11 few stragglers. And, of course, you
12 deal with that with the policy of
13 three tardies and they get detention.

14 Q. So if I look at Ms. Smith's
15 letter that say the girls would be
16 deprived of 15 to 20 minutes of
17 instruction, I guess if you add ten,
18 somewhere between ten and four, give
19 or take in those situations, Ms.
20 Smith might be off by two or three
21 minutes on the low end?

22 A. We're talking the boys and
23 girls swimming?

24 Q. Just overall the instructional
25 period that runs at the high school.

1 A. I'm not sure I understand you.

2
3 Q. You're talking about swimming
4 classes?

5 A. Yes, swimming class, maybe.
6 Physical education class, no.

7 Q. I was a little confused. I
8 thought you said swimming classes and
9 phys. ed. are really basically the
10 same.

11 A. No. Physical education class,
12 girls in general, no showers. There
13 are no showers for the girls. Boys,
14 yes, we do shower.

15 Q. For phys. ed?

16 A. For physical education classes.
17 And obviously for swimming. They're
18 all soaking wet anyway from getting
19 out of the swimming pool.

20 Q. Okay. You indicated that
21 occasionally, you did --- say Jana
22 Grant or ---

23 A. Jackie Morrison.

24 Q. --- Jackie Morrison, that you
25 would cover the locker room for

seventh period?

A. For one or both or --- you mean me covering? For Jackie, yes. I would check on the boys. Yes. I would come down. She said they were fooling around one day. She said they were fooling around, so I decided I'd better start checking on them. So after my class I ran down and walked through the locker rooms pretending like I was doing something just to make sure they were all right.

Q. Now, if the Arbitrator would grant Mr. Collins' request, there would then be three male phys. ed. instructors at the high school and only one female, that would be Jackie Morrison?

A. Uh-huh (yes). Correct.

Q. How are you going to cover the locker rooms?

ATTORNEY RODKEY:

I'm going to object to that. I don't know if that's

within his --- that would be the District's job.

ATTORNEY BEARD:

It's the total issue we've been discussing here.

ATTORNEY RODKEY:

I don't think so.

ATTORNEY BEARD:

It's one of the most compelling reasons. I mean, you know, you're arguing here. I think it's very clear for ---.

ATTORNEY RODKEY:

I haven't argued at all.

ATTORNEY BEARD:

Well, we're arguing.

ARBITRATOR PARKINSON:

The administrators I would think would have to deal with that. You could offer an opinion or an objection based on experience his experience as a teacher. But I mean as far

as the supervision, I don't think you would want him to --- I mean, he can give an opinion.

ATTORNEY BEARD:

Well, I'm interested in his opinion. He's been working up there 16 years.

ARBITRATOR PARKINSON:

Well, that's what I said, he can give an opinion, but as far as the policy or however you handle it, that would be up to the positions of the District administrators, I think. If you have an opinion, you can offer that.

A. Just from past practices maybe someone would have to come in and be a locker room monitor. But of course, Ms. Morrison isn't always in the locker rooms. Sometimes she does have swimming classes, so she obviously can't be both places at the same time. But the classes that she has, the physical education classes,

at the same time then she could handle --- I would think she would be able to handle that as it is handled right now at the middle school.

BY ATTORNEY BEARD:

Q. Have you ever been in the girls' locker room?

A. Yes, I have.

Q. During the period of time that they were dressing and undressing?

A. I hope not.

Q. So when I say you've been in the girls' locker room, during what context?

A. I was at the middle school. I used to take them into the girls' locker room and show them how to open their locks, make sure they knew how to maneuver the three-digit number so they could open the locks, show them where the shower was and what was expected of them. We do the same thing in orientation the first day. We'll take them in, show them the locker room, show them what we expect

1 of them in the locker room as an
2 orientation day fully clothed
3 obviously.

4 Q. But after that?

5 A. No.

6 OFF RECORD DISCUSSION

7 ARBITRATOR PARKINSON:

8 No further Cross

9 Examination. Redirect?

10 REDIRECT EXAMINATION

11 BY ATTORNEY RODKEY:

12 Q. Just one question, Mr. Vokes,
13 so we understand. You indicated that
14 at the conclusion of the swimming
15 class you would give the girls a
16 little bit longer, up to about ten
17 minutes?

18 A. Yes.

19 Q. Now, this is not instruction;
20 is that correct?

21 A. No, sir, I'm not in there.

22 Q. This is to get the makeup on
23 and the hair because it takes them
24 longer to look good to go back out?

25 A. Correct.

1 Q. And that would be the
2 difference between the girls'
3 swimming locker room and the girls'
4 phys. ed. locker room because the
5 girls don't shower in phys. ed; is
6 that correct?

7 A. Correct.

8 Q. So how long after the class
9 does the girls phys. ed. --- or do
10 you give the girls in phys. ed. to
11 get ready?

12 A. Approximately six minutes.

13 Q. And that's the difference,
14 longer to get ready?

15 A. Yes.

16 ATTORNEY RODKEY:

17 Thank you.

18 RECROSS EXAMINATION

19 BY ATTORNEY BEARD:

20 Q. Mr. Vokes, at the end of class,
21 whether it be phys. ed. or swimming,
22 when you go back, do you go back to
23 the boys' locker room after class
24 would be over?

25 A. Correct. I have an office in

1 the boys' locker room, so, yes,
2 that's where I station myself during
3 physical education classes. Swimming
4 classes, occasionally I'd go into the
5 boys' locker room and check them out.
6 But the office is not in one of the
7 locker rooms. It's out on the pool
8 deck.

9 Q. Do you do like Mr. Collins
10 does, circulate in the beginning and
11 at the end of the period when the
12 boys are in the locker room?

13 A. Physical education classes, I'm
14 there, yes. Swimming class, very
15 seldom do I go into the locker room
16 before class.

17 ATTORNEY BEARD:

18 I don't have any other
19 questions.

20 ATTORNEY RODKEY:

21 Just one other question.

22 REDIRECT EXAMINATION

23 BY ATTORNEY RODKEY:

24 Q. The issue of instruction in the
25 locker room, approximately how many

1 kids do you have in a gym class?

2 A. Physical education?

3 Q. Yes, sir.

4 A. Thirty (30), 35.

5 Q. Without going into a lot of
6 detail, is the physical layout and
7 configuration of the locker room
8 conducive to any type of instruction
9 for that many kids?

10 A. No, sir. No. There's lockers
11 and benches beside them. No.

12 ATTORNEY RODKEY:

13 Thank you. That's all I
14 have.

15 ARBITRATOR PARKINSON:

16 Anything else? Thank
17 you, Mr. Vokes.

18 ATTORNEY RODKEY:

19 We'll rest at this time.

20 ARBITRATOR PARKINSON:

21 We'll proceed with the
22 District's witnesses.

23 ATTORNEY BEARD:

24 I'd like to call Ms. Pat
25 Smith, please.

PATRICIA SMITH, PREVIOUSLY SWORN,
CALLED TO TESTIFY

DIRECT EXAMINATION

BY ATTORNEY BEARD:

Q. Ms. Smith, could you state your full legal name for the record, please?

A. Patricia Peble (phonetic) Smith.

Q. And by whom are you employed?

A. Clearfield Area School District.

Q. In what capacity?

A. Superintendent.

Q. How long have you been the superintendent?

A. Seven years.

Q. How long have you been in education overall?

A. Close to 40 years.

Q. And prior to assuming the reigns of superintendent here at Clearfield seven years ago, what were your positions, if any, here in the School District?

A. Supervisor of curriculum and instruction.

Q. How long were you the supervisor of curriculum and instruction, roughly? It doesn't have to be exact.

A. Roughly six years I would say, and assistant principal before that.

Q. Okay. Now, as far as certifications go to be an high school instructor or be a superintendent, what type of certifications do you hold?

A. Health and physical education, English and general science.

Q. Okay. And when you say health and physical education, did you teach health and physical education?

A. Yes.

Q. How many years did you teach health and phys. ed?

A. There again I believe about six years.

Q. And where did you teach health and phys. ed?

A. Selinsgrove Area School District.

Q. West Snyder?

A. Yes, in Selinsgrove.

Q. What was the remainder of the time between when you were teaching phys. ed., and when you were working here in the District as superintendent and curriculum supervisor?

A. I taught classrooms, kindergarten, first grade, second, third grades, middle school. And then the majority of my time would be at the high school.

Q. Now, you're familiar with this matter that's before the Arbitrator; correct?

A. Yes.

Q. Just going back, could you just provide a little bit of background for the Arbitrator as to what actually was going on back in --- I guess at the high school back in 1998-'99 as far as the phys. ed.

department, who was there?

A. In '98-'99 we had a teacher, Ms. Morrison, split her day between middle school and high school. In addition to that there were Mr. Vokes, Mr. Short and Mr. Smith in the phys. ed./swimming area and Mr. Rishel in the health area. Over the years he had taught some phys. ed. We also had Ms. Nisewonger and Ms. Fletcher in the girls' area.

(District Exhibit One
marked for identification.)

BY ATTORNEY BEARD:

Q. I'm handing you what is marked as District One and ask you if you can take a look at that document.

And let me know when you're finished.

A. Okay. I went back a few years before this on scheduling I can see. But this is the phys. ed. and health last year, '98-'99.

Q. Okay. And what, if anything, happened as it relates to changing personnel at the end of '98-'99?

A. The spring of '99 Ms. Nisewonger and Ms. Fletcher resigned for retirement purposes. Also at that time was the decline of enrollment we had had. The number of students we felt could be accommodated with the dropping the half position.

Q. And when you say the half position, the half position being?

A. Ms. Morrison's half.

Q. So at the high school in '98-'99 approximately how many students were up there, male and female?

A. '98-'99, I would have to look specifically, but we've been dropping in the neighborhood of 50 to 100 a year, so I would say somewhere around closer to maybe 1,100.

Q. And how are they split, equal numbers?

A. It's an equal number of students. Sometimes there are more girls than boys in our enrollment, but it's split.

Q. And I think you've already seen a copy of J-3, the posting?

A. Yes.

Q. And the District did post for two physical education teachers at the high school?

A. Yes.

Q. And do you recall receiving a copy of a letter of interest from Mr. Collins into a position at the high school?

A. Yeah.

Q. Now, there had been some testimony in regards to this issue of transfer days. You did receive a transfer request from Mr. Collins?

A. Yes.

Q. And was Mr. Collins awarded the position up at the high school?

A. No.

Q. Well, could you describe for the arbitrator what discussions or processes that you and the administration went through in determining as to why Mr. Collins did

not get the position at the high school?

A. I think some of the earlier conversations were when perhaps Dr. Wunder and Mr. Law and I talked about the schedule and the number of students. And the feasibility of how could that be accommodated when we looked at the numbers and the schedule. We did not feel that --- you know, we could see that was going to be a problem to get an educational program that we were accustomed to quite frankly.

There were the conversations I believe they may have had with Mr. Collins. I know that I had put a call into Mr. Collins, left a message and asked if he would return my call.

I didn't hear from him until the transfer day, despite the fact that I believe that he and Mr. Mackey had talked prior to that.

The transfer day I asked him if he had gotten my message and he said

he had but that he hadn't had time. He had been out of town and hadn't had time to get back to me. That day we talked with him and tried to explain the circumstances and hoped that he would be able to work with us under those circumstances for the sake of the students.

Q. Now, when you say for the sake of the students, what do you mean for the sake of the students?

A. Well, realizing the impossibility of the scheduling and realizing that we would not have that ability to have ongoing instruction and supervision in the locker rooms, you know. And I explained if the reverse were true, if it were the boys' program and they had --- would be down to only one instructor, what --- hoping that he would understand perhaps from that perspective how that would impact adversely on the boys' program. In this case, it would be the girls' program with

1 having only the one instructor and
 2 not being able to cover it. I think,
 3 you know, our District, including at
 4 the middle school, we've managed most
 5 of the time to have at least two
 6 female instructors and at least two
 7 male instructors in the middle school
 8 and the high school so that they
 9 could work together and team. I
 10 think I heard that word used here
 11 earlier. But that's essentially what
 12 we have tried to do to team it and
 13 provide that coverage and provide
 14 that instruction. In this case, we
 15 weren't going to be able to do that
 16 without having to go to only one
 17 teacher at the high school in the
 18 girls' locker room.

(District Exhibit Two
 marked for identification.)

21 BY ATTORNEY BEARD:

22 Q. I'm going to hand you what has
 23 been marked as District Two and just
 24 take a look at that and let me know
 25 when you're done. Are you familiar

1 with that document?

2 A. Yes, this is the schedule.

3 Q. When you say the schedule, the
 4 schedule for?

5 A. The timing schedule, the
 6 schedule of the top --- the regular
 7 class schedule for the year and this
 8 typically is the way we do this. We
 9 have an activity schedule. There's a
 10 little variation in the morning or
 11 afternoon, but the regular daily
 12 schedule is at the top. It would be
 13 the amount of minutes for each class
 14 period and then given time for class
 15 passing.

16 Q. And when you have the phys. ed.
 17 classes, you would agree with Mr.
 18 Collins they are approximately 42
 19 minutes in length?

20 A. Yes, in most cases.

21 Q. And as far as the 42 minutes
 22 for the purposes of the Pennsylvania
 23 Department of Education, does that
 24 full 42 minutes count as
 25 instructional time?

1 A. Yes, it does.

2 Q. Now, just going back to your
 3 time when you were a phys. ed.
 4 instructor, did you, at that time,
 5 have co-ed classes?

6 A. There were some activities that
 7 were co-ed.

8 Q. Okay. You taught primarily
 9 female phys. ed. classes?

10 A. Right. Right. The idea of co-
 11 ed would be a teaming situation again
 12 where the boys classes and the girls
 13 classes would be during the same
 14 class period and we could team it and
 15 do co-ed activities.

16 Q. Now, just going back to when
 17 you taught phys. ed., what goes on in
 18 a phys. ed. classroom from the time
 19 the students come in to the time that
 20 they actually leave when the period
 21 is over?

22 A. The conduct of my instruction
 23 when I took my undergraduate degree
 24 in health and physical education, and
 25 as I continued in my teaching, the

1 instructions occur when the students
 2 enter the classroom. You have the
 3 responsibility for those students
 4 when they enter the classroom and we
 5 were taught that the classroom --- or
 6 the fact in the case of physical
 7 education inclusive to the locker
 8 room and we were responsible for
 9 those students when they were in the
 10 locker room. I believe that
 11 circulating in the locker room,
 12 talking with the students, the
 13 students would typically have
 14 questions.

15 We could begin our instructions
 16 in the locker room, giving directions
 17 for the day, perhaps giving out some
 18 safety --- going over some safety
 19 issues. The idea is to use as much
 20 of that time as possible. And that
 21 time begins in the locker room.
 22 There are some personal issues, some
 23 personal hygiene issues. There are
 24 some classes that are quite vigorous
 25 and we do take showers or did promote

1 the taking of showers. It is a
2 limited amount of time. But we did
3 encourage that, monitor that
4 situation.

5 The students need to be under
6 supervision at all times. And I
7 would not have spent time in my
8 office so to speak within the locker
9 room, but I would be out circulating
10 and having the students under visual
11 supervision at all times. So that's
12 the way I was taught to teach the
13 program and that's the way I taught
14 the program.

15 Q. Now, at any point during this
16 process you said that you had
17 intended to explain this to Mr.
18 Collins, were there various meetings
19 between the parties, between the
20 administration and I guess the
21 Association in regards to the
22 grievance of Mr. Collins?

23 A. Yes.

24 Q I'm handing you what has been
25 marked as part of Joint Two. It's an

1 August 1st, 1999 letter. Do you
2 recognize that letter?

3 A. Yes.

4 Q. Can you identify for the record
5 what exactly that letter is all
6 about?

7 A. This was a follow-up letter, if
8 I may just --- on Tuesday, July 27th,
9 '99, we met to discuss the step-two
10 grievance that Mrs. Nagle submitted
11 to me on July 21st intending a review
12 of Ms. Nagle, Mr. Rishel and I. The
13 grievance was in regard to requesting
14 a transfer to a high school physical
15 education position. It stated, you
16 wanted to move on from the middle
17 school and work at the high school
18 and that your request does not have
19 to do with your high school coaching
20 as you had previously indicated to
21 Mr. Meckey and me.

22 ARBITRATOR PARKINSON:

23 Excuse me. But I would
24 rather you not read from the
25 thing. If you have to refer to

1 refresh your recollection, you
2 may do so, but we have all seen
3 the document.

4 BY ATTORNEY BEARD:

5 Q. Answer as to what you're
6 actually recalling of Mr. Collins.

7 A. Okay. The discussion was
8 basically so that he would understand
9 the numbers at the high school and
10 the number of teachers, male and
11 female, and the difficulties that we
12 would have in providing a good
13 program for the female students and
14 providing instruction and
15 supervision.

16 Q. Pursuant to the grievance
17 procedure, was there ultimately a
18 meeting between the Association and
19 the board of school directors in
20 regard to Mr. Collins' grievance?

21 A. Yes.

22 Q. And did you inform the board in
23 regards to the grievance that was
24 coming up for them?

25 A. Yes, I did.

1 (District Exhibit Three
2 marked for identification.)

3 BY ATTORNEY BEARD:

4 Q. And I'm going to hand you what
5 has been marked as District Exhibit
6 Three and if tell me if you recognize
7 the top document?

8 A. Yes, I recognize it.

9 Q. And it's to the board of school
10 directors?

11 A. Yes.

12 Q. And, Ms. Smith, the last page
13 on here is your August 1st letter.
14 Do you recall sending the letter to
15 Mr. Scott Collins?

16 A. Yes.

17 Q. Do you recall the meeting with
18 the board of school directors at this
19 hearing?

20 A. Yes.

21 Q. And did the board take a vote
22 to grant or deny the grievance?

23 A. They took a vote to deny the
24 grievance.

25 Q. And was the Association aware

1 of the board's decision?

2 A. Yes, they received the minutes
3 and they were all present.

4 Q. Okay. Now, going back to some
5 of the past experiences that Mr.
6 Vokes' had here at the District, do
7 you ever recall that the District
8 utilized an aide in conjunction with
9 physical education at the middle
10 school?

11 A. I was not in administration at
12 the time that I recall or at least
13 not superintendent at the time. And
14 it would not be something that I
15 would want to approve nor do because
16 I do believe there's an educational
17 disadvantage to that I guess.

18 Q. Do you know how long --- even
19 though you weren't in administration
20 at the time, how long the normal
21 practice --- what he says is
22 practice, but how long they did it
23 and then it was discontinued?

24 A. I really couldn't tell. I
25 don't know, maybe a couple of years.

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1 I'm not sure.

2 Q. Ms. Smith, if the Arbitrator
3 would grant Mr. Collins' request,
4 given that you're the superintendent,
5 what would that do to the high school
6 as far as scheduling goes in your
7 opinion as superintendent?

8 A. I don't believe it could be
9 scheduled so that there could be an
10 equal program for the girls and boys.

11 (District Exhibit Four
12 marked for identification.)

13 BY ATTORNEY BEARD:

14 Q. I'm going to hand you what has
15 been marked as District Four and ask
16 you if you can take a look at that
17 document and let me know when you're
18 done. You're done?

19 A. Yes.

20 Q. Could you briefly describe for
21 the record what D-4 is?

22 A. D-4 is the 1999-2000 current
23 school year's schedule for the
24 physical education department, and
25 health. Actually the driver's

1 education department isn't shown on
2 this page.

3 Q. So right now according to this
4 Ms. Grant, Ms. Morrison and Mr. Short
5 and Mr. Vokes are involved in the
6 phys. ed and swimming?

7 A. Yes.

8 Q. If Mr. Collins was up at the
9 high school, how would you deal with
10 the issue of this educational
11 component of the classroom in the
12 locker room and the supervision? How
13 would that be undertaken?

14 A. I did do scheduling for several
15 years and I don't see how it could be
16 worked out really from this schedule.
17 If you'll note that there's an eight
18 period day and physical education is
19 taught on a semester basis, so if you
20 look at the fall and spring
21 semesters, you'll note that a typical
22 schedule is six periods a day out of
23 the eight periods and there wouldn't
24 be locker room coverage so to speak
25 for two periods of the day let alone

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1 providing for instruction that we
2 would be using. So I don't see how
3 it's possible.

4 Q. Where would you want to revise
5 it if you would have an aide in the
6 locker room like was discontinued
7 back in '92?

8 A. I think that there's too much
9 at risk. I think that a locker room
10 needs a professional not only for the
11 instructions but also for the
12 supervision. And you know that even
13 you're talking the professional out
14 of the situation and depriving the
15 girls of the full program.

16 Q. During your tenure as
17 superintendent, have you utilized an
18 aide on an ongoing basis to monitor
19 the physical education and/or the
20 locker room?

21 A. No.

22 Q. Would you make such a
23 recommendation to the board of school
24 directors?

25 A. I could not make that kind of

1 recommendation.

2 Q. Ms. Smith, when you are a phys.
3 ed. teacher, what are some of the
4 safety or problem issues that you
5 would sometimes encounter in the
6 locker room?

7 A. Well, quite frankly there are
8 issues of taking each others
9 equipment or clothing, so there are
10 safety issues. You may have heard
11 the word horseplay, but I've seen
12 them get up on the benches. I've
13 seen them run in the shower rooms.
14 I've seen them get into a squabble.
15 I've been around kids for 40 years
16 and these things happen.

17 And, you know, to pretend that
18 they're not happening I think would
19 be pretty naive because when kids get
20 together these kinds of things happen
21 in the locker room. These kinds of
22 things happen in the classroom. And
23 it take s professional oftentimes to
24 deal with it. It isn't a matter of
25 just saying, you know, don't do that

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1 or an aide saying, you know, don't do
2 that.

3 But it takes the intervention of
4 someone who's had some ed. psych and
5 some training, specialized training
6 dealing with students and I feel
7 strongly that the professional needs
8 to be there.

9 Q. Ms. Smith, you also said that
10 you testified previously there's
11 health and hygiene. And just by
12 given realities of life with females,
13 ladies, women, girls, do issues come
14 up relative to the menstrual issues
15 as far as in the locker room?

16 A. Very definitely. And problems
17 of sanitation but also of, you know,
18 my period is late or, you know,
19 what's going on. Could I possibly be
20 pregnant. There's some really
21 personal questions that come up in
22 the girls' locker room. And if they
23 don't have anyone, a professional to
24 review this, be willing to take them
25 inside and talk to them about it ---

1 I would say it's very common to have
2 those discussions and to have that
3 counseling advice.

4 Q. Now, Ms. Smith, if the
5 situation would be reversed in this
6 particular instance whereby you
7 needed supervision and education with
8 the boys, would your testimony be any
9 different?

10 A. No, it would not. And you
11 know, I think --- you know, my
12 primary goal is to give the best
13 educational program as we can. And I
14 can't see how that would work either
15 in the boys' locker room. It is very
16 important that they have a
17 professional in the locker room at
18 all times for many of the same
19 reasons that we've talked about
20 today. But certainly the supervision
21 and the educational program.

22 ATTORNEY BEARD:

23 I don't have any further
24 questions. I would release her
25 for Cross.

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1 CROSS EXAMINATION

2 BY ATTORNEY RODKEY:

3 Q. Ms. Smith, you indicated that a
4 Mr. Smith taught phys. education in
5 1998-'99. He's not on here; is he?

6 A. I did correct myself. I'm
7 sorry if you missed that. On this
8 schedule that would have been a prior
9 year.

10 Q. Mr. Smith, when he did teach
11 phys. ed., he did teach girls' phys.
12 ed.; is that not correct?

13 A. With an aide having the other
14 girls' phys. ed. teacher available.

15 Q. And that's what happens in the
16 middle school now?

17 A. But at the middle school,
18 remember, there are two female phys.
19 ed. teachers and two male teachers so
20 that they can teach and work with the
21 students in the locker rooms so that
22 there's always a professional in the
23 locker room opposite.

24 Q. But Mr. Smith did teach girls'
25 phys. ed. and he being a male; is

1 that correct?

2 A. That's not what the issue ---.

3 Q. Answer my question, please.

4 A. And your question again,
5 please.

6 Q. That Mr. Smith, when he taught,
7 there were times when he taught
8 girls' physical education in eighth
9 grade while that was in the high
10 school?

11 A. That is correct.

12 Q. And he also taught swimming, I
13 believe, which was co-ed?

14 A. That's correct.

15 Q. Now, when did Ms. Nisewonger
16 retire?

17 A. Spring of '99.

18 Q. So that would have been May,
19 June?

20 A. The end of the last school
21 year.

22 Q. This schedule for 1998-'99,
23 when was that made up, do you know?

24 A. That was made up in time for
25 the opening of that school year.

1 Q. And then that's Exhibit D-1.
2 Exhibit D-4, when would that have
3 been made up? That's the 1999-2000
4 school year.

5 A. That would be made up in the
6 summer also.

7 Q. Summer of '99?

8 A. Yes, that would be.

9 Q. Okay. In your letter to Mr.
10 Collins, the August 1st letter which
11 was part of Joint Exhibit Two, what
12 is the bona fide occupational
13 qualifications that he didn't have?

14 A. The ability to teach and
15 instruct in the girls' locker room,
16 supervise.

17 Q. And when was that known, I
18 mean, that he wouldn't have that
19 qualification? I mean, when was it
20 determined that that was a
21 qualification? Let me put it that
22 way.

23 A. Well, under ordinary
24 circumstances where there would be an
25 inability to provide for both the

1 girls and the boys, that would not be
2 an issue. But the issue is that when
3 you looked at the schedule, there was
4 no way to provide an equal program.

5 Q. And when did you look at those
6 schedules?

7 A. I can't remember directly. But
8 I would assume it was sometime
9 around, you know, the spring there of
10 or June or whenever it occurred.

11 Q. In '99?

12 A. Yes.

13 Q. And the '98-'99 staffing
14 existed for a year before?

15 A. That's true.

16 Q. So now if you wanted a female
17 phys. ed. instructor, you knew that
18 in the spring of '99?

19 A. Well, I don't think the student
20 numbers were in and that things were
21 far enough along the scheduling
22 process to have known that when we
23 processed the returns if that's what
24 you mean. I don't know the exact
25 date of the retirement. So ---.

1 Q. Well, you knew what the staff
2 was. You knew you had Morrison,
3 Short, Nisewonger retiring, Fletcher
4 and Rishel; is that correct?

5 A. Right.

6 Q. And historically don't you have
7 pretty much equal boys and girls?

8 A. I would say yes.

9 Q. So you had to know in the
10 spring, as you said, that you
11 probably were trying to fill a girls'
12 phys. ed. position; is that what
13 you're saying?

14 A. If everything came together in
15 that way as you're describing, that
16 would be the case.

17 Q. So there was a qualification
18 for that job which Mr. Collins didn't
19 possess and that had to have been
20 known to you in the spring of '99 as
21 you have indicated; is that correct?

22 A. Well, when you say the spring
23 of '99, that's quite a window.

24 Q. Well, you used that term, I
25 didn't.

1 A. Well, I can only say that I
2 cannot tell you what month, you know,
3 or what day that all of that would
4 come together.

5 Q. Did it come together before
6 July?

7 A. Probably by then we got serious
8 about scheduling at that point. And
9 I think perhaps even prior to that I
10 believe the principals had talked
11 some with Mr. Collins about the
12 situation.

13 Q. Prior to July?

14 A. I believe so. You would have
15 to ask them when they talked with
16 him, or Scott.

17 Q. You knew though that Nisewonger
18 was retiring at the end of her '98-
19 '99 school year?

20 A. Yeah. I'm not real sure when
21 the retirement letters came in,
22 probably sometime in May.

23 Q. Now, you indicated that the
24 locker room needs a professional for
25 both supervision and instruction; is

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1 that correct?

2 A. Yes.

3 Q. And the testimony of Mr. Vokes
4 I think is quite clear that in the
5 swimming part of the curriculum he is
6 a male teacher, there are female
7 swimming students. He is not in the
8 girls' locker room; is that correct?
9 You've heard that testimony?

10 A. Right.

11 Q. What is the difference that you
12 don't need a professional to
13 supervise the girls' swimming locker
14 room but you need one to supervise
15 the girls' phys. ed. locker room?

16 A. The difference is there's been
17 a counterpart available and will
18 continue to be if we have the two
19 people there. If you have one person
20 there, you don't have a counterpart
21 available. There's no one to call.
22 There's no one to come to see the
23 locker rooms adjoining the swimming
24 locker rooms. And there's a door
25 right there between the two rooms.

1 But in the case of down to one for
2 the girls, there's no one to call.
3 Mr. Vokes said he would make a phone
4 call or he would ask there to be or
5 his counterpart would ask him. But
6 there's not going to be anyone to
7 call if you're down to one person.

8 Q. Well, when the other female
9 phys. ed. teacher is missing, we have
10 male substitutes. We've had Mr.
11 Vokes and a Spanish teacher who is
12 male cover classes and we survived
13 that. We'd use locker room monitors
14 in some situations.

15 A. With a substitute teacher that
16 we had. But just picking up on the
17 word survive, I'd rather that we not
18 just survive. If we want to give a
19 good educational program, you know, I
20 think that we want to do a little
21 better for --- I guess what we're
22 indicating is that we can do it for
23 the boys but we can't do it for the
24 girls.

25 ARBITRATOR PARKINSON:

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1 Well, just answer the
2 question. And just ask a
3 question. I think we're almost
4 getting into bargaining.

5 ATTORNEY RODKEY:

6 Just a couple more
7 questions.

8 BY ATTORNEY RODKEY:

9 Q. The safety issues would be no
10 different in a swimming locker room
11 than a phys. ed. locker room; is that
12 correct?

13 A. There could be some
14 differences, yes.

15 Q. What would they be?

16 A. The locker rooms are larger,
17 there's more lockers that would allow
18 for perhaps the classes to be larger.

19 Q. The female sanitation issue,
20 menstruation would be no different in
21 a phys. ed. locker room than in a
22 swimming locker room; is that true?

23 A. Probably not true because
24 there's more opportunity in the phys.
25 ed. component for the female issues.

1 Q. How would that be?

2 A. Well, the design of the

3 dressing room program and so forth,

4 they may be just sitting out if they

5 are having their menstrual period in

6 swimming, but that may not be true of

7 physical education.

8 Q. But why would one require a

9 professional and the other would not?

10 You're trying to make a difference

11 and I'm having difficulty seeing it,

12 that is if a girl has a menstrual

13 issue, whether it's a swimming locker

14 room where Mr. Vokes as a male covers

15 that, versus a phys. ed. locker room,

16 what would be the meaning for

17 difference?

18 A. Well, I think there's an

19 important difference. And the

20 difference is, you know, I have to

21 come back to you aren't going to have

22 a female even available if you're

23 down to one. You rely on the male

24 and female being available in the

25 swimming locker room if there's a

1 need. And we aren't going to have

2 that if we just have one.

3 Q. How do you know? I mean, it's

4 covered now, it's existing now.

5 A. Because we have two teachers

6 there, two female teachers.

7 ATTORNEY RODKEY:

8 I'm not going to argue

9 with you. I don't have any

10 other questions.

11 ARBITRATOR PARKINSON:

12 Anything else?

13 ATTORNEY BEARD:

14 No.

15 ARBITRATOR PARKINSON:

16 Thank you, Ms. Smith.

17 ATTORNEY BEARD:

18 I would like to call

19 John Law.

20 JOHN LAW, PREVIOUSLY SWORN, CALLED TO

21 TESTIFY

22 DIRECT EXAMINATION

23 BY ATTORNEY BEARD:

24 Q. Mr. Law, can you state your

25 full legal name for the record,

1 please?

2 A. John Richard Law.

3 Q. And by whom are you employed?

4 A. Clearfield School District.

5 Q. In what capacity?

6 A. High school assistant

7 principal.

8 Q. How long have you been the

9 assistant principal at the high

10 school?

11 A. Seven years.

12 Q. Mr. Law, besides being a

13 principal, how long have you been in

14 an educational roll?

15 A. Seventeen (17) years.

16 Q. Seventeen (17) years.

17 A. What certifications, if any, do

18 you possess?

19 A. I'm a health and physical

20 education teacher, along with high

21 school administration, secondary

22 school administration.

23 Q. How long did you teach phys.

24 ed?

25 A. Eight years.

1 Q. Where did you teach phys. ed.?

2 A. New Jersey.

3 Q. Where at?

4 A. Demarest, New Jersey.

5 Q. Now, Mr. Law, just going back,

6 you've been here for seven years and

7 you were here for this testimony.

8 Are you familiar with this grievance

9 that has been going on for quite some

10 time now?

11 A. Yes.

12 Q. Now, just going back to your

13 experiences as a phys. ed.

14 instructor, here at Clearfield the

15 classes are 42 minutes long. Tell me

16 in your capacity as a phys. ed.

17 instructor what went on when you

18 taught phys. ed. as far as from the

19 time you entered the locker room

20 until the time you left?

21 A. Much the same as it is now.

22 Q. I want to make sure I'm clear.

23 Did you teach phys. ed. here?

24 A. Demarest, New Jersey.

25 Q. So you're relating to what went

on in Demarest?

ATTORNEY RODKEY:

I didn't object to that when Ms. Smith talked about it ---.

ARBITRATOR PARKINSON:

I thought maybe I was missing something.

ATTORNEY RODKEY:

I don't know what relevancy what he did in a different district in a different state has. I'm not clear on that.

ARBITRATOR PARKINSON:

I'm not clear yet either, but maybe we'll find out.

BY ATTORNEY BEARD:

Q. Mr. Law, as it relates to right here at Clearfield High School, do you agree with Mr. Collins that instruction only occurs from the time the kids wind up in the locker room to have their tardies and see if

they're dressed properly until they go back down to the locker room?

A. When they line up in the locker room?

Q. No. When they line up in the gym.

A. No. Instruction begins at the locker room door and ends in the locker room. Not every day is the same. Some days more is done. You do what's needed.

Q. Can you give me an example of why you think it goes on as students comes to the locker room door?

A. You know, I have taught different than Scott has, Mr. Collins has. You teach different things. Some days you just talk to a couple kids, you're in charge of getting the equipment down to the field, you make sure of this. I'll take the arrows, you take the other things like that.

You're always in there constantly talking to the kids in regard to safety, making sure that

they're not running, running into the doors. In my experience, and it's already been alluded to, there was some stealing or taking things that don't belong to you. You have the supervision and you constantly talk to the kids about what's going on in the class and afterwards. You talk about what has happened in the class, make sure sometimes that they don't bring something --- some of that stuff back from the field and take it into the locker room.

Q. Do you think that's a rule that's made in the locker room?

A. No, that's the rule of a teacher.

Q. Do you work with the schedules at the high school, Mr. Law?

A. Yes, I do.

Q. Are you familiar with D-1?

A. Yes.

Q. When was D-1 --- when was that thing put together?

A. We started this in June. We

probably finished this somewhere in July.

Q. Of what year?

A. Of '98-'99

Q. Are you familiar with D-4?

A. Yes.

Q. What is D-4?

A. It's a physical education and health schedule for this year, '99-2000.

Q. And again when was that one put together?

A. The same time frame, June and July.

Q. Of?

A. '99.

Q. Okay. Looking at the schedules and the experience that you have undergone here, if the Arbitrator were to grant Mr. Collins' request to go up to the high school and the only female phys. ed. instructor up there is Ms. Morrison, do you see how you could cover the classes?

A. We can't build a schedule.

1 Q. I'm sorry, I can't hear you.
2 A. No, we can't build a schedule.
3 I'm sorry.

4 ATTORNEY BEARD:

5 I don't have any other
6 questions.

7 ARBITRATOR PARKINSON:

8 Any Cross Examination of
9 this witness?

10 CROSS EXAMINATION

11 BY ATTORNEY RODKEY:

12 Q. Some of the things you
13 mentioned that you would see being
14 done in a classroom, talking safety,
15 telling the students what's going on
16 in the classroom, when they came
17 back, what went on, is there any
18 reason that couldn't be discussed out
19 in the gymnasium? Why would that
20 have to be done in the locker room?

21 A. Safety issues are important in
22 the locker room. A teacher can have
23 their own style and do all of that
24 different. If they don't choose to
25 --- some decide to get it done in the

1 locker room, so the kids, when they
2 hit the floor, they know what's going
3 on.

4 Q. But it's possible that as
5 they're lined up in squads for
6 attendance roll call they could be
7 told those things as well?

8 A. Yes.

9 Q. Now, even looking at your
10 Exhibit D-4, there would --- strike
11 that.

12 ATTORNEY RODKEY:

13 I don't think I have any
14 other questions.

15 ARBITRATOR PARKINSON:

16 Thank you.

17 ATTORNEY BEARD:

18 I would like to call

19 Judy Nisewonger?

20 JUDY NISEWONGER, PREVIOUSLY CALLED,
21 SWORN TO TESTIFY

22 ARBITRATOR PARKINSON:

23 Is it

24 N-I-S-E-W-O-N-G-E-R.

25 A. That's correct.

1 DIRECT EXAMINATION

2 BY ATTORNEY BEARD:

3 Q. Judy, can you state your full
4 legal name for the record, please?

5 A. Judith Ann Nisewonger.

6 Q. And I guess at this point in
7 time, what is your relationship to
8 the District as we sit here today?

9 A. The job that is in question is
10 my job and the person replacing me is
11 the question.

12 Q. So you're a former employee
13 here at the Clearfield School
14 District?

15 A. Yes. I was currently employed
16 31 years as a health and physical
17 education teacher, 27 with this
18 school district. I was the
19 coordinator of K through 12 for
20 health and physical education and I
21 was department head at the high
22 school.

23 Q. Now, as it relates to I guess
24 this grievance, just going back to
25 the time that you spent here in the

1 District, what goes on from the time
2 that the students enter the locker
3 room until the time they leave?

4 A. Well, the first thing you're
5 watching for is students coming in
6 late. You know, we have the
7 responsibility to see they're on
8 time. That is the first issue we're
9 dealing with. Also supervising their
10 dressing, making sure of safety. It
11 is primary in the locker room, there
12 is horseplay. As it's been said,
13 getting equipment out, getting
14 instruction about what to take, you
15 know, if I'm playing field hockey or
16 talking about shin guards,
17 safety-wise, getting those. This is
18 at the beginning.

19 Q. Do you circulate through the
20 locker room?

21 A. Yes. Yes. I circulate through
22 the locker room. I'm also perhaps
23 giving them clothing, fitting girls
24 with clothing if we're going to have
25 sides. It was pretty much part of my

1 day. I'd have clothing, that was
 2 part of my duty to do that. Then,
 3 you know, we're pretty much going
 4 out. And I beg to differ with the
 5 time that has been given. The basic
 6 program at the high school is perhaps
 7 most developed by me and also the
 8 department head right now, Harold
 9 Short. And the time that we allow is
 10 usually three to four minutes at the
 11 beginning for dressing, like I said,
 12 if we're putting on extra clothes to
 13 go out, we might have to do that.
 14 And at the end our dismissal is
 15 pretty much the same as the boys. If
 16 we were outside with distance to
 17 come, we dismissed at ten minutes and
 18 that gives them about seven minutes
 19 to get into the locker room. We have
 20 a large facility and there needs to
 21 be travel time. You know, being with
 22 the swimming program right from the
 23 beginning, you know, some of the
 24 curriculum I've even written, you
 25 know, for the swimming program

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1 currently. I was a WSI instructor
 2 there and I taught swimming classes.
 3 Q. So how much is it at the end?
 4 A. Ten minutes. You give your
 5 students ten minutes at the end. And
 6 I don't see the boys ever differ from
 7 the girls in that manner. Now, if
 8 I'm inside, I would give my girls
 9 seven minutes because the locker room
 10 is only about 30 seconds away from
 11 the door. But there is a lot more
 12 time than alluded to with most of the
 13 physical education teachers. Also,
 14 it's important to give your students
 15 time to dress because otherwise if
 16 they're late to another class, then
 17 you create a problem with other
 18 teachers.
 19 Q. That period of time that
 20 you're in the locker room both at the
 21 beginning and the end, do you think
 22 those are appropriate job duties for
 23 an aide?
 24 A. No. And I spoke to Mr. Collins
 25 at one point about this. He says, I

1 just didn't feel that he could do the
 2 job that a trained professional with
 3 health and physical education, being
 4 a female, could do in the locker room
 5 situation.

6 Q. Give some examples.

7 A. They talked about fights. Yes,
 8 I've broken up fights. You know,
 9 being in that locker room, the
 10 current one right now for 25 years,
 11 yes, I've broken up fights. One
 12 comes to mind where a girl was, you
 13 know, down on the floor pulling
 14 another girl's hair out and there was
 15 pieces of hair coming out of the
 16 scalp. You know, I was right on that
 17 immediately. An aide would hesitate.
 18 Do they have the training and
 19 expertise that I do with my teacher
 20 background? Care of injuries. As
 21 soon as you would come in to the
 22 locker room at the end of the period,
 23 being the teacher who taught the
 24 class, I'm in the locker room, I
 25 witnessed injuries, so I had to

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1 follow up on those. You know, so I
 2 talk to the students to make sure, do
 3 they need to go to the nurse for
 4 further evaluation or are they okay
 5 to go on. There was a lot ---.

6 ARBITRATOR PARKINSON:

7 What are you reading
 8 from?

9 A. These are just my notes, sir.

10 ARBITRATOR PARKINSON:

11 Do you want to see
 12 those?

13 ATTORNEY RODKEY:

14 No.

15 A. Just personal notes on a card.

16 ARBITRATOR PARKINSON:

17 You can use them. I was
 18 just wondering what you were
 19 reading from.

20 A. Health issues. You do
 21 circulate in the locker room. You
 22 know, sometimes there's missiles,
 23 shoes being thrown over back and
 24 forth across the locker room, a
 25 danger of things hitting the lights.

1 And also we do have a separate
2 office, you know, so it's not like
3 I'm stuck out in the locker room.
4 And there's some privacy given with
5 an instructor being in the office.
6 Many times I was the first person to
7 know that a girl would be pregnant.
8 I really do not feel with my
9 background and my experience that a
10 female physical education student
11 would go to a male instructor
12 immediately with that problem. You
13 know, I would try to instruct her in
14 what to do, contact her parents first
15 and go through proper channels. But
16 many times I held this in confidence
17 until that girl would accomplish this
18 and I would keep speaking with her at
19 the time. Also, it affected how I
20 handled her in the classroom then and
21 safety-wise I was concerned for her
22 pregnancy with being the only person
23 that would know at that time.

24 Showers are an option for girls
25 physical education. They are not

1 denied. They can take a shower. And
2 some girls have showered. There is a
3 problem sometimes with cleanliness,
4 body odor. You know, I'd get
5 complaints about a girl in the locker
6 room. And I would go up, you know,
7 walk by that girl, which a man or a
8 male instructor would not be able to
9 do, and being a health educator I
10 would then bring that girl to my
11 office and discuss health problems in
12 that way. So I did a lot of health
13 teaching, you know, in the locker
14 room itself.

15 Q. In your capacity, I notice that
16 this has come up in prior testimony,
17 what about the issues surrounding
18 menstrual cycles with the girls?
19 A. Oh, yes. They come in and they
20 might be afraid. You know, maybe
21 they're missing their period. Some
22 of the things I might --- I know
23 girls have come in and talked to me
24 about vaginal infections and how to
25 deal with those. You know, these are

1 really very private personal
2 situations. When you have a student
3 each day, being a female, they will
4 open up to you.

5 Now, you can say, I'll just
6 send them to the nurse being a male,
7 but the girls do not see Ms. Short,
8 our nurse, every day and have that
9 feeling of confidentiality. And I
10 can develop a really good rapport
11 with students in that manner.

12 Q. Now, I'm going to show you
13 District One and District Two. I
14 don't know if you've ever seen these
15 before.

16 A. I have not seen --- of course,
17 I'm not teaching this year, so I'm
18 not, you know, that much aware.

19 ARBITRATOR PARKINSON:

20 District Four she has
21 not seen?

22 Q. Because I'm not ---

23 BY ATTORNEY BEARD:

24 Q. Teaching.

25 A. --- teaching right now.

1 ARBITRATOR PARKINSON:

2 Okay. I understand.

3 A. This was my schedule from last
4 year.

5 ARBITRATOR PARKINSON:

6 District One?

7 A. D-1, yes.

8 BY ATTORNEY BEARD:

9 Q. Judy, you were the department
10 chair?

11 A. Yes, 25 years.

12 Q. Twenty-five (25) years. What
13 are the duties of the department
14 chair?

15 A. I would go in in July and see
16 the principal and I'd say, how is the
17 schedule set up. And, you know, I
18 would look at it, make mention of
19 certain things that I felt were
20 needed and then, you know, we would
21 talk about changes to be made. So
22 this one that I have, D-1, does
23 involve some of the changes that I
24 suggested, you know, with Dr. Wunder.

25 Q. While you were there, what was

1 the balance as far as female phys.
2 ed. instructors versus male?

3 A. Okay. We've always had two
4 females and at least two males,
5 sometimes three males. But at least
6 there was a lady available each
7 period in the locker room for the
8 instruction as needed in the locker
9 room and the teaching of the class.
10 There was one situation where Barbara
11 Peters --- now, she was there when I
12 was there. She retired. And they
13 tried to eliminate down to one male
14 (sic) instructor again. I was the
15 female that was left in the locker
16 room. I had tons of supervision. I
17 was going crazy. I couldn't do it,
18 you know, with the men and that's
19 where Mr. Short was assigned a
20 women's class. And I'm not sure if
21 Mr. Vokes was assigned a women's
22 class at that time. That lasted one
23 month.

24 And I continued to work to get
25 back to getting a female instructor.

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1 And that's when Ms. Janis Phillips
2 was hired at that time. Then we had
3 two women in the locker room.
4 There's always a female instructor in
5 the locker room with that situation.

6 So as far as any type of men
7 teaching women's classes, they were
8 only temporary. They were never on a
9 permanent basis with the high school.

10 Q. Looking at that and based on
11 your experience, looking at D-1 ---.

12 A. I know this one. I taught that
13 one.

14 Q. Looking at D-1, looking at what
15 you're familiar with when you were
16 here, do you see running the program
17 with three males and one female?

18 A. No. I had study up in the art
19 room period five and that left just
20 one female instructor down there.

21 And if that person would have been a
22 male, there would have been a big
23 problem in the supervision in the
24 locker room. An aide cannot function
25 the way a teacher can in the locker

1 room. You cannot just step in and
2 break up a fight without the
3 experience, the training that you
4 have as a teacher.

5 ARBITRATOR PARKINSON:

6 You know, let's get an
7 answer to the question, please.

8 A. Yes. I'm sorry.

9 ARBITRATOR PARKINSON:

10 Don't argue the case.

11 A. Yes.

12 BY ATTORNEY BEARD:

13 Q. Judy, when you were here, do
14 you recall a year back in the early
15 '90s of an aide in the middle school?

16 A. Yes.

17 Q. How long did they use an aide?

18 A. I do not know. I was not
19 brought in on that situation. As a K
20 through 12 coordinator, I would have
21 fought the situation because then you
22 had an aide but there --- yeah. That
23 condition did exist in the middle
24 school for a while.

25 Q. And then it discontinued?

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1 A. Right. Because the School
2 District worked to get a balance of
3 male and female instructors again.
4 That was the purpose of eliminating
5 the aide.

6 ATTORNEY BEARD:

7 I don't have any other
8 questions. I'll release her
9 for Cross.

10 CROSS EXAMINATION

11 BY ATTORNEY RODKEY:

12 Q. Would it be correct, Ms.
13 Nisewonger, that the aides were used
14 in the middle school for two years,
15 '91-'92 and '92-'93?

16 A. I was not the teacher involved
17 and I do not know how long the aides
18 were used.

19 Q. You retired at the end of the
20 '98-'99 school year?

21 A. Yes, I did.

22 Q. When did you submit your notice
23 of intent to retire?

24 A. You would have to go back and
25 get my resignation out of the file,

1 the date.

2 Q. Can you give us an idea?

3 A. There was a date it was due,
4 you know, if you were going to retire
5 and receive your benefits. There was
6 a date due and it was submitted by
7 that time.

8 Q. Can you give us a month, May,
9 April? Do you have any idea?

10 A. I don't remember. You know, it
11 would be on record, though, if you
12 want to obtain that.

13 Q. The school year ends June 30th.
14 It would have been prior to that?

15 A. Yes. Yes.

16 Q. Substantially prior can you
17 recall, a month?

18 A. Probably a month.

19 ATTORNEY RODKEY:

20 I have no other questions.

21 ARBITRATOR PARKINSON:

22 Thank you, Ms. Nisewonger.

23 ATTORNEY BEARD:

24 The District would like to
25 call Doctor Wunder.

1 WILLIAM WUNDER, PREVIOUSLY SWORN,
2 CALLED TO TESTIFY
3 DIRECT EXAMINATION

4 BY ATTORNEY BEARD:

5 Q. Dr. Wunder, can you state your
6 full legal name for the record,
7 please?

8 A. William Lloyd Wunder.

9 Q. And by whom are you employed?

10 ARBITRATOR PARKINSON:

11 How do you spell your last
12 name?

13 A. W-U-N-D-E-R, German spelling.

14 ARBITRATOR PARKINSON:

15 It looks like an O on this.

16 That's the reason I asked.

17 W-U-N-D-E-R?

18 A. Yes.

19 ARBITRATOR PARKINSON:

20 Thank you.

21 BY ATTORNEY BEARD:

22 Q. In what capacity?

23 A. High school principal.

24 Q. And how long have you been high
25 school principal?

1 A. Just a little over two years.

2 Q. How long have you been in
3 education overall?

4 A. I'm completing my 28th year, a
5 little over 28 years.

6 ARBITRATOR PARKINSON:

7 I'm going to have to have
8 you move up because I can't see
9 your face and ---.

10 BY ATTORNEY BEARD:

11 Q. You indicated about completing
12 your 28 years. Prior to coming to
13 Clearfield as a high school principal,
14 what positions, if any, did you hold?

15 A. Well, I was a teacher in six
16 different school districts. The last
17 school district I worked in for nine
18 years was Keystone Central School
19 District up by Lock Haven. And the
20 last four years of that time I was an
21 administrator and assistant principal
22 at Lock Haven High School and then
23 the last three years as a principal
24 of Sugar Valley School, which is a
25 K-12 school, and for about a half a

1 year at Bald Eagle-Nittany as co-
2 principal and running the alternative
3 school in that district.

4 Q. Do you work on scheduling
5 matters?

6 A. Yes.

7 Q. Do you work on scheduling
8 matters for the Clearfield School
9 District?

10 A. Yes.

11 Q. I'm going to hand you what has
12 previously been marked as District
13 One and District Four and ask you to
14 take a look at them and let me know
15 when you're finished.

16 A. Yes, I'm through with those.

17 Q. Now, Dr. Wunder, based on what
18 has ensued through this grievance, if
19 the Arbitrator would grant Mr.
20 Collins' request to put him up there
21 and you would then have three males
22 and one female, having been there for
23 two years and worked on scheduling,
24 could you accomplish that?

25 A. Absolutely not.

1 Q. Tell the Arbitrator why.

2 A. It would be extremely
3 difficult, if not impossible, to
4 provide the coverage in the locker
5 room that is necessary. For those
6 programs to run and to be equal
7 programs is very important. As has
8 been mentioned numerous times before,
9 there would not be ample coverage
10 with one female and three males in
11 the phys. ed. department, whether it
12 was swimming or phys. ed. because
13 they're, by contract, only supposed
14 to be teaching 260 minutes a day
15 which equates to six periods of an
16 eight-period schedule in the high
17 school. As you noticed on those
18 documents, the phys. ed. classes and
19 swimming classes are spread out
20 through those eight periods. And
21 there would be two periods out of the
22 day that would be uncovered and the
23 girls' phys. ed., there would not be
24 ample supervision or instruction
25 going on in those areas.

1 Q. When you say instruction going
2 in, were you here for Mr. Collins'
3 testimony he begins instruction after
4 everybody lines up in the gym?

5 A. Yes, I did hear that.

6 Q. Do you agree with that?

7 A. No.

8 Q. Can you tell us why?

9 A. Well, I agree with what the
10 state regs say that instruction times
11 starts from the first period to the
12 --- or from the first moment of that
13 period to the end of the period. And
14 there are times when you must be
15 involved with that class in the
16 locker room which you would be
17 excluding the girls from the male
18 phys. ed. teacher.

19 Q. How about the possibility,
20 well, we'll just hire an aide? Would
21 you want an aide in there?

22 A. No, I wouldn't.

23 Q. Tell us why.

24 A. I thought Ms. Nisewonger said
25 that extremely well. There's a lot

1 of things that go on having fathered
2 a girl. And I know there's a lot of
3 issues that are totally different
4 than what the boys have and I would
5 not, if I were the teacher, feel
6 comfortable talking to a girl about
7 her menstrual cycle and the
8 possibility of being pregnant, having
9 a fight with her boyfriend, family
10 issues that girls would have
11 different than the boys.

12 Q. And as far as the discussion to
13 go with a female versus a male
14 teacher, were you part of those
15 discussions?

16 A. Yes.

17 Q. What is your recollection as to
18 why the District decided to go in
19 that direction?

20 A. The concern was that going from
21 two females to one female would make
22 it impossible to perform a schedule.
23 Scheduling starts long before the
24 summer by guidance counselors going
25 into the classrooms, getting course

1 request sheets filled out. They come
2 back in, the secretary types them
3 into the computer. We start getting
4 a printout of how many students have
5 signed up for different courses. And
6 that's when we first get an idea,
7 sometime in April, of the possibility
8 of the numbers and classes. We start
9 putting the schedule together in June
10 or July as far as the actual schedule
11 itself, but all the preliminary work
12 is done up to that time. When we
13 started discussing about the two
14 ladies retiring and the possibility
15 of what could happen, there was
16 concern as far as to one female.

17 ATTORNEY BEARD:

18 I have no further
19 questions. Release him for
20 Cross, reserve for rebuttal.

21 CROSS EXAMINATION

22 BY ATTORNEY RODKEY:

23 Q. How early did that concern
24 going to one female occur?

25 A. I would say it was after school

1 was out. It was June sometime. I'm
2 not exactly sure of the date.

3 Q. 1999?

4 A. Yes.

5 Q. Now, these female health
6 issues, isn't that what the school
7 nurse is for?

8 A. Well, she does help in those
9 areas, yes.

10 ATTORNEY RODKEY:

11 That's all I have.

12 ARBITRATOR PARKINSON:

13 Okay. Thank you.

14 ATTORNEY RODKEY:

15 That's it. May I have just
16 a second to see if I have any
17 rebuttal.

18 SHORT BREAK TAKEN

19 ATTORNEY RODKEY:

20 I'm going to recall for
21 rebuttal Mr. William Vokes.

22 WILLIAM VOKES, PREVIOUSLY SWORN,

23 RECALLED TO TESTIFY

24 REDIRECT EXAMINATION

25 BY ATTORNEY RODKEY:

1 Q. Your name is V-O-K-E-S?

2 A. Correct.

3 Q. There was testimony by one or
4 more of the District's witnesses
5 concerning female sanitary issues
6 involving menstruation and so forth.
7 In your years as the swimming
8 instructor, have you dealt with that
9 situation, Mr. Vokes?

10 A. Yes, many times. As a matter
11 of fact, it's part of our orientation
12 the first day. We talk about
13 attendance in the class and, of
14 course, after we go through the
15 orientation I ask the boys to go out
16 in the hall and sit down. And I'll
17 have the girls stay. And I'll talk
18 to them about their menstrual period
19 and so on. First I need a note from
20 the parent, also I need to know if
21 they're going to use a tampon or
22 they're not. If they are going to
23 use a pad, then I ask them that they
24 bring exercise clothes and exercise.
25 And we go over this pretty good with

1 them and we talk about toxic shock
2 syndrome.

3 We talk about if they're going
4 to use a tampon, that they should
5 talk it over with their parents and
6 most of them --- and I have ---
7 they've come to me and they've asked,
8 Mr. Vokes, do you have a tampon. And
9 I tell them that the nurse has
10 tampons or the lady phys. ed.
11 teachers have them. I have them. And
12 sometimes they're embarrassed and
13 they won't come to me, but they'll
14 have a friend come to me and I'll
15 ---.

16 Q. So over the years you've had to
17 deal with this issue and you have
18 been able to do that?

19 A. Yes. It's an ongoing thing,
20 yes.

21 ATTORNEY RODKEY:

22 Thank you. That's all I
23 have.

24 ATTORNEY BEARD:

25 Nothing.

1 ARBITRATOR PARKINSON:

2 Thank you again, Mr. Vokes.

3 A. Thank you.

4 ATTORNEY RODKEY:

5 That's all we have, sir.

6 ARBITRATOR PARKINSON:

7 Are you going to orally
8 come up or file briefs?

9 ATTORNEY RODKEY:

10 For a thorough record, I
11 think I would probably submit a
12 memorandum.

13 OFF RECORD DISCUSSION

14 ARBITRATOR PARKINSON:

15 The hearing is closed now,
16 but the record won't be closed
17 until I get the briefs and make
18 the exchange. Thank you all
19 very much.

20 * * * * *

21 HEARING CONCLUDED AT 12:45 P.M.

22 * * * * *

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	33	8		123	20
	36	18		131	15
	55	23		137	15
	57	14		137	22
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	81	22		83	1
	82	18		107	9
	87	7		113	6
	101	9		128	14
	102	21, 25		144	16
	103	4	younger	48	11
	104	14	yourself	39	24
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	128	17			
	129	4			
	132	14			
	133	20			
	134	13			
	136	4			
	137	1			
year's	95	23			
years	16	11			
	19	9, 22			
	53	19, 20			
	54	4, 6, 21			
	86	1			

JH#2

F. Form for Filing of Grievance

Name of Complainant Scott Collins Date Filed 16 July, 1999

Home Address RR3 Box 177A Morrisdale, PA 16858

Home Telephone No. 814-345-6524 No. Of years in School System 6

Name of School and

School Address Clearfield Middle School, Mill Road, Clfd., PA
School

Principal Mr. Timothy Meckey Telephone No. 765-5302

Building Representative Margie Kanski, CEA/PR&R Representative

Provision of Master Agreement/School Policy alleged violated:

Article II, Section K, Paragraph 2 (Page 11)

Article II, Section K, Paragraph 3, .1 through .5 (Pages 11-12)

Article II, Section L, Paragraphs 1 through 4.4 (Pages 12-14)

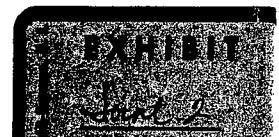
Statement of Grievance (specific terms or manner in which grievant was harmed):

Two (2) High school Physical Education positions were vacated due to retirements. These positions were posted on 30 June, 1999. I applied for one of those positions. Being second-most senior of all applicants, I should have been assigned to the second position. The administration has denied me the assignment.

Action Requested:

That I be assigned to the vacant High School Physical Education position, for which I am fully qualified, for which I legitimately applied, and for which I am eligible, due to my seniority; and any other award granted by an arbitrator.

Scott A. Collins
Signature of the Complainant



Clearfield Area Middle School

Administrative Offices
Mill Road

Telephone: 814-765-5302

Clearfield, Pa. 16830

FAX: 814-765-4604

July 21, 1999

Mr. Scott Collins
RD 3 Box 177A
Morrisdale PA 16858

Dear Scott,

On Friday, July 16, 1999, I received a grievance from you with respect to Physical Education positions. On the same date, a conference was held to discuss this grievance. Mrs. Suzanne Nagle of the Clearfield Education Association was also present at the meeting. The decision from this conference is that the grievance is denied at this level.

Sincerely,



Tim Meckey
Middle School Principal

tm/dc



PHONE 814 765-2233

CLEARFIELD EDUCATION ASSOCIATION
CLEARFIELD AREA SCHOOLS
CLEARFIELD, PENNSYLVANIA 16830

21 July, 1999

Patricia P. Smith, Supt.
Clearfield Area School District
P.O. Box 710
Clearfield, PA 16830

Dear Mrs. Smith:

Since our meeting with Mr. Meckey failed to bring about a satisfactory resolution to the problem at Step One, we are moving to Step Two of the Grievance Procedure, under cover of this letter, a grievance filed on 16 July, 1999 by Scott Collins, a member of the Bargaining Unit.

Would you be so kind as to schedule an oral conference with all involved on or before 27 July, 1999? We are eager to have this situation resolved before the beginning of the 1999-2000 school year. Therefore, we ask your co-operation in moving the process as expeditiously as possible, keeping in mind that the suggested time lines in the Grievance Procedure are maximum calendar days.

In the event that you should deny the grievance at Step Two, we would expect to have a Board level hearing on or before 21 August, 1999 and the Board's disposition by 31 August, 1999.

Thank you in advance for your co-operation in resolving this problem.

Sincerely,

Suzanne S. Nagle, Chair
CEA/PR&R

cc: Marianne McCloskey, President, CEA
Paul Young, Vice-president, CEA
Jenifer DuBois, PSEA UniServ
Margie Kanski, CEA/PR&R (Middle School)

July 22 '99

Clearfield Area School District

ADMINISTRATIVE OFFICES

POST OFFICE BOX 710 438 RIVER STREET
CLEARFIELD, PENNSYLVANIA 16830
814-765-5511 FAX 765-5515

August 18, 1999

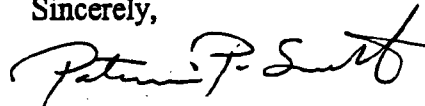
Mrs. Suzanne S. Nagle
416 Treasure Lake
Dubois, Pa. 15801

Dear Mrs. Nagle:

On behalf of the Clearfield Area Board of School Directors, I am responding to your request to schedule a board-level hearing on August 23, 1999. After consideration of various schedules and vacations, I have been able to confirm that date for you at 7:00 P.M. at the Clearfield Elementary Library.

Thank you for your consideration.

Sincerely,



Patricia P. Smith
Superintendent

cc: Marianne McCloskey, CEA President
Paul Young, CEA Vice President
Jennifer DuBois, PSEA UnivServ
Margie Kanski, CEA/PR & R (Middle School Rep)

Clearfield Area School District

ADMINISTRATIVE OFFICES
POST OFFICE BOX 710 438 RIVER STREET
CLEARFIELD, PENNSYLVANIA 16830
814-765-5511 FAX 765-5515

August 1, 1999

Mr. Scott Collins
R.R. 3, Box 177A
Morrisdale, PA 16858

Dear Mr. Collins:

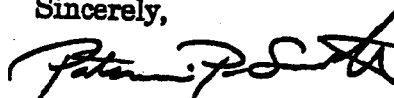
On Tuesday, July 27, 1999, we met to discuss the Step Two grievance that Mrs. Nagle submitted to me on your behalf on July 21, 1999. Attending were you, Mrs. Nagle, Mr. Rishel and I.

The grievance is in regard to your request to transfer to the high school girls' physical education position. You stated that you wanted to move on from the Middle School and work at the High School and that your request does not have to do with your high school coaching as you had previously indicated to Mr. Meckey and me. You believe that your certificate and the CEA Agreement entitles you to transfer.

I explained that I have an overall concern for the educational program for all the students. If you were to transfer to the high school girls' physical education position, there would be four male teachers and one female, yet an equal number of girls and boys need to be served. Under those limitations, it would be impossible to schedule a comparable program for the girls. The girls' locker room is part of the classroom. Since you could not go into the locker room, the girls would be deprived of 15-20 minutes of instruction and supervision each class period. You would not be able to perform the full range of duties for the job. It is a matter of your not having the bona fide occupational qualifications for the job. The position requires that the teacher be able to teach and supervise the students the entire class period.

Therefore, I must deny the grievance. Please consider that this involves matters of mutual concern that affect the educational program for all the students.

Sincerely,



Patricia P. Smith
Superintendent

PPS/clm

Clearfield Area School District

ADMINISTRATIVE OFFICES
POST OFFICE BOX 710 438 RIVER STREET
CLEARFIELD, PENNSYLVANIA 16830
814-765-5511 FAX 765-5515

J+y#3

***** PLEASE POST *****
REVISED POSTING

TO: Professional Staff
FROM: Superintendent's Office
DATE: July 2, 1999
RE: Amended Posting of Vacancies

Applications for the following positions will be accepted in the Central Office until 12:00 Noon on Tuesday, July 13, 1999:

POSITIONS: Grade 1 Teacher at Bradford Township Elementary School
(Amended to Grade 1 BUBBLE CLASS Teacher at Bradford Township Elementary School)

Grade 1 Teacher at Centre Elementary School

Grade 2 Teacher at Clearfield Elementary School

Grade 3 Teacher at Clearfield Elementary School

Grade 7 Life Science Teacher

Grade 8 Physical Science Teacher

High School Health/Physical Education Teacher
(Amended to TWO (2) High School PHYSICAL EDUCATION TEACHERS)

SALARY: As per contract

PLEASE NOTE: ALL LETTERS OF APPLICATION SHOULD BE SUBMITTED TO MARGIE COWDER IN THE CENTRAL OFFICE.

A TRANSFER DAY WILL STILL BE HELD AT THE MIDDLE SCHOOL LIBRARY ON THURSDAY, JULY 15, 1999 AT 1:00 P.M.

mc



REGULAR CLASS SCHEDULE 1998-2000

	07:53	STUDENTS REPORT TO HOMEROOM
	08:02	TARDY BELL
	08:02 - 08:10	ENROLLING AND ANNOUNCEMENTS
	1 08:15 - 08:57	
	2 09:02 - 09:44	
	3 09:49 - 10:31	
A	B	C
Ln 10:36 - 11:08	4 10:36 - 11:18	4 10:36 - 11:18
4 11:10 - 11:52	Ln 11:22 - 11:52	5 11:22 - 12:04
5 11:56 - 12:38	5 11:56 - 12:38	Ln 12:08 - 12:38
	6 12:42 - 01:24	
	7 01:29 - 02:11	
	8 02:18 - 02:58	

A.M. ACTIVITY SCHEDULE

	07:53	STUDENTS REPORT TO HOMEROOM
	08:02	TARDY BELL
	08:02 - 08:10	ENROLLING AND ANNOUNCEMENTS
Activity	08:15 - 08:46	
	1 08:51 - 09:21	
	2 09:28 - 09:56	
	3 10:01 - 10:31	
A	B	C
Ln 10:36 - 11:08	4 10:36 - 11:18	4 10:36 - 11:18
4 11:10 - 11:52	Ln 11:22 - 11:52	5 11:22 - 12:04
5 11:56 - 12:38	5 11:56 - 12:38	Ln 12:08 - 12:38
	6 12:42 - 01:24	
	7 01:29 - 02:11	
	8 02:18 - 02:58	

P.M. ACTIVITY SCHEDULE

	07:53	STUDENTS REPORT TO HOMEROOM
	08:02	TARDY BELL
	08:02 - 08:10	ENROLLING AND ANNOUNCEMENTS
	1 08:15 - 08:57	
	2 09:02 - 09:44	
	3 09:49 - 10:31	
A	B	C
Ln 10:36 - 11:08	4 10:36 - 11:18	4 10:36 - 11:18
4 11:10 - 11:52	Ln 11:22 - 11:52	5 11:22 - 12:04
5 11:56 - 12:38	5 11:56 - 12:38	Ln 12:08 - 12:38
	6 12:42 - 01:12	
- Activity	01:17 - 01:48	
	7 01:53 - 02:23	
	8 02:28 - 02:58	

HOLIDAY/EARLY DISMISSAL

6	12:42 - 01:04
7	01:09 - 01:31
8	01:36 - 02:00
02:00	STUDENT DISMISSAL

ACT 80 EARLY DISMISSAL

6, 7 or 8	12:42 - 01:00
01:00	STUDENT DISMISSAL

Clearfield Area School District

ADMINISTRATIVE OFFICES
POST OFFICE BOX 710 438 RIVER STREET
CLEARFIELD, PENNSYLVANIA 16830
814-765-5511 FAX 765-5515

TO: Board of School Directors
FROM: Patricia P. Smith, Superintendent
RE: FOCUS Information - Board only
DATE: August 6, 1999

Collins Grievance--Attached is a copy of the Collins grievance requesting a Level III Board hearing. We will have to coordinate the date with Solicitor Beard and your schedules to see whether this will be possible. The contract calls for a hearing date within twenty days which would, in fact, put us on August 23. Also attached is a copy of my Level II response to the grievance.

At issue is our need to have a teacher in that position who can fulfill the full requirements of the job ("occupational qualifications"). If the person in this job is not female, then the teaching and supervisory responsibilities could not be met during the time in the locker room (also a part of the classroom, per se). Under the direction of Solicitor Beard, we have taken the following steps.

1. Confirmed Jackie Morrison whose position had been collapsed to the one girls H & PE position at the High School.
2. Transferred Jana Grant who had been teaching at the Middle School to the second girls H & PE position at the High School.

Note: These two vacancies occurred with the retirements of Mrs. Fletcher and Miss Nisewonger.

3. Interviewed for the Middle School girls H & PE position resulting from the Grant transfer. We will have a recommendation for the Board's consideration on August 16.

Under this plan, Mr. Collins would remain as the boys H & PE teacher at the Middle School along with Mr. Billotte. The new hire would serve along with Miss Speicher for girls H & PE at the Middle School.

If you have any questions, please feel free to call me.

dbr





PHONE 814 765-2233

CLEARFIELD EDUCATION ASSOCIATION
CLEARFIELD AREA SCHOOLS
CLEARFIELD, PENNSYLVANIA 16830

August 3, 1999

James A. Naddeo, President
Clearfield Area Board of School Directors
P.O. Box 710
Clearfield, PA 16830

RE: Scott Collins grievance

Dear Mr. Naddeo:

We are transmitting herein a grievance filed on 16 July, 1999 on behalf of Scott Collins, a member of the Bargaining Unit. This grievance has been denied at Steps One and Two of the Grievance Procedure.

Would you be so kind as to schedule a Board-level review of the situation on or before 23 August, 1999, so that we may attempt to resolve the issue before the beginning of the new school year?

Thank you in advance for your consideration of this matter.

Cordially,

Suzanne S. Nagle, Chair
CEA/PR&R

cc: Marianne McCloskey, CEA President
Paul Young, CEA Vice-President
Jennifer DuBois, PSEA UniServ
Mergie Kanski, CEA/PR&R (Middle School Rep)

11

F. Form for Filing of Grievance (Amended)

Name of Complainant Scott Collins Date Filed 16 July, 1999

Home Address RR3 Box 177A Morrisdale, PA 16858

Home Telephone No. (814) 345-6524 No. Of years in School System 6

Name of School and

School Address Clearfield Middle School, Mill Road, Clfd., PA

Principal Mr. Timothy Meckey

School Telephone No. 765-5302

Building Representative Margie Kanski, CEA/PR&R Representative

Provision of Master Agreement/School Policy alleged violated:

Article II, Section K, Paragraphs 1, 2, and 3 (Pages 10 -12)

Article II, Section L, Paragraphs 1 through 4.4 (Pages 12-14)

Statement of Grievance (specific terms or manner in which grievant was harmed):

Two (2) High school Physical Education positions were vacated due to retirements. These positions were posted on 30 June, 1999. I applied for one of those positions. Being second-most senior of all applicants, I should have been assigned to the second position. The administration has denied me the assignment.

Action Requested:

That I be assigned to the vacant High School Physical Education position, for which I am fully qualified, for which I legitimately applied, and for which I am eligible, due to my seniority; and any other award granted by an arbitrator.

Signature of the Complainant

Clearfield Area School District

ADMINISTRATIVE OFFICES

POST OFFICE BOX 710 438 RIVER STREET
CLEARFIELD, PENNSYLVANIA 16830

814-765-5511 FAX 765-5515

August 1, 1999

Mr. Scott Collins
R.R. 3, Box 177A
Morrisdale, PA 16858

Dear Mr. Collins:

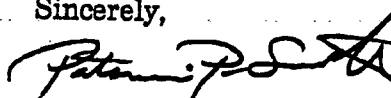
On Tuesday, July 27, 1999, we met to discuss the Step Two grievance that Mrs. Nagle submitted to me on your behalf on July 21, 1999. Attending were you, Mrs. Nagle, Mr. Rishel and I.

The grievance is in regard to your request to transfer to the high school girls' physical education position. You stated that you wanted to move on from the Middle School and work at the High School and that your request does not have to do with your high school coaching as you had previously indicated to Mr. Meckey and me. You believe that your certificate and the CEA Agreement entitles you to transfer.

I explained that I have an overall concern for the educational program for all the students. If you were to transfer to the high school girls' physical education position, there would be four male teachers and one female, yet an equal number of girls and boys need to be served. Under those limitations, it would be impossible to schedule a comparable program for the girls. The girls' locker room is part of the classroom. Since you could not go into the locker room, the girls would be deprived of 15-20 minutes of instruction and supervision each class period. You would not be able to perform the full range of duties for the job. It is a matter of your not having the bona fide occupational qualifications for the job. The position requires that the teacher be able to teach and supervise the students the entire class period.

Therefore, I must deny the grievance. Please consider that this involves matters of mutual concern that affect the educational program for all the students.

Sincerely,



Patricia P. Smith
Superintendent

PPS/clm

D-4

1999-00 Clearfield High School Schedules

PHYS ED, HEALTH AND DRIVER ED DEPARTMENTS

PER	Miss Grant	Mrs. Morrison	Mr. Short	Mr. Vokes	Mr. Rishel			
1	Phys Ed F - 18 S - 36	Phys Ed F - 23 S - 38	Phys Ed F - 25 S - 30	Swimming	Health F - 24 S - 21			
2	Phys Ed F - 18 S - 3 (Ad)	Phys Ed F - 23	Phys Ed F - 17 S - 22	Swimming	Health S - 14			
3	Phys Ed F - 24 S - 21	Phys Ed F - 33 S - 33	Phys Ed F - 28 S - 35	Swimming	Health F - 15			
4	Phys Ed F - 38 S - 45	Phys Ed F - 39	Phys Ed F - 41 S - 43		Health F - 19 S - 24			
5	Phys Ed F - 3 (Ad)	Swimming		Phys Ed F - 35 S - 30	Health F - 29			
6				Phys Ed F - 33 S - 33	Health F - 15 S - 18			
7	Phys Ed. F - 39 S - 32	Swimming	Phys Ed F - 26 S - 34		Health S - 20			
8	Phys Ed S - 38	Swimming	Phys Ed S - 43	Phys Ed F - 36	Health F - 26 S - 26			

Class #1

Clearfield Area School District Position Description

JOB TITLE:	Teacher, Physical Education		
DEPARTMENT:	Instruction		
REPORTS TO:	Principal		
PREPARED BY:	Michael W. Spencer	DATE:	December 16, 1996
APPROVED BY:	Board of School Directors	DATE:	

SUMMARY:

Instructs students in physical education activities in educational institution by performing the following duties.

ESSENTIAL DUTIES AND RESPONSIBILITIES include the following. Other duties may be assigned.

- Plans physical education program to promote development of student's physical attributes and social skills.
- Teaches individual and team sports to students, utilizing knowledge of sports techniques and of physical capabilities of students.
- Organizes, leads, instructs, and referees indoor and outdoor games such as volleyball, baseball, and basketball.
- Instructs individuals or groups in beginning or advanced calisthenics, gymnastics, or corrective exercises, determining type and level of difficulty of exercises, corrections needed, and prescribed movements.
- Teaches and demonstrates use of gymnastic and training apparatus.
- Confers with students, parents, and school counselor to resolve student problem.
- Selects, stores, orders, issues, and inventories equipment, materials, and supplies used in physical education program.
- Teaches students with disabilities.
- Plans curriculum, lessons, and teaching methods.
- Evaluation, assessment and screening of students.

SUPERVISORY RESPONSIBILITIES:

Students and Aides

QUALIFICATIONS To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill, and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

A-1

EDUCATION and/or EXPERIENCE:

Four year college or university program majoring in health and physical education.

LANGUAGE SKILLS:

Ability to read, analyze, and interpret common scientific and technical journals, financial reports, and legal documents. Ability to write reports, business correspondence, and procedure manuals. Ability to effectively present information to top management, public groups, and/or boards of directors.

MATHEMATICAL SKILLS:

Ability to calculate figures and amounts such as discounts, interest, commissions, proportions, percentages, area, circumference, and volume. Ability to apply concepts of basic algebra and geometry.

REASONING ABILITY:

Ability to define problems, collect data, establish facts, and draw valid conclusions. Ability to interpret an extensive variety of technical instructions in mathematical or diagram form and deal with several abstract and concrete variables.

CERTIFICATES, LICENSES, REGISTRATIONS

Valid Pennsylvania Teaching Certificate with a health and physical education endorsement.

PHYSICAL DEMANDS The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee is regularly required to stand, walk, and talk or hear. The employee frequently is required to use hands to finger, handle, or feel and reach with hands and arms. The employee is occasionally required to sit, climb or balance, sprint or run, bend and twist at the trunk and neck more than the average person, and stoop, kneel, crouch, or crawl. The employee must occasionally lift and/or move up to 25 pounds. Specific vision abilities required by this job include distance vision, and peripheral vision, and the ability to adjust focus.

WORK ENVIRONMENT The work environment characteristics described here are representative of those an employee encounters while performing the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee is occasionally exposed to outside weather conditions. The noise level in the work environment is usually loud.

The information contained in this job description is for compliance with the American with Disabilities Act (A.D.A.) and is not an exhaustive list of the duties performed for this position. Additional duties are performed by the individuals currently holding this position and additional duties may be assigned.



ARBITRATION PROCEEDING
BEFORE
PHILIP PARKINSON, ARBITRATOR

In the matter of:
CLEARFIELD EDUCATION
ASSOCIATION

and

CLEARFIELD AREA
SCHOOL DISTRICT

: Grievance: Scott A. Collins
: Awarding of Vacancy
:
:
:

: Hearing Date: April 26, 2000
:
:

BRIEF ON BEHALF OF
CLEARFIELD AREA SCHOOL DISTRICT

Carl P. Beard, Esquire
ANDREWS, WAGNER & BEARD
3366 Lynnwood Drive
P.O. Box 1311
Altoona, PA 16603
(814) 943-3304

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TABLE OF AUTHORITIES

Cases

<u>Board of Education of School District of City of Erie v. Erie Education Association</u> , 70 LA 567, 569 (1978)	11, 12, 17
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I. STATEMENT OF THE CASE

The Grievant, Scott A. Collins (hereinafter "Grievant"), filed a grievance against the Clearfield Area School District (hereinafter "District"). At the time the grievance was filed, Mr. Collins was employed as a middle school health and physical education teacher by the District. The Grievant, along with the Clearfield Education Association (hereinafter "Association"), claims that the District violated the Collective Bargaining Agreement (hereinafter "Agreement") when it denied Mr. Collins the transfer by stating that he did not possess the ability to perform an essential function of the position for which he applied.

The parties could not resolve this issue through the grievance procedure and, therefore, the matter proceeded to arbitration.

II. STATEMENT OF THE FACTS

As a result of the retirement of two female high school physical education teachers, Mrs. Fletcher and Miss Nisewonger, two physical education teacher positions at the Clearfield Area High School became vacant. The vacancies were posted by the School District on June 30, 1999. In response to the job posting, the Grievant applied for a transfer to one of the positions. However, The Grievant's transfer application was denied and both positions were filled by female physical education teachers.

On July 16, 1999, Mr. Collins filed a grievance against the School District for its denial of his transfer request. Also, on July 16, 1999 a conference was held to discuss the grievance. Present at this conference were Suzanne Nagle, of the Association, and Tim Meckey, the Middle School Principal. The Grievance was denied at the July 16 conference and the Grievant was notified by a letter dated July 21, 1999 of the outcome of the conference.

The grievance was again denied at step two of the grievance process after a meeting between Ms. Nagle, Mr. Rishel, and Ms. Smith. The Grievant was made aware of the denial at step two by a letter dated August 1, 1999, in which Ms. Smith indicated that the reason the transfer was denied was the inability of the Grievant "to perform the full range of duties for the job," as the Grievant would be unable to "teach and supervise the students the entire class period."

Unable to resolve the matter, the grievance was processed to arbitration and a hearing was held before this Arbitrator on April 26, 2000.

III. ISSUE PRESENTED

WHETHER THE DISTRICT VIOLATED THE COLLECTIVE BARGAINING AGREEMENT WHEN IT DENIED THE TRANSFER REQUEST OF THE GRIEVANT BECAUSE HE WAS NOT ABLE TO FULFILL AN ESSENTIAL FUNCTION OF THE POSITION FOR WHICH HE HAD APPLIED.

SUGGESTED ANSWER: IN THE NEGATIVE

IV. RELEVANT CONTRACT AND STATUTORY PROVISIONS

PREAMBLE

The Board of School Directors of the Clearfield Area School District and the Clearfield Education Association believe that the development and operation of educational programs of the **highest quality for the benefit of the students and the community** is a common responsibility which requires, for its effective discharge, consultation among the Board, the Superintendent and Administrative Staff, and other members of the Professional Staff speaking through their elected representatives. Since these groups have the same ultimate aim of providing the best educational opportunity for all pupils enrolled in the schools consistent with community resources, relations must be established and maintained which are based upon the common interest and the concept of education as a public trust and a professional calling.

The Board of School Directors, the Superintendent, the Administrative Staff, and other members of the Professional Staff can best attain their common objectives and discharge their common responsibilities if each utilizes the ability, experience, and judgment of the others in formulating policies and making decisions that involve matters of mutual concern **and which affect the quality of the District's educational program**. It is the purpose of this Agreement to set forth the standards governing such matters of mutual concern to the parties.

This Agreement is made and entered into by and between the Board of School Directors of the Clearfield Area School District, hereinafter referred to as the "Board" and the Clearfield Education association, hereinafter referred to as the "Association."

ARTICLE II EMPLOYEE RIGHTS

Section K: Vacancies, Qualifications, and Assignments

1. Vacancies – All staff vacancies ninety (90) school days or more in duration, including newly created positions and supplementary employment, must be announced to all staff members and an opportunity given to all qualified personnel to apply for a vacant position. Professional staff members will be given priority for such positions except that athletic supplemental positions will be given to the most qualified applicants as determined by the Board. Where it is determined that qualifications are equal, seniority in the school district shall prevail.

Grievance Procedure

4. Step Four – If the Board and grievant are unable to agree upon a disposition of the grievance, the Association may request arbitration of the grievance by filing a notice with the superintendent, which notice must be received within twenty (20) school days after the decision in Step Three is received or due.

The arbitrator shall **have no power or authority to add to, subtract from, or modify the provisions of this agreement** in arriving at a decision of the issue or issues presented and shall confine his decision solely to the application and interpretation of this agreement.

The decision of the arbitrator shall be final and binding on both parties, except where the decision would require an enactment or amendment of a State statute, in which case it shall be binding only if such statute is enacted or amended. The arbitrator shall be requested to issue his decision within thirty (30) days after the hearing or receipt of the transcript of the hearing.

V. ARGUMENTS

A. THE SCHOOL DISTRICT DID NOT VIOLATE THE EXPRESS TERMS OF THE COLLECTIVE BARGAINING AGREEMENT WHEN IT DENIED THE TRANSFER REQUEST OF THE GRIEVANT, THEREFORE, THE DISTRICT'S ACTIONS IN DENYING THIS TRANSFER REQUEST WERE PROPER.

It is the position of the Clearfield Area School District that it has not violated the terms of its Collective Bargaining Agreement with the Clearfield Education Association in denying Mr. Collins' request for a transfer. The District's actions in denying this request were proper as the Grievant was unable to perform an essential function of the position for which he had applied.

The preamble of the Agreement establishes that the underlying purpose of the Agreement is to set forth standards governing matters of mutual concern of the parties. One such matter of mutual concern is the quality of education received by the students. (See Joint Exhibit 1).

The quality of education that would be obtained by the female students in the Clearfield Area School District would lag behind that of the male students if a male physical education teacher, for example the Grievant, had been hired to fill either of the positions that became vacant at the time of the retirement of Mrs. Fletcher and Miss Nisewonger. As Patricia Smith, the Superintendent of Schools testified when asked about using male substitutes and being able to survive with this process: "I'd rather that we not just survive. If we want to give a good educational program, you know, I think that we want to do a little better for --- I guess what we're indicating

is that we can do it for the boys but we can't do it for the girls." (N.T., 4/26/00, p. 108) See also Joint Exhibit No. 2, 8/1/99 letter from Patricia Smith to Mr. Collins as to why his grievance was denied and his transfer request was denied to a high school position, attached hereto and made a part hereof.

The School district did not violate the terms of its Collective Bargaining Agreement with regard to the filling of vacancies. Article II, Section K, 1 of the Agreement indicates that all qualified personnel will be given the opportunity to apply for any vacancies. (See Joint Exhibit 1).

The Grievant in this case was not qualified for the vacancy and therefore the School District's denial of his transfer request was proper.

Finally, Article II, Section K, 1 also indicates that if qualifications are equal positions will be awarded based on seniority. However, as the Grievant was not equally qualified for the position there was no violation of his seniority rights under the Agreement.

1. The School District has discretion in determining the duties of the positions to which it assigns or transfers employees.

The School District has not bargained away its inherent managerial right to determine the duties and qualifications for positions within the bargaining unit. Pursuant to Section 702 of Act 195, the employer possesses the right to select and direct the workforce.

At no point in the collective bargaining agreement did the School District agree to forfeit its managerial right to determine the qualifications necessary for a teacher within the district. Because the School District did not lose its right to define the essential

functions of teaching positions, the essential functions of Physical Education Teachers within the district defined by the District's Position Description, dated December 16, 1996 still have full force and effect. (See Association Exhibit 1). Some of these essential duties include: "confers with students, parents, and school counselor to resolve student problem; evaluation, assessment and screening of students." (See Association Exhibit 1). Also, as defined by the District's Position Description dated November 21, 1996, essential functions of a high school teacher are "creates a classroom environment that is conducive to learning and appropriate to the maturity and interests of the students; encourages students to set and maintain standards of classroom behavior." See School District Position Description, November 21, 1996.

The School District has both managerial and discretionary power that it may use in defining duties and functions and assigning positions. In Fatscher, the court determined that "the decision to suspend a male teacher from the secondary physical education department was rationally based on the valid and practical purpose of maintaining a needed balance in that department between male and female teachers." Fatscher v. Board of School Directors of Springfield School District, Springfield, Delaware County, 417 A.2d 287, 289 (Pa. Cmwlth. 1980).

Similar to the actions in Fatscher, the School District had the discretionary power to deny the Grievant's request based on the impact it would have had on the composition of the high school physical education department. As was revealed through testimony, it would not be possible, if the department were composed of three male physical education teachers and only one female teacher, to create a schedule

that would provide locker room coverage to the girls' locker room throughout the day.
All four (4) District witnesses were consistent in this regard.

Mrs. Patricia Smith (N.T. 4/26/00 pp. 95-96)

Beard: Ms. Smith, if the Arbitrator would grant Mr. Collins' request, given that you're the superintendent, what would that do to the high school as far as scheduling goes in your opinion as superintendent?

Smith: **I don't believe it could be scheduled so that there could be equal program for the girls and boys.**

Beard: if Mr. Collins was up at the high school, how would you deal with the issue of this educational component of the classroom in the locker room and the supervision? How would that be undertaken?

Smith: I did do scheduling for several years and I don't see how it could be worked out really from this schedule. If you'll note that there's an eight period day and physical education is taught on a semester basis, so if you look at the fall and spring semesters, **you'll note that a typical schedule is six periods a day out of the eight periods and there wouldn't be locker room coverage so to speak for two periods of the day let alone providing for instruction that we would be using, so I don't see how it's possible.**

Dr. William Wunder (N.T. 4/26/00 pp. 137-138)

Beard: Now Dr. Wunder, based on what has ensued through this grievance, if the Arbitrator would grant Mr. Collins' request to put him up there and you would then have three males and one female, having been there for two years and worked on scheduling, could you accomplish that?

Wunder: **Absolutely not.**

Beard: Tell the Arbitrator why.

Wunder: **It would be extremely difficult, if not impossible, to provide the coverage in the locker room that is necessary.** For those programs to run and to be equal programs is very important. As has been mentioned numerous times before, there would not be ample coverage with one female and three males in the phys. ed. department, whether it was swimming or phys. ed. because they're, by contract, only supposed to be teaching 260 minutes a day which equates to six

periods of an eight-period schedule in the high school. As you noticed on those documents, the phys. ed. classes and swimming classes are spread out through those eight periods. **And there would be two periods out of the day that would be uncovered and the girls' phys. ed., there would not be ample supervision or instruction going on in those areas.**

Mr. John Law (N.T. 4/26/00 pp. 117-118)

Beard: Okay. Looking at the schedules and the experience that you have undergone here, if the Arbitrator were to grant Mr. Collins' request to go up to the high school and the only female phys. ed. instructor up there is Ms. Morrison, do you see how you could cover the classes?

Law: **We can't build a schedule.**

Beard: I am sorry, I can't hear you.

Law: No, we can't build a schedule. I'm sorry.

Mrs. Judy Nisewonger (N.T. 4/26/00 pp. 130-133)

Nisewonger: Okay. **We've always had two females and at least two males, sometimes three males. But at least there was a lady available each period in the locker room for the instruction as needed in the locker room and the teaching of the class.** There was one situation where Barbara Peters — now, she was there when I was there. She retired. And they tried to eliminate down to one male (sic) instructor again. I was the female that was left in the locker room. I had tons of supervision. I was going crazy. I couldn't do it, you know, with the men and that's where Mr. Short was assigned a women's class. And I'm not sure if Mr. Vokes was assigned a women's class at that time. That lasted one month.

And I continued to work to get back to getting a female instructor.

So as far as any type of men teaching women's classes, they were only temporary. They were never on a permanent basis with the high school.

Beard: Looking at [exhibit] D-1, looking at what you're familiar with when you were here, **do you see running the program with three males and one female?**

Nisewonger: **No.** I had study up in the art room period five and that left just one female instructor down there. **And if that person would have been a male, there would have been a big problem in the supervision in the locker room. An aide cannot function the way a teacher can** in the locker room. You cannot just step in and break up a fight without the experience, the training that you have as a teacher.

Right. Because the School District worked to get a balance of male and female instructors again. That was the purpose of eliminating the aide.

Because the Grievant is unable to provide supervision in the locker room, the school district's refusal to grant him the girls' high school physical education teaching position for which he applied was not violative of the contract.

2. The School District did not violate the seniority rights of the Grievant in denying his transfer request.

As the Grievant was not qualified for the position for which he applied, it is impossible that the School District's refusal to hire him for this position resulted in a violation of his seniority rights. However, even if seniority were an issue, courts have held that these rights are superseded by the general rights of the School District.

In Erie Arbitrator James C. Duff indicated that when the interests of the School District and the interests of one teacher come into conflict and it is not possible to give equal deference to both parties, one party's interests must be compromised. Board of Education of School District of City of Erie v. Erie Education Association, 70 LA 567, 569 (1978). In that case the Arbitrator determined that when the interest of the School

District in maintaining the quality of its Physical Education program came into conflict with the interest in its employee in preserving his seniority rights, the interest of the School District had to prevail. Id. In stating that the seniority rights of the employee must yield to the "School District's overall genuine interest in the quality and character of its Physical Education programs," the Arbitrator was attempting to preserve what he believed to be the greater interest. Id.

Similar to the circumstances in Erie, while there is no dispute that the Grievant does have an interest in preserving his seniority rights, the greater interest of the School District in maintaining the quality of its physical education program must prevail. As the Preamble of the agreement states, the parties agreed to utilize each other's judgment in making decisions that would have an effect on the quality of the education that the School District and its employees would provide. (See Joint Exhibit 1). The School District clearly can not serve this purpose if the seniority rights of each employee are allowed to supersede the right of the School District to formulate policies that serve to improve, or at a minimum maintain, the quality of education provided to its students.

The Arbitrator in FMC Corporation indicated that, although the past practice of the Corporation was to allow employees to select their assignments on the basis of seniority, there was no agreement that the employees could select assignments based on seniority without regard to the needs of the Corporation. In re FMC Corporation, Industrial Chemical Division v. United Steel Workers of America, Local 12625, 70 LA 110, 113 (1978).

Similar to the holding in FMC Corporation, it is clear that if the teachers were allowed to select their positions based solely on seniority as opposed to qualifications

the quality of education received by the female physical education students would decrease. The needs of the School District in maintaining the quality of education of its students must be considered before assignments are based on seniority alone. The Testimony of Superintendent Smith was very deliberate on this point.

Mrs. Patricia Smith (N.T. 4/26/00 pp. 85-86)

Beard: Now, when you say for the sake of the students, what do you mean for the sake of the students?

Smith: Well, realizing the impossibility of the scheduling and realizing that we would not have that ability to have ongoing instruction and supervision in the locker rooms, you know. And I explained if the reverse were true, if it were the boys' program and they had --- would be down to only one instructor, what --- hoping that he would understand perhaps from that perspective how that would impact adversely on the boys' program. In this case, it would be the girls' program with having only one instructor and not being able to cover it. I think, you know, our District, including at the middle school, we've managed most of the time to have at least two female instructors and at least two male instructors in the middle school and the high school so that they could work together and team. I think I heard that word used here earlier. But that's essentially what we have tried to do to team it and provide that coverage and provide that instruction. In this case, we weren't going to be able to do that without having to go to only one teacher at the high school in the girls' locker room.

B. THE SCHOOL DISTRICT ACTED REASONABLY WHEN IT DETERMINED THAT AN ESSENTIAL FUNCTION OF A HIGH SCHOOL PHYSICAL EDUCATION TEACHER IS TO SUPERVISE AND INSTRUCT WITHIN THE LOCKER ROOM BOTH BEFORE AND AFTER THE CLASS ACTIVITIES.

The School District acted properly when it refused to award the Grievant his transfer request. Because the Grievant is unable to perform the essential functions of the position for which he applied and because hiring an aide to perform these duties in

place of the Grievant is not a reasonable accommodation, the grievance should be denied.

As defined on November 21, 1996, the essential functions of a teacher in the Clearfield Area High School include: "creates a classroom environment that is conducive to learning and appropriate to the maturity and interests of the students; encourages students to set and maintain standards of classroom behavior." See School District Position Description, November 21, 1996.

While there are two documents that state the essential functions of a teacher, one being a general teacher position and one defined to cover physical education teachers, there is no reason to believe that the School District wished for physical education teachers to be held to a lesser standard or less stringent qualifications than those required for all teachers.

Through the testimony of Pat Smith, the School Superintendent, it was revealed that the physical education classes run for 42 minutes and that the Pennsylvania Department of Education counts the full 42 minutes as instructional time. (N.T., 4/26/00, p. 87-88). Also, Mr. Law, the current assistant principal of Clearfield Area High School, and a former physical education teacher indicated "Instruction begins at the locker room door and ends in the locker room." (N.T., 4/26/00, p. 115).

The Superintendent, Pat Smith has made clear that the School District's definition of classroom includes both the activity area and the locker room. Because the Board does have the ability to determine who is qualified for athletic positions based on the Agreement, it also has the authority to determine the appropriate qualifications.

(See Joint Exhibit 1). Because the Grievant was not qualified based on the terms established by the School Board his grievance should be denied.

1. **Because supervision is an essential function of the position of a high school physical education teacher, the Grievant is unable to perform all essential functions of the position for which he applied.**

The School District properly denied the transfer request of the Grievant because he was unable to perform the essential functions of the position for which he applied as he did not meet an "occupational qualification" or the "requisite qualifications" that was established by the School District.

In the District's opening statement, Attorney Rodkey indicated this was a simple question of interpretation under Section K-1 of the collective bargaining agreement regarding denial of a transfer. The Association will inevitably argue that the District does not have any basis under the collective bargaining agreement or under the law to deny the male grievant a transfer to the girls' physical education instructor position in the high school.

The District believes this clearly is not the case based on the current case law in the Commonwealth of Pennsylvania. In Commonwealth, Department of Corrections v. AFSCME, 101 Pa.Cmwlth. 121, 515 A.2d 1000 (Pa.Cmwlth. 1986), Commonwealth Court reversed an arbitrators award which required correctional institutions to make prison guards shift assignments without regard to the gender of the prison guards. In this case, the Court stated the arbitrator's award was not rationally derived from the essence and purpose of collective bargaining agreement which permitted the prison to depart from seniority as basis for assignment in order to protect the efficiency of the operation.

In the Department of Corrections case, the facts showed there were two separate housing units for both male and female prisoners with female guards staffing the female housing unit and the male guards staffing the male housing unit. The focal point of the arbitrator's ruling centered on whether men or women officers were being excluded from certain shift assignments based on their gender. In that particular case, one of the key issues as established by the arbitrator was whether the distinction made by the Department Shift was based upon a bone fide occupational qualification.

In reversing the Decision of the Arbitrator, the Court stated as follows:

"The essence of this contract involves the operation of a correctional institution having a legal responsibility as a public agency to deal with its inmate population effectively, efficiently and humanely."

In so ruling, the court ruled that it was manifestly unreasonable to conclude that prison management could have intended to bargain away its absolute responsibility to accord to prisoners such vestige of human status as is embodied in personal privacy and reversed the award as not being rationally derived from the essence of the contract.

The District believes that the principles enunciated in this case can also be applied in the instant dispute. Surely Association Counsel and the Honorable Arbitrator are aware that Pennsylvania courts have given considerable deference in many labor rulings over the years where it involves an educational setting. Surely all of us are aware of the classic ruling involving the prohibition of smoking in the workplace where Commonwealth Court held in Chambersburg based on the educational nature of the operation, smoking could be unilaterally terminated whereas in a noneducational facility it needed to be bargained.

Given the fact that we are speaking about an educational facility versus a prison, the District believes the sensitivity to the gender issue in staffing the girls' physical education position is of even more critical importance than one would find in the prison setting.

In light of the Department of Corrections case, the District believes it is clear that the grievance should be denied.

In support of its position, the District also relies upon the arbitration case in Keystone Central. In Keystone Central, the arbitrator determined that the School District's actions in facilitating an involuntary transfer were justified as a result of a male teacher's inability to supervise the girls' locker room. Keystone Central School District v. Keystone Education Association, PSA Vol. 24, No. 38 (1997). While the Grievant in Keystone Central was the teacher who was involuntarily transferred and the Grievant in our case is the male teacher who was not awarded the position as a result of his inability to supervise the girls' locker room the outcome should be the same. It has already been decided that it is permissible for a School District to take necessary steps to ensure that students are supervised by a teacher while in the locker room. Keystone Central School District v. Keystone Education Association, PSA Vol. 24, No. 38 (1997).

In City of Erie, the Arbitrator determined that where the school maintained separate locker rooms for boys and girls and requires that the instructor be present in the locker room, it was proper to select a female to be the girls' physical education teacher. Board of Education of School District of City of Erie v. Erie Education Association, 70 LA 567 (1978). The Arbitrator further stated, "there is nothing in contract that precludes employer from disqualifying professional employee from certain

position based on sex where sex has demonstrable factual nexus with ability satisfactorily to perform full range of duties incidental to job." Board of Education of School District of City of Erie v. Erie Education Association, 70 LA 567 (1978).

Similar to the contract at issue in City of Erie, there is no language in the Agreement between Clearfield Education Association and Clearfield Area School District that prevents the employer from disqualifying an employee from a position based on sex when sex will prevent the employee from performing the duties of the job. As one of the duties of the job of girls' physical education teacher is to observe the locker room, the Grievant is unable to perform this duty and the District properly denied his transfer request.

While there has never been any indication on the part of the association or the Grievant personally that he expected to be in the locker room if he were awarded the position, his inability to offer the necessary supervision or to offer psychological support to the students justifies the District's refusal to hire him to fill this position.

The importance of this supervision was stressed through the testimony of Judy Nisewonger who was a health and physical education teacher with the Clearfield School District for 27 years. (N.T., 4/26/00, p. 120). Nisewonger indicated that during her time as a health and physical education teacher she supervised the locker room by making sure the students arrived on time, dressed safely, and did not engage in horseplay. (N.T., 4/26/00, p. 121). Nisewonger also testified the importance of a physical education teacher's presence in the locker room to break up fights, follow up on any injuries that may have occurred during the active part of the class, and remain apprised of any health issues of the students. (N.T., 4/26/00, p. 124-25).

A male physical education teacher is unable to maintain supervision of the girls' locker room. Such supervision may be viewed as an essential function or primary duty of the position and, therefore, a BFOQ stating that a woman must fill this position is permissible.

The issue of sex as a BFOQ or a "requisite qualification" for a position has also arisen in the context of custodial employees.

In Corn Products, the Arbitrator determined that it was permissible to deny a senior female employee the job of cleaning main plant locker room used by male employees as this would be a violation of community standards of morality or propriety. In re Corn Products Company International, Inc. v. Oil, Chemical and Atomic Workers International Union, Local 7-662, 54 LA 303 (1970). The Arbitrator also indicated "that the same standards must apply to both sexes." In re Corn Products Company International, Inc. v. Oil, Chemical and Atomic Workers International Union, Local 7-662, 54 LA 303, 306 (1970).

Similar to the finding in Corn Products, it would be a violation of community standards of morality and propriety for a male physical education teacher to supervise the girls' locker room. The School District did not apply different standards to males and females. Men were to fill the positions for boys' physical education teacher and women were to fill the positions for girls' physical education teacher.

Similar to the Arbitrator's finding in Corn Products, the Arbitrator in FMC Corporation also denied the position of locker room janitor to a female employee "because it would not be possible to prevent the exposure of nude male employees to the female janitors, given the size of the locker rooms, their frequent use, and the

considerable time necessary to clean them." In re FMC Corporation, Industrial Chemical Division v. United Steel Workers of America, Local 12625, 70 LA 110, 111 (1978).

Like the decision in FMC Corporation, the Grievant should not be permitted to fill the position of girls' physical education teacher as he would not be able to perform the supervisory duties of the position in light of the possible exposure of female students during changing times.

Similar to both Corn Products and FMC Corporation, the Arbitrator in AIRCO determined that it was permissible to hire a female employee to perform janitorial work in the women's shower room over a more senior male employee. In re AIRCO Carbon and Oil, Chemical and Atomic Workers International Union, 86 LA 25 (December 4, 1985). In reaching this conclusion the Arbitrator, citing another decision regarding the same parties, quoted "conventional standards of sexual privacy ... cannot be ignored." In re AIRCO Carbon and Oil, Chemical and Atomic Workers International Union, 86 LA 25, 27 (December 4, 1985).

2. **An aide is not a reasonable accommodation and therefore the School District is not required to hire an aide to supervise the locker room in place of the Grievant.**

While it is necessary for an employer to be willing to make reasonable accommodations in order to allow a particular employee to perform his or her duties, an employer is not obligated to provide an accommodation that would serve to prevent the

employee from having to perform an essential function of the position nor is an employer obligated to suffer undue hardship as a result of an accommodation.

An aide is not a reasonable accommodation in this situation for two reasons. First, an aide would serve an essential function in providing supervision during the time that students are in the locker room. Second, an aide would result in an undue burden on the School District which would essentially have to pay two people to perform the work that could be accomplished by one female physical education teacher.

An additional argument to be made with regard to the hiring of an aide to take the place of the physical education teacher in the locker room is the concern which has been expressed through testimony of the need to have a professional in the locker room who has the training to deal with any situation that may arise and who has the rapport with the students that enable them to feel free to discuss important and often very personal issues with the professional employee.

In Keystone Central, the Arbitrator determined that the possibility of hiring an aide to cover the locker room in place of the physical education teacher "was not a realistic solution to the problem." Keystone Central School District v. Keystone Education Association, PSA Vol. 24, No. 38, p. 6 (1997). The Arbitrator stated, "the supervisory activities involved with the locker rooms are more appropriately professional duties. There is a real question as to whether the interests of either the District or the Association would be well served if an Aide were utilized to handle those duties." Keystone Central School District v. Keystone Education Association, PSA Vol. 24, No. 38, p. 7 (1997).

Similar to the view of the Arbitrator in Keystone Central, testimony indicates that both school administrators and present and former physical education teachers at Clearfield Area High School do not believe that an aide could adequately perform the duties of supervision in the girls' locker room. Superintendent Pat Smith testified that she believes a professional who is equipped with specialized training needs to be present in the locker room. (N.T., 4/26/00, p. 99). Smith indicated that she would not recommend using an aide to supervise the locker room. (N.T., 4/26/00, p. 97). Judy Nisewonger, a physical education teacher with the School District for 27 years testified that "an aide cannot function the way a teacher can in the locker room. You cannot just step in and break up a fight without the experience, the training that you have as a teacher." (N.T., 4/26/00, p. 131-32). Nisewonger testified that based on the contact she had with female students she felt able to develop a really good rapport with students. (N.T., 4/26/00, p. 128). The Grievant also testified that he had a "tendency to develop a rapport with the students" (N.T., 4/26/00, p. 31-32). The Grievant further testified that he believed that his presence was necessary for safety reasons. (N.T., 4/26/00, p. 33).

Based on this testimony, an aide would not be able to perform the same functions and develop the same relationship or "rapport" with the students as the professional physical education teacher who spends time with the students both in the locker room and in the gym.

**C. THE SCHOOL DISTRICT NEVER BARGAINED AWAY ITS
MANAGERIAL RIGHT TO DETERMINE THE QUALIFICATIONS FOR
ANY PARTICULAR JOB OR POSITION WITHIN THE BARGAINING
UNIT.**

Pursuant to Section 702 of Act 195, the Employer possesses the right to select and direct the work force. This right is also referenced in the School Code and in Section 1106 provides in pertinent part as follows:

"The Board of School Directors shall employ the necessary qualified professional employees, substitutes and temporary employees, to keep the public schools open in their respective districts in compliance with the provisions of this Act." (emphasis added.)

Section 1 found in Paragraph K on page 9 of the current agreement clearly references "qualifications of personnel." In fact, there is a limitation on Section 1 wherein it provides "Where it is determined that qualifications are equal, seniority in the school district shall prevail." As has been stated from the outset, this is not as simple as the Association argued. In this case, the District has determined that Mr. Collins does not possess the necessary qualifications to teach girls' physical education in the high school.

Establishment of requisite qualifications

It needs to be noted that it is clear from a review of the express provisions of the collective bargaining agreement as well as express provisions of Act 195 and the School Code and testimony at the hearing that the District has not bargained away or otherwise restricted its prerogative to establish and assess the minimum qualifications necessary for a position covered by this collective bargaining agreement or any other position within the District.

Although the instant dispute between the parties is subject to the grievance procedure for resolution, the District believes its ability to **establish** and **evaluate/assess** a job candidate's qualifications for a position is one of the most fundamental and inalienable prerogatives granted to public sector employers by not only Act 195 but also one fully supported by case law.

Within the last couple of years, Pennsylvania Courts had to deal with the difficult question of the application of Veteran's Preference Act when a veteran who was seeking employment in the school setting failed to meet school district qualifications for the position of social studies teacher and a nonveteran applicant met those qualifications. See G. Gordon Brickhouse v. Springford Area School District, 656 A.2d 495 (Pa. 1995). In Brickhouse, the court noted that "the case turns on the meaning of the statutory phrases '**requisite qualifications**' and 'eligible for appointment'." Brickhouse arose in the school setting. The District believes the same issues regarding meeting the 'requisite qualifications' of the position is present in the instant dispute.

Just as G. Gordon Brickhouse argued he should be awarded the teaching position simply because he possessed a teaching certificate, was over 18 years of age and was of sound moral character, the Grievant in the instant dispute is arguing because he has physical education certification, he should be awarded the high school physical education position previously occupied by a female physical education instructor although he does not meet all of the requisite qualifications for the position.

The District in the instant dispute is requesting this Arbitrator to reject the Association's argument as put forward on Mr. Collins' behalf just as the Pennsylvania

Supreme Court rejected G. Gordon Brickhouse's argument. In Brickhouse, the Court stated as follows:

"If it is required as a matter of public policy, as we have held, that a person who is preferred under the Veterans' Preference Act must be able to demonstrate his ability to perform the job in question at the level of expertise demanded by the employer, then the **employer must be free to set the hiring requirements of that job as they reasonably relate to the duties to be performed in order to ensure that the person hired will be competent.**

"In this case, there is no doubt that the school district's criteria for employment were rationally related to the job and that Brickhouse's credentials did not qualify him for the job. Were these considerations less apparent than they are, we would remand for an evidentiary hearing to determine whether the employer's requirements for the job were reasonable and whether the applicant was 'qualified' with respect to those requirements.

"Whatever Brickhouse's accomplishments may be, and they appear to be many, he is not accomplished in the particular manner sought by the school board. He is not, therefore, qualified for the job which was available, and preference under the Veterans' Preference Act, accordingly, does not apply. (Section 7105 of the Veterans' Preference Act ☐ provided he possess the other requisite qualifications to satisfactorily perform all of the duties which the position requires." Brickhouse did not possess "the other requisite qualifications to satisfactorily perform all of the duties which the position requires."

"Order of Commonwealth Court is reversed."

Brickhouse v. Spring-Ford Area School District, 656 A.2d 483, 486-487 (Pa. 1995).

The notion of hiring a person "qualified" for the position since the Brickhouse decision has been followed in several cases. See Dickey v. Board of Commissioners of the City of Washington and County of Washington, 658 A.2d 876 (Pa.Cmwlt. 1995).

Just as Ody A. Dickey, Jr., lacked the 'requisite qualifications' for the 911 Coordinator Position in Dickey and Fitzgerald did not possess extensive public management housing experience, a requisite qualification for the job in the instant

dispute Mr. Collins likewise is precluded from providing the required instruction and supervision in the girls' locker room during significant portions of the class period. Irrespective of the testimony put forward by the District witnesses or the Association witnesses, it appears that anywhere from 14 to 20 minutes per class does include locker room activities. As such, in the instant dispute, Mr. Collins did not possess the requisite qualifications for a high school physical education instructor – he cannot supervise the girls' locker room.

Just as the Brickhouse and Dickey, Courts have held it was not the intent to defeat the Veterans' Preference Act but "hire the most competent [or qualified] applicant" for the position, the District is arguing and has demonstrated it likewise was not trying to frustrate the express provisions of the collective bargaining agreement but simply hire the qualified individual that can provide supervision and instruction during the entire class period for girls' physical education.

In the instant dispute, Mr. Collins unfortunately simply did not possess the minimum qualifications for the position.

The District will concede the instant dispute does not involve any challenge regarding veterans' preference and is being challenged under the grievance procedure of the collective bargaining **Error! Bookmark not defined.** agreement or via local agency appeal as in Brickhouse and Dickey, however the undeniable issue or thread in all of these cases involves the ability of a public sector employer to 'establish' and 'evaluate' the qualifications for a job. Because of this common thread, the District would ask the Arbitrator to consider the holdings in Brickhouse and Dickey as having some persuasive value.

D. THE ASSOCIATION'S ARGUMENT THAT MR. COLLINS WAS QUALIFIED TO TEACH IN THE GIRLS' PHYSICAL EDUCATION POSITION AND SHOULD HAVE BEEN TRANSFERRED TO SAME IS COMPLETELY WITHOUT MERIT.

The Administration believes the Agreement is clear that the District can 1) establish requisite qualifications for a position; 2) the District is not under "any obligation to place an employee into a position for which he/she is not qualified."¹

In Reynolds Metals Co., 66 LA 1276, 1280, Arbitrator Volz noted that "the initial determination of ability must be made by management in the reasonable exercise of its authority to direct the working force and that its decision, where factually supported is entitled to great weight in the absence of a showing that it acted discriminatorily, arbitrator or in bad faith." It is clear from the evidence presented that the District's determination that Mr. Collins did not possess the minimum qualifications to perform the job was factually supported. In addition, the Association failed to establish that the District was motivated by discriminatory intent or bad faith in making its determination. Therefore, the District's decision should be given great weight in determining that Mr. Collins did not possess the minimum qualifications to perform the job of high school girls' physical education instructor.

At the arbitration hearing, Mr. Collins was asked on cross examination "How are you going to cover the supervision of the girls' locker room." He responded as follows:

¹ Paragraph K, Section 1, Page 9 of the collective bargaining agreement, Joint Exhibit No. 1.

Collins: I would not be in the girls' locker room.

Beard: Why not?

Collins: I think it's very inappropriate.

Beard: You think it is appropriate?

Collins: Inappropriate. I think common knowledge is the gender privacy.

Beard: Well, who's going to do that then?

Collins: Do what?

Beard: The supervision in the girls' --- who's going to provide that supervision, that six to ten minutes that you testified before in the middle school. Who's going to be there?

Collins: I would assume the female physical education instructor.

(N.T. Vol. 1, pp. 40, cross examination testimony of Grievant, Scott Collins).

The District believes it is very clear that Mr. Collins cannot be in contact with his class for approximately one-third (1/3) of the class period when the female students are in the locker room. By his own admission, Mr. Collins acknowledges privacy and gender issues relative to a male staff member in the girls' locker room. Although it has been very clear from the testimony of Mrs. Smith and Mrs. Nisewonger regarding safety issues in the locker room relative to horseplay, and breaking up fights, there are also issues associated with hygiene to include menstrual issues and questions surrounding pregnancy. (N.T. 4/26/00 pp. 123-132; 97-100.)

Although Mr. Collins maintains that no instruction goes on prior to the period that the students assemble in gym class, the Superintendent², the prior girls' high school

physical education teacher (Ms. Nisewonger), Mr. Law² and Dr. Wunder all take strong exception. It is very clear from the testimony that such time counts as instructional time. (N.T. 4/26/00, 87-88; 115).²

According to both Mr. Law and Mrs. Smith, instruction begins in the locker room and ends in the locker room. (N.T. 4/26/00, pp. 115). In this regard, Mrs. Smith testified as follows: (N.T. 4/26/00, pp. 88 – 90)

Smith: The conduct of my instruction when I took my undergraduate degree in health and physical education, and as I continued in my teaching, **the instructions occur when the students enter the classroom.** You have the responsibility for those students when they enter the classroom and we were taught that the classroom — or the fact in the case of physical education inclusive to the locker room and we were **responsible for those students when they were in the locker room.** I believe that circulating in the locker room, talking with the students, the students would typically have questions.

We could begin our instructions in the locker room, giving directions for the day, perhaps giving out some safety — going over some safety issues. The idea is to use as much of that time as possible. And that time begins in the locker room. There are some personal issues, some personal hygiene issues. there are some classes that are quite vigorous and we do take showers or did promote the taking of showers. It is a limited amount of time. But we did encourage that, monitor that situation.

The student need to be under supervision at all times. And I would not have spent time in my office so to speak with in the locker room, but I would be out circulating and having the students under visual

² The period of time that the students spend in physical education classes, to include the time in the locker room, counts as instructional time for purposes of the Pennsylvania Department of Education. (N.T. 4/26/00, pp. 87).

See also the testimony of Dr. Wunder taking exception with the testimony of Mr. Collins wherein it states:

Wunder: Well, I agree with what the state regs say that instruction times start from the first period to the — or from the first moment of that period to the end of that period. And there are times when you must be involved with that class in the locker room which you would be excluding the girls from the male phys. ed. teacher.

See also N.T. 4/26/00 pp. 92 as to the locker room being an extension of the classroom.

supervision at all times. So that's the way I taught to teach the program and that's the way I taught the program.

E. *IT IS THE MANAGERIAL PREROGATIVE OF THE DISTRICT TO DETERMINE HOW IT WANTS TO STAFF ITS SCHOOLS.*

There has been extensive evidence and testimony by District witnesses as to why Mr. Collins is not qualified to be a girls' physical education instructor at the high school. Mr. Collins has already conceded that certain gender privacy issues would preclude him being in the locker room to provide any supervision during approximately one-third (1/3) of the class instructional time. As one may recall, Mr. Collins was asked how he was going to provide the supervision. His response was that he assumed the female physical education instructor would take care of it. The District believes the Arbitrator needs to seriously weigh the testimony of all four District witnesses that coverage could simply not be provided if there are three (3) male physical education instructors at the high school and only one female physical education instructor.

Although the Association tap danced around a response as to how the necessary supervision is to be carried out, they introduced the testimony of Mr. Vokes who suggested that it might be appropriate to have an aide in the locker room to provide supervision. Mr. Vokes testimony almost leaves one with the impression that there has been an ongoing practice in the middle school wherein a locker room aide is present to monitor such activities and should continue on if Mr. Collins request to transfer to the high school is granted. (N.T. 4/26/00, pp. 54-55). Mr. Vokes subsequently indicated that there are locker room monitors from time to time. (N.T. 4/26/00, p. 60). However, on cross examination, Mr. Vokes admitted that the practice was discontinued back in

the early 1990s. (N.T. 4/26/00, p. 66). When questioned as to the present use of a locker room aide, Mr. Vokes admitted that it was only when there was a sub. When specifically questioned as to whether there is somebody on the District's payroll on a regular continuing basis who is a locker room monitor, Mr. Vokes responded "Not that I know of. Not since -90 -01 and -92." (N.T. 4/26/00, p. 67).

There can be no dispute the District had a legitimate nondiscriminatory reason when it determined that Mr. Collins was not qualified for the position. He simply cannot be present to provide supervision in the locker room and the Association's suggestion that a locker room monitor be hired or someone else hired, is simply not programmatically or operationally feasible nor desired by the District. When Mr. Vokes was asked how he would cover the locker room, there was an objection by Association counsel. In attempting to address the objections of both counsels, the Honorable Arbitrator responded as follows:

Arbitrator Parkinson (N.T. 4/26/00, p. 72)

Well, that's what I said, he can give an opinion, but as far as the policy or however you handle it, that would be up to the positions of the District administrators, I think. If you have an opinion, you can offer that.

In response to the posed question, Mr. Vokes stated as follows:

Vokes: Just from past practice maybe someone would have to come in and be a locker room monitor. But of course, Ms. Morrison isn't always in the locker rooms. Sometimes she does have swimming classes, so she obviously can't be both places at the same time. . . ³

³ It is also interesting to note that in his direct testimony, he conceded that there were problems in the girls' locker room, albeit smoking; however, in order to check on this activity, he would have to ask a female instructor to check on it for him once in a while. However, to accomplish this, a phone call has to be placed over to the girls' phys. ed. office to check on this for him. (N.T. 4/26/00, pp. 57,60)

The District believes the Arbitrator is correct in his observation that it is within the province of the employer to determine how the delivery of educational and program services is going to be accomplished in the school setting.

In response to the question whether the Superintendent would like to revisit the situation of having an aide in the locker room as was discontinued back in 1992,

Superintendent Smith responded as follows:

Smith: I think there's too much at risk. I think that a locker room needs a professional not only for the instructions but also for the supervision. And you know that even you're talking the professional out of the situation and depriving the girls of the full program.

Beard: During your tenure as Superintendent, have you utilized an aide on an ongoing basis to monitor the physical education and/or the locker room?

Smith: No.

Beard: Would you make such a recommendation to the board of school directors?

Smith: I could not make that kind of recommendation.

(N.T. 4/26/00, pp. 97-98).

When Mr. Nisewonger, the prior girls' high school physical education instructor with 27 years in the school district (who also just happened to be the prior Coordinator of K through 12 for health and physical education and department head at the high school) was asked the question, she responded that she did not believe that the types of activities undertaken by professional educators in the locker room area were appropriate for an aide. (N.T. 4/26/00, pp 123-128, 131, 133).

In addition, when the former High School Principal and current Superintendent, Dr. Wunder was asked the same question about the possibility of just hiring an aide to provide coverage, he responded as follows:

Beard: How about the possibility, well, we'll just hire an aide? Would you want an aide in there?

Wunder: No, I wouldn't.

Beard: Tell us why.

Wunder: I thought Ms. Nisewonger said that extremely well. There's a lot of things that go on having fathered a girl. And I know there's a lot of issues that are totally different than what the boys have and I would not, if I were the teacher, feel comfortable talking to a girl about her menstrual cycle and the possibility of being pregnant, having a fight with her boyfriend, family issues that girls would have different than the boys.

(N.T. 4/26/00, pp. 139 -140).

In essence, what the Association is asking the Arbitrator to do is place an individual into a position which, based on the clear evidence and testimony he could not carry out for at least one-third (1/3) of each of the six (6) classes per day of physical education. All four District witnesses who are familiar with the operation of the high school -- three of whom are past physical education instructors -- testified that it would be impossible to develop a schedule and provide supervision of the girls' locker room with three male physical education instructors and only one female physical education instructor at the high school.

In addition, as to the argument of the Association that the District could simply go back and revert to a process in place in the early 1990s, (discontinued due to its unsatisfactory nature) to provide supervision in the locker room is simply unacceptable. All of the District's witnesses testified that this would be an unsatisfactory arrangement.

It appears that if the Arbitrator were to grant the Association's request, the only way whatsoever to provide supervision in the locker room would be to hire an aide. The District believes such an action is far beyond the power and authority of the arbitrator even if same were an indirect result of such an award. In essence, what the Association is attempting to do is ask the Arbitrator to grant the request, which could result in an indirect requirement that would create a staffing situation that would not be in the District's or students' best interest based upon the testimony of the Superintendent, High School Principal, Assistant High School Principal and the former high school girls' physical education instructor.

The District finds it interesting to note that despite the fact that from the time a student first enters the physical education locker room until the time he/she leaves, all that time is counted as instructional time from the Department of Education. Ironically, the Association is suggesting that a non-bargaining unit member, i.e., aide or locker room monitor, be hired to supplant teaching or instructional activities historically reserved for professional staff in order to accomplish Mr. Collins' transfer to the high school. Based on the overwhelming testimony of record that this simply a bad idea and not in the best interest of the students or the District. As such, the Arbitrator should not permit such a situation to occur.

Perhaps Arbitrator J. H. Jordan said it best on page 6 of his award in the Keystone Central School District, PSA Vol. 24, No. 38 (1997) case wherein he commented: **"Finally, one has to concur with the District's reasoning hiring a Aide to supervise the locker rooms was not a realistic solution to the problem."** The District likewise believes the same is equally true in this case.

It is for all of these reasons that the District believes the transfer request of the grievant should not be considered and the grievance denied.

F. THE DISTRICT BELIEVES IT IS VERY TELLING IN THIS CASE THAT THE INDIVIDUAL MR. COLLINS IS ASKING TO DISPLACE IS JANICE GRANT WHO WAS INVOLUNTARILY TRANSFERRED TO THE HIGH SCHOOL IN THE FIRST PLACE TO BE THE SECOND FEMALE PHYSICAL EDUCATION INSTRUCTOR.

Although it probably goes without saying, a cursory review of the 1998-1999 work schedule at the high school (District Exhibit 1) clearly shows there are two female and two male physical education instructors to coincide with the approximate split in student population of approximately 500 boys and 500 girls, respectively.

Judy Nisewonger, the former Department Head and female physical education instructor with some 27 years in the District testified that there has always been a balance in the school. When specifically asked in direct testimony about this question, she responded as follows:

Beard: While you were there, what was the balance as far as female phys. ed. instructors versus male?

Nisewonger: Okay. **We've always had two females** and at least two males, sometimes three males. **But at least there was a lady available each period in the locker room for the instruction as needed in the locker room and the teaching of the class.** There was one situation where Barbara Peters — now, she was there when I was there. She retired. And they tried to eliminate down to one male (sic) instructor again. I was the female that was left in the locker room. I had tons of supervision. I was going crazy. I couldn't do it, you know, with the men and that's where Mr. Short was assigned a women's class. And I'm not sure if Mr. Vokes was assigned a women's class at that time. That lasted one month.

And I continued to work to get back to getting a female instructor, and that's when Ms. Janis Phillips was hired at that time. Then we had two women in the locker room.

So as far as any type of men teaching women's classes, they were only temporary. They were never on a permanent basis with the high school.

Based on the foregoing, it is clear that the Association's claim that Mr. Collins has somehow been inappropriately denied a transfer to the girls' physical education position in violation of the collective bargaining agreement is unfounded and without merit.

VI. CONCLUSION

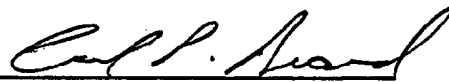
It is the position of the Clearfield Area School District that it has not violated the terms of its Collective Bargaining Agreement with the Clearfield Area Education Association. The School District has not bargained away its managerial rights to determine qualifications for positions within the school. Also based on the clear language of the Agreement there has been no violation of the Grievant's seniority rights as they relate to the filling of this vacancy.

The School District acted reasonably when it determined that supervision was an essential function of the position for which the Grievant applied, and being unable to perform this function of the job duties the Grievant's transfer request was appropriately denied. Furthermore, the School District is under no obligation to hire an aide to perform what has been classified as an essential function of the position of high school physical education teacher.

Accordingly, based upon the foregoing, the District respectfully requests that the grievance be denied.

Respectfully submitted,

ANDREWS, WAGNER & BEARD



Carl P. Beard, Esquire
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P.O. Box 1311
Altoona, PA 16603
(814) 943-3304

ARBITRATION PROCEEDING
BEFORE
PHILIP PARKINSON, ARBITRATOR

In the matter of:
CLEARFIELD EDUCATION
ASSOCIATION

Grievance: Scott A. Collins
Awarding of Vacancy

and

CLEARFIELD AREA
SCHOOL DISTRICT

Hearing Date: April 26, 2000

CERTIFICATE OF SERVICE

I, Carl P. Bead, do hereby certify that on Friday, July 14, 2000, I served upon the Arbitrator a true original of the attached Brief on Behalf of Clearfield Area School District as follows:

UPS OVERNIGHT MAIL

Philip W. Parkinson, Esquire
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ANDREWS, WAGNER & BEARD



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Clearfield Area School District

ADMINISTRATIVE OFFICES
POST OFFICE BOX 710 438 RIVER STREET
CLEARFIELD, PENNSYLVANIA 16830
814-765-5511 FAX 765-5515

August 1, 1999

Mr. Scott Collins
R.R. 8, Box 177A
Morrisdale, PA 16858

Dear Mr. Collins:

On Tuesday, July 27, 1999, we met to discuss the Step Two grievance that Mrs. Nagle submitted to me on your behalf on July 21, 1999. Attending were you, Mrs. Nagle, Mr. Rishel and I.

The grievance is in regard to your request to transfer to the high school girls' physical education position. You stated that you wanted to move on from the Middle School and work at the High School and that your request does not have to do with your high school coaching as you had previously indicated to Mr. Meckey and me. You believe that your certificate and the CEA Agreement entitles you to transfer.

I explained that I have an overall concern for the educational program for all the students. If you were to transfer to the high school girls' physical education position, there would be four male teachers and one female, yet an equal number of girls and boys need to be served. Under those limitations, it would be impossible to schedule a comparable program for the girls. The girls' locker room is part of the classroom. Since you could not go into the locker room, the girls would be deprived of 15-20 minutes of instruction and supervision each class period. You would not be able to perform the full range of duties for the job. It is a matter of your not having the bona fide occupational qualifications for the job. The position requires that the teacher be able to teach and supervise the students the entire class period.

Therefore, I must deny the grievance. Please consider that this involves matters of mutual concern that affect the educational program for all the students.

Sincerely,


Patricia P. Smith
Superintendent

PPS/clm

TABLE OF AUTHORITIES

Cases

<u>Board of Education of School District of City of Erie v. Erie Education Association</u> , 70 LA 567, 569 (1978)	
.....	11, 12, 17
<u>Commonwealth, Department of Corrections v. AFSCME</u> , 101 Pa.Cmwth. 121, 515 A.2d 1000	
(Pa.Cmwth. 1986).....	15, 16, 17
<u>Dickey v. Board of Commissioners of the City of Washington and County of Washington</u> , 658 A.2d 876	
(Pa.Cmwth. 1995).....	25, 26
<u>Fatscher v. Board of School Directors of Springfield School District, Springfield, Delaware County</u> , 417	
A.2d 287, 289 (Pa. Cmwth. 1980)	8
<u>G. Gordon Brickhouse v. Springford Area School District</u> , 656 A.2d 495 (Pa. 1995).....	24, 25, 26
<u>In re AIRCO Carbon and Oil, Chemical and Atomic Workers International Union</u> , 86 LA 25 (December 4,	
1985)	20
<u>In re Corn Products Company International, Inc. v. Oil, Chemical and Atomic Workers International Union,</u>	
<u>Local 7-662</u> , 54 LA 303 (1970)	19, 20
<u>In re FMC Corporation, Industrial Chemical Division v. United Steel Workers of America, Local 12625</u> , 70	
LA 110, 113 (1978).....	12, 20
<u>Keystone Central School District v. Keystone Education Association</u> , PSA Vol. 24, No. 38 (1997)17, 21,	
34	
<u>Reynolds Metals Co.</u> , 66 LA 1276, 1280	27

that such sympathetic co-workers would be angered by the Company's treatment in this case, is a very serious charge, and should not be made by the Union without evidence to support such a charge. Allegations without supporting evidence could easily create a lessening of creditability as to disputed facts.

AWARD

The grievance of James Meade is sustained and the Company is directed to pay to him an amount equal to the one day regular shift wages, at the regular rate, which the grievant would have earned had the foreman permitted the grievant to work on November 22, 1976.

The grievance of Gary Shreve is sustained and the Company is directed to pay to him an amount equal to the one day regular shift wages, at the regular rate, which the grievant would have earned had the foreman permitted the grievant to work on November 22, 1976.

BOARD OF EDUCATION OF ERIE, PENNSYLVANIA —

Decision of Arbitrator

In re BOARD OF EDUCATION OF SCHOOL DISTRICT OF CITY OF ERIE, PENNSYLVANIA and ERIE EDUCATION ASSOCIATION, March 21, 1978

Arbitrator: James C. Duff

TRANSFER OF EMPLOYEES

—Choice of female physical education instructor — By-pass of senior male instructor ▶ 107.30 ▶ 100.56 ▶ 120.10

School employer that maintains separate locker rooms for boys and girls in its health and physical education facilities properly selected female employee to be girls' physical education instructor, instead of senior male employee who was by-passed because employer's physical education program requires that instructor be physically present in locker room to observe emotional and other problems of students while changing clothes, since (1) employee's undisputed seniority is subordinate to employer's broad educational goals, and (2) there is nothing in contract that precludes employer from disqualifying professional employee from certain position based on sex where sex has demonstrable factual nexus with ability satisfactorily to perform full range of duties incidental to job.

Appearances: For the employer — John W. Beatty, attorney, solicitor for District. For the union — Donald J. Creola, UniServ representative.

FEMALE INSTRUCTOR

Pertinent Subject Matter

DUFF, Arbitrator: — The grievance report form filed by John Phillip Koval listed the alleged violation of Article VIII, Section A, which is entitled "Teacher Transfers".

Relevant Portions of the Collective Bargaining Agreement

ARTICLE VIII TEACHER TRANSFERS

A. When decreased staffing requirements or increased staffing requirements are necessary in the District, voluntary requests for transfer shall be given first priority provided the teacher(s) is qualified. Should sufficient volunteers not be available, the least senior teacher(s) who is qualified shall be transferred.

All other voluntary or involuntary transfers not defined in the above paragraph shall be on the basis of seniority provided the teacher(s) is qualified.

B. When requested, a meeting with the Coordinator of Personnel shall be scheduled to discuss the reasons for the transfer.

C. Teachers shall be given an opportunity to apply, without giving reasons, for transfer to be effective the next school year if the application is made by April 15 on a form provided by the Personnel Office.

D. Teachers may apply for transfers to be effective during the school term in which application is made, provided that in such cases, the teacher states the reason for the transfer request.

E. The Board shall post a list of known vacancies no later than May 31. Teachers may make application for such vacancies no later than June 15. Such vacancy list, as updated from time to time, shall be forwarded to the Association and posted on the Personnel Department notice bulletin board as near as practicable to July 15, August 1, and August 15.

F. If a teacher who is new to the Erie City Schools is employed to fill a vacancy that occurs during the school year, he will be advised that his teaching assignment is temporary and that he shall be transferred if a qualified teacher in the school system requests to be transferred to this position at beginning of the coming school year.

G. Notice of tentative teacher assignments will be given to the teachers on or before June 30.

Background Facts

The following memo from Grievant was first in the relevant chain of events:

Date April 6, 1977

To Personnel Department

SUBJECT: In accordance with the Master Contract between the Erie Education Association and the School District of the City of Erie, I would like to apply for transfer from the position of Elementary Physical Education Specialist at Edison Elementary School to the position of Physical Education Instructor at Wayne Middle School. If you have any questions please feel free to contact me.

Respectfully,

John Phillip Koval

The Personnel Department acknowledged receipt of the above request for transfer on April 7, 1977. There were in fact two such positions available for the 1977-78 school year, as Grievant learned through discussions with the Coordinator of Health and Physical Education for the Erie School District. These positions were not posted in accordance with Article VIII of the Collective Bargaining Agreement. Two individuals were selected to teach Physical Education at this new middle school, and there is no dispute relative to the male instructor who serves as the boys' Physical Education Instructor, since he had greater seniority than the instant Grievant. However, a female Physical Education Instructor was selected by the District to serve as the girls' Physical Education Instructor, and that female employee is junior in seniority to Mr. Koval. Accordingly, he instituted the present challenge to the District's failure to assign this position to him alleging that its decision in favor of the female employee constituted a violation of the Collective Bargaining Agreement.

The facilities at the Wayne Middle School are such that there are completely separate and segregated boys' and girls' locker room areas, each of which has as an integral portion thereof certain office space for the respective Physical Education Instructors. Mr. Mahoney, the District's Coordinator of Health and Physical Education, testified that the time spent by students in the locker room is part of their instructional day. He opined that it is in the best educational interests of the students to have a qualified instructor physically present in the locker room when the students are changing clothes to observe any possible social, emotional or physical problems the students might have, including any relating to personal hygiene, discipline, et cetera. The School District admits that it appointed a less senior female Physical Education Instructor to this position

even though the more senior male Grievant had already given the School District notice that he wanted this job. It is likewise apparent that the District refused to appoint Grievant to this position because of the potential problems which would arise if a male instructor were to be placed in the girls' locker room, and it is conceded that other than his sex, Mr. Koval is adequately qualified for this work.

Contentions of the Parties

The Association insists that Grievant is certified by the Department of Education and qualified as a Physical Education Teacher, and since he is senior to the employee selected for the position he requested, it argues that the District violated the Labor Agreement when it passed over him in favor of a female employee. It points out also that the District violated the Agreement when it failed to post these positions in accordance with Article VIII, E and it submits that denial of this position to Grievant based on his sex is illegal under the Pennsylvania Human Relations Act and Title VII of the Civil Rights Act of 1964. It urges the undersigned to direct the District to place Grievant in the position he has improperly been deprived of by the District.

The District believes it was completely justified in refusing to place Grievant in the position of girls' Physical Education Instructor, since the nature of this job at the Wayne Middle School requires the physical presence of the instructor in the locker room where girls change their clothes. As its decision in favor of the junior employee was premised upon a bona fide, rational, legitimate basis in fact and concern for the dignity and educational needs of its female students, the District requests that the grievance be denied.

Discussion and Findings

It is quite apparent in this case that Mr. Koval has been deprived of a position to which he was clearly entitled based on seniority and qualifications, with the sole exception of his sex. However, that is not the same as a finding that the District is engaging in any practice of discriminating against a particular sex, per se. In fact, what the District has done at the Wayne Middle School is to set up separate locker room facilities for both sexes, and that action is manifestly designed to advance the interests of male as well as female students. It can hardly be denied that there are real advantages to having students monitored, with respect to personal habits and behavior, while they

change clothes in the locker room areas.

The crucial question at the heart of this controversy then concerns whether the District's decision to have one male and one female Physical Education Instructor, to comport with both its broad educational goals and the Wayne School Physical Education layout, must be subordinated to the Grievant's undisputed seniority rank. In other words, viewed in proper perspective this case presents a question of which or whose interests are paramount, the School District's overall genuine interest in the quality and character of its Physical Education programs, or Mr. Koval's personal, although equally legitimate concern, that his seniority rights, earned by service to the District, be respected. The unfortunate fact is that one or the other must be compromised to some extent, and it is for that reason alone that the undersigned concludes that Mr. Koval's seniority rights must yield.

Were the situation otherwise, so as to make it possible for the District to utilize Grievant's services as a Physical Education Instructor, without substantial reduction of the depth of physical education instruction to the female students at Wayne Middle School, or without incurring substantial increase in costs for a Teacher's Aide to assist the Grievant by going into the girls' locker room area (which is arguably at least inferior in desirability to having a certified and qualified female Physical Education Instructor present therein), the undersigned would indeed be inclined to reach a different result. There are cases however where it is just not possible to accord equal deference to the rights of an Employer and an Employee, and in the present situation where that very incompatibility arises, the undersigned is persuaded that the only prudent course of action is to allow the District to maintain separate dressing facilities because it is beneficial to all of the students.

It does appear that the District improperly failed to post the positions in question for bid, but as to the present Grievant, that issue is moot, because he could not under this Decision and based on the admitted facts, have claimed either of the positions in question. Though the result that obtains here has the net effect of subordinating Grievant's seniority to the District's managerial right, as well as public and legal responsibility, to determine what are the essential qualifications for its Physical Education Instructors at Wayne Middle School, a valid educational objective is served thereby. More apropos is the lack of anything in this

Contract which precludes the District from disqualifying a professional employee from a certain position based on sex where sex has a demonstrable factual nexus with ability to satisfactorily perform the full range of duties incidental to the job, according to commonly recognized community standards of propriety in this delicate context.

AWARD

The grievance is denied.

GAS SERVICE CO. —

Decision of Arbitrator

In re GAS SERVICE COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 53, Grievance No. 1977-5, March 7, 1978

Arbitrator: Raymond Goetz

WORK ASSIGNMENTS

—Changing flat tires — Female collector — Job description ▶ 117.331

Employer had right to require female collector to change flat tires on car that it provided her to perform her duties where job description of collector requires driver's license as one of qualifications; while changing of tires may not have been included in description of duties set forth in posted notice of vacancy for position, job description does not contain every detail of work that employee is expected to perform. Fact that tires occasionally have been changed for collectors does not preclude employer from requiring collectors to perform work so long as no individual collector is singled out for harassment.

CHANGING FLAT TIRES

GOETZ, Arbitrator: — Although the parties were unable to agree on a statement of the issue presented in this arbitration, the basic question to be decided is whether the Company can properly require the Grievant, Fannie Robinson, to change flat tires on the automobile provided by the Company for performance of her duties as a Collector.

The Facts

The Grievant was originally transferred into the classification of Collector after she bid on the job when notice

COMMONWEALTH of Pennsylvania,
DEPARTMENT OF CORRECTIONS, STATE
CORRECTIONAL
INSTITUTION AT MUNCY, Petitioner,

v.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 13, AFL-
CIO, Respondent.

Commonwealth Court of Pennsylvania.

Argued Sept. 11, 1986.

Decided Sept. 30, 1986.

Department of Corrections petitioned for review to challenge labor arbitrator's award requiring correctional institution to make all prison guard shift assignments without regard to gender and regardless of personal privacy of inmates in presence of guards of opposite sex. The Commonwealth Court, No. 326 C.D. 1986, Craig, J., held that arbitrator's award which required correctional institution to make prison guard shift assignments without regard to gender of prison guards was not rationally derived from essence and purpose of collective bargaining agreement which permitted institution to depart from seniority as basis for assignment in order to protect efficiency of operation.

Vacated.

LABOR RELATIONS 462

232Ak462

Arbitrator's award which required correctional institution to make prison guard shift assignments without regard to gender of prison guards and regardless of personal privacy of inmates in presence of guards of opposite sex and which was based upon conclusion that privacy rights of inmates did not establish bona fide occupational qualification was not rationally derived from essence and purpose of collective bargaining agreement which permitted institution to depart from seniority as basis for assignment in order to protect efficiency of operation and which did not deal with operation of institution.

**1000 *122 Cheryl G. Young, John D. Raup, Harrisburg, for petitioner.

Nancy B.G. Lassen, Kirschner, Walters, Willig, Weinberg & Dempsey, Philadelphia, for respondent.

Before CRAIG, COLINS and PALLADINO, JJ.

CRAIG, Judge.

Where a labor arbitrator's award requires a state correctional institution to make all prison guard shift assignments without regard to the gender of the prison guards and hence regardless of the personal privacy of *123 inmates in the presence of guards of the opposite sex, is the arbitrator's award invalid as not rationally derived from the essence of the provisions of the collective bargaining agreement relating to the prison's operation?

The Pennsylvania Department of Corrections has appealed from the award of a labor arbitrator upholding two grievances of corrections officers (guards) at the State Correctional Institution at Muncy, which houses approximately 400 female prisoners **1001 and 140 male prisoners and is the only state facility for female prisoners.

The grievances protested the failure of the employer to allow bids for shift preferences in accordance with Article 30, Section 10 of the agreement which states:

In making shift assignments to shift openings, preference shall be granted on a seniority basis unless the Employer feels it is necessary to assign otherwise in order to protect the efficiency of operation. Seniority status in this regard shall be Classification seniority attained at the work site.

The agreement further provides under Article 33, Discrimination:

Both the Employer and the Union agree not to discriminate against any employee on the basis of race, creed, color, ancestry, sex, marital status, age, national origin, non-job related handicap or disability, union membership or political affiliation.

The arbitrator's findings of fact, which are not substantially in dispute in any respect, establish that the department's shift vacancy announcements at issue, posted in January and February of 1984, were labeled "C.O.I. VACANCY-- FEMALE" and addressed to "All Female C.O.I.'s." After the department declined to permit male guards to bid on specific assignments, and after *124 the rejection of the resulting grievances at initial steps, the parties submitted the grievances to the arbitrator.

The arbitrator found that the women prisoners live in eight large two-story housing units in two-person rooms, with a shower room on each floor, having two

(Cite as: 101 Pa.Cmwlt. 121, *124, 515 A.2d 1000, **1001)

or three separate shower stalls; at least one recreational room is located in each women's building. Male prisoners reside in two single-story structures, each with a large open dormitory room, a shower room and a small recreation area.

Heretofore, the department staffed female housing units with female guards and male housing units by male guards. However, as the arbitrator found, since 1981 the department has had in effect for the prison a policy statement which declares that a guard's gender will not exclude the employee from employment nor from particular assignments except where sex is a bona fide occupational qualification. Summarized, specific policy guidelines state:

- a. Guards will not be assigned to work in open view of unclothed inmates of the opposite sex;
- b. External escort of prisoners must be by at least one officer of the same sex;
- c. Assignments to housing units will involve at least one officer of the same sex as the inmates; and
- d. Guards will not conduct strip or frisk searches of inmates of the opposite sex except in case of emergency.

Because of the express gender labeling of the shift bid announcements, the arbitrator correctly concluded that the grievants had established a prima facie case of sex discrimination. He acknowledged that, under the department's guidelines, both male and female officers *125 qualify for assignments on all shifts and may work with inmates of the opposite sex when more than one officer is present. He also correctly noted that the primary consideration is not whether men and women guards are eligible for several respective assignments in any shift, but rather the point is that men or women officers are being excluded from certain shift assignments on the basis of their gender.

The key issue, as the arbitrator stated it at the outset, was whether the distinction made by the department in the shift assignments was based upon a bona fide occupational qualification. Stated as a contract interpretation question, the issue is whether the department could depart from seniority as the sole criterion "in order to protect the efficiency of operation." Art. 30, sec. 10, quoted above.

The arbitrator acknowledged the decision of the United States Supreme Court in *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), in which the **1002 Court declined to invalidate a state regulation barring the hiring of women guards in contact positions at all-male prisons,

concluding that gender was a bona fide occupational qualification in the circumstances of that case, which involved a danger of violence against women guards, threatening the control of the prison.

However, because the evidence in this case did not exhibit any special threat of violence against either male or female guards in this prison, the arbitrator decided that a guard's gender was not a bona fide occupational qualification, rejecting the department's position that personal privacy concerns of inmates, with respect to states of undress and the performance of intimate bodily functions in the presence of guards of the opposite sex, had a meaningful relationship to the selection of guards. The arbitrator found legal support-- and apparently also a factual foundation--for that determination in *Griffin v. Michigan Department of Corrections*, 30 Fair Empl.Prac.Cas. (BNA) 638 (E.D.Mich.1982). In that case, the U.S. District Court for the Eastern District of Michigan rejected the claim of the prison management defendants that inmate privacy is a factor creating a bona fide occupational qualification, stating:

Defendants' argument is without merit because (1) it assumes that inmates retain an unqualified protected right of privacy under the Constitution, and (2) it is based on stereotypical sexual characterization that a viewing of an inmate while nude or performing bodily functions, by a member of the opposite sex, is intrinsically more odious than the viewing of a member of one's own sex. Neither assumption can withstand traditional scrutiny.

....

Inmates do not possess any protected right under the Constitution against being viewed while naked by correctional officers of the opposite sex. The entire basis of the argument rests on assumptions and stereotypical sexual characteristics which have been expressly prohibited by Title VII, *Dothard*, supra, and other Supreme Court decisions that refute principals [sic] of sexual stereotyping.

30 Fair Empl.Prac.Cas. (BNA) at 646-48. Accordingly, the arbitrator here, in arriving at the award, stated his rationale as follows:

Privacy rights of inmates is not a justification for a BFOQ exception to the general prohibition of discrimination on the basis of sex. It follows, therefore, that the Employer's attempt to draw a delicate balance between the inmates' rights of privacy and the employees' rights under the Agreement has no basis in law.

*127 In so doing, the arbitrator departed from his own sound articulation of the issue, as noted above, and reached his conclusion on the basis of a different

(Cite as: 101 Pa.Cmwlth. 121, *127, 515 A.2d 1000, **1002)

issue--balancing the rights of inmates against the rights of guards-- which is not involved in the case. The interpretation issue for the arbitrator here was, as he initially recognized, whether the department had a basis for deeming it necessary to depart from seniority "in order to protect the efficiency of operation." With respect to resolving that issue, the arbitrator strayed from the essence of this contract and from the issue at hand, to import into the case the philosophical views of a federal trial court, whose position is neither binding nor necessarily persuasive with respect to the law of this Commonwealth. As this court has stated in an opinion by President Judge Crumlish:

Laws forbidding discrimination in hiring on the basis of sex do not purport to erase all differences between the sexes. These laws recognize that there are jobs for which one sex is inherently and biologically more qualified than those of the opposite sex. The biological difference between men and women which in turn produce psychological differences are the facts that justify limiting personal contact under intimate circumstances to those of the same sex.

****1003** Philadelphia v. Human Relations Commission, 7 Pa.Commonwealth Ct. 500, 510 n. 7, 300 A.2d 97, 103 n. 7 (1973).

The essence of this contract involves the operation of a correctional institution having a legal responsibility as a public agency to deal with its inmate population effectively, efficiently and humanely. The essence of the contract being interpreted here is not to operate an institution which treats prisoners as if they were less than human, like inmates of a concentration camp, deprived *128 even of that minimal degree of personal privacy which the common opinion of civilized communities recognizes to be the entitlement of every person.

The irrationality of this award cannot withstand even the limited scope of review accorded to the appellate courts in these cases. In *Community College of Beaver County v. Community College of Beaver County Society of the Faculty*, 473 Pa. 576, 375 A.2d 1267 (1977), the Pennsylvania Supreme Court reiterated that an arbitrator's award is to be respected by the judiciary

if 'the interpretation can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention ...' *Ludwig Honold Mfg. Co. v.*

Fletcher, 405 F.2d 1123, 1129 (3rd Cir.1969). It was this approach which was meant to be suggested by the brief statement in *International Brotherhood of Firemen and Oilers*, supra, that 'the arbitrator's interpretation of the contract must be upheld if it is a reasonable one.' 465 Pa. at 366, 350 A.2d at 809. 473 Pa. at 594, 375 A.2d at 1275.

In accordance with that equating of the rational derivation essence test with the reasonableness language of *International Brotherhood of Firemen and Oilers*, 465 Pa. 356, 350 A.2d 804 (1976), the Pennsylvania Supreme Court, in *Philadelphia Housing Authority v. Union of Security Officers No. 1*, 500 Pa. 213, 216, 455 A.2d 625, 627 (1983), overturned an arbitrator's award reinstating a housing authority security officer who had been discharged for defrauding an elderly tenant. Condemning the irrationality of condoning such conduct in relation to the essence of the collective bargaining agreement, the Supreme Court decided that

it is manifestly unreasonable to conclude that the Housing Authority could have intended to bargain *129 away its absolute responsibility to insure the integrity of its housing security force by discharging an officer who has defrauded one of the very people whom he is paid to protect.

The Supreme Court thus concluded that the arbitrator was without authority to overturn the discharge because the arbitrator's decision was "unjustified by any terms that were or could properly have been contemplated by the parties...." 500 Pa. at 216, 455 A.2d at 627.

Similarly here, it is manifestly unreasonable to conclude that prison management could have intended to bargain away its absolute responsibility to accord to prisoners such vestige of human status as is embodied in personal privacy.

The award of the arbitrator here, not being rationally derived from the essence of the contract and its purpose, must be vacated.

ORDER

NOW, September 30, 1986, the arbitrator's award dated January 13, 1986, is vacated.

END OF DOCUMENT

*876 658 A.2d 876

Ody A. DICKEY, Jr., Appellant

v.

BOARD OF COMMISSIONERS OF the CITY OF
WASHINGTON,
Pennsylvania, and the County of Washington.

Commonwealth Court of Pennsylvania.

Argued March 13, 1995.

Decided May 9, 1995.

Unsuccessful applicant for position of 911 emergency response system coordinator brought action against county under Veterans Preference Act. Following remand, the Common Pleas Court, Washington County, No. 92-4177, Terputac, J., found for county. Applicant appealed. The Commonwealth Court, No. 2078 C.D. 1994, McGinley, J., held that: (1) county did not impose overly strict requirements as "requisite qualifications" for position, so as to violate Act, and (2) Common Pleas Court did not fail to consider job applicant's military experience with 911 emergency response systems.

Affirmed.

1. ADMINISTRATIVE LAW AND PROCEDURE
⊕683

15A ---

15AV Judicial Review of Administrative
Decisions

15AV(A) In General

15Ak681 Further Review

15Ak683 Scope.

Pa.Cmwlth. 1995.

Commonwealth Court's scope of review in local agency appeals where common pleas court takes de novo evidence is limited to determining whether constitutional rights were violated or whether common pleas court manifestly abused its discretion or committed error of law.

2 OFFICERS AND PUBLIC EMPLOYEES ⊕10
283 ---

283I Appointment, Qualification, and Tenure

283I(B) Appointment

283k10 Preference of discharged soldiers,
sailors, or marines.

Pa.Cmwlth. 1995.

County did not impose overly strict requirements as "requisite qualifications" for position of 911 emergency response system in violation of Veterans Preference Act; qualifications for position were

established not to defeat veterans' preference but to hire most competent applicant. 51 Pa.C.S.A. § 7104(a).

3. OFFICERS AND PUBLIC EMPLOYEES ⊕10
283 ---

283I Appointment, Qualification, and Tenure

283I(B) Appointment

283k10 Preference of discharged soldiers,
sailors, or marines.

Pa.Cmwlth. 1995.

For purposes of determining whether employer imposes unduly restrictive requisite qualifications in violation of Veterans Preference Act, employer is free to establish hiring requirements that are reasonably related to duties to be performed, so long as such requirements are not undertaken in bad faith. 51 Pa.C.S.A. § 7104(a).

4. OFFICERS AND PUBLIC EMPLOYEES ⊕10
283 ---

283I Appointment, Qualification, and Tenure

283I(B) Appointment

283k10 Preference of discharged soldiers,
sailors, or marines.

Pa.Cmwlth. 1995.

Common Pleas Court did not fail to consider job applicant's military experience with 911 emergency response systems in determining whether county imposed unduly restrictive requisite qualifications in violation of Veterans Preference Act; Court considered applicant's military experience but concluded that applicant failed to meet requisite qualifications. 51 Pa.C.S.A. § 7104(a).

Samuel J. Cordes, for appellant.

Janette Baisley, for appellees.

Before MCGINLEY and KELLEY, JJ., and
SILVESTRI, Senior Judge.

MCGINLEY, Judge.

Ody Dickey, Jr. (Dickey) appeals an order of the Court of Common Pleas of Washington County (common pleas court) after determining upon remand (FN1) that Dickey lacks the "requisite qualifications" for the 911 Coordinator position and therefore is not entitled to be hired under Section 7104(a) of the Act commonly known as the "Veterans Preference Act" (Act). (FN2)

The facts as recounted in this Court's memorandum opinion of *Dickey v. Board of Commissioners of the*

County of Washington and the County of Washington, 164 Pa.Commonwealth Ct. 699, 643 A.2d 1191 (1994), are as follows. In February of 1992 the County of Washington (County) advertised for applicants *877 for a position as Coordinator of its new 911 emergency response system. The newspaper advertisement read:

COORDINATOR FOR 911

PUBLIC SAFETY PROFESSIONAL to direct planning, implementation & management of county-wide enhanced 911 system. Coordinator for 911 serves as liaison to Washington County 911 Planning Committee & County Commissioners. Successful applicant will have some knowledge of 911, good communication skills, be computer intelligent, have management experience, a public safety background, & a 4-year degree in a related field. Salary negotiable.

Send cover letter describing qualifications & resume to interim 911 Coordinator, Room 202, Courthouse Square Building, 100 W. Beau St., Washington, PA 15301. Applications accepted until March 6, 1992.

E.O.E.

Notes of Testimony, March 9, 1993, (N.T.), Exhibit 1.

The County's Director of Employee Relations, Katherine B. Emery (Emery) and Francis Pettit (Pettit), a member of the search committee, developed a job description for the Coordinator position which required, *inter alia*, the following:

Thorough knowledge of Act 78 of 1990 which is designed to provide a no-charge telephone number 911 for individuals to gain rapid direct access to emergency aid.

Thorough knowledge of all other applicable regulations and laws.

Thorough knowledge of the operations of a 911 system and current usage in the County for an emergency number.

Ability to analyze, evaluate and plan to meet the legal requirements of a 911 system.

Ability to establish and foster positive working relationships with state and municipal officials,

volunteers, business persons and the general public.

Ability to prepare fiscal and administrative reports.

Ability to plan, organize and direct the work of others individually and as groups.

Ability to effectively express ideas in writing and orally.

N.T. at 57a, Respondent's Exhibit A at 1-2.

Emery assisted the search committee with the interviewing. Fifty applications were received and five were selected for interviews. Dickey's name was subsequently added to the list as a favor to a County Commissioner. Relying upon the advice of the search committee, the Washington County Board of Commissioners (Board) hired Brian Bark (Bark), a non-veteran. Dickey, a veteran who served 21 years in the Air Force, appealed, alleging that he possessed the "requisite qualifications" and that he was entitled to be hired. On remand the common pleas court found that "[r]equisites three and four of the job description direct that the applicant have a thorough knowledge of the operation of a '911 system and current usage in the County for an emergency number' and the ability 'to analyze, evaluate and plan to meet the legal requirements of a 911 system.'" Opinion of the Common Pleas Court, August 7, 1994, at 4. The common pleas court found:

Without a doubt Dickey has no thorough knowledge of the operation of a 911 system and its current usage in the County and also he lacks the ability to analyze, evaluate and plan to meet the legal requirements of the system.

In effect, talking to people in the Columbus, Ohio, system and touring a 911 system in Greensburg, and reading about the system are hardly the kinds of knowledge which would meet the standards of 'requisite qualifications' under parts three and four of the job description.

Opinion at 5.

On appeal Dickey contends: 1) that the Board imposed overly strict requirements upon a veteran so that Dickey was unable to meet the "requisite qualifications" under Section 7104(a) in violation of the Act and this Court's decision in *Brickhouse v. Spring Ford Area School District*, 155 Pa.Commonwealth Ct. 402, 625 A.2d 711 (1993); 2) that the common pleas court failed to take into

consideration Dickey's experience with similar 911 systems while in the Air Force; 3) *878 that the common pleas court's determination that Dickey lacked experience for 911 Coordinator position was in contravention of Section 7105 of the Act; and (4) that Dickey was evaluated under different standards than Bark.

[1] Our scope of review in local agency appeals where the common pleas court takes *de novo* evidence is limited to determining whether constitutional rights were violated or whether the common pleas court manifestly abused its discretion or committed an error of law. *McLaughlin v. Centre County Housing Authority*, 151 Pa.Commonwealth Ct. 292, 616 A.2d 1073 (1992).

[2] Initially, Dickey contends that the County's job description imposed overly strict requirements as "requisite qualifications" for the 911 Coordinator position in violation of Section 7104(a) of the Act and *Brickhouse*. Dickey asserts that he satisfied the reasonable requirements for the position of the 911 Coordinator as advertised by the County in the newspaper and therefore met the "requisite qualifications" under the Act.

Section 7104(a) provides:

(a) Non-civil service.--Whenever any soldier possesses the requisite qualifications and is eligible to appointment to or promotion in a public position, where no such civil service examination is required, the appointing power in making an appointment or promotion to a public position shall give preference to such soldier.

Recently, our Pennsylvania Supreme Court reviewed this Court's decision in *Brickhouse* and reversed. *Brickhouse v. Spring-Ford Area School District*, --- Pa. ---, 656 A.2d 483 (1994). In *Brickhouse*, G. Gordon Brickhouse (Brickhouse) applied for a secondary social studies teaching position. Brickhouse, a Vietnam veteran, had one year's experience teaching social studies with other experience as a paralegal, bookkeeper, manager of a trailer park, manager of a hunting lodge and teacher in reform and other special schools. The Spring-Ford Area School District hired Andrew Ruppert (Ruppert), a non-veteran, who possessed excellent academic credentials (3.78 grade point average) (FN3) and favorable evaluations as a long-term substitute teacher.

On appeal the Supreme Court framed the issue

presented as whether a veteran, certified to teach in Pennsylvania, must be hired pursuant to the Act when the other applicants are non-veterans. The Supreme Court stated:

It is clear, thus that there must be a reasonable relation between the basis of the preference (being a veteran) and the object to be obtained (preferring veterans to properly perform public duties). In other words, veterans are not to be preferred in the assignment of public jobs merely on the strength of being veterans. They must be, in some sense, 'qualified.'

[*Commonwealth ex rel. Graham v.*] *Schmid* [333 Pa. 568, 3 A.2d 701 (1938)] also aids in defining the meaning of 'qualified.' Veterans who seek to take advantage of the act must be able to accomplish 'proper performance of public duties.' That is, a veteran seeking to take advantage of the preference mandated by the act must be able to demonstrate his ability to perform the job at the level of skill and with the expertise demanded by the employer. Such a demonstration would establish that he will be able to 'properly perform' the job duties.

Since the applicant must demonstrate his ability to perform, merely having the appropriate certification or licensure, without more, would not serve to qualify an applicant for the job. Thus, *Brickhouse's* assertion of qualification based on minimal age, good moral character, and certification to teach, must fail. These features may establish a veteran's eligibility to be considered for the position, but they will not establish that he is 'qualified' for the job.

Were ability to perform at the level of the expertise demanded by the employer not required, not only would public policy mentioned in *Schmid* be violated, but the likelihood of absurd results, forbidden by the Statutory Construction Act, 1 Pa.C.S. *879 § 1922(1), would be present in hundreds if not thousands of hirings.

....

We are mindful that a public employer might be able to formulate qualifications for a job in such a way as to defeat the veterans' preference required by the act. When such formulations are undertaken in bad faith without regard to legitimate need, they must fail, but determination of the legitimacy of the employer's formulation of hiring criteria can be done only on a case by case basis.

If it is required as a matter of public policy, as we have held, that a person who is preferred under the Veterans' Preference Act must be able to demonstrate his ability to perform the job in question at the level of expertise demanded by the employer, *then the employer must be free to set the hiring requirements of that job as they reasonably relate to the duties to be performed in order to ensure that the person hired will be competent.* (emphasis added).

Id., --- - ---, 656 A.2d at 486-87.

[3] In the present controversy, the Committee and Emery, the County's personnel director, formulated the qualifications for the 911 Coordinator position. It is clear from the record that the "requisite qualifications" listed in the job description required that the candidate possess more expertise and skill than originally advertised by the County. However, pursuant to *Brickhouse* the employer is free to establish hiring requirements that are reasonably related to the duties to be performed so long as such requirements are not undertaken in bad faith.

Emery testified that the County was seeking to hire a candidate who possessed technical or actual experience with 911 equipment, a knowledge of Act 78 and the ability to enhance the 911 system. (FN4) Emery stated that these "requisite qualifications" in the job description were formulated prior to the interview process and that each applicant was judged based upon whether they met those qualifications. The evidence established that it was not the intent of the County when it established the "requisite qualifications" in the job description to defeat the veteran's preference but to hire the most competent applicant. *Brickhouse*.

[4] Dickey next contends that he possessed the "requisite qualifications" and that the common pleas court erred as a matter of law when it failed to credit his military experience with similar 911 systems. Dickey asserts the evidence establishes that he possessed "some knowledge" of the civilian 911 system and that he had extensive management and leadership experience and the ability to communicate his ideas to a diverse group of people.

Dickey testified that he was Deputy Director of the Base Disaster and Control Emergency Program in the Air Force which he stated is the military equivalent to the civilian 911 system. Dickey also testified that he was familiar with the civilian 911 system and that the military and civilian systems were "essentially the same." N.T. at 20; R.R. at 21a. When queried as

to how the technology was the same, Dickey responded that the difference between the civilian and military technologies was like driving a 1962 automobile compared to driving a 1993 model. (FN5) Bark testified that he was *880 involved with the 911 system and that he had experience in implementing and managing an enhanced 911 system. (FN6) The evidence established that the common pleas court did consider Dickey's prior military experience but found that, even with his military experience, Dickey failed to meet the "requisite qualifications" of the 911 Coordinator position.

Dickey also contends that pursuant to Section 7105 of the Act, 51 Pa.C.S. § 7105 a lack of experience does not disqualify a veteran and cannot be considered as a "requisite qualification."

Section 7105 of the Act provides:

The lack of academic or scholastic training or experience, age, loss of limb or other physical impairment which does not in fact incapacitate any such soldier shall not be deemed to disqualify him, provided he possesses the other requisite qualifications to satisfactorily perform all of the duties which the position requires.

51 Pa.C.S. § 7105. In *Brickhouse* the Pennsylvania Supreme Court rejected a similar argument and stated that "[c]ontrary to Commonwealth Court (FN7), ... we do not perceive that a different result is required by § 7105 of the Veteran's Preference Act. *Brickhouse* does not 'lack' academic training ... [h]e is disqualified because he does not possess 'the other requisite qualifications to satisfactorily perform all of the duties which the position requires.' " *Brickhouse*, --- Pa. at --- - --- n. 4, 656 A.2d at 488 n. 4.

Lastly, Dickey asserts that the County considered him qualified for the 911 Coordinator position based upon the letter sent from Pettit to him (FN8) but contends that the County did not hire him because at the interview he appeared "very stilted and did not exude any warmth." N.T. at 72; R.R. at 73a. This argument is without merit. First, the letter sent to Dickey also stated that the three candidates chosen for the next step "came closest to meeting all of our requirements." Also, Emery testified that the letter sent to Dickey was a form letter and that it was sent to three of the six candidates not considered for further interviews. See N.T. at 74; R.R. at 75a. Second, although Emery did make these remarks, her observations were relevant because the position required a person to be a salesman. Emery's

testimony clearly established that based upon his interview Dickey "would not make a good salesperson ..." as the 911 Coordinator to the sixty-seven local municipalities and political sub-divisions in the county. N.T. at 72; R.R. at 73a.

Accordingly, we affirm the decision of the common pleas court.

ORDER

AND NOW, to wit, this 9th day of May, 1995, the order of the Court of Common *881. Pleas of Washington County at No. 92-4177, dated August 7, 1994, is affirmed.

FN1. On April 6, 1994, this Court vacated the order of the common pleas court and remanded the matter for a determination as to whether Dickey had the "requisite qualifications" for the 911 Coordinator position.

FN2. 51 Pa.C.S. § 7104(a).

FN3. Brickhouse's overall grade point average was 2.78 during his final two years of college.

FN4. David A. Miller, County's attorney, to Emery:

Q: What were the areas to be covered?

A: We divided it into three broad categories, and I will say, sort of in the area of importance; (1) technical experience, or experience with 911, with all the equipment and with Act 78, and what is required to go from a regular 911 to an enhanced 911 system; (2) would be to explore the abilities and expertise of the candidate on speaking in public, and to gather or garner support for the system with the community. We thought that the key element of the job was selling this concept to the community, and to ascertain their ability in that area. The third area would be more procedural part of their abilities to administer and manage people, because as the system developed, they will be a Department Head and have supervisory responsibilities with other managers in the office.

N.T. at 66-67; R.R. at 67a-68a.

FN5. Andrew G. Sykes, Dickey's attorney, to Dickey:

Q: When you say the technology is the same, be more specific and tell us how and in what we [sic] are the same?

A: Well, I would categorize using an analogy that the communications or--let me put it this way: if you had an automobile that you were driving today, a 1962 automobile, and you went out this afternoon and stepped into a 1993 automobile, the displays, the power steering, the power brakes, and so on and so forth, may be all different as to what you were used [sic] to driving in the 1962 model, but you could still drive the vehicle.

N.T. at 20; R.R. at 21a.

FN6. Mr. Miller to Bark:

Q: Had you had any experience on the date you were interviewed by the Search Committee in planning a 911 system?

A: Yes, I was involved in the team approach in the development of going from a basic 911 system, as we talked about earlier, to an enhanced 911 system. So, there was a great deal of planning involved there.

Q: Did you have any experience in implementing the 911 system?

A: Again, going from a basic to implementing an enhanced 911 system, yes.

Q: Finally, there is mention of managing an enhanced 911 system; on the day that you were interviewed by the Search Committee, did you have experience in managing an enhanced 911 system?

A: Yes, overseeing the day-to-day operations certainly does follow [sic] under that.

N.T. at 107; R.R. at 108a.

FN7. This Court stated that "[i]n addition, Section 7105 of the Act, 51 Pa.C.S. § 7105, although not cited by either side appears to prohibit the imposition of overly strict standards for qualification...." *Brickhouse*, 155 Pa.Commonwealth Ct. at 415 n. 10, 625 A.2d at 717 n. 10.

FN8. The letter stated in part that "[t]here is always the possibility that the new Coordinator will not be chosen from the three selected for various reasons ... [i]f this is the case, there is always the chance you would hear from us again...." Letter of March 30, 1992; R.R. at 125a.

*287 417 A.2d 287

53 Pa.Cmwlth. 223

Robert L. FATSCHER, Appellant,
v.
BOARD OF SCHOOL DIRECTORS OF the
SPRINGFIELD SCHOOL
DISTRICT, SPRINGFIELD, DELAWARE
COUNTY,
Pennsylvania, Appellee.

Commonwealth Court of Pennsylvania.

Argued April 10, 1980.

Decided July 24, 1980.

Appeal was taken by tenured teacher from an order of the Court of Common Pleas, Delaware County, Clement J. McGovern, Jr., J., affirming teacher's suspension by board of school directors from his position as a high school health and physical education teacher. The Commonwealth Court, No. 1412 C.D. 1979, Williams, J., held that: (1) decision of board of school directors to suspend a male teacher from secondary physical education department was rationally based on valid and practical purpose of maintaining a needed balance in that department between male and female teachers and, as such, fell squarely within discretionary power of board despite claim that it was unlawful to restrict candidates for suspension to male secondary physical education teachers, and (2) use of seniority as sole criterion for suspension of a tenured teacher from his position in secondary physical education department was not unlawful because no performance evaluations had been made for current school year where it was not required that ratings be based on performance evaluations for current school year.

Affirmed.

1. SCHOOLS ☞ 147.9

345 ---

345II Public Schools

345II(K) Teachers

345II(K)2 Adverse Personnel Actions

345k147.8 Grounds for Adverse Action

345k147.9 In general.

Formerly 345k147.8345k141(4)
Pa.Cmwlth., 1980.

Decision of board school directors to suspend a male teacher from secondary physical education department

was rationally based on valid and practical purpose of maintaining a needed balance in that department between male and female teachers and, as such, fell squarely within discretionary power of board despite claim that it was unlawful to restrict candidates for suspension to male secondary physical education teachers.

2. SCHOOLS ☞ 61

345 ---

345II Public Schools

345II(C) Government, Officers, and District Meetings

345k51 District Boards

345k61 Appeal from decisions.

Pa.Cmwlth., 1980.

A reviewing court will not interfere when a board of school directors has exercised discretion in accordance with circumstances and the law.

3. SCHOOLS ☞ 147.6

345 ---

345II Public Schools

345II(K) Teachers

345II(K)2 Adverse Personnel Actions

345k147.6 Effect of tenure or lack thereof.

Formerly 345k141(4)

Pa.Cmwlth., 1980.

Use of seniority as sole criterion for suspension of a tenured teacher from his position in secondary physical education department was not unlawful because no performance evaluations had been made for current school year where it was not required that ratings be based on performance evaluations for current school year. 24 P.S. § 1125.

4. SCHOOLS ☞ 147.2(1)

345 ---

345II Public Schools

345II(K) Teachers

345II(K)2 Adverse Personnel Actions

345k147.2 Dismissal, Non-Renewal,
Demotion, Non-Promotion, Transfer, or
Reassignment, in General

345k147.2(1) In general.

Formerly 345k141(1)

Pa.Cmwlth., 1980.

There is no statutory requirement that ratings of teachers be based on performance evaluations for current school year. 24 P.S. § 11-1125.

5. SCHOOLS ☞ 147.6

345 ---
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.6 Effect of tenure or lack thereof.

Formerly 345k141(4)
Pa.Cmwlt., 1980.

Advance warning of possible suspension by board of school directors did not prevent tenured teacher from being rated and ranked fairly in light of agreement between school officials and faculty union providing for such early notice, an agreement apparently reached out of concern for those teachers facing prospect of suspension.

6. SCHOOLS 147.6

345 ---
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.6 Effect of tenure or lack thereof.

Formerly 345k141(4)
Pa.Cmwlt., 1980.

That tenured teacher was the least senior member of the health and physical education department gave the board of school directors a valid basis for suspending teacher to maintain a needed balance in the department between male and female teachers.

[53 Pa.Cmwlt. 224] *288 C. Norwood Wherry,
Media, for appellant.

D. Barry Gibbons, Gibbons, Buckley & Smith,
Media, for appellee.

Before CRUMLISH, President Judge, and BLATT
and WILLIAMS, JJ.

WILLIAMS, Judge.

This is an appeal by Robert L. Fatscher, a tenured professional employee of the Springfield School District (District) from a decision and order of the Court of Common Pleas of Delaware County. The court below held that the appellant's suspension from his position as a high school health and physical education teacher by the Springfield Board of School Directors (Board) was lawful.

The relevant facts are as follows: In December of 1974, because of a significant decline in student enrollment in the Springfield School District, it

became apparent to school officials that a reduction of certain teaching positions would be necessary.

Among those positions scheduled to be eliminated was one in the health and physical education department. It was decided by school officials that in order to maintain an equal number of male and female teachers in that department, the teacher to be suspended had to be a male high school teacher. Although the physical education classes in the District were co-educational, conducted by both male and female teachers, there existed the need for a balance of male and female teachers for purposes of separate locker room supervision. (FN1)

[53 Pa.Cmwlt. 225] Based on evaluation reports of the physical education teachers for previous years and at least one classroom observation, it was concluded that all teachers in that department, both male and female, were highly rated, there being no significant differences *289 among them in their performance evaluations. Accordingly, the elimination of the one teacher from the physical education department would have to be based on seniority rights pursuant to Section 1125(b) of the Public School Code of 1949 (Code). (FN2)

Appellant, with two years of tenure in the department, was the teacher with the least seniority. He was therefore identified as the teacher most likely to be suspended. Prior negotiations between the Board and the teachers' union had resulted in an agreement to provide early notification to those staff members who might possibly be suspended. Accordingly, the Board notified appellant in February of 1975 of the likelihood of suspension at the end of that school year. In June 1975 he was in fact suspended.

When the appellant received advance notice in February 1975 of his likely suspension, he requested the Board to grant him a hearing on the matter. The Board refused. It took an order from this Court for him to obtain a hearing; (FN3) and hearings were held in May and June of 1977. In October 1977 the Board affirmed its suspension of the appellant. When the lower court, on May 31, 1979, affirmed the Board's decision, the instant appeal followed.

[53 Pa.Cmwlt. 226] Appellant does not dispute the fact that the declining school enrollment justified the elimination of one of the health and physical education positions. He concedes that declining school enrollment is one of the statutory grounds for staff

reduction as set forth in Section 1124 of the Code, 24 P.S. s 11-1124.

The appellant's present contentions are directed to the procedures utilized to ultimately identify him as the person to be suspended from the health and physical education department.

[1][2] Appellant first asserts that it was unlawful for the District to restrict the candidates for suspension to only male secondary physical education teachers. In that regard he relies on *Smith v. Harmony Area School District*, 16 Pa.Cmwlt. 175, 328 A.2d 883 (1974) for the proposition that all teachers in any subject-area of education must be considered for suspension. Appellant's reliance on that case is misplaced. *Smith* focused on areas of education only in response to the issue of whether, under circumstances of declining enrollment, a school district was required to retain teachers unneeded in a particular area of education at the expense of not hiring teachers needed in another area. Since this Court in *Smith* held that a school district had no such obligation, that case can be read as contravening appellant's contention, if applicable at all. In the instant matter, the decision to suspend a male teacher from the secondary physical education department was rationally based on the valid and practical purpose of maintaining a needed balance in that department between male and female teachers. Such a decision was squarely within the discretionary power of the school authorities. A reviewing court will not interfere when a school board has exercised its discretion in accordance with circumstances and the law. *Smith*, supra.

[53 Pa.Cmwlt. 227] [3] Appellant further contends that the use of seniority as the sole criterion for suspension was unlawful because no performance evaluations had been made for the 1974-75 school year. From that premise he additionally asserts there was no support for the conclusion that there were no significant differences in the ratings for the physical education teachers.

Section 1125 of the Code provides in pertinent part:

"(a) Whenever a board of school directors decreases the size of the staff of professional employes, the suspensions to be made shall be determined by the district superintendent on the basis of efficiency rank determined by ratings made in accordance with standards and regulations, determined by rating cards prepared by the

Department of Public Instruction, as required by section one thousand *290. one hundred twenty-three of this act. It shall be the duty of boards of school directors to cause to be established a permanent record system, containing ratings for each professional employe employed within the district. Copies of all ratings for the year shall be transmitted to the professional employe upon his or her request, or, if any rating during the year is unsatisfactory, a copy of same shall be transmitted to the professional employe concerned. No professional employe shall be dismissed under this act unless such rating records have been kept on file by the board of school directors

(b) In cases in which suspensions are to be made, professional employes shall be retained on the basis of seniority rights, acquired within the school district of current employment, where no differences in rating are found. Seniority rights shall also prevail where there is [53 Pa.Cmwlt. 228] no substantial difference in rating. In cases where there are substantial differences in rating of those under consideration for suspension, seniority shall be given consideration in accordance with principles and standards of weighting incorporated in the rating cards. . . ."

[4] There is no contention by appellant that rating records or their equivalent were not kept on file by the Board. In fact, it was the ratings already on file which were important to the conclusion that all of the members of the department were highly rated and that there were no significant differences in the ratings among them. Nowhere in the Code do we find a requirement that the ratings must be based on performance evaluations for the current school year. We have stated that where the teacher suspended is the least senior, even a failure to make and keep ratings would not invalidate the suspension. *Smith*, supra.

[5] We believe that in circumstances where declining enrollment makes suspensions probable or even strongly possible, an early warning to the candidates for suspension is in a spirit of fairness. Ironically, it was the act of the school authorities, in giving the appellant advance warning of his possible suspension, that forms the basis of his final contention: that the prior warning in February 1975 prevented him from being rated and ranked fairly. That argument must fail in light of the agreement between school officials and the faculty union providing for such early notice, an agreement apparently reached out of concern for

those teachers facing the prospect of suspension.

The evidence shows that another teacher evaluation was made at the end of the 1974-75 school year, and that produced no significant differences in the ratings of the physical education teachers. The court below properly concluded that it was of no relevance in this case if the evaluations had been made in previous [53 Pa.Cmwlth. 229] years, in February 1975, or at the end of the 1974-75 school year. Nor was it significant that the evaluations were not used to assign a numerical rank to each teacher; because, there were no significant differences among them.

[6] In the case at bar, there are no shown facts which should have altered the conclusion that seniority had to be the sole criterion for selecting the person to be suspended from the health and physical education department. The suspension of the instant appellant was validly based on the undisputed fact that he was the least senior member of the department. Accordingly, we affirm the order of the court below.

ORDER

AND NOW, the 24th day of July, 1980, the order of the Court of Common Pleas of Delaware County in the above matter, dated May 31, 1979 at No. 77-16309, is affirmed.

FN1. During the time that appellant was a teacher in the department, the physical education instruction was divided between four male and four female teachers. However, the head of that department was one of the female teachers who, accordingly, had a reduced teaching load. Evidence presented at the hearing demonstrated that the male and female balance of staff members has been maintained since appellant's suspension.

FN2. Act of March 10, 1949, P.L. 30, as amended, 24 P.S. s 11-1125(b).

FN3. Fatscher v. Springfield School District, 28 Pa.Cmwlth. 170, 367 A.2d 1130 (1977).

objective is accomplished, the out of court declarations of a conspirator cannot be used as evidence against his co-conspirators (*Commonwealth v. Ransom*, 446 Pa. 457, 461-462, 288 A.2d 762, 764 (1972)), there are instances in which statements made after the perpetration of the target crime are admissible because they are so closely connected to the commission of the substantive offense that they may reasonably be considered part of a continuing course of criminal conduct emanating from the substantive offense. See *Dreibelbis*, *supra* (the object of the conspiracy, a murder, did not terminate the conspiracy, and in their flight and their efforts to conceal their identities, the conspirators acted in furtherance thereof, thereby providing no obstacle to the admission of certain co-conspirator's inculpatory statements). See also *Cocciolatti*, *supra*, 493 Pa. at 112-113, 425 A.2d at 391-392 (declarations made in the course of concealing evidence and in furtherance of the common design of evading capture are admissible pursuant to the co-conspirator exception to the hearsay rule).

Here, Fitzroy Lewis testified that he had a telephone conversation with co-defendant Smith approximately an hour after the murder. During that conversation, Smith told Lewis that he and appellant Cull had just acted together to kill a woman and that he and Cull had both attempted to clean up and remove their belongings from the crack house which they operated following the shooting. Lewis further testified that Smith told him that they made the joint decision to close down their drug operation so that they could leave town in a hurry and escape detection. Further, Smith then asked Lewis to recommend a hotel where he and appellant could both stay until nightfall, after which they could then travel to New York under the cloak of darkness.

This evidence demonstrated that Smith and appellant Cull were engaged in jointly secreting evidence of the murder and acting jointly to escape detection and apprehension. 6. Appellant also asserts a *Bruton* violation and trial counsel ineffectiveness for counsel's failure to object to Faye Cherry's statement that co-defendant Smith telephoned her approximately one and one-half months following the murder and told her that appellant Cull was solely responsible for the crime. Upon close examination of the record, however, we note that Ms. Cherry gave this particular statement to a defense investigator a few days before her in-court testimony and that it was co-defendant Smith's counsel who read this statement into evidence. N.T.

Co defendant Smith's statements sled him on both the nature and execution of the conspiracy in that they concerned the details of the killing itself as well as the two conspirators' motives behind the killing. Also, Smith's statements formed the basis of the co-conspirators' joint efforts to avoid detection by the police. These statements to Lewis were therefore properly admitted at trial. The Superior Court properly reversed the trial court's grant of a new trial.

[6, 7] Even without regard to whether these statements were admissible, however, appellant's related claim that his trial counsel was ineffective for failing to object to the admission of these statements is without merit. A criminal defendant sustains a claim of ineffectiveness of counsel only if he proves: (1) that the underlying claim is of arguable merit; (2) that counsel's performance had no reasonable basis; and (3) that counsel's ineffectiveness worked to his prejudice. See *Commonwealth v. Edmiston*, 535 Pa. 210, 237, 634 A.2d 1075, 1092 (1993) (citation omitted). Trial counsel may not be deemed ineffective in cases in which the defendant cannot demonstrate that he was prejudiced from his trial counsel's performance. *Id.*

[8] Here, appellant himself admitted that he "shot the bitch because she scratched me in my face." Consistent with this admission, Cherry observed scratches on appellant's face. Therefore, given appellant's own inculpatory statement and the other overwhelming evidence in this case demonstrating appellant's guilt, no prejudice occurred as a result of the admission of co-defendant Smith's statements to Cherry and Lewis. See *Commonwealth v. Peterkin*, 538 Pa. 455, 649 A.2d 121, 125 (1994) (capital murder defendant did not receive ineffective assistance of counsel when his attorney failed to object to prosecution's closing argument because any prejudice from those remarks was outweighed by overwhelming other evidence of guilt).⁶ Appellant's asserted ineffectiveness for the crime. Upon close examination of the record, however, we note that Ms. Cherry gave this particular statement to a defense investigator a few days before her in-court testimony and that it was co-defendant Smith's counsel who read this statement into evidence. N.T.

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factiveness claim is therefore without merit and appellant is not entitled to a new trial. As U.S. Supreme Court Justice Cardozo wrote in *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934):

There is danger that the criminal law will be brought into contempt . . . if guesswork possibilities of prejudice to a defendant are nullified by a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

291 U.S. at 122, 54 S.Ct. at 338.

The statements of co-defendant Smith having not violated the Confrontation Clause and having not caused any prejudice to appellant, provides no basis for disturbing appellant's convictions. Accordingly, we hereby affirm the Superior Court's reversal of the trial court's grant of a new trial, and remand the matter to the trial court for proceedings consistent with this opinion.

PAPADAKOS, J., did not participate in the decision of this case.

FLAHERTY, J., files a concurring opinion in which NIX, C.J. and ZAPPALA, J., join.

CAPPY, J., concurs in the result.

MONTEMURO, J., is sitting by designation.

FLAHERTY, Justice, concurring.

I concur in the result reached by the majority. I would affirm the conviction simply because the witness testimony in question was admissible and there was, therefore, no ineffectiveness in failing to object to its admission. The court's discussion concerning

320-330. We also note from our review of the record that defense counsel read the statement into evidence not to assert the purported truth of the statement, but to impeach Ms. Cherry's credibility and consistency regarding Smith's statements to her. *Id.* As such, the truth-determining mission of the confrontation clause is not implicated and no *Bruton* violation occurred. See *Dutton*, *supra*, 400 U.S. at 81-82, 91 S.Ct. at 215-16 (the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials). See also *Tennessee v. Street*, 471 U.S. 409,

factiveness claim is therefore without merit and appellant is not entitled to a new trial.

As U.S. Supreme Court Justice Cardozo wrote in *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934):



G. Gordon BRICKHOUSE, Appellee,

v.

SPRING-FORD AREA SCHOOL DISTRICT, Appellant.

Supreme Court of Pennsylvania.

Argued Oct. 20, 1994.

Decided April 4, 1995.

Veteran sought judicial review of decision of local school board that school district's decision not to hire him for vacant teaching position did not violate Veterans' Preference Act. The Court of Common Pleas, Montgomery County, No. 90-202090, Maurizio Rossanese, J., appealed school board's decision, and veteran appealed. The Commonwealth Court, No. 293 C.D. 1992, McGinley, J., 155 Pa.Cmwith. 402, 625 A.2d 711, reversed. School district petitioned for allowance of appeal and allocatur was granted. The Supreme Court, No. 31 E.D. Appeal Docket 1994, Flaherty, J., held that veteran, who applied for vacancy on teaching staff of public school and established he was certified to teach in state, did not have to be hired for position pursuant to Veterans' Preference

413-414, 105 S.Ct. 2078, 2081-82, 85 L.Ed.2d 423 (1985) (defendant's rights under the confrontation clause not violated by the introduction of an accomplice's confession for nonhearsay purposes). Further, we believe no claim of trial counsel ineffectiveness may lie on this point on the basis of our finding herein that trial counsel's failure to object to the admission of any of Smith's statements was not prejudicial to appellant's case in light of appellant's own explicit admission of guilt and the other meaningful evidence of guilt. See *Peterkin*, *supra*.

Cite as 656 A.2d 483 (Pa. 1995)

Act when veteran failed to meet school district's qualifications for position and nonveteran applicant met those qualifications.

Reversed.

Zappala, J., filed a concurring opinion in which Cappy, J., joined.

Castille, J., filed a dissenting opinion.

1. Officers and Public Employees §10

Veterans are not to be preferred in the assignment of public jobs merely on the strength of being veterans; rather, they must be, in some sense, "qualified." 51 Pa.C.S.A. § 7104(a).

2. Officers and Public Employees §10

Veteran seeking to take advantage of preference mandated by Veterans' Preference Act must be able to demonstrate his ability to perform the public job at level of skill and with expertise demanded by the employer. 51 Pa.C.S.A. § 7104.

3. Officers and Public Employees §10

Since Veterans' Preference Act requires a veteran applying for a public job to demonstrate his ability to perform the job, merely having appropriate certification or licensure, without more, does not serve to qualify the veteran for the job. 51 Pa.C.S.A. § 7104.

4. Schools §133.1(1)

Veteran, who applied for a vacancy on teaching staff of public school and established she was certified to teach in state, did not have to be hired for position pursuant to Veterans' Preference Act, where school district sought a person of high academic performance with outstanding current references, veteran's record, at best, was mediocre, veteran did not furnish required outstanding recommendations and current references, and nonveteran hired for position had a 3.80 grade point average, had received several awards for his academic achievements, and had received very good evaluations with respect to his work as a long-term substitute within school district. 51 Pa.C.S.A. § 7104.

the job, he appealed the failure to hire and also brought a civil action seeking declaratory relief.

In response to Brickhouse's appeal, the school board held a hearing pursuant to the provisions of the Local Agency Law, 2 Pa.C.S. § 101 et seq. A complete record was transcribed. After hearing, the board found that the position already had been filled at the time of Brickhouse's application, that his application was incomplete, and that he was not, in any event, entitled to the position.

Brickhouse appealed the board's decision and requested a trial de novo and, in the alternative, leave to appeal *nunc pro tunc*. The trial court granted the motion to appeal *nunc pro tunc* and dismissed the complaint for declaratory relief. Further, the trial court affirmed the factual findings of the school board.

On appeal from that determination, Commonwealth Court reversed, holding that the Veterans' Preference Act requires that Brickhouse be hired. It rejected the school district's arguments that section 7104(a) does not mandate a preference and also that the Veterans' Preference Act does not apply to school employment. In addition, Commonwealth Court rejected the school district's argument that the vacancy had been filled already when Brickhouse applied and that Brickhouse was not qualified, holding that since Brickhouse holds a valid teaching certificate, he is qualified. The school district argued that although Brickhouse was certified to teach in Pennsylvania, he was not qualified to teach in this particular school district, where high academic performance, outstanding recommendations, and current references were required. Commonwealth Court stated that the district "may not defeat the purpose of the Act by recognizing other requisite qualifications" beyond what the Commonwealth established." 155 Pa.Cmwlth. 402 at 415, 625 A.2d 711 at 717.

The school district petitioned for allowance of appeal and we granted allocatur in order to determine the manner in which the Veterans' Preference Act should be applied.

The parties have also raised question as to whether the Commonwealth Court applied the proper standard of review and whether there was a vacant teaching position at the time of

facts of this case.'

The Veterans' Preference Act, § 7104(a) provides:

(a) Non-civil service. Whenever any soldier possesses the *requisite qualifications* and is *eligible to appointment* to or to promotion in a public position, where no such civil service examination is required, the appointing power in making an appointment or promotion to a public position shall give preference to such soldier.

51 Pa.C.S. § 7104(a). (Emphasis added.) There is no dispute that Brickhouse is a "soldier" within the terms of the act. Although other sections of the act concern the hiring and promotion of veterans in cases involving a civil service list or examination, see subsections 7104(b) and (c), in this case there is neither a civil service list nor an examination applicable to this job. Instead, this case involves criteria for hire formed by the school district.

The case turns on the meaning of the statutory phrases "requisite qualifications" and "eligible to appointment." If Brickhouse has the necessary qualifications and is eligible for appointment, he must be given "preference" under the terms of the act.

The school district argues, in essence, that its requisite qualification for hire is that the candidate be a high achiever. The Superintendent of the school district testified as follows:

Q. Can you describe what—briefly, what is it that you are looking for in a social studies teacher?

A. Well, a social studies teacher, a kindergarten teacher or a science teacher, we are looking for a high academic performance, outstanding recommendations, current references.

The school district states that Brickhouse's application was weak in that there was no letter accompanying the application dealing with the position applied for and explaining his interest, nor was there any letter explaining

Brickhouse's application. Because of our disposition of the case, we decline to address these matters.

Cite as 656 A.2d 483 (Pa. 1995)

ing how his background, which was primarily non-academic, qualified him for the position. Additionally, Brickhouse's grade average of 2.78 was deficient and his work history was very little related to teaching social studies. In the prior eleven years, Brickhouse had taught social studies for one year, but he had spent the rest of this time working as a paralegal, a bookkeeper, a manager of a trailer park, a manager of a hunting lodge, and a worker at reform schools or other special schools for children.

The person hired, on the other hand, had recently graduated with a 3.80 grade point average and had received several awards for his academic achievements. Additionally, this person had received very good evaluations with respect to his work as a long term substitute within the school district.

Brickhouse, however, argues that to be qualified to teach in Pennsylvania, the only requirements are that one be of sound moral character, over eighteen years of age and be certified to teach by the Commonwealth, and that once he is qualified, he must be awarded the job.

[1] The landmark case in the area is *Commonwealth ex rel. Graham v. Schmid*, 383 Pa. 568, 3 A.2d 701 (1958), which held: while it may be perfectly lawful to prefer veterans, there must be some reasonable relation between the basis of preference and the object to be obtained, the preference of veterans for the proper performance of public duties. Public policy, as well as constitutional restrictions, prohibits an unrestrained preference as it does a preference credit based on factors not representative of their true value.

* * * * *

The fact that veterans, either through voluntary enlistment or conscription, have

2. The "constitutional restrictions" and the "constitutional mandate" referred to in *Schmid* derived from Article III, Section 7 of the Pennsylvania Constitution, which at that time prohibited granting special or exclusive privileges or immunities. In 1967, this language was deleted from the constitution by amendment.

However, *Schmid* is also grounded on constitutional principles sounding in due process and equal protection:

been to wars for the preservation of their country should be given some consideration. It is the greatest service a citizen can perform, and it comes with ill grace for those of us not in such wars to deny them just consideration. . . . [O]n the other hand, where war service is appraised, in the allotment of public positions, beyond its value, and the preference goes beyond the scope of the actual advantages gained in such service, the classification becomes void and the privilege is held unreasonable and arbitrary. Public policy demands such a rule of law. It is essential to the administration of public affairs that governmental employees be selected on the basis of their ability to perform the duties imposed upon them in an efficient manner, and if public servants are not selected on this basis, the appointing power violates its oath of office; where the legislature so provides, it offends the constitutional mandate.²

333 Pa. at 573-74, 3 A.2d at 704. It is clear, thus, that there must be a reasonable relation between the basis of the preference (being a veteran) and the object to be obtained (preferring veterans to properly perform public duties). In other words, veterans are not to be preferred in the assignment of public jobs merely on the strength of being veterans. They must be, in some sense, "qualified."

[2] *Schmid* also aids in defining the meaning of "qualified." Veterans who seek to take advantage of the act must be able to accomplish "proper performance of public duties." That is, a veteran seeking to take advantage of the preference mandated by the act must be able to demonstrate his ability to perform the job at the level of skill and with the expertise demanded by the employer. Such a demonstration would establish that he

[Veterans'] preferences have been considered by the courts under constitutional prohibitions against special privileges and unreasonable classification, and while the constitutional provisions differ somewhat in the various jurisdictions, they are similar in that all permit reasonable classifications and prohibit unreasonable ones and arbitrary privileges.

333 Pa. at 573, 3 A.2d at 704. (Emphasis added.)

will be able to "properly perform" the job duties.

[3, 4] Since the applicant must demonstrate his ability to perform, merely having the appropriate certification or licensure, without more, would not serve to qualify an applicant for the job. Thus, Brickhouse's assertion of qualification based on minimal age, good moral character, and certification to teach, must fail. These features may establish a veteran's eligibility to be considered for the position, but they will not establish that he is "qualified" for the job.

Were ability to perform at the level of expertise demanded by the employer not required, not only would public policy mentioned in *Schmid* be violated, but the likelihood of absurd results, forbidden by the Statutory Construction Act, 1 Pa.C.S. § 1922(1), would be present in hundreds if not thousands of hirings. Anticus Pennsylvania School Boards Association suggests the following possibilities:

A person runs a mess hall for twenty years in the army. A school district with a thirty million dollar budget seeks a business manager. The mess hall sergeant has no post-high school education. The sergeant applies for the job and is the only veteran to apply. Ten other school business managers—all with experience—apply for the job. There are no state requirements such as certification for the job. According to the Commonwealth Court, the sergeant would get the job simply because he is a veteran.

Or, a school district is seeking a Spanish teacher for an accelerated program. Because of the sophistication of the students, an experienced teacher is sought who also has "hands on" experience in using the language in a Spanish-speaking country. A veteran applies who received Spanish certification twenty-five years ago, has never taught nor used the language since then. According to *Brickhouse*, the veteran is entitled to the position.

3. The record contains three references which concern the years 1984 through 1986. These references were apparently submitted with Brickhouse's 1990 application. Although the ref-

Although these scenarios are hypothetical, they illustrate problems of a sort likely to be faced by public employers.

Applying to this case the rule that in order to be "qualified," veterans first must demonstrate an ability to carry out the job in question at the level of expertise demanded by the employer, it is apparent that Brickhouse was not qualified for the job as the school district had defined it. The school district sought a person of high academic performance with outstanding and current references. Brickhouse's academic record, at best, is mediocre, and he did not furnish the required outstanding recommendations and current references.³ Putting it another way, the school district was looking for a highly motivated, currently involved teacher who had accomplished considerable success in his teaching endeavor. Had Brickhouse met these criteria, he should have been preferred under the act.

[5] We are mindful that a public employer might be able to formulate qualifications for a job in such a way as to defeat the veterans' preference required by the act. When such formulations are undertaken in bad faith without regard to legitimate need, they must fail, but determination of the legitimacy of the employer's formulation of hiring criteria can be done only on a case by case basis.

[6] If it is required as a matter of public policy, as we have held, that a person who is preferred under the Veterans' Preference Act must be able to demonstrate his ability to perform the job in question at the level of expertise demanded by the employer, then the employer must be free to set the hiring requirements of that job as they reasonably relate to the duties to be performed in order to ensure that the person hired will be competent.

In this case, there is no doubt that the school district's criteria for employment were rationally related to the job and that Brickhouse's credentials did not qualify him for

ences speak highly of Brickhouse's work and his character, they are not current and they do not concern teaching.

the job. Were these considerations less apparent than they are, we would remand for an evidentiary hearing to determine whether the employer's requirements for the job were reasonable and the whether the applicant was "qualified" with respect to those requirements.

Whatever Brickhouse's accomplishments may be, and they appear to be many, he is not accomplished in the particular manner sought by the school board. He is not, therefore, qualified for the job which was available, and preference under the Veterans' Preference Act, accordingly, does not apply.⁴

Order of Commonwealth Court is reversed.

PAPADAKOS, J., did not participate in the consideration or decision of this matter.

ZAPPALA, J., files a concurring opinion which is joined by CAPPY, J.

CASTILLE, J., files a dissenting opinion.

MONTEMURO, J., is sitting by designation.

ZAPPALA, Justice, concurring.

I concur in the judgment of reversal. I agree with the majority that a public employer may establish criteria for employment for particular positions that exceed the minimum certification requirements that might be otherwise established by law, and that these criteria would be the "requisite qualifications" under which the Veteran's Preference Act, 51 Pa.C.S. § 7104(a), is to be applied. To be meaningful, however, it is necessary that such criteria be clearly spelled out in advance of the selection process, and not merely be subjective conclusions, formed ad hoc during or after the selection process, based on the relative credentials of the actual applicants. I find no evidence in the record that the school district established such criteria in this case.

4. Contrary to Commonwealth Court, see 155 Pa. Cmwlth. at 415, n. 10, we do not perceive that a different result is required by § 7105 of the Veteran's Preference Act. That section provides:

The lack of academic or scholastic training or experience, age, loss of limb or other physical impairment which does not in fact incapacitate any such soldier shall not be deemed to disqualify him, provided he possesses the other

Even so, I do not consider it necessary to reach the question of whether the school district was required to give the appellee an absolute preference upon receipt of his application. Following the hearing, the board found that the position had, for all intents and purposes, been filled on July 2, 1990, prior to the appellee's application on July 10. Although the board had not taken formal action to approve the hiring of the candidate recommended by the Administration Committee on July 2, because no meetings were scheduled until August, the position was considered closed.

Commonwealth Court treated the Administration Committee's recommendation to be insufficient, as a matter of law, to close the position, holding that the vacancy was not filled until the board acted in August. The court concluded, therefore, that the appellee's application had to be considered along with any others submitted before the "advertised deadline." This analysis ignores a critical finding of fact.

Although the appellee learned of the posting of the position, and its provision that applications could be submitted until July 15, the board found that this was an internal posting only, pursuant to the contract between the teacher's union and the district, to allow teachers within the system the opportunity to apply for vacancies prior to their being publicly advertised. The common pleas court held, and I agree, that this finding was supported by substantial evidence. Based on this fact, the appellee's July 10 application did not "beat the advertised deadline," since the deadline did not apply to him. Instead, the application was premature. The appellee, despite being aware of the position, would only have been eligible to apply for it if the board had rejected all candidates from

requisite qualifications to satisfactorily perform all of the duties which the position requires.

Brickhouse does not "lack" academic training; he has a college degree. He is disqualified because he does not possess "the other requisite qualifications to satisfactorily perform all of the duties which the position requires."

within the system and elected to entertain outside applications.

As the common pleas court's decision affirming the board's action on this ground was correct, I join in reversing the Commonwealth Court's order reversing that decision.

CAPPY, J., joins this concurring opinion.

CASTILLE, Justice, dissenting.

I respectfully dissent. The sole issue in this case is whether the Veterans' Preference Act at 51 Pa.C.S. § 7104(a) (the "Act") mandates that a veteran seeking a teaching position with a school district meet the skill and expertise requirements established by that individual school district or, in the alternative, whether such veteran must merely meet the more general skill and expertise requirements established by statute. In holding that the veteran-applicant must satisfy the eligibility requirements set forth by an individual school district, the majority infuses the Act with standards not contemplated by the General Assembly, thereby leaving Pennsylvania veterans with an illusory preference benefit.

In support of its position, the majority contends that the individual school district should have been able to formulate qualification standards beyond those established by statute and that Brickhouse did not meet this particular school district's qualifications for the teaching position in question which allegedly included high academic performance, outstanding recommendations, and current references. Majority Opinion at 485. However, the majority ignores the statutory provision directly following Section 7104 which provides that "the lack of academic or scholastic training or experience . . . shall not be deemed to disqualify [any veteran from the benefits of the Act], provided he possesses the other requisite qualifications . . ." 51 Pa.C.S. § 7105. This succeeding provision makes it clear that a veteran's qualifications are not to be considered relative to any *ad hoc* standards established by a potential public

1. It must be noted that in *Schmid* a veteran was deemed to possess the minimum qualifications necessary for a position if he had passed the relevant examination. Although there is no examination requirement at issue in the instant

lic employer, but only relative to that which makes him qualified to perform the duties of the position in question. In short, by supplementing Section 7104 with Section 7105, it is evident that the General Assembly sought to ensure a veteran's hiring preference even when that veteran possesses only the minimum criteria required by statute for the job.

In *Commonwealth ex rel. Graham v. Schmid*, 339 Pa. 588, 3 A.2d 701 (1939), this Court considered the separate issue of whether the veterans' preference provision of the Third Class City Law relating to the examination and employment of building inspectors was constitutional in light of the now-repealed Pennsylvania constitutional prohibition against granting class privileges. This Court held that a veterans' preference statute is constitutional since there exists a rational relationship between the basis of the preference (status as a veteran) and the object to be obtained (preferring veterans for public-duty employment). *Id.*, 333 Pa. at 573-574, 3 A.2d at 704. We grounded that analysis on the assumption that a veteran is reasonably fitted for a public-duty position (and, therefore, the rational relationship will be deemed to exist) when a veteran-applicant possesses only the minimum qualifications necessary to fulfill the duties of the public-duty position sought. See *id.* ("[t]he underlying principle in all cases is that to sustain any preference the veteran must [merely] possess the minimum qualifications necessary to perform the duties involved").

The majority, on the other hand, asserts that a rational relationship is found only where "a veteran seeking to take advantage of the preference mandated by the act [is] able to demonstrate his ability to perform the job at the level of skill and with the expertise demanded by the employer." Majority Opinion at 486. Notwithstanding the majority's ability to manufacture its conclusion from whole cloth (obviously not khaki-colored) and not from our decision in *Schmid* or from the language of the applicable statutes, the instant appellee possesses the qualifications

case, the requirement of holding a valid teaching certificate is sufficiently analogous to the passing of a civil service examination so that *Schmid* is instructive to the facts before us.

necessary for a teaching position in this Commonwealth. Brickhouse is a graduate of an accredited college who holds a valid teaching certificate accepted by the Commonwealth, is over 18 years of age, is a U.S. citizen, and is morally fit for the position. See the Public School Code of 1949 at 24 P.S. §§ 11-1109, 12-1201. Accordingly, because appellee possesses the requisite statutory minimum qualifications for the position, he is entitled to the veteran's preference mandated by the Act, notwithstanding the "higher" qualifications created by the school district.

Further, as a result of the majority's position, public employers may easily undermine the Act's broad altruistic objectives merely by defining for themselves the level of "requisite qualifications" necessary to perform the duties of the position in question. For example, a Commonwealth agency determined to evade the veterans' preference statute could merely select a specific candidate with a certain employment history for an open position and then apply that candidate's particular qualifications as the standard "requisite qualifications" against which a veteran must compete who would otherwise be entitled to the statutory preference, thereby distorting the clear mandate of the Act. The majority's solution to this problem is that the "determination of the employer's formulation of hiring criteria can be done only on a case by case basis." Majority Opinion at 487.

In light of the great service and personal sacrifice rendered by Pennsylvania's veterans both in time of war and in time of peace, the statutory preference granted to our veterans must be a reality, not illusory or a mere gesture and certainly not subject to endless litigation regarding each public employer's formulation of the "requisite qualifications." Veterans' preference statutes exist as a form of consideration for society's recognition that (1) veterans generally bring highly valued skills conducive to the better performance of public employment duties, including discipline, experience and service; (2) veterans suffer from a comparative disadvantage relative to non-veterans because of their exclusion from the labor market during their period of military service to the nation; and (3) veterans have rendered the greatest service a citizen can perform namely, the defense of our liberty. See *Schmid*, 333 Pa. at

573-574, 3 A.2d at 704; *Northeastern Educational Intermediate Unit No. 19 v. Stephens*, 98 Pa. Commw. 127, 138, 510 A.2d 1267, 1273 (1986). These considerations highlight the very reason why the language in our preference statute is mandatory and not merely permissive: the General Assembly intended to reward veterans' service to the country and intended that veterans have the actual benefit of the preference granted by the Act. See also 1 Pa.C.S. § 1928(c) (statutes not included in any class of statute listed by the legislature as requiring a strict construction (such as the Act) must be liberally construed to effect its object and to promote justice).

The Act's use of the mandatory term "shall" with reference to granting the preference to veterans possessing the requisite qualifications points strongly to a legislative intent to take from the employer most (if not all) discretionary power of appointment in the case of a veteran. Indeed, although the legislature can make a law to delegate a power to carry out some administrative function upon which the law depends, the legislature cannot delegate its constitutional duty to make law and the policy choices inherent in such action. *Blackwell v. Commonwealth, State Ethics Commission*, 523 Pa. 347, 359-360, 567 A.2d 630, 636-637 (1989), *reargued granted*, 524 Pa. 403, 573 A.2d 536 (1990), *aff'd*, 527 Pa. 172, 589 A.2d 1094 (1991) (citations omitted). The legislature may delegate its power to determine the application of a specific statute only if in so doing it surrounds such power with definite standards, policies, and limitations to which the delegatee must strictly adhere and by which the delegatee is strictly governed. *Id.* In sum, the principal limitation on the delegation of legislative power is that basic policy choices must be made by the legislature, not by the delegatee who may wish to ignore or evade those policies. *Id.*

Here, the Act merely states that the preference shall be granted in those cases in which the veteran possesses the "requisite qualifications" for the position. 51 Pa.C.S. § 7104(a). The General Assembly did not within this statutory provision, define what qualifications are "requisite." But in the Public School Code of 1949 at 24 P.S. §§ 11-1109, 12-1201, the General Assembly defined

Cite as 656 A.2d 491 (Pa. Super. 1995)

the qualifications: a person is qualified to teach in the public schools of the Commonwealth if that person holds a valid teaching certificate accepted by the Commonwealth, is over 18 years of age, is a U.S. citizen, and is morally fit for the position. Pursuant to the majority's analysis, each potential public employer is now granted the discretionary authority to define the level of "requisite qualifications" a veteran must possess to trigger the preference. Vested with this discretionary authority, public employers may define "requisite qualifications" by reference to the minimum statutory qualifications or by reference to its own skill and expertise requirements. In so doing, public employers are thereby empowered to redefine one of the basic premises on which the Act rests in that individual employers may now decide for themselves, without reference to the legislature's mandate, the essential scope and application of the Act. In short, the majority opinion vests public employers with the power to make a basic policy choice in violation of the general prohibition against such delegation of authority. The majority's interpretation of the Act, then, ostensibly renders the veterans' preference statute unconstitutional, a clearly unwarranted result under the law.²



Anita L. CAMPANARO, Lois Diggins, Janice M. Durry, Nancy A. Foster, Melissa K. Fultz, Patricia Kay Germann, Mary Ann Grove, Karen A. Hallman, Theresa M. Heane, Kimberlee A. Johnnie, Michelle R. Jones, Rhonda E. Miller, Gloria J. Morgan, Cathy D. Reifsteck, Beverly J. Rosenberry, Kimberly A. Sager, Paula J. Schunk, Robin M. Washington, Patricia A. Wertz, Beverly M. Wilson, Leann B. Wray, Appellants

v.

PENNSYLVANIA ELECTRIC COMPANY.

Superior Court of Pennsylvania.

Argued Oct. 25, 1994.

Filed Feb. 10, 1995.

Reargument Denied April 21, 1995.

Female employees brought class action against employer alleging that wage rates

the danger of arbitrary discrimination in the administration of the laws is reduced. *Kolender v. Lawson*, 461 U.S. 352, 357-358, 103 S.Ct. 1855, 1858-59, 75 L.Ed.2d 903 (1983). Here, as stated, the majority's analysis of the Act now confers on each public employer the discretionary authority to define the level of "requisite qualifications" a veteran must possess to trigger the preference. To the extent the statutory phrase "requisite qualifications" then takes on hundreds or even thousands of different meanings (in accordance with the number of public employers), the statute may be rendered unconstitutional vague in that veterans seeking to capitalize on the statutorily-granted preference must necessarily guess at the meaning of the phrase "requisite qualifications." Under the majority's analysis, the grant or denial of the preference, a constitutionally protected property right, is made without regard to the protections against the arbitrary exercise of governmental power afforded by our basic concepts of due process.

2. My research also indicates a potential due process problem with the majority's analysis of the Act. The U.S. Court of Appeals for the Third Circuit recently held that the Pennsylvania Veterans' Preference statute at 51 Pa.C.S. § 7104(b) granting a promotion preference (as opposed to a hiring preference) confers a constitutionally protected property right upon a veteran. *Carrier v. City of Philadelphia*, 989 F.2d 117, 122-123 (1993). As such, the grant or denial of the statutory preference must comport with basic notions of due process. See *id.* In that regard, a statute which requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127-28, 70 L.Ed. 322 (1926). This constitutional safeguard ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values and that

which derives from the terminology of the Flextime Guidelines - is not affected by statements which may have been made during the Flextime Guidelines negotiations or by an asserted practice which developed since the September 1980 implementation of the Flextime Guidelines.

Upon the above and the entire record, it is concluded that the Employer's reliance upon the Minimum Supervisory Standard of the Flextime Guidelines to require particular employees to change their flextime schedules violated the Flextime Guidelines. Indeed, a contrary conclusion arguably would permit the Employer to effect arbitrary changes in the administrative units specified in Attachment No. 4 and thereby alter the supervisory ratios now appearing in Attachment No. 4. Such unilateral Employer action would have the effect of negating the various above-cited provisions of Sections III and IV of the Flextime Guidelines which are fundamental to their effective operation.

The question remains whether the Employer's October 1984 change in employees' flextime work schedules also violated the MOU. Section 7 of the MOU deals with "Overtime." Suffice to say that overtime is basic to the wages, hours and terms and conditions of employment of the employees covered by the MOU. In essence, Section 7 H of the MOU incorporates the concept of the "flexible biweekly work schedule" which exists in the County's Social Services Agency. That flexible biweekly work schedule derives directly from the Flextime Guidelines. Accordingly, it is deemed reasonable to find that the Flextime Guidelines are a fundamental component of the Parties' overall negotiating relationship and particularly of their Memorandum of Understanding. It reasonably follows, and it is concluded, that the Employer's violation of the Flextime Guidelines effectively violated Section 7 H of the Parties' MOU.

There is the question of a remedy to correct the Employer's violation of the Flextime Guidelines and the MOU. The passage of time since the Employer's October 1984 violation makes it impractical and unrealistic to formulate a remedy without involvement of the Parties themselves. In that light, it is concluded that the County and the Unions shall meet for the purpose of reaching a mutually acceptable remedy in this case. Should the Parties fail to do so within sixty days of the issuance date of this Opinion and Award, the matter of remedy may be submitted to the Arbitrator for resolution.

AWARD

1. The Employer violated the Parties' Flextime Guidelines and Memorandum of Understanding by requiring that employees' flextime work schedules in the Social Services Agency be adjusted to comport with the "minimum supervisory coverage" identified in the Parties' Flextime Guidelines.

2. Pursuant to the Parties' stipulation, the Arbitrator retains jurisdiction of this dispute until all of the terms of the Award are complied with so that he may interpret or correct the award should it be required.

AIRCO CARBON -

Decision of Arbitrator

In re AIRCO CARBON and OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, FMCS Case No. 85K/13177, December 4, 1985

Arbitrator: Carl F. Stoltenberg, selected by parties through procedures of Federal Mediation & Conciliation Service

JOB VACANCIES

- Janitorial position - Cleanup of women's facilities -119.126 -117.125 -94.554

Employer did not violate seniority provision of contract when it recalled laid off female employee to fill job involving cleaning of women's locker and shower rooms, rather than selecting male senior applicant to fill job, where two prior awards involving same parties held that male's seniority rights were not violated when employer awarded female employee janitorial position involving women's facilities at plant. Prior awards were controlling.

Appearances: For the company—A. A. Hensel, human resources manager; T. A. Blalo, loss control supervisor. For the union—H. T. Schiro, international representative; M. K. Koslowski, recording secretary; T. Jackson, vice president; E. H. Townsend, financial secretary; J. Davidson, safety representative.

AWARD TO FEMALE EMPLOYEE

Grievance and Question to be Resolved

STOLTENBERG, Arbitrator: — On February 12, 1985 the following grievance was filed:

On Feb. 4, 1985 the company posted a job for an office janitor in the human resources bldg. to replace an employee who is retiring the end of Feb. The job posting was then canceled and was given to a new hire.

This is a direct violation of Art 20. The union is grieving this action and demands that the job be reposted and filled in accordance with Art. 20 of the labor agreement.

The union requests that since there has been much discussion already concerning this incident that it be heard directly in the 3rd step of the grievance procedure.

The question to be resolved is whether or not the Company violated Article XX of the Agreement when it rehired a female employee to perform the janitorial work in the female shower room.

Cited Portion of the Agreement

The following portion of the Agreement was cited. It is noted that the Union cited Article XX in its entirety, beginning with page 50 of the Agreements and continuing through page 79. The pertinent portion is found in Section 20.12, which provides in pertinent part that:

ARTICLE XX SENIORITY

Section 20.12

In the filling of such jobs, the job shall be given to the senior man in the department who has the ability to do the job and he shall have a minimum of eighty (80) hours to qualify.

Factual Background

On February 4, 1984 the Company posted for bid the position of Office Janitor. The position had become vacant when its former incumbent retired. Several male employees responded to the bid; however, the Company withdrew the bid when it determined that it would hire some seven female employees in compliance with its affirmative action program, and that the janitorial position in question would service the female facilities.

The Company then recalled a female employee from layoff to fill the position; this employee was less senior than any of the earlier male applicants. On February 12, 1985 the Union filed the instant grievance, alleging that the Company had violated the seniority provision in the Collective Bargaining Agreement. When the Parties were unable to resolve the dispute, it

was processed to arbitration hereunder.

Contentions of the Parties

Union Contentions: The Union contends that the Company's action in awarding the job to a less senior female employee violates the Agreement, Article XX, Seniority. It argues that this provision makes to reference to gender in the determination of seniority and submits that if a change was necessary in order to facilitate a minority, the Company was obligated to meet with the Union for purposes of amending the Agreement. The Union maintains that even after a 1977 arbitration involving a similar dispute, male janitors have worked the female facilities. It emphasizes the fact that seniority is a protection provided by the Agreement and it charges that the Company violated the employees' seniority rights when senior male employees were not afforded an opportunity to fill a position that had previously been filled by a male employee. The Union requests that the grievance be sustained and that the job be reposted for bid.

Company Contentions: The Company contends that the issue here in dispute has been resolved by the Parties in two prior grievances. It points to a 1977 arbitration Award by Arbitrator Robert R. France, and a 1982 grievance settlement as controlling in this dispute. The Company submits that Arbitrator France affirmed their right to hire a less senior female janitor to clean the female facilities. It maintains that this right was again affirmed by a 1982 grievance which required the Company to recall a female janitor to replace a male janitor who had been assigned to clean the female facilities at the plant. The Company requests that the grievance at hand be denied.

Discussion and Findings

There is no dispute on this record that the Company was hiring additional female employees in compliance with its affirmative action program, or that the job of Office Janitor here in dispute would service the female rest room and shower facilities. It must be observed as significant that on October 26, 1977 Arbitrator Robert R. France issued an Award involving these same Parties where the Company awarded a janitorial job to a junior female employee to service the women's shower and locker facilities. In that Award, Arbitrator France found in pertinent part that:

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Opinion and Award

Conventional standards of sexual privacy, however, cannot be ignored. Sex is a bona fide occupational qualification for a janitor to clean female facilities on a continuous shift operation. In fact, were the Company to close female facilities down while they were being cleaned, it would subject itself to a discrimination charge under State and Federal regulations, because male employees are not so inconvenienced. Article XXI, Section 21.12 provides that the senior employee who has the ability to do the job be awarded the bid. While the male bidders had the physical and skill ability to do the job, they did not have the social qualifications required by conventionally accepted standards. The Company, therefore, did not violate the Agreement by awarding the position to the female employee who was junior to male bidders.

The record reveals that on July 2, 1982 a grievance was filed by a female employee who was placed on layoff, when at the same time the Company assigned a more senior male to clean the women's locker room and shower room. That grievance asserted that the France Award cited, supra, required the Company to recall the less senior female janitor. The Company granted the grievance and the Grievant, a female, was recalled.

It is at once apparent that the Parties on two prior occasions have determined through the grievance procedure that it is not a violation of a more senior male's seniority rights when the Company awards a janitorial position to service the women's facilities at the plant to a female employee. To hold otherwise would obfuscate the purpose of the grievance procedure and set aside a prior and controlling Award by Arbitrator France. Accordingly, there exists no basis for a grant of the relief sought and the grievance must be denied.

AWARD

The grievance is denied.

AVCO NEW IDEA —

Decision of Arbitrator

In re AVCO NEW IDEA, FARM EQUIPMENT DIVISION [Coldwater, Ohio] and UNITED STEELWORKERS OF AMERICA, SUB-DISTRICT 2, LOCAL 4839, FMCS Case No. 85K/08417, Grievance No. X-1156, December 28, 1985

Arbitrator: Jonathan Dworkin, selected by parties through procedures of Federal Mediation & Conciliation Service.

GRIEVANCE PROCEDURE

— Failure to file timely answer at second step — Legitimacy of grievance 93.467-93.305

Contract requirement that grievance be considered granted as requested if employer fails to give written answer within specified time limits was not invoked by employer's failure to submit timely answer at second step of grievance procedure to potential retiree's grievance demanding extra vacation pay, where employee's submission was cognizable neither as class or as individual grievance. Co-workers who were not included initially as grievants and who subsequently petitioned to join grievance did not nominate grievant as their representative; grievant testified that he never intended to act for his own benefit.

Appearances: For the company—J. Kevin Hennessy and William T. Coloman, attorneys; Marvin C. Bracy, human resources director; Jerald W. Cross, former vice president; Paul Meyer, manager of manufacturing; W. S. Wilmot, corporate ELR director; Nola Puthoff, personnel supervisor. For the union—Dan Winslow, staff representative; Virgil Muhlenkamp, local president; Louis Overman, local secretary-treasurer.

UNTIMELY ANSWER

Issue

DWORKIN, Arbitrator: — Article 10, Section 2 — Effect of Company's neglect to answer grievance within contractual time limits; whether class grievance was legitimate.

Summary of Dispute

The grievance demands payment for up to three weeks' additional vacation allegedly earned between May 1, 1983 and April 30, 1984.

Under the Agreement which expired April 15, 1984, vacation entitlements were determined by years of service. They ranged from one week at two percent of gross earnings for employees with less than a year's service to five weeks at ten percent of annual gross earnings for employees with twenty or more years of service. The Union ratified a new Agreement in which it relinquished all but two weeks of vacation. Article 8, Section 1 of that Agreement provides:

F. L. Dillard to the position of Head Operator on December 1, 1968. It is therefore unnecessary to answer the second question concerning an award.

CORN PRODUCTS CO.—

Decision of Arbitrator

In re CORN PRODUCTS COMPANY INTERNATIONAL, INC. [Pekin, Ill.] and OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 7-662, FMCS Case No. 70A/1419, January 9, 1970

Arbitrator: Jerome Gross

FEMALE EMPLOYEES

—Attendant for male locker room—
Seniority ▶ 107.30

Employer did not violate contractual seniority rights of female employee by denying her, because of her sex, job of cleaning main plant locker room which is in frequent use round the clock by male employees. It would be considerable violation of community standards of morality or propriety to have person of one sex using room while person of other sex was present. Further, removal of female attendant every time male employees wanted to use room would disrupt plant production.

Appearances: For the company—John Barwick, labor relations assistant. For the union—Oran Miller, business representative.

LOCKER ROOM ATTENDANT

GROSS, Arbitrator:—The parties agreed the submission question before the Arbitrator was:

"Can the Company deny a person the job of restroom attendant because of sex?"

Joint exhibits were: No. 1, the contract dated July 23, 1968 to July 1, 1970, which is now in force and effect between the parties; No. 2, Grievance and answers (as contained in the Company and Union briefs); No. 3, the labor agreement dated August 15, 1966 to July 1, 1968, and No. 4, the labor agreement dated December 24, 1964 to July 1, 1966. Union Exhibit No. 1, Rules and Regulations of the Equal Employment Opportunity Commission, and Company Exhibit No. 1, a booklet published by the U.S. Equal Employment Opportunity Commission entitled, "Toward Job Equality for Women", were introduced,

Both parties filed pre-hearing briefs and agreed the matter was properly submitted to the Arbitrator for disposition.

The grievance signed by Mildred M. Stone sets forth:

"The week of Memorial day they needed a person for the #17 locker room on Sat. They asked Leo Hedrick, Ben Hoyle, and Roy Meixsell, they all turned it down and were scheduled off by request. I was never asked and I was next in seniority in my department. Then they discontinued the #32 locker room job on Sat. in which E. Barbour was scheduled in #32 for five days of work (including Saturday) and put him on the #17 locker room job on Sat. I think they should have had to ask me first, if they needed a person for the #17 locker room, before discontinuing the #32 locker room job. How could they have asked everyone else in my dept to work in #17 locker room but me? I feel I should be paid 8 hrs. pay."

The Company answered that historically the male locker room runs have never been assigned the grievant; denied the grievance which was then remanded to the fourth step and then to arbitration.

The applicable contract clause, Article I, reads:

"1-1. The management of the plant and the direction of the working force, the right to hire, suspend, or discharge for just cause, to assign to jobs, to transfer employees in accordance with the Agreement, to increase and decrease the working force, to determine products to be handled, produced or manufactured, the schedules of production, and the methods, processes, means of production and handling is vested exclusively in the Company; provided, this will not be used for the purpose of discrimination against any employee covered by this agreement.

"1-2 The parties agree that there shall be no discrimination with regard to race, color, creed, sex, or national origin in the application of the terms of this labor Agreement."

Mrs. Stone who has been an employee of the Company since August 16, 1965, and in the Sanitation Department since July 28, 1968, objected because on Saturday, May 31, 1969, the Building 17 locker room run needed a cleaner. She alleged that supervision asked the three oldest department employees, Leo Hedrick, Ben Hoyle and Roy Meixsell, if they wanted to work the Saturday in question and they turned the work down. They were scheduled off on Saturday by their own request. Supervision then discontinued Building 32 locker room run and placed that employee, Euell Barbour, on the 17 locker room run. The grievant alleges that she

should have worked the Building 17 locker room run that Saturday rather than Mr. Barbour and asked for the eight hours pay involved.

The Union contends the Company denied the grievant her contractual right to work in Building 17 locker room purely because of her sex and contends that this can only mean that the Company arbitrarily will determine what jobs women will be placed on. They agree that prior to the agreement signed August 16, 1966 the contract had a clause, which was then Article II, Section 15, which read:

"Women shall exercise their seniority rights only on women's jobs which are in the restaurant, sewing room, laboratory (dishwasher), and office (janitress). Male employees cannot exercise seniority rights on these jobs unless women are not available within the plant or cannot be contacted by the last telephone number as listed in the Personnel Office."

The Union contends that all employees, regardless of sex, having the necessary seniority and ability to perform jobs in the bargaining unit should be allowed to exercise their rights. They contend that Mrs. Stone did have the seniority and ability to perform the job in question and ask that the Arbitrator sustain the grievant.

The Company contends that no portion of the labor agreement was violated and that Mrs. Stone (a female) was not the proper person to work in and clean male locker rooms or toilet rooms in constant use by male employees. They contend that the job in question has a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise and cite the Equal Employment Opportunity Commission booklet, "Toward Job Equality for Women", E.E.O.C. U.S. Government Printing Office, 1969 O-361-219, Company Exhibit No. 1, as stating in part:

"As a general rule, all jobs must be open to both men and women. Jobs must be open to both sexes unless the employer can prove that sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. The term bona fide occupational qualification or BFOQ is being narrowly defined by the Commission and the courts, with the burden of proof that sex in a BFOQ for the job in question falling on the employer (or union or employment agency) involved."

They cited some examples of preferences, limitations, specifications,

and restrictions which are legitimate under Title VII and those which are not. They assert that jobs may be restricted to members of one sex and among examples cite the one they consider applicable here, which reads:

"Because of community standards of morality or propriety (restroom attendant, lingerie sales clerk)."

They assert the job of locker room custodian certainly falls within this category as a bona fide occupational disqualification and the Company thus asks the Arbitrator to deny the grievance for the above reason.

The Union in Union Exhibit No. 1, the regulations of the federal E.E.O.C., has set forth that there are separate lines of progression and seniority systems, that Paragraph 1604.2(a)(1) sets forth:

"A female is prohibited from applying for a job labeled 'male,' or for a job in a 'male' line of progression; and vice versa."

This certainly is not applicable here because this is not a job labeled "male" or a job in a male line of progression, or conversely, a job labeled "female" or a job in the female line of progression. Both men and women work in the CPC Pakin plant Sanitation Department and both men and women, evidence before the Arbitrator shows, clean restrooms. Conversely, Company Exhibit No. 1 shows that the Company has quite properly cited that jobs may be restricted by the official bulletin of E.E.O.C. and that under Title VII a legitimate restriction is one (where jobs may be restricted to members of one sex) such as:

"Because of community standards of morality or propriety."

and it then lists "restroom attendant" and "lingerie sales clerk" which would certainly apply here since this involves a "restroom attendant."

At the beginning of the hearing the parties agreed that witnesses would be sworn, but none were called. There was informal discussion, however, and in rebuttal argument the Union insisted that men were not in a state of undress constantly and that they may undress at shift changes. They insisted there were a number of ladies' rooms (such as those in the main office) which are cleaned by males on the eleven to seven shift; that this might not necessarily preclude that a lady would not sometimes be working after hours in the main office and would use this restrooms, and also cited the sewing room and

other locker and toilet rooms in the plant.

The Company rejoined by pointing out that while males cleaned ladies' rooms in the main office, that they did this, and were scheduled to do so, after the time that ladies would normally, or even generally, be working in the office.

The Union contended that the canteen also has a ladies' room which is being cleaned by males. The Union contends, and I think quite properly, that if it is improper for a female to clean a male locker room, it is then wrong for a male to clean female locker rooms. The Union has contended that while the locker rooms may be open at all times, that they are not in constant use. The Union also contends that men are not constantly in a stage of undress.

Certainly any rule or guideline must apply equally to both sexes under equal or relatively equal or similar conditions if it is to avoid being discriminatory and in violation of both the contract and E.E.O.C. regulations.

The Union contends that the ladies' locker room spoken of is used by both men and women and contends in the canteen that women are there around the clock. The Union contends that orders have been given at times for men not to use the Ladies' restroom in the sewing room but they have not been followed.

The Company charges that the Union is indulging in supposition in some of their contentions and asserts that they cannot possibly close locker rooms without harm to employees while they're in constant use during shifts around the clock and assert that the locker room in this instant arbitration is in use around the clock.

Discussion

The Arbitrator has before him a submission question which reads:

"Can the Company deny a person the job of restroom attendant because of sex?"

The Company has argued that this is the only matter before the Arbitrator, and quite properly so. However, the Arbitrator must consider that any implementation of a procedure must apply equally to men and women.

The Company would have the right, the Arbitrator feels, to deny a person the job of restroom attendant because of sex without being in violation of the contract when it is in conformity with E.E.O.C. rules and regulations, provided, of course, that such pro-

cedure then would, in turn, not be discriminatory as it would be if it applied to one sex and not to the other.

Thus the Arbitrator must give consideration and attention to the Union's argument that a double standard cannot prevail, and that if it is improper for a male attendant to clean a ladies' restroom, then it is equally improper for a female to clean a male restroom under the same conditions.

The parties chose not to present witnesses or to have the Arbitrator view the premises.

The Union contends that certain restrooms, which have been mentioned, are used by ladies and are being cleaned by males. The Company has been equally emphatic in its contention that the restroom which would have been cleaned by Mrs. Stone on the Saturday for which she grieves was a restroom which was in round-the-clock constant use in the main plant in which men would be using the toilet locker room facilities and would be in various stages of undress. The Union has contended that only at certain periods, at the beginning and ending of the shifts, would this matter of undress occur.

Therefore, before the Arbitrator can dispose of this grievance, it is necessary for him to point out:

1. That under the E.E.O.C. exception the Company can deny a person the job of restroom attendant because of sex.

2. That there must be a constant and equal application by the Company in its administration of this right and that this administration must apply equally to both sexes. By this, the Arbitrator wishes to make very clear he means that a rule under relatively the same circumstances must apply to men as well as to women.

3. That we must take into consideration that *equal circumstances* means just what it says. Obviously the circumstances are different in an office where a ladies' restroom may be cleaned by male workers in the Sanitation Department well after the normal working hours. Simply because occasionally someone may be working would be vastly different from an around-the-clock operation where persons of the opposite sex would be, if not constantly, with periodic regularity using this restroom.

As to the other rest rooms cited by the Union, the Arbitrator does not have before him certain and positive

knowledge and evidence to determine just which of these locker rooms are constantly being used around-the-clock by female employees and cleaned by male employees.

The Arbitrator realizes, too, that the submission question before him does not necessarily cover what locker rooms may be used by females and cleaned by males, and vice versa throughout the plant. There is before him only the one grievance and that is the grievance of Mrs. Stone which relates to the main plant locker room on the 17 locker room run on the Saturday on which Mr. Barbour was assigned and which she contends that she should have received the assignment.

Thus before me is the submission question as to the Company's right to deny a person the job of restroom attendant because of sex and before me officially is only the grievance of Mrs. Stone which relates to this 17 locker room run which has been identified as a main plant locker room and which the Company has asserted, and the Union has not denied, is an around-the-clock operation.

The Arbitrator wishes to make clear in this opinion that he considers that the Company's right, which he intends to find the Company has, to deny a person the job of restroom attendant because of sex is, of course, contingent upon its equal and nondiscriminatory administration towards persons of both sexes.

The Arbitrator wishes to emphasize further that there is a difference between the cleaning of a locker room used by persons of one sex by a person or persons of another sex after working hours when it would not be in use, or perhaps only intermittently in use when it would be practicable and feasible to call to the locker room attendant and ask a locker room attendant of the opposite sex to step out.

Certainly in the locker room and toilet which Mrs. Stone apparently is referring to in her grievance, the main plant operation would be such that men would be using this locker room repeatedly. It would be a considerable disruption of production to expect that the female attendant would have to be called out everytime a man wanted to use the locker room. Certainly the Arbitrator feels that it would be a considerable violation of community standards of morality or propriety to have a person of one sex using a toilet or locker room while a person of the other sex was present.

The Arbitrator is seeking to say here that the same standards must apply to both sexes. Most certainly if the application of such a procedure is considered discriminatory by the Union, they have a right to so file a grievance, but certainly such grievance, other than that of Mrs. Stone, is not before me today.

Therefore, the Arbitrator intends to find that the Company is not in violation of the law or the contract when it denies a person the job of restroom attendant because of sex. He thus finds that the Company was not in violation of the contract or the applicable law when they so denied this eight hours work to Mrs. Stone on Saturday, May 31. He finds this subject to the dictum mentioned in which a single standard must apply equally to parties of both sex under equal circumstances, or relatively equal circumstances. Certainly were there before him a question of males cleaning a locker room constantly in use by females, he would have to find that the standard would have to apply equally to them as well.

Therefore, the Arbitrator will have to find for the Company and order the grievance dismissed. Despite the fact that the disposition of the grievance is not a part of the submission it is a joint exhibit and the grievance which brought about this instant arbitration. The Arbitrator would be remiss if he did not make certain of the disposition of the grievance.

AWARD

The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having duly heard the profits and allegations of the parties, finds:

In answer to the question:

"Can the Company deny a person the job of restroom attendant because of sex?"

that the Company can so deny such job because of such reason. The Arbitrator tempers this in line with the dictum in the above opinion that such must be equally applied to both sexes.

He orders the grievance of Mildred M. Stone dismissed.

herein or the intent of the same phraseology as was set forth in Kindig's award. It must again be emphasized, in this connection, that the subject Arbitrator is not called upon to decide what is usually done by arbitrators in reference to reimbursement of dismissal pay where the dismissal is reduced to a disciplinary suspension. The subject Arbitrator's duty is to construe the peculiar language of Article VI., Subsection 1 in connection with the peculiar language of Arbitrator Kindig's award. What the subject Arbitrator or other Arbitrators should have awarded in the Kindig case is obviously beside the point. *The question is what did Kindig literally state in his award, not what he arguably should have stated.*

Had Arbitrator Kindig so clearly made a similar award in the subject case, as did the Arbitrators in the above cited cases, there would have been no cause for the instant arbitration.

The Import of Article VI., Subsection 3

"Section 3. In the event that an employee accepts dismissal pay in accordance with this Article and is subsequently rehired by the Publisher within an eighteen (18) month period, such employee shall be considered a new employee for purposes of future dismissal pay eligibility but shall retain his previous seniority rights for all other purposes. An employee accepting dismissal pay who is rehired after eighteen (18) months shall be considered a new employee for all purposes." (Jl. 1)

The above provision apparently deals with rehires after a layoff. Thereby, it is argued by the Company that Article VI., Subsection 3 above also includes layoff situations even though the word dismissal is used. Subsection 3 is cited by the Company for purposes of arguing that it clearly relieves the employee of the duty to return to dismissal pay on return from layoff. Therefore, since Subsection 3 is a particular exception, the general rule should hold, i.e., return of dismissal pay where the employee is dismissed. The Arbitrator is not persuaded by such argument for reasons set forth in the Opinion.

AWARD

The Grievance is sustained. Grievant shall be entitled to retain the dismissal pay.

FMC CORP. —

Decision of Arbitrator

In re FMC CORPORATION, INDUSTRIAL CHEMICAL DIVISION and

UNITED STEELWORKERS OF AMERICA, LOCAL 12625, FMCS Case No. 78K/00226, January 19, 1978

Arbitrator: Joseph Shister, selected by parties through procedures of Federal Mediation & Conciliation Service

WORK ASSIGNMENTS

—Female employees — Disqualification from janitor jobs — Cleanup of male locker rooms ► 107.30 ► 117.331

Employer had right to disqualify female employees from janitor jobs involving cleanup of male locker rooms having capacity of up to 600 employees on ground that it was not feasible to prevent exposure of nude male employees to female janitors due to size of rooms and their frequent use, since (1) employer's alternate approaches to prevent exposure of males were impracticable because they would interfere significantly with normal use of locker rooms and would have adverse impact on company operations, (2) there is arbitration precedent that bona-fide consideration of sex in work assignment is not violation of public policy or contractual non-discrimination clauses, and (3) disqualification of female janitors from work in locker rooms did not deprive them of their rights with respect to equality of overtime distribution under contract.

—Disqualification from janitor jobs — Cleanup of male locker rooms — Past practice ► 107.30 ► 24.368 ► 117.331

Employer properly disqualified female employees from janitor jobs involving work in male locker rooms, notwithstanding union's contention that disqualification was in violation of past practice enabling janitors to choose their assignments based on seniority, since (1) there is nothing in contract which dictates work assignment within classification by seniority; on contrary, agreement refers to seniority with respect to jobs, and not assignments within a job, (2) there was no agreement by parties that janitors could select their assignments by seniority regardless of employer's needs in various assignments.

Appearances: For the company — D. D. Johnson, attorney; R. J. Jacquet; D. J. Kostelansky; E. F. Eckert. For the union — L. Ratliff, staff representative; R. E. Carroll; C. F. Griffith; T. E. Richardson; C. O. Barker; A. D. Roush.

DISQUALIFICATION FROM JOBS

The Issue

SHISTER, Arbitrator: — The issue in the present case is whether the Company has the right to restrict female janitors from working in the relevant male locker rooms.

Discussion and Findings

The Company is divided geographically into two plants: the east plant (also referred to as the, main plant) and the west plant (also referred to as, the CDB plant). The contract provides for various divisional seniority units, one of which is the janitor division (Joint Exhibit No. 4, p. 81). The only job classification (hereafter also referred to as, job or classification) in the aforesaid division is that of janitor. The janitors work only the day and evening shifts, although the plant operations are generally performed on all three shifts. The janitor job is comprised of eleven different assignments (Union Exhibit No. 2). Up until 1976 all the janitors were male. In October, 1976 — for the first time — a female employee (Cheryl Powell) bid for, and was awarded, a janitor job; she began working as a janitor shortly thereafter. Since then two other female employees have been awarded janitor jobs. As a result of due and careful deliberation the Company concluded that the female janitors were not qualified to work in the male east plant locker room (hereafter referred to as, the main locker room) and the male west plant locker room (hereafter referred to as, the CDB locker room) because it would not be possible to prevent the exposure of nude male employees to the female janitors, given the size of the locker rooms, their frequent use, and the considerable time necessary to clean them. The relevant Company representatives discussed this matter with the relevant Union representatives and explained its position.

On December 17, 1976, Powell filed the following grievance (Joint Exhibit No. 1):

The Company is in violation of Article XV, Section 1, in bypassing me for overtime on December 11 and 12. I ask for 8 hrs. pay at time and a half for Saturday and 16 hrs. pay at double time for Sunday.
Article 15, section 1 of the contract reads:

OVERTIME DISTRIBUTION - Overtime work shall be distributed as equally as possible among the qualified employees within the respective operating jobs or work groups. The Company recognizes the advantages and disadvantages of various work assignments and will distribute all overtime work assignments as equitably as possible. The following shall be a guide in making overtime distribution:

The overtime in question occurred in the main and CDB locker rooms.

Since Lynch was not permitted to work in the main and CDB locker rooms, that reduced the opportunities for the male janitors to work on the other assignments of the janitor job. As a result, James W. Kennedy III filed the following grievance on January 10, 1977 (Joint Exhibit No. 2):

The Company is in violation of Article XVIII, Section 2 by forcing me into position that I haven't accepted thru inter-division bidding. I feel I am being discriminated against because I am being moved due to my sex.

Article 18, Section 2 of the contract reads:

(a) All advancements and promotions in the Operating Divisions shall be given to the employee with the greatest divisional seniority within the division where the vacancy occurs, except as provided in paragraph (b) below.

(b) All advancements and promotions in the Boiler Repairmen and Turbine Repairmen work groups in the Power Division shall be given to the employee with the greatest work group seniority within the work group where the vacancy occurs.

(c) Divisions are hereinafter specified and described in Schedule B (which also lists departments attached hereto and made a part hereof.)

In the Union Opening Statement (Union Exhibit No. 1), allusion is also made to article 18, section 1, which reads:

PROMOTION POLICY - It is the intent of the Company to promote from within the organization and to train employees for openings which may occur.

Furthermore the Opening Statement alludes to article 18, section 2(a) — not to 2(a) and (b), as does the grievance.

Also generated by the underlying conditions which led to the Lynch grievance was a grievance filed by P. Matthews on January 17, 1977, which reads:

The Company is in violation of the following provisions of the contract: Article XVI, Article XVIII, Sec. 2(a), Article XXXI, Sec. 3 and Sec. 6. The Company awarded a job to a female when the job rightfully belonged to me. This is reverse discrimination and violates my Civil Rights as a male employee. I request the job in question be awarded to me and that the Company cease such unfair discrimination.

Article 16 is a lengthy provision entitled "Seniority" (Joint Exhibit No. 4, pp. 37-38); however, the Union Opening Statement alludes to only article 16, sections 1 and 2, which read:

SECTION 1 - SENIORITY - Shall mean the length of an employee's continuous employment with the Company and its predecessors at its South Charleston plant plus the period of layoff, if any, of the employee not in excess of the length of the employee's continuous employment.

SECTION 2 - QUALIFICATIONS - In the filling of all jobs, seniority shall prevail, wherever provided for in this Contract (including Articles X, XVIII, XIX, XX, XXI, and XXII) if the employees affected have the physical and mental qualifications to perform the job.

Article 31, section 3 reads:

NON-CONTRACTUAL RULES - ALL other privileges, rules, practices and other conditions not specified in this contract shall remain the same unless changed by mutual agreement.

Article 31, section 6 reads:

NON-DISCRIMINATION. Neither the Company nor the Union shall discriminate because of race, creed, color, age, sex, or national origin against any employee or applicant for employment in hiring, training, upgrading, promotion, transfer, layoff, discharge or other conditions of employment.

It is the Company's contentions that the grievances lack merit for these reasons: (1) The disqualification of the female janitors was based on sound and reasonable considerations, consistent with public policy, and therefore not contractually or legally violative. (2) There is no such *contractually binding* past practice as claimed by the Union — namely, that the Company is obligated to make assignments within the janitor classification on the basis of seniority. (3) There is nothing in the contractual provisions cited by the Union — or in any other contractual provisions — which provides for bidding on an assignment within a janitor job; quite the contrary, the postings for janitor vacancies merely spell out the janitor classification without reference to any particular assignment, and the contractual seniority provisions refer to "jobs" not "assignments within a job". Furthermore, movement from one assignment to another within the janitor job is not a promotion or advancement.

On the basis of all the evidence, testimony, and arguments, the Arbitrator concludes as follows:

(1) The Company disqualified the female janitors from working in the male main and CDB locker rooms for good and proper reasons. It is not feasible to prevent the exposure of nude male employees to the female janitors, because of the size of the locker rooms, their frequent use, and the considerable time necessary to clean them. More specifically: The main locker room has a capacity of about six hundred people, and the CDB locker room a capacity of about two hundred people. (R. 126-127) Both locker rooms are used frequently around the clock, since — among other reasons — there is a very high amount of overtime work. (R. 78-82; 126-127; 208-210; 220-231; Company Exhibit No. 11) The main locker room takes about five hours to clean on the day shift and a little over four hours on the evening shift; the corresponding figures for the CDB locker room are about five hours and two hours, respectively. (R. 205-208; 246; Company Exhibit No. 10) When the relevant Company representatives met with the Union representatives to explain why the female janitors were not qualified to work in the main and CDB locker rooms, and when the Company explained that the exposure of nude men to female employees would be improper and create problems, the Union itself admitted that the exposure

of nude males to females would generate complaints by the male employees. (R. 53; 126; 196; 241-242). The Company thought of various possible methods and approaches which would enable the female janitors to work in the main and CDB locker rooms without being exposed to the sight of nude males, but found them — as well as those suggested by the Union — impracticable, since they would interfere significantly with the normal use of the locker rooms and would have an adverse impact on Company operations. (R. 128; 157; 163-174; 186-187; Union Exhibits Nos. 3a, 3b)

The term "sex" in article 31, section 6 (the non-discrimination clause) was first inserted into the contract in the 1973 negotiations because both parties agreed that the clause was required by public policy — the Federal Civil Rights Act of 1964 and Federal Executive Order No. 4. (R. 140-141; Company Exhibit No. 7) Granted that, the question arises: Was the Company's policy of disqualifying female janitors from the main and CDB locker rooms in any way violative of public policy? And the answer is in the negative. First, section 703(a) of Title VII of the Civil Rights Act permits what the Company did here. Second, the U.S. Supreme Court ruling in *Dothard v. Rawlinson* (decided June 27, 1977) lends support to the Company policy here. Third, it has been held in arbitration that a bona-fide consideration of sex in work assignments is not a violation of either public policy or a contractual non-discrimination clause. (Corn Products Company, 70-1 ARB ¶8432; Keyser Foundation Hospitals and Medical Centers, 67-2 ARB ¶8471).

There is no denying the Union contention that female janitors clean the hydrogen peroxide male employee locker room (hereafter referred to as, peroxide locker room). But it does not follow that the Union case here has merit. For there are very significant differences between the main and CDB locker rooms on the one hand, and the peroxide locker room on the other, with respect to those factors which led the Company to disqualify female janitors from work in the main and CDB locker rooms — size of the rooms, frequency of use, and time consumed in cleaning. The aforesaid factors were such in the peroxide room that it was feasible to assign female janitors thereto without exposure of nude males to the female janitors. (R. 143-144; 155; 186; 188-189; Company Exhibit No. 8-d) Similarly, the male janitors are assigned to cleaning the four female employee locker rooms because the aforesaid factors are significantly different from those in the main and CDB locker rooms. (R. 54-

57; 144; 186-189; Company Exhibits Nos. 8-a, 8-b, 8-c, 8-d, 10)

It is germane to note that the disqualification of the female janitors from work in the main and CDB locker rooms did not deprive them of their rights with respect to equality of overtime distribution under article 15, section 1. (R. 131-138; Company Exhibit No. 6). The aforesaid Exhibit No. 6 reads:

JANITOR OVERTIME

As of 11/30/77

TOTAL AVERAGE

Male	2075	231
Female	451	226

(2) We now come to the Union argument with regard to past practice. The Union contends that the Company has violated a past practice under which janitors were permitted to choose their assignments on the basis of seniority, because they are now restricted in their choice as a result of female janitors being disqualified in the main and CDB locker rooms. But the Union argument lacks merit for these reasons.

First, by permitting the janitors to choose any of the eleven assignments by seniority the Company did so, not as a matter of contractual obligation, but as a convenience for the relevant employees — when permitting such seniority choice did not interfere with the Company's operations. That is to say, the Company did not relinquish its unilateral right to make assignments within the janitor classification (or any other classification, for that matter). In fact, when — for one reason or another — the Company has found that granting assignment preference by seniority was not feasible, it refused so to grant. (R. 116-119; 196) And it should be noted that the Company's unilateral right to make assignments within any given classification has been upheld in arbitration in this bargaining unit. (R. 103-104; 106-109; 109-111; Company Exhibits Nos. 2, 3, 4) As already noted, there is absolutely nothing in the contract (including obviously the provisions cited by the Union) which dictates work assignment within a classification by seniority. Quite the contrary. The agreement refers to seniority with respect to jobs, not assignments within a job. Thus, article 16, section 2 states: "In the filling of all jobs . . ." (emphasis supplied). And article 18, which deals with promotions and advancements, by clear implication alludes to jobs and not assignments within a job, granted that here a different assignment in the same job is not a promotion

or advancement, as has been held in arbitration in this bargaining unit. (R. 104; Company Exhibit No. 2) It should also be noted that the posting of a vacancy in the janitor classification alludes to the janitor job, and not to any specific assignment in that job. (R. 33; Company Exhibit No. 1)

Secondly, at no time has there been an agreement or mutual understanding or joint determination by the parties that the janitors could select their assignments by seniority regardless of the Company's needs in various assignments. And in that context it is germane to quote from Arbitration Award A-51-56 (Seibel, Arbitrator) in this bargaining unit (Company Exhibit No. 5):

There are two distinct kinds of what are loosely referred to as past practices. The first kind is a practice which is the result of a mutual understanding or joint determination. That mutual understanding or joint determination need not be in writing; it may be inferred from the kind of subject matter covered and from all the surrounding circumstances. The second kind is not the result of a mutual understanding or joint determination at all. Rather, it may have occurred as a result of mere happenstance, developed without design or deliberation; or, it may be a choice by the Company, in the exercise of its managerial discretion, as to the convenient method at the time.

The first kind of so-called past practice — the result of a mutual understanding or joint determination — under appropriate circumstances may be changed only by mutual agreement. Such appropriate circumstances occur when the so-called past practice is related either to an appropriate past practice clause or to some other provision of the collective bargaining agreement. Then the past practice becomes part of the agreement. In other words the binding quality of this kind of past practice is due to the agreement on which it is based and not simply to the fact that it is a past practice. If the so-called past practice is not related either to an appropriate past practice clause or to some other provision of the agreement, then it is not part of the collective bargaining agreement and may be changed without mutual agreement; the Company may be required to inform the Union and be ready to discuss the change if so requested, but such requirement is completely apart from the Company's right to change without mutual agreement.

The significance of the second kind of so-called past practice is not the particular method or practice involved but rather the managerial freedom or discretion with respect to it. By not being the result of a mutual understanding or joint determination by the parties, such practice must be the product of managerial freedom or discretion, and in the absence of a provision in the collective bargaining agreement to the contrary, such practice is subject to change under the same managerial freedom or discretion. There is no requirement of mutual agreement as a condition precedent to a change of practice of this character. A claim that apart from any basis in the agreement a method of operation or assignment employed in the past — a past practice — may not be changed

except by mutual agreement clearly is without any foundation whatsoever.

Thirdly, the Union allusion to article 31, section 3 in support of its case, is an unpersuasive contention. Granted, that provision refers to all "... practices ... not specified in this contract shall remain the same unless changed by mutual agreement." But the practice cited by the Union existed under circumstances other than those here involved. More specifically: It pertained to circumstances where all the janitors were males, whereas here we are dealing with a situation where the janitorial force is composed of both males and females. That is to say, the circumstances under which these cases arose are different from those obtaining when the practice alluded to by the Union was in existence; we are confronted with a new set of circumstances which are not on all fours with those to which the Union clings in its "past practice" argument.

AWARD

The Grievances Are Denied.

PAYNE & KELLER OF LOUISIANA, INC. —

Decision of Arbitrator

In re **PAYNE & KELLER OF LOUISIANA, INC.** and **AMERICAN FEDERATION OF UNIONS, LOCAL 102, FMCS Case No. 77K/13553, January 10, 1978.**

Arbitrator: N. L. Scanlon, selected by parties through procedures of Federal Mediation & Conciliation Service

DISCHARGE

— Alleged "wobble" of job due to demotion — Evidence ▶ 118.6603 ▶ 118.02 ▶ 118.311

Employer improperly discharged millwright, who had been removed from temporary foreman position, allegedly for attempting to "wobble" job, or to cause walkout, because of his demotion, where report by one employee of attempted "wobbling" was denied by grievant, who insisted that he really was urging employees to stay on job.

Appearances: For the company — G. Michael Pharis, attorney. For the union — Ralph Tureau, attorney.

WOBBLE OF JOB

Issue

SCANLON, Arbitrator: — Was the grievant, H —, discharged for just cause? If not, what is the proper remedy?

Background

The grievant, an experienced construction worker, was hired by the Company in July of 1976. His job was that of millwright, 1st class.

The grievant was assigned to work on a Ciba-Geigy maintenance contract held by Payne & Keller.

On or about January 19th, 1977 H — was made a temporary foreman and was assigned area duties involving various crafts.

He continued on this job for a short time with no apparent difficulties until Saturday, Feb. 5th, when the "roof caved in".

H — reported for work on this overtime day to learn that the "week end" supervisor (P&K used normal rotating week end supervisory coverage) had no intention of permitting him to work with his crew, which, incidentally, had been established by past practice when some three or more in a craft worked on a particular coverage. While H — claimed he had proper authorization to work, Mr. Ingram, normally a planner in the organization (but a former supervisor) but in charge that week end, disputed this.

Whether H — really had "authorization in writing" was never clearly established.

During the January period abnormal amounts of overtime were required because of operating difficulties.

At any rate, after telephone communications with Mr. Walker, P&K general superintendent in charge of the project, H — left work.

On Monday, Feb. 7th, H — was removed from his foreman status and put back with his tools.

On the morning of Feb. 8th, H — was discharged for allegedly attempting to "wobble" the job because of his demotion.

The grievance was filed, timely, on Feb. 14th.

Discussion

It was generally admitted that H — is a good craftsman.

One contemporary, in evidence, indicated that, so far as he (the contemporary) was concerned, H — left quite a bit to be desired as a foreman.

It developed that this contemporary later got H —'s supervisory job.

**PUBLIC
SECTOR**

Arbitration

■ *A service of the Pennsylvania School Boards Association*

Volume 24, No. 38, 1997

1. Vacancy
2. Transfer

Arbitrator held that the district did not violate the agreement when it involuntarily transferred the grievant to a secondary physical education position. The transfer was necessary because a female teacher was required to supervise the girls' locker room which could not be done by the male assigned to the position.

Keystone Central School District and
Keystone Education Association

Dr. James H. Jordan
Arbitrator



Pennsylvania School Boards Association

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FACTUAL BACKGROUND

In June of 1996, Ms. Susan Darrin who held the position of Mill Hall Elementary Support Inclusion Teacher submitted a bid at the annual "Bid Fair" for a transfer to the position of Itinerant Elementary PE. She was awarded that job and during the Summer of 1996 began her preparations to assume the new position.

Her old job was then awarded to Cathy Hoffman. At the same time, Jeff Brinker bid and was awarded the position of Girls Physical Education teacher at the Lock Haven High School.

The position of Girls PE teacher at Lock Haven High School requires the supervision of both Junior and Senior High School girls who have separate locker room facilities. Muir, the Superintendent, in approving the award to Brinker, at first thought that there was only one girls locker room facility. When finding this was not so, he then assumed that there were parallel teacher schedules which would allow for the supervision of both locker rooms by female certified teachers which would permit Brinker to assume the job.

However, on July 24th, Muir was informed that the schedules were not parallel and Brinker could not supervise the female locker rooms. With Brinker unable to supervise the locker rooms, he could not take the Girls PE position since the Administration also decided it would not provide a female Aide for that supervision.

In late July, it was further determined that the District would have to add a teacher position at Mill Hall as an Elementary Learning Support Resource since there were a high number of Special Education students at that location.

Muir, at first when analyzing the Brinker problem, thought that Ms. Darrin might be interested in teaching secondary physical education. He therefore scheduled a meeting on August 6th with Darrin and her Association President, Marge Beers. Unfortunately, Ms. Darrin was not informed of the meeting but Beers told Muir that Darrin was not interested in teaching

secondary students, and suggested an Aide be hired. This was not acceptable to Muir, who then wrote the following letter to Darrin:

"As a result of the bidding transfer process in June, Jeff Brinker's option for district employment resulted in his having to bid into Sherry Dwyer's physical education sabbatical at Lock Haven High School. The inability of Jeff to provide locker room supervision and the fact that the senior high girls physical education schedule is not parallel to the junior girls schedule creates an untenable teaching situation.

Thus far, the only viable alternative appears to be an involuntary transfer of a physical education teacher who is capable of providing adequate locker room situation and tenable instruction.

The necessity will be for the district to create an involuntary transfer situation in regard to the physical education staffing. A meeting had been scheduled on my calendar for Tuesday, August 6, 1996, at 2:00 p.m. with Marge Beers, Association President, and you. An apparent miscommunication has evolved.

Consequently, unless another viable solution is presented, be advised of the district's intent to temporarily, involuntarily transfer you to the Lock Haven High School Physical Education Assignment for 1996-97. At the conclusion of the 1996-97 school year, you may return to your original itinerant, elementary physical education bid position.

Please contact my office to arrange a meeting to discuss the district's intent."

A meeting was subsequently held on August 15th with Muir, Coploff and Darrin at which time Muir thought that perhaps Ms. Hoffman who had bid Darrin's old job would relinquish it. On August 21, at another meeting it was learned Hoffman would not do this.

Muir then on September 4th informed Sue Darrin that:

"The permanent position of Mrs. Susan Darrin, Keystone Central School District Professional Employee, for the 1996-97 school is that of itinerant elementary physical education teacher at Porter, Sugar Valley and McGhee Elementary Schools. She has been temporarily, involuntarily transferred to the Mill Hall Elementary Special Education Learning Support Resource Room for the 1996-97 school year. Subsequently, Mrs. Darrin may return to her itinerant elementary physical education position in whatever from it exists in the 1997-98 school year."

On August 20, 1996, the Association filed a grievance contingent:

"Area of Contract Violated (Articles/Sections) Article VIII Section 8.4-1 and all other articles pertaining to this issue. Nature of Grievance Sue Darrin was involuntarily transferred from the itinerant elementary physical education at Porter, Sugar Valley and McGhee Elementary. Relief Sought Immediate reinstatement to the physical education position she was originally awarded."

The dispute has not been settled in the Grievance Procedure and has been processed to arbitration.

APPLICABLE CONTRACT PROVISIONS

"ARTICLE VIII - PROFESSIONAL ASSIGNMENTS: VACANCIES AND TRANSFERS

8.2-2 When vacancies occur after July 15, notice of such vacancy shall be given to four (4) persons designated by the Association as the persons to receive the notification.

8.4 Involuntary Transfer

8.4-1 An involuntary transfer is initiated by the Administration to fill a position opening for which the employee is properly certificated. When an employee is transferred, the transfer must be totally from one position to another, from one subject area preparation to another, or from one grade to another. Such transfers shall be initiated only for a legitimate reason. There shall be a conference between the employee and the Administrative Review Committee, which shall be held fifteen (15) calendar days prior to reassignment, unless the employee consent to shorter notice. The employee is entitled to have a representative of the Association present at such a conference. An involuntary transfer shall not be made if there is a qualified internal applicant for the position.

8.6 The Board shall consider existing staff in filling all vacancies in supervisor positions, evening school, summer school, federal projects and other programs whenever possible. Whenever a vacancy or new position arises or is anticipated, the Superintendent shall promptly, after Board action, post notices on faculty bulletin boards and in Keynotes and notify the Association of same before the position is filled.

SUMMARY OF THE PARTIES CONTENTIONS

Counsel for the parties gave detailed arguments in support of their respective positions at the hearing. Therefore, I find it necessary to only briefly summarize their main contentions.

ASSOCIATION

The Association claims that the District's actions clearly violate the terms of the collective bargaining agreement.

● It argues that the contract provides that involuntary transfers ".....shall be initiated only for a legitimate reason."

However, there was no legitimate reason. The reason for the transfer of Darrin was so that the District would not have to furlough Jeff Brinker who was a non-tenured teacher.

- Secondly, there was not ".....a conference between the employee and the Administrative Review committee, ...held fifteen (15) calendar days prior to reassignment."

- Additionally, there was no effort made to advertise and bid the new job to which Darrin was involuntarily transferred. This, is a violation of section 8.6.

- Finally, an Aide could have been hired to supervise the locker room so that Brinker could fill the job.

DISTRICT

The District contends that there has been no violation of the contract.

- It calls attention to the fact that the Association has never before raised a question of a violation of section 8.6, and argues that it has waived that argument.

- Secondly, the involuntary transfer was for a legitimate reason. Brinker could not do the job. The District unfortunately learned of this after the job award and acted responsibly. Both parties seek to avoid furloughs and that was what the District prevented.

- A conference was timely held, but due to a mistake Sue was not informed. But, such a meeting was held with her representative. Further, The Association was fully informed well before the fact.

- Finally, the issue is moot since the school year will be over in a short time.

DISCUSSION AND OPINION

It has been observed by students of collective bargaining that there is never enough time nor creativity in negotiations to anticipate every problem that will arise under a collective

bargaining agreement during its term. This case illustrates that point.

First, it is obvious that all the parties have acted in good faith. I was most impressed with the sincerity and well meaning of all the Association representatives as well as the District. There is no villain in this case.

Sue Darrin is clearly a dedicated teacher who enjoys her teaching and is a dedicated professional. What she wanted was to continue her teaching but in the elementary area, and that is understandable. She took time during the summer to buy her uniforms, books, and prepare her lesson plans. There must have been great disappointment when she learned that not only would she not get her new bid position, but that she couldn't return to her old job.

But, has there been a violation of the contract given the circumstances of this case? That is the question we must answer despite our appreciation of Sue's problem.

First, there is a very real question as to whether the District could actually have furloughed Brinker even if it and the Association really felt that was the proper course. When a Board reduces its professional staff, it can only do so for the reasons set forth in Section 1124 of the School Code, 24 P.S. Sec. 11-1124. Hixson v Greater Latrobe School District, 52 PA. Commonwealth 92, 421 A. 2d 474 (1980)

Although that determination is not necessary to decide in this case, concern over it, would have been legitimate grounds for Muir to search for an alternative, since in all likelihood, Brinker could contest being furloughed.

Added to the above, is the fact that both this Association and the District have worked assiduously to avoid furloughs. That policy was not contested at the hearing, and frankly, it is one to be encouraged. The furlough of Brinker given both these factors was not a realistic option.

Both parties acknowledged at the hearing that the Board was not going to approve hiring an additional teacher if it could be avoided. That option was simply not available.

- Accordingly, I find that the transfer was ".....initiated for legitimate reasons." Given, the facts the District had to find a way to fill the needed positions by making a transfer.

Further, it is uncontested that the District sought to find a way to accomplish this by a voluntary transfer. It sought to determine if Cathy Hoffman would give up Sue Darrin's old job so that Sue could return to it. However, Ms. Hoffman was unwilling to do this, so that there was no way to solve the problem by a voluntary transfer.

- Secondly, there is no question but that the District tried to arrange a conference within the time limits of the contract. The facts show that a meeting within the contractual time frame was arranged on August 6th, but that inadvertently Sue was not informed. Muir then immediately set up another meeting for August 15th.

Technically, one might seek to postulate that there has been a contract violation, but I conclude that there was the spirit and intent to comply with the notification requirement. The important point is that all the parties knew well before August 6th, and the Association representatives knew as early as July 25th that a transfer was contemplated. No one was "kept in the dark" about the problem and all knew that in all likelihood a transfer for Sue would have to be made.

- The contract recognizes in Section 8.2-2 that when vacancies occur after July 15th, the bidding process in 8.6 does not apply. The realities of the time occurrences in this case are such that the provisions of 8.2-2 govern.

- Finally, one has to concur with the District reasoning that hiring an Aide to supervise the locker rooms was not a realistic solution to the problem. Besides the "no hiring" edict

of the Board, the supervisory activities involved with the locker rooms are more appropriately professional duties. There is a real question as to whether the interests of either the District or the Association would be well served if an Aide were utilized to handle those duties.

Reviewing the entire record in retrospect, regrettable as it may be, leads to the finding that the transfer of Sue did not violate the terms of the collective bargaining agreement.

Accordingly, I must dismiss the grievance.

However, what emerges from the proceedings and was reflected in the September 4, 1996 letter from Muir to Sue is the commitment of the District that:

"Subsequently, Mrs. Darrin may return to her itinerant elementary position in whatever form it exists in the 1997-98 school year."

Mr. Muir explained that he used the term "in whatever form" because there may be a school closing. He did agree however that the responsibilities would not include those for Renovo. That assurance is most important for Sue and Mr. Muir's commitment is therefore reflected in the record.

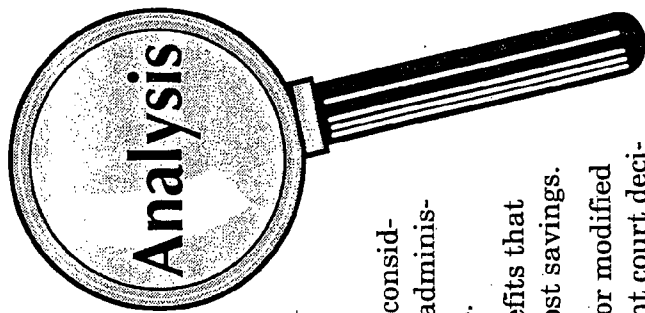
AWARD

In reviewing the specific facts and the time of their occurrence, I find that there was no violation of the collective bargaining agreement by the involuntary transfer of Sue Darrin.

The District has agreed to return her to her itinerant elementary physical education position (which will not include any responsibility for Renovo) for the 1997-98 school year.

By Direction of the Arbitrator

Dated 7/1/97
J. H. Jordan



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three star edition, it is relevant to determine the intention of the parties at the time they entered into that Memorandum of Agreement. What type of changes in "current operation" were the parties thinking of when they agreed to make the Memorandum of Agreement contingent upon a standard of substantial sameness? Based on the testimony presented to the Arbitrator, it is evident that the parties were contemplating something far more significant than a mere shift of the six thousand copy Toledo, Ohio, dispatch from an early edition to a later edition. As stated by Production Manager Rowland (transcript, p. 154):

"... you wanted that language in there ... in case we had a change in machinery or a large fluctuation in circulation".

And when Mr. Rowland was asked on cross-examination what a "substantial change" would be, he replied:

"Well, 'substantially' as we used it in the Memorandum of Agreement referred to a drastic reduction of circulation or a drastic change within a room of equipment". (transcript, p. 167)

"Well, there has been a change. Moving Toledo from the two star to the three star is a change, but I don't call that a substantial change". (transcript, p. 115)

This testimony leaves little doubt that the company and the union did not intend the August 28, 1973, Memorandum of Agreement to be nullified by an occurrence as insignificant as the moving of six thousand of the Cleveland, Ohio, plant's 140,000 issues from an early edition to a later edition. It is the Arbitrator's conclusion that this occurrence on April 30, 1974, left the company's operation substantially the same as it had been prior to that date.

AWARD

Based upon all of these considerations, and as a matter of pure semantics, the arbitrator finds that the change in editions, which occurred with respect to the Toledo, Ohio, dispatch on April 30, 1974, did not breach the standard of substantial sameness contained in the parties' August 28, 1973, Memorandum of Agreement. For this reason, the union's grievance must be and it is ordered denied and dismissed.

REYNOLDS METALS CO.—

Decision of Arbitrator

In re REYNOLDS METALS COMPANY [St. Louis, Mo.] and ALUMINUM WORKERS INTERNATIONAL UNION, LOCAL 160, Grievance No. 5-75, July 20, 1976

Arbitrator: Marlin M. Volz

JOB VACANCIES

— Disqualification from job — Discrimination — Female employee ▶ 107. 30 ▶ 119.129

Employer did not violate contract provision barring discrimination against employees on basis of sex when it disqualified female applicant from materials checker and handler's job at end of two-week trial period on ground that she had difficulty remembering manner of operating levers on fork truck or paper clamp truck and admittedly was slow. (1) Employee failed to show satisfactory progress as to knowledge of job, judgment, speed, and safety which reasonably could be expected of average employee in similar situation; (2) trial period is not training period.

Appearances: For the company— Arthur J. Smith, Jr., regional labor relations manager. For the union— Richard Hansen, international representative; Al Parson, local president.

FEMALE EMPLOYEE

VOLZ, Arbitrator:—By the terms of the Agreement between Reynolds Metals Company, hereinafter called "the Company", and Aluminum Workers International Union, Local 160, hereinafter referred to as "the Union", disputes between the parties are to be settled in accordance with the grievance and arbitration procedures therein provided.

Issue

The parties agreed to the following statement of the issue:

"Did the Company discriminate against Employee M because of sex, in violation of the Agreement, when she was disqualified on June 13th, 1975, from the job classification of Materials Checker and Handler? If so, what should be the appropriate remedy?"

Contract Provisions

The grievance reads:

"Employee M— was disqualified from the job classification of Material Checker Handler. The Union feels she was discriminated against because of her sex (in her training and in the determina-

tion of disqualification) memorandum of agreement A & B par. (8) sec. E."

The grievance requests that:

"Employee be given new trial period free of discrimination. Should employee qualify, all back pay to be the difference in the wage grade..."

While the grievance basically presents factual questions, the following contractual provisions are relevant:

"Article XXXI. *Male-Female Employees*. All provisions of this Agreement shall apply alike to male and female employees. (Masculine pronouns or references in this Agreement shall be deemed to include feminine pronouns or references)."

"Article XXXII. *Nondiscrimination*. The Company and the Union agree not to discriminate against any employee because of race, color, creed, national origin, sex, age, or Union activity in all matters pertaining to hiring, wages, hours, and working conditions."

"Article XV. *Jobs Bulletin*. (a) Any vacancy in an existing job classification or a newly created job classification shall be bulletined in the department affected for a period of two (2) working days. In such case consideration shall be given to employees in the order of their departmental seniority. If the employee with the greatest seniority so desires, he shall be given a trial of two (2) weeks provided that in the judgment of the management and the shop steward he has sufficient ability to fill such vacancy. The employee's failure to satisfactorily fill the vacancy shall not penalize him with any loss of seniority..."

Section 8(e) of the Memorandum of Agreement referred to in the grievance provides:

"If the Company determines to (c) or (d) above that an employee is unable to perform satisfactorily any job classification, the Company shall notify the employee and the Union, and the Company decision becomes subject to immediate challenge in the grievance procedure. The Company's decision may be reversed if it is determined to be arbitrary and not made in good faith."

Section 7 of such Memorandum of Agreement reads in part:

"In the filling of vacancies or new positions, all employees will have an opportunity for consideration pursuant to Article XV of the collective bargaining agreement..."

Statement of Facts and Contentions of the Parties

With a seniority date of February 2, 1953, Mrs. McKight, who formerly had held the jobs of Wrapper, Jogger, Cutter, Creaser, and Re-winder, entered the job classification of Materials Checker and Handler on June 2, 1975. At the end of the two-week trial

period, she was "disqualified due to inability to perform the duties required of the job". On June 16, 1976, she was transferred to the job classification of Jogger.

During the first week of her trial period on the job of Materials Checker and Handler, her supervisor was Mr. Mangelsdorf, Traffic Manager and also in charge of Shipping and Receiving. He explained that the job in question consisted of the operation of a lift truck or a paper clamp truck to haul raw materials to the presses and other departments, to unload materials from the trucks and rail cars, to get production orders ready, to move the finished goods on skids into trucks, and to load railcars. Mr. Mangelsdorf testified that each day during the first week she worked with a qualified Materials Handler and Checker at her side, that he (Mangelsdorf) explained the job to her, that he watched her progress closely, that the work was dangerous in that very heavy materials had to be moved, and that one of her main problems was that she could not remember which levers to pull on the truck. He added that on Friday afternoon he met with her, John Skelton, Vice President of the Union, and Mr. Sharrock, General Foreman of the Spooling Department who was to be her Supervisor during the second week; that, as he was outlining her lack of progress, she interrupted and said (tr. 12), "I know, the men don't want me back here because I am a woman"; that Mr. Skelton told her that she was receiving more assistance than others had; that normally an experienced driver is assigned to be with the new operator for only two or three days; and that M— then stated (tr. 14):

"Well, I know I am slow in learning, you have a problem with me. But I feel that given three or four weeks, I will be able to run a truck. I feel that as long as I am on the truck eight hours, I am doing eight hours work."

Mr. Mangelsdorf further explained that, after he explained the operation of the trucks to her, he assigned her to work with Mr. Laverne Mitchell, an experienced operator, to get orders ready, one of the simplest tasks, which she continued to do until Tuesday noon; that he then assigned her for the balance of the day to work with Mr. Richard Muelken, who was driving a paper clamp truck in the raw materials warehouse; that on Wednesday he reassigned her to Mr. Mitchell and told her to load an

empty railcar with scrap bales; that in six hours she loaded only one-third of a car whereas normally the entire car should have been loaded; that, for the balance of Wednesday, he assigned her to Mr Muelken and the paper clamp truck; that in two hours she hauled four rolls of paper to a press; and that he had to hold Mr. Muelken over on overtime to finish loading the press. Mr. Mangelsdorf continued that on Thursday he assigned her to finish loading the boxcar; that in four hours she put 16 bales into the car; that after lunch he placed her in the raw materials warehouse and assigned her to work with Mr. Dennis Peachee, another experienced operator; that she continued to be extremely slow; that after three days she didn't seem to be making any progress; and that (tr. 19) "I observed on at least two occasions when she had these rolls up in the air, the wrong levers were reached for and hit at the wrong time, to which it started to rotate these rolls up in the air".

During a thorough cross-examination, he acknowledged that the Company has four or five clamp trucks and four or five fork trucks; that the Materials Handler and Checker is expected to know how to use both types in moving raw materials and handling finished goods; that no woman has worked in the department in the 10 years he has been there; that, if she had qualified, she would have been the most-senior one in the department; that there is a difference in the controls of the paper clamp trucks versus the fork trucks; and that she didn't have an accident although she came close.

Mr. Sharrock testified that on Monday he asked her to take the top half of skids from a stack, that she was unable to do so, that she was very slow in hauling jumbo rolls, that she couldn't remember where a certain size paper was although she had worked with it the preceding Friday, that she was having a hard time remembering the locations of the different sizes of paper, and that he assigned her only to the paper phase of the job and not to the receiving of incoming materials or the handling of the 12-foot-high foils. Mr. Sharrock referred to an incident on Monday when she wedged the truck and trailer in the door between the spooling area and the pressman. He added that on Tuesday she failed to deliver the proper rolls of paper to the presses as called for by the requisitions;

that on that day it took her one hour to put skids on the dock, which should have taken about 15 minutes; that on Wednesday she had to be reinstructed on how to operate a clamp truck although she had operated one on four days during the previous week; that on Thursday it took her 7½ hours to fill a requisition of 30 rolls of paper plus nine rolls of returns; and that only four hours normally are required. Mr. Sharrock also testified that he talked to her at about 9:30 a.m., Friday, June 13, and that (tr. 50):

"I told her that she was not progressing enough to warrant staying on the materials checker and handler job, and that she would be going back to the jogger. And she said that she knew she was slow and took a little longer than the others, but given longer, she would be able to do the job. She told me that she thought that I had been instructed by Ray Mangelsdorf to disqualify her no matter what, and he didn't want her working in his area. She said that she was being discriminated against and would fight it as long as necessary to win."

He stated that Mr. Mangelsdorf had not given him any instructions to disqualify her and that he had done so on the basis of (tr. 50):

"Safety, her inability to handle the dollies or the trucks. She exhibited ... quite a safety problem while driving trucks. She had a lot of trouble remembering the locations of the paper. She had to have an instructor with her just about every day ... in order to make every move. ... I told her I felt we could not keep the presses running on thirty rolls of paper a day."

On cross-examination Mr. Sharrock acknowledged that she had not damaged any equipment, paper, or anything; that anytime she was given instructions for doing a particular job, she got it done; but that often extra help had to be assigned to get the job done.

Both Messrs. Mangelsdorf and Sharrock stated that their evaluations were based in large part on the reports from the experienced operators who had been assigned to assist with her training. The former commented (tr. 23):

"They all voiced the same opinion that due to her forgetfulness in the working of these levers that they felt that it was very unsafe to be walking or working around the trucks with her."

M— related that, before she had assumed the job in question, Mr. Mangelsdorf said to her something to the effect (tr. 59):

"No, that day she asked with her (tr. 59):

"Ray, know it and if voluntary. Accord:

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"No, you are not going to come over in that department."

She added that, during the meeting with him on Friday, she told him (tr. 59):

"Ray, everyone knows me, they know that I can't work under pressure, and if I can't perform the job, I will voluntarily get off."

According to her, he replied (tr. 60):

"It's not your decision, I am going to have the last say."

She explained that she had not had an accident; that she performed the duties assigned to her; that she had never been reprimanded or talked to about not doing her duties properly; and that, as far as the assistance she had received from the experienced operators (tr. 60):

"I am saying that they answered the questions that I asked and they helped me when I asked them to."

She denied that she ever had delivered wrong paper. She admitted that she had had a problem with the levers on the different trucks which she attributed to the fact that (tr. 61):

"I always had fellas watching me, and I was nervous, and I was continually told this was a dangerous job. . . . Sometimes when I had the roll in the air, I only asked for precautionary reasons, and not because I didn't know. . . ."

She testified that Mr. Sharrock had been her supervisor for six years, that she had started slowly on other jobs and improved to a satisfactory rate, that she was assigned to stay with Mr. Muelken the whole second week, and that she had never refused to do any assignment.

In rebuttal, Mr. Mangelsdorf denied that he had told M— that she wasn't coming to his department. He added (TR. 80):

"And I have never, in the past, had to personally get out and show anyone and help them out in operating this. Your break-in period was the way anyone else's would be. You would be assigned—your job would be explained to you, and the basic fundamentals would be explained, and you would be assigned to a qualified operator. This is the way the procedure has always been."

The Company maintains that unacceptable job performance during the trial period was the sole cause of the disqualification and discrimination on account of sex was not involved, that it complied with Section 8(e) of the Memorandum of Agreement, that both the grievant and the Union were personally informed of the reasons

for the disqualification, and that the decision was not arbitrary. The Union replies that the primary reason given for her disqualification was that she was slow, that she performed the duties assigned to her, that no woman has ever worked in the department, and that other companies have women forklift drivers who perform just as well as men.

Discussion

The parties have brought the law of the shop, as expressed in their collective-bargaining agreement, into harmony with the law of the land, as expressed in several Congressional anti-discrimination enactments, particularly in Title VII of the Civil Rights Act of 1964. In Article XXXI they have specified that their Labor Agreement "shall apply alike to male and female employees". In Article XXXII they "agree not to discriminate against any employee because of . . . sex." And, this same intent is carried over into their Memorandum of Agreement which is set out as an appendage to their Labor Agreement beginning on page 73. However, neither federal law nor the contractual provisions against discrimination require a waiver of a number of basic principles inherent in the labor-management relationship.

The first of these general principles that the parties may adopt and enforce reasonable provisions and practices concerning the qualifications of all employees to perform the work in question, regardless of race, color, creed, age, or sex. Arbitrator Kelliher summed it up in Shell Chemical Co., 68-1 ARB, Par. 8281 (1968), when he wrote:

"It is apparent here that while the Grievant is an extremely conscientious worker and attempted to perform the job satisfactorily, he simply lacked the basic skills necessary for this important job This was not due to a lack of effort on the part of the Grievant, but simply an inability to handle this job It certainly would not be to the benefit of the Grievant if he were reinstated in this job which has proven to be difficult for him. Successive future misoperations could lead to his discharge from this Company despite his years of seniority. It is to his own benefit that he perform work that he is able to handle. No company is required to retain an employee in a job where he obviously is unable to satisfactorily perform the work. Management has a duty to function efficiently in order to provide continued employment and realize profits that can go towards increased wage benefits to all employees."

Consistent with this general rule, the parties have specified in Article XV that the "employee with the greatest seniority . . . shall be given a trial period of two (2) weeks provided in the judgment of the management and the shop steward he has sufficient ability to fill such vacancy". In the instant case M— was permitted to enter upon the job of Materials Checker and Handler and was given a trial period of two weeks.

A second general principle which is still valid is that a significant difference is recognized between a trial and a training period. The purpose of a trial period is to determine whether an employee who possesses the basic qualifications can satisfactorily do a job which she does not regularly perform. It is assumed that she will not have to be trained in all aspects of the job; for a trial period is not a training period, but simply an opportunity to demonstrate ability to do the job. A trial period, in effect, is a lengthened familiarization or orientation period in which the employee is acquainted with the nature and techniques of the job. It presupposes that the employee will be given instruction and assistance and that she will not simply be turned loose to "sink or swim". But, it also assumes that she brings with her to the trial period by virtue of prior experience or education considerable knowledge, background, and skill for performing the duties of the new position. She still needs instruction in the peculiar requirements, procedures, equipment, and techniques of the job; but an intensive on-the-job training program, such as would be appropriate for a novice, is not contemplated. M— did not show that she was denied this type of trial period. The Company did provide her with a full orientation of the various phases of the job, did offer her on-the-job opportunities to demonstrate ability, and gave her help and instruction from experienced operators. For the second week she served under a former supervisor, had the assistance of the same experienced operator, generally was assigned to the same group of tasks, and used the same type of vehicle most of the time.

A third general principle, which has not been abrogated by the anti-discrimination laws or contractual provisions, is that the initial determination of ability must be made by management in the reasonable exercise of its authority to direct the working force and that its decision

where factually supported is entitled to great weight in the absence of a showing that it acted discriminatorily, arbitrarily, or in bad faith. In Section 8(e) of the Memorandum of Agreement, the parties provide:

"The Company's decision may be reversed if it is determined to be arbitrary and not made in good faith."

Non-discrimination, reasonableness, and good faith require that the employee be given a fair opportunity during the trial period to demonstrate ability; that her progress be reasonably judged on the basis of the usual factors of quality of work, carrying out instructions, speed, judgment, safety, cooperation, knowledge of the job, and reliability as to attendance; and that she be given the same consideration, orientation, equipment, type of work, and instructions as other candidates had been given for the same job.

Under the facts it must be found, and is found, that M— failed to show the progress toward attaining sufficient ability in performing the duties of Materials Checker and Handler which could reasonably be expected of the average employee in a similar orientation and instruction. It was not necessary that she attain the proficiency of an experienced person during the trial period, but she was required to demonstrate that she had the capability of fulfilling the requirements of the job within the time needed by an average employee. Here, M— was cooperative; she carried out instructions; she was reliable as to attendance. But, the Company did not act discriminatorily, arbitrarily, or in bad faith in determining that she had not made satisfactory progress as to knowledge of the job, judgment, speed, and safety. She continued to have difficulty in remembering how to operate the levers on the various trucks; her forgetfulness created safety hazards; on occasions she failed to show good judgment in determining how to proceed, and she admittedly was slow. Speed is an important factor and contemplates an ability to perform at a normal pace or with average speed. However, where an employee possesses the other requisites for doing the work, it can be reasonably expected that speed in the operation of a fork truck or a paper clamp truck will improve with experience. However, here, it was not arbitrary for the Company to have determined that her operation of the trucks was exceptionally slow and

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C. S. JOHNSON CO., INC.

that she exhibited insufficient progress in other areas. Therefore, it did not violate the anti-discrimination provisions of the Labor Agreement or Section 8(e) of the Memorandum of Agreement in disqualifying M— at the end of the trial period from the job of Materials Checker and Handler.

AWARD

Grievance 5-75 must be, and is, denied.

C. S. JOHNSON CO., INC.—

Decision of Arbitrator

In re C. S. JOHNSON COMPANY, INC. [Champaign, Ill.] and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LOCAL LODGE 431, FMCS Case No. 76K/13067, July 10, 1976

Arbitrator: B. J. Speroff, selected by parties through procedures of Federal Mediation & Conciliation Service

DISCHARGE

— Failure to pass physical test —
Age discrimination charge ▶ 106.07
▶ 118.655

Employer did not violate contract provision barring parties from discriminating against employee because of age when it discharged hypertensive employee who failed to pass physical examination required of employees who are 65 years of age or who are approaching that age, since employer did not discriminate against employee because of his age but rather because of his physical condition. Employer has right to apply whatever reasonable standards it deems fit once person is over established and recognized retirement age.

GRIEVANCES

— Age discrimination charge — Arbitrability ▶ 94.59 ▶ 94.117 ▶ 106.07
▶ 118.655

Employer waived its challenge to arbitrability of grievance charging that employer had unjustly terminated hypertensive employee because of his age, where employer allowed grievance to be processed in grievance procedure without maintaining central position that grievance was not arbitrable and allowed issues to be joined and obfuscated on questions of age discrimination and physical health of employee.

ARBITRABILITY**Statement of Issue**

SPEROFF, Arbitrator: — The Com-

pany and Union being unable to concur on a submission pose two disparate questions. The Company contends the issue is whether the "grievance is subject to arbitration under the provisions of the grievance procedure as outlined in Article XV, Section 3 (Step 4), of the current Union (sic) agreement." Contra, the Union states the issue as "was Mr. Glenn Burwell on 2/2/76, and is now, physically able to continue working at the C. S. Johnson Co.?"

Position of Company

The Company avers the grievant was terminated because he failed to pass the physical examination required of all employees aged 65 or approaching 65; that the grievant was not invidiously discriminated against because of his age; and that, in point of fact, this grievance is not subject to the arbitral process.

Position of Union

On the other hand the Union proounds the grievant is physically able to continue in gainful employment because his hypertensive condition is controllable via medication; that rather he was terminated unjustly because of his age; and finally deny this grievance is not subject to the arbitral process.

Findings of Fact & Discussion

The C. S. Johnson Co., Inc. was formed as a successor to the Johnson Division, Koehring Company, on 23 August 1975. During the interim, until 5 November 1975, when a new contract was signed between the parties, all employees were informed of the conditions under which they would be rehired by C. S. Johnson Co., Inc., including the stipulation all employees aged 65 or approaching that age would be required to undergo a physical examination. The Company opted not to mandate automatic retirement for all employees at 65, rather to extend the employment beyond that age on a year to year basis with passing the physical examination being the salient governing factor. The grievant, Glenn Burwell, a welder, had been employed some 35 years with the predecessor company, and upon being given a pre-employment physical examination on behalf of the successor company, C. S. Johnson Co., Inc., was declared by the Company doctor to have failed passing the acceptable standards because of high blood pressure. Thereupon Mr. Burwell discussed his situation with Mr.

*740 430 A.2d 740

Formerly 232Ak677

60 Pa.Cmwlt. 29, 110 L.R.R.M. (BNA) 2251

[See headnote text below]

CHAMBERSBURG AREA SCHOOL DISTRICT
v.
COMMONWEALTH of Pennsylvania,
PENNSYLVANIA LABOR RELATIONS
BOARD et al.
Appeal of DISTRICT COUNCIL 89, AMERICAN
FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-
CIO.
COMMONWEALTH of Pennsylvania,
PENNSYLVANIA LABOR RELATIONS
BOARD, Appellant,
v.
CHAMBERSBURG AREA SCHOOL DISTRICT,
Appellee.

Commonwealth Court of Pennsylvania.

Argued April 10, 1981.

Decided June 12, 1981.

Union filed unfair labor practices charge against school board alleging refusal to bargain in good faith over policy banning all smoking in public school buildings. Following Labor Relations Board's conclusion that school district committed unfair labor practice and that matter of smoking policy constituted mandatory subject of bargaining, the Court of Common Pleas, Franklin County, George C. Eppinger, President Judge reversed the Board's finding and ruled that union had waived its right to bargain, and union and Board appealed. The Commonwealth Court, Nos. 883 and 886 C.D. 1980, MacPhail, J., held that ban on smoking in all public school buildings was inherent managerial policy and not mandatory subject of bargaining.

Affirmed.

Williams, J., dissented.

1. LABOR RELATIONS ⚡677.1

232A ----

232AX Judicial Review and Enforcement of
Decisions of Labor Relations Boards

232AX(A) Review by Courts

232Ak677 Questions of Law or Fact

232Ak677.1 In general.

1. LABOR RELATIONS ⚡680

232A ----

232AX Judicial Review and Enforcement of
Decisions of Labor Relations Boards

232AX(A) Review by Courts

232Ak679 Findings of Board

232Ak680 Substantial evidence.

Pa.Cmwlt., 1981.

Commonwealth Court's review of Labor Relations Board findings is limited to determination of whether findings of Board are supported by substantial and legally credible evidence and whether conclusions thereon are reasonable and not capricious, arbitrary or illegal.

2. SCHOOLS ⚡20

345 ----

345II Public Schools

345II(A) Establishment, School Lands and
Funds, and Regulation in General

345k20 Regulation and supervision of schools
and educational institutions in general.

Pa.Cmwlt., 1981.

School district acted in furtherance of its duty to promote education when it adopted smoking policy.

3. SCHOOLS ⚡24(1)

345 ----

345II Public Schools

345II(B) Creation, Alteration, Existence, and
Dissolution of Districts

345k23 Creation and Organization

345k24 In General

345k24(1) In general.

Formerly 345k24

Pa.Cmwlt., 1981.

School districts act as agencies of state legislature in administering educational program within district.

4. SCHOOLS ⚡45

345 ----

345II Public Schools

345II(C) Government, Officers, and District
Meetings

345k45 Administration of school affairs in
general.

Pa.Cmwlt., 1981.

School districts are given broad powers to determine policy relative to education by public school code of 1949. 24 P.S. § 1-101 et seq.

5. SCHOOLS ⇨20

345 ----

345II Public Schools

345II(A) Establishment, School Lands and Funds, and Regulation in General

345k20 Regulation and supervision of schools and educational institutions in general.

Pa.Cmwlth., 1981.

In view of authority given school boards in management of school affairs and unchallenged motivation of school district in adopting smoking policy, ban on smoking was matter of basic educational policy. 24 P.S. §§ 1-101 et seq., 2-211, 5-510.

6. LABOR RELATIONS ⇨178

232A ----

232AIV Collective Bargaining

232AIV(A) In General

232Ak178 Subjects of bargaining.

Pa.Cmwlth., 1981.

On balance, educational motive behind ban on all smoking in public school buildings outweighed any impact on employees' interests, even if smoking was working condition, and smoking ban was inherent managerial policy and not mandatory subject of bargaining. 43 P.S. §§ 1101.701, 1101.702.

7. SCHOOLS ⇨72

345 ----

345II Public Schools

345II(D) District Property

345k66 School Buildings

345k72 Control and use.

Pa.Cmwlth., 1981.

In reaching balance between educational motive behind ban on all smoking in public school buildings and impact on interests of employees of school district, paramount consideration was public interest in providing effective and efficient education for school district's students.

8. LABOR RELATIONS ⇨389

232A ----

232AVII Unfair Labor Practices

232Ak388 Refusal to Bargain in General

232Ak389 Conduct constituting refusal.

Pa.Cmwlth., 1981.

Refusal to comply with requirements of "meet and discuss" obligation, which can arise where subject of labor practice is one of inherent managerial policy but also affects wages, hours and other terms and conditions of employment, constitutes separate unfair practice under Public Employee Relations Act. 43 P.S. § 1101.1201(a)(9).

*741 [60 Pa.Cmwlth. 30] James L. Crawford, Anthony C. Busillo, II, Harrisburg, for Labor relations bd.

Jan G. Sulcove, Black & Davison, Chambersburg, for Chambersburg Area School Dist.

Theodore M. Lieverman, Kirschner, Walters & Willig, Alaine S. Williams, Philadelphia, for Dist. Council 89, etc.

[60 Pa.Cmwlth. 29] Before BLATT, WILLIAMS and MacPHAIL, JJ.

MacPHAIL, Judge.

This is a consolidated appeal by the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) and the Pennsylvania Labor Relations Board (Board) from an order of the Court of Common Pleas of Franklin County which reversed the Board's determination that the Chambersburg Area School District (School District) committed an unfair labor practice, as defined by Section 1201(a)(5) of the Public Employee Relations Act (Act 195), (FN1) [60 Pa.Cmwlth. 31] by unilaterally invoking a ban on smoking in School District buildings.

On September 8, 1976 the School District adopted a policy to ban all smoking in public school buildings, effective November 1, 1976. The policy applies to all School District *742 employees and provides for disciplinary action for violations thereof. It is undisputed that the School District did not offer to negotiate with AFSCME relative to the no smoking policy prior to its adoption. AFSCME, as exclusive collective bargaining representative for the unit of custodial personnel employed by the School District, filed a charge of unfair practices with the Board on October 28, 1976 alleging a refusal to bargain in good faith. (FN2) Based on evidence adduced at two hearings the Board issued a nisi decision and order concluding that the School

District had committed an unfair labor practice and that the matter of a smoking policy constitutes a mandatory subject of bargaining under Section 701 of Act 195, 43 P. S. s 1101.701. The School District filed exceptions to the Board's ruling which were dismissed and the nisi order was made final. The School District appealed the final order to the Court of Common Pleas of Franklin County which reversed the Board finding that: 1) the smoking prohibition is a matter of inherent managerial policy and is therefore excluded from the scope of mandatory bargaining by force of Section 702 of Act 195, 43 P. S. s 1101.702, and 2) by virtue of a "finality" clause contained in the collective bargaining agreement signed by AFSCME [60 Pa.Cmwlth. 32] and the School District on December 9, 1976, AFSCME waived its right to bargain relative to the smoking policy. The instant appeals followed.

[1] Our review in a case of this nature is limited to a determination of whether or not the findings of the Board are supported by substantial and legally credible evidence and whether or not the conclusions based thereon are reasonable and not capricious, arbitrary or illegal. Pennsylvania Labor Relations Board v. Bald Eagle Area School District, 44 Pa.Cmwlth. 254, 403 A.2d 1038 (1979).

The threshold issue presented for our determination is whether or not a smoking policy is a mandatory subject of bargaining under Act 195.

The resolution of this issue is guided by our Supreme Court's interpretation in Pennsylvania Labor Relations Board v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975), of Sections 701 and 702 of Act 195. Section 701 provides:

Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 702 states:

Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, [60 Pa.Cmwlth. 33] standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employee representatives.

In its State College opinion, the Supreme Court determined that Sections 701 and 702, when read together, require that a balance be struck between the Section 701 mandatory subjects of bargaining and the Section 702 managerial prerogatives which need not *743 be bargained. "In striking this balance the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question." State College, 461 Pa. at 506, 337 A.2d at 268. The Supreme Court's holding establishes the balancing approach which must be applied to the instant case:

(W)here an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole. If it is determined that the matter is one of inherent managerial policy but does affect wages, hours and terms and conditions of employment, the public employer shall be required to meet and discuss such subjects upon [60 Pa.Cmwlth. 34] request by the public employee's representative pursuant to section 702.

Id. at 507, 337 A.2d at 268. Since this balancing approach must be applied on a case-by-case basis we

accordingly further limit the issue presented to us to the facts surrounding the smoking policy of the Appellee-School District.

Turning to those facts, counsel stipulated at the time of hearing that the School District's reasons for implementing the smoking ban were the following: its belief that, 1) the ban would further the goal of consistency among ongoing school programs directed against smoking; 2) the ban would be part of a necessary regulatory scheme for students in the public schools; 3) the ban would supplement the role modeling efforts of parents who do not direct their children against smoking; 4) the total ban on smoking, by virtue of its application to School District employees and students alike, would generate respect among students for school authority, thereby improving discipline; 5) the ban would lend recognition to the plight of the non-smoker; and 6) the ban would reflect and emphasize the hazards of smoking.

[2] [3] [4] [5] We conclude that the School District acted in furtherance of its duty to promote education when it adopted the smoking policy. School districts act as agencies of the state legislature in administering the educational program within the district. Slippery Rock Area Joint School System v. Franklin Township School District, 389 Pa. 435, 133 A.2d 848 (1957). School districts are given broad powers to determine policy relative to education by the Public School Code of 1949 (Code), Act of March 10, 1949, P. L. 30, as amended, 24 P. S. s 1-101 et seq. Section 211 of the Code, 24 P. S. s 2-211 provides that school districts "shall be, and hereby are vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions[60 Pa.Cmwth. 35] of this act." Section 510 of the Code, 24 P. S. s 5-510 gives school boards the power to "adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all ... employes during the time they are engaged in their duties to the district..." Based on this grant of authority and the unchallenged motivation of the School District in adopting the smoking policy, we find that the ban is a matter of basic educational policy.

[6] [7] This conclusion, however, does not necessarily remove the policy as a subject of

mandatory bargaining. We must also determine under the State College test whether the policy is a matter of fundamental concern to the interests of the employees in wages, hours and other terms and conditions of employment. We note that, based on substantial evidence, the Board found as fact that teachers and custodians had smoked in School District buildings since at least 1959. The Board, therefore, concluded that smoking had been a working condition. In State College the Supreme Court seemingly endorsed the view that "terms and *744. conditions" are "something more than minimal economic terms of wages and hours, but something less than the basic educational policies of the board of education." State College, 461 Pa. at 506, 337 A.2d at 268 (emphasis added). Using this definition we might conclude that smoking is not a working condition in the instant case and thus not a matter of fundamental concern to the employees' interests. Even if it is a working condition, we are convinced that in striking a balance the educational motive behind the policy outweighs any impact on the employees' interests. We repeat that the paramount consideration in reaching this balance is the public interest in providing effective and efficient education for [60 Pa.Cmwth. 36] the School District's students. We, therefore, conclude that the smoking ban is an inherent managerial policy and not a mandatory subject of bargaining. (FN3)

[8] The remaining issue concerns the possible "meet and discuss" obligation of the School District. All parties to this appeal have presented arguments relative to the "meet and discuss" obligation which can arise where the subject is one of inherent managerial policy but also affects wages, hours and other terms and conditions of employment. A refusal to comply with the requirements of "meet and discuss" constitutes a separate unfair practice under Section 1201(a)(9) of Act 195, 43 P. S. s 1101.1201(a)(9). Because AFSCME failed to charge before the Board that the School District violated Section 1201(a)(9) the issue is not properly before us and will not be addressed.

Finally, due to our conclusion that the smoking policy is not subject to bargaining, we need not consider the issues raised relative to AFSCME's alleged waiver of its right to bargain.

We, accordingly, affirm the order of the court

below insofar as it finds the smoking policy to be a matter of inherent managerial policy and not a mandatory subject of bargaining.

ORDER

AND NOW, this 12th day of June, 1981, the order of the Court of Common Pleas of Franklin County, dated [60 Pa.Cmwlth. 37] April 2, 1980 is hereby affirmed insofar as it finds the smoking policy of the Chambersburg Area School District to be a matter of inherent managerial policy and not a mandatory subject of bargaining.

WILLIAMS, J., dissents.

FN1. Act of July 23, 1970, P. L. 563, 43 P. S. s 1101.1201(a)(5).

FN2. The Chambersburg Area Education Association filed a similar charge on November 8, 1976 as the bargaining representative of teachers, guidance counselors and others. The two charges

were consolidated for hearings before a Board hearing examiner; however, the Association is not a party to the instant appeal. In fact, the Association did not prevail before the Board due to the Board's conclusion that a "finality" clause in the Association's contract with the School District satisfied their statutory obligation to bargain.

FN3. The Board in its brief filed with this Court argues that an additional impact on the employees' interests in this case is found in the penalty provision of the policy which provides for a written reprimand upon a first violation and the possible institution of termination proceedings for further violations. Neither the Board's decision nor the decision of the court of common pleas discusses this aspect of the policy and AFSCME has at no time to our knowledge argued that the penalty provision is a basis for their challenge to the School District policy. We, accordingly, limit our ruling to the actual ban on smoking and do not address the penalty imposed for breach of the policy.



D

CLEARFIELD AREA EDUCATION ASSOCIATION

vs.

CLEARFIELD AREA SCHOOL DISTRICT

SCOTT A. COLLINS

Transfer Grievance

Hearing held April 26, 2000
Clearfield Area School District
Administration Building
Mill Road, Clearfield, Pennsylvania
Before Philip Parkinson, Hearing Officer

**MEMORANDUM SUBMITTED ON BEHALF OF THE
CLEARFIELD AREA EDUCATION ASSOCIATION AND
SCOTT A. COLLINS, GRIEVANT**

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(814) 535-3513

I. PROCEDURAL HISTORY

This Grievance was filed by the Clearfield Area Education Association, hereinafter referred to as the "Association", on behalf of Scott A. Collins, hereinafter referred to either as "Collins" or "Grievant", on July 16, 1999. The Grievance packet has been identified as Joint Exhibit 2.

This Grievance was filed in response to action by the Clearfield Area School District, hereinafter referred to as the "District", refusing to transfer Mr. Collins to a Physical Education position in the High School.

This Grievance was processed through the grievance procedure by the parties and was not resolved. Accordingly, arbitration was requested on behalf of the Association. In view of the parties' inability to resolve the Grievance between themselves at the various stages of the grievance procedure, the matter was referred to Arbitration at the request of the Association.

A panel of Arbitrators was obtained from the Pennsylvania Bureau of Mediation. From that panel, Mr. Philip Parkinson was selected as Arbitrator and notified of his appointment by letter from the Association dated October 13, 1999. Pursuant to his selection as Arbitrator, Mr. Parkinson scheduled a hearing for January 12, 2000. However, shortly before said Hearing, Mr. Collins was involved in an accident and was not physically able to participate in the Hearing. Thereafter, the case was scheduled for hearing on Wednesday, April 26, 2000 at the District Administrative Office, where all parties were heard. A stenographic record was made of the Arbitration Hearing.

Following conclusion of the Hearing, the parties were granted leave to submit Post-Hearing Memorandums. This Memorandum is submitted in support of the Grievance on behalf of the Association and Mr. Scott A. Collins.

II. F A C T S

The Grievant in this case, Mr. Scott A. Collins, is a professional employee of the District, having been hired for the 1993-94 school year as an 8th grade Health Instructor. He is certified in Health and Physical Education K through 12. (T.p. 19). Initially, Mr. Collins taught in the High School building but was transferred to the Middle School Building for the 1998-99 school year as a result of a reorganization in the District. When Grievant was hired 8th grade in the high school, he taught only Health. When he moved to the Middle School in 1998-99, he then taught Health and Physical Education.

The Middle School Physical Education curriculum consisted of both male and female students and involved traditional gymnasium and Physical Education activities. (T.p. 21-22).

Mr. Collins Physical Education duties involving both male and female students, included locker room for the changing of clothes only before and at the end of class. Mr. Collins testified that locker room activities were for dressing purposes only and averaged three to five minutes with four (4) minutes being normal. Mr. Collins indicated that the longer the students were in the locker room, the more time they were off task or away from instructional activities. Mr. Collins also indicated that a female teacher would supervise the girls' locker room during these periods. (T.pp. 23-24). The length of the Physical Education class in the Middle School and in the High School is 42 minutes. (T.p. 24).

Mr. Collins became aware of the Physical Education vacancies in the High School because of the posting of the positions. The posting notice has been introduced as Joint Exhibit 3. In response

to the posting, Mr. Collins sent a brief letter of interest to the Personnel Director, Mr. Bob Rishel. Following that, on "transfer day", which was held at the Middle School Library, no mention was made of the High School Phys. Ed. Position. Mr. Collins approached Mr. Rishel, who then brought the Superintendent into the discussion and Mr. Collins was advised that he would not be given the vacancy. (T.pp. 26-27). Collins indicated that Jackie Morrison, a teacher more senior to him was given one of the positions. Later, towards the end of Summer, Mr. Collins learned that the second position was given to a Jana Grant, who is a less senior teacher. At that point, the Grievance was initiated.

Collins further indicated in his testimony (T.pp. 30-24), that instruction does not begin until the students are actually in the gym class or in what he referred to as their squads, where instruction is given as to what the activity for the day would be. This is not in the locker room. (T.p. 35).

Collins was shocked on the transfer day that the High School Physical Education positions were not even brought up when all the other transfers were discussed at that meeting. (T.p. 43).

Collins saw the transfer to the High School as a career enhancement. As a Physical Education instructor, he would be teaching an older age group and teaching only Physical Education, whereas presently he teaches both Health and Physical Education. He was looking forward to the challenge of working with an older age group. (T.p. 48).

In the Middle School, other female instructors cover the locker room for the girl students that are in Mr. Collins' class. There is a mechanism in place in the District where female Phys Ed students are supervised and the male Phys. Ed students are supervised in the locker room. (T.p. 49). The same procedure can be followed in the High School as in the Middle School and that locker

rooms are used only for changing clothes and that instruction, attendance, policies, explanations are done in squads in the gymnasium or outdoor area where the activity is taking place. (T.pp. 49-50).

The Association realizes that Collins' personal experiences relate to that in the Middle School, although he does have knowledge of what takes place in the High School. The Association called Edward Wilson Vokes, a High School Health and Physical Education teacher who has taught in the District for 28 years and has had personal experience with both the actualities of the Physical Education/Programs in the High School and the Middle School and the Swimming Program in the High School. Vokes indicated that when he was in the Middle School, the locker room issue on a gender basis was handled by an aide. That is, Vokes had both all boys and all girls Phys. Ed. Classes. During the girls Physical Education class, the District hired an aide who would oversee the girls while they were in the locker room. (T.p. 54). Vokes also indicated that historically the District has used locker room aides or monitors to cover the locker room gender differences in the Physical Education class. He indicated that there was one "today" in the High School as the hearing was being held. (T.p. 55). There has always been a way for the District to provide locker room coverage for the girls when there was a male Physical Education teacher. (T.p. 55)

Vokes also indicated that the District has a swimming program as part of the Physical Education curriculum in the High School and that the board policy is that every high school student will have at least one (1) swimming class. These swimming classes are co-ed and the locker room is obviously involved for the students to have to change from their clothing into a bathing suit and afterwards shower and get back into their regular clothing. (T.p. 56). Vokes indicated that he personally observes the boys' locker room behavior and does not, of course, enter into the girls' locker room. If he senses a problem, he has a female teacher look in on the locker room from time to

time. Vokes indicated that swimming has been involved in the High School since about 1975, and as a swimming instructor, he has handled both boys and female locker rooms without a problem.

Importantly, at page 58 of the testimony, Vokes indicated that there is no meaningful difference in the locker room experience with a Physical Education class as opposed to a swimming class. Vokes specifically denied the 15 to 20 minutes of instruction being involved in a Phys. Ed locker room as referenced in the Superintendent's August 1, 1999 letter, which is part of Joint Exhibit 2. Vokes indicated that locker room realities were to keep the number of minutes in the locker room at a minimum so that students were not fooling around. He indicated that the time would be perhaps four (4) minutes is what they strive for (T.p. 59). He indicated that there is no instruction going on in the locker room and the roll call attendance, instruction and so forth is done when they line-up in the gymnasium or outside for roll call. (T.p. 60). He indicated that has been the practice since at least 1975. (T.p. 60).

Vokes indicated that a Mr. Harold Short, another High School Phys. Ed teacher, has also handled all female Physical Education classes in the past and that the locker room situations have been covered in some fashion, perhaps by one of the other female teachers. Vokes also indicated that in fact he as a male, has covered locker room coverage for the female Phys. Ed students of Miss Jana Grant at the present time. (T.pp. 61-62). He also indicated that a Michael Sciabia, a Spanish teacher, has provided coverage for Ms. Grant's Physical Education classes and he, of course, is a male teacher. (T.p. 62). Vokes indicated that at the present time all of the qualified Physical Education substitutes are male and they provide coverage for female Physical Education classes and the locker room monitors or others provide coverage without difficulty. (T.pp. 63-64). Vokes also indicated that he only teaches half day swimming. The other swimming instructor is Miss Jackie

Morrison, a female, and she has male students in her co-ed swimming class and Vokes provides locker room coverage for her in the event there is a need.

At page 74, Vokes indicated that at the conclusion of a swimming class, he would give the girls a little bit more time to get dressed, up to about 10 minutes, but this was not instruction. It was simply in recognition of more time needed to get on makeup and get their hair looking good. He indicated to that at the conclusion of a girls' Phys. Ed. Class, the girls do not shower and they are given approximately six (6) minutes to get dressed. Vokes indicated that the physical layout and configuration of the locker room is not conducive to any type of instructions for 30 to 35 kids in a typical Phys. Ed. Class. (T.p. 57).

Ms. Nisewonger and Ms. Fletcher, two (2) female Phys. Ed. Instructors at the High School, resigned for retirement purposes in the Spring of 1999. It is clear based upon the testimony of the Superintendent, that Mr. Collins did not receive the position for which he applied because he was a male Phys. Ed. Instructor. (T.pp. 85-86). The Superintendent, while formerly being a Health and Physical Education teacher, taught in other districts and never taught Health and Physical Education in the Clearfield Area School District. She taught Health and Physical Education in the Selinsgrove Area School District in West Snyder. (T.p. 80).

The Superintendent, in her testimony, indicated that Mr. Smith, who did teach Physical Education prior to the 1998-99 school year, taught girls Physical Education with an aide and with another Physical Education teacher available and taught, as well, as co-ed swimming. (T.pp. 101-102). Mrs. Smith indicated that she had known as early as the Spring of 1999, that there would be a need to fill a girls' Physical Education position and further that she knew that Nisewonger was

retiring at the end of the 1998-99 school year. (T.pp. 105-106). She further indicated that the retirement letters usually come in May.

Mr. John Law, an Administrator testified that prior to being an Administrator in the District, he was a Physical Education in the State of New Jersey. Ms. Nisewonger, who testified for the District and who seems somewhat irritated if not actually hostile to the position taken by the Association, nevertheless agreed that the time in the locker room would be "three to four minutes at the beginning for dressing ... and at the end ... we dismissed at ten (10) minutes and that gives them about seven (7) minutes to get into the locker room." (T.p. 122). Her testimony is not substantially different from that of either Mr. Collins or Mr. Vokes.

Superintendent Smith and one of the District's principals raised female sanitary or hygiene issues being dealt with in the locker room. Dr. Wunder, High School Principal, indicated that the school nurse was available to deal with these feminine hygiene concerns. Secondly, Mr. Vokes was recalled and he testified that over his many years of supervising Health and Physical Education classes, it was his duty to deal with female students about feminine hygiene issues, as well as talk about their menstrual cycle. Mr. Vokes indicated that he dealt with these issues successfully and on many occasions, was required to provide female sanitary items. Mr. Vokes indicated that over the years, he dealt with these issues successfully and it's been an ongoing situation at the District.

III. RELEVANT CONTRACT LANGUAGE

ARTICLE II EMPLOYEE RIGHTS

"K. Vacancies, Qualifications, and Assignments

1. Vacancies - All staff vacancies ninety (90) school days or more in duration, including newly created positions and supplementary employment, must be announced to all staff members and an opportunity given to all qualified personnel to apply for a vacant position. Professional staff members will be given priority for such positions except that athletic supplemental positions will be given to the most qualified applicants as determined by the Board. Where it is determined that qualifications are equal, seniority in the school district shall prevail.

Announcements of such available positions must clearly state qualifications necessary, and a job description will be available in the Superintendent's office. Such announcements must be made at least two (2) weeks prior to filing the vacant positions.

3. Reassignments between Buildings - Building to building reassignment of teachers will not be made without sufficient and mutual agreement.

.4 Staff members interested in the vacancies, which occur in their area of certification, will be present at the transfer day or will provide a written proxy to the CEA President or another member to apply on their behalf. All transfers are to be filled according to seniority.

- L. 4. Uses of Seniority - All reassignments, transfer, and furloughs will be made with due process and, if not voluntary, will be based on District seniority. This shall be accomplished with the least number of assignment changes."

The Grievance, Joint Exhibit 2, references contract language and pages from the July 1, 1995 to June 30, 1999 Contract. However, the above cited provisions are from the July 1, 1999 to June 30, 2002 contract. The matters giving rise to the Grievance occurred under the old contract but the Grievance was filed under the new Contract. This is a distinction without meaning inasmuch as the language between the two (2) Contracts are identical, although the page reference are not exactly the same.

IV. I S S U E

WHETHER OR NOT THE DISTRICT VIOLATED THE ABOVE COLLECTIVE BARGAINING AGREEMENT BY NOT ASSIGNING SCOTT A. COLLINS TO THE PHYSICAL EDUCATION VACANCY IN THE HIGH SCHOOL BUILDING, PURSUANT TO THE POSTING OF JUNE 30, 1999?

Suggested answer in the affirmative.

V. A R G U M E N T

This Grievance presents a clear case of contract violation by the District by its refusal to grant a High School Physical Education position to Mr. Scott A. Collins. It has not been challenged by the District that Jana Grant, who filled the second position, is a less senior teacher than Mr. Collins. The Arbitrator's attention is directed to Joint Exhibit 3, the posting for the High School Physical Education teaching position. There is no mention of any specific qualifications for the Physical Education position in the High School. Most notably, there is no reference that this is for a female Physical Education class and that the teacher must be a female.

The Arbitrator's attention is then called to Article II, paragraph K., sub-paragraph 1., dealing with the posting of notice of a vacancy. Clearly such vacancies must be posted, as was the vacancy in this case. Also equally clearly is following language in the Collective Bargaining Agreement: "Announcement of such available positions must clearly state qualifications necessary and the job description will be available in the Superintendent's office." Plainly, the notice or announcement of

the position states no specific qualification for the job. Mr. Collins is certified K through 12 Health and Physical Education and he fully qualifies for the job in question.

Article II, paragraph K., sub-paragraph 3.4 provides that all transfers are to be filled according to seniority. Paragraph L., sub-paragraph 4 provides likewise. It is undisputed that Mr. Collins is senior to Jana Grant.

The Arbitrator's attention is called to Association Exhibit No. 1, the job description dated December 16, 1996 for the position of Physical Education teacher. Under qualifications, nothing is listed that states that a Physical Education teacher can instruct only students of the same gender. Likewise, under essential duties and responsibilities, there is no indication of any gender specific duty or responsibility that would disqualify Mr. Collins from this position. It should be noted that the posting did not even mention that it is a girls' Physical Education position that was being filled.

Suffice it to note at this juncture that the job description for the position does not entail health and female hygiene, pregnancy or menstrual difficulty counseling. A District witness, Ms. Nisewonger, a former teacher, would have the Arbitrator believe that the girls' Physical Education instructor is some sort of female confidant counselor and such is not borne out by the District's own required documentation in this case, i.e., the posting notice and the job description, which the Collective Bargaining Agreement requires the District to maintain. The Physical Education instructors, being they male or female, are not de facto school nurses. The School Nurse is there to deal with any of the feminine hygiene issues.

The District has asserted that it has never completely bargained away its ability to determine qualifications for positions. The Association is not questioning the District's ability to properly determine job qualifications. The Association's position is simply that if the District had any bona

bona fide gender based qualifications for this position, it was incumbent upon the District, pursuant to clear contractual language, to set forth those qualifications for the posting of the position. Note again that the posting does not indicate that it is a male or female Physical Education vacancy and it certainly does not impose a gender qualification for the applicant, neither does the Collective Bargaining Agreement nor the job description for the position in question.

The Superintendent's letter to Mr. Collins dated August 1, 1999, part of Joint Exhibit 2, shows the fallaciousness of the District's position in this case. First of all, imposing an alleged "bona fide occupational qualification", is just not tenable, based upon the language of the Collective Bargaining Agreement, the posting notice and the job description for the position in question. Equally unsupportable, is the Superintendent's comment that the girls would be deprived of 15 to 20 minutes of instruction each class period.

While it is indeed the Arbitrator's function to assess credibility of any witness, Mr. Collins indicated that no instruction whatsoever takes place in the locker room but that it is for purposes of changing clothes and changing clothing only both before and after class. He testified that the minimal amount of time is allotted to this task as it reduces the time that the students are off task, i.e., not engaged in Physical Education instruction. It further reduces the opportunity for horseplay and misconduct in the locker room. This is confirmed by Vokes, Nisewonger, and Dr. Wunder.

The Association called Mr. Willie Vokes, who has no interest in the outcome of this Grievance. He has been a Health and Physical Education instructor in the District for over 28 years, teaching both in the Middle School and in the High School and also teaching Swimming in the High School. He gave testimony that as a male Physical Education instructor, he has on numerous occasions, taught all female or co-ed Physical Education classes. He did not obviously go into the

locker room when the girls were changing clothes. This situation had been covered historically by employees called locker room aides or monitors and by other Physical Education or ordinary teaching staff supervising the locker room. He alluded to areas where male, non-Physical Education teachers covered for female P. E. instructors who were absent for day or particular class.

Mr. Collins and Mr. Vokes indicated that in the Middle School, the Physical Education classes are co-ed and that has been the practice forever and the Physical Education programs are not suffering.

Mr. Vokes indicated that the Swimming classes he instructs are co-ed and that he is able to deal with any locker room issues related to the female students. Mr. Vokes also indicated that he has been able over his 28 years to deal successfully with the feminine hygiene and menstrual issues, speaks to female students about those concerns and has provided the necessary sanitary products on occasions.

Interestingly, Principal Wunders supported the testimony of Collins and Vokes relative to the length of time that students are in the locker room before and after class, as did the testimony of Nisewonger.

The Association asserts that the testimony of Superintendent Smith and the several Administrators about all the scheduling difficulties in this case should the position to be granted to Collins is simply a smoke screen and a diversion. The realities in the District, according to Mr. Vokes, is that males successfully teach and supervise females in the Physical Education and Swimming arenas. Why this has to change suddenly when the District is confronted with the proper application of Mr. Collins for this position one can only speculate. The Arbitrator's attention is reminded of other Physical Education instructors, Harold Short and Mrs. Smith, who taught either

entire classes of the opposite gender or co-ed classes without difficulty or scheduling problems or complaints by the District. It is maintained that the District scheduling "dilemma" is a pure ruse and smoke screen in this case.

It is clear from the record that the District knew that Nisewonger would retire at the end of the 1998-99 school year. Superintendent Smith testified that Nisewonger's resignation was known in May of 1999. Therefore, the gender mix of the High School Physical Education staff was known as early as May of 1999 and I am sure the intended retirement of a long-time teacher such as Ms. Nisewonger was known for many, many months prior thereto. Thus, when the District posted the Physical Education vacancy on July 2, 1999, it knew what the staffing situation in the High School would have been. If gender was a valid occupational qualification, such was known at the time of the posting and the District was required by the Collective Bargaining Agreement to state that qualification in the posting.

Indeed the teaching realities and the past practices have been thoroughly discussed and show that is not a qualification for this job and for whatever reason, the District simply does not want to acknowledge Mr. Collins right to the position to which he is entitled.

The Arbitrator's attention is called to Article II, paragraph B. 3. .3, Non-instructional periods assigned. The contract contains a non-instructional responsibility provision which appears on page 6, whereby teachers can be assigned certain areas of non-academic supervision of students in an instructional area or some other area of the building. The testimony shows that the District has used this non-instructional responsibility in the past to provide coverage for the locker room for the various Physical Education teachers. Proof of this is the testimony of Mr. Vokes about the Spanish teacher, Mr. Sciabica, supervising Jana Grant's Gym class.

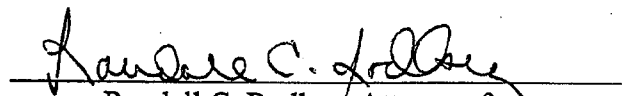
The testimony is un rebutted that all of the Physical Education substitutes in the District are male and they substitute for the female Physical Education teachers as needed and no issue is raised of quality instruction in the locker room or any of the other excuses asserted by the District. As the Arbitrator stated (T.pp. 71-72), locker room coverage is the responsibility of the Administration to deal with and so it has with aides, monitors, other staff. It (Administration) cannot now assert this as a reason to violate the Collective Bargaining Agreement.

IV. CONCLUSION

Based upon the relevant provisions of the Collective Bargaining Agreement, the credible facts and the Argument on behalf of the Association, this Grievance should be sustained and Mr. Collins transferred to the Physical Education position in the High School.

Since it is impossible to transfer Mr. Collins retroactively for the 1999-2000 school year when Grievant should have received the position, the Arbitrator is requested to fashion a remedy to compensate Mr. Collins for this injustice done to him.

Respectfully submitted


Randall C. Rodkey, Attorney for
Clearfield Area Education Association
and Scott A. Collins
300 Penn Traffic Building
Johnstown, PA 15901
(814) 535-3513



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CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,
PENNSYLVANIA
CIVIL DIVISION

CLEARFIELD AREA SCHOOL
DISTRICT

vs.

CLEARFIELD AREA EDUCATION
ASSOCIATION and
SCOTT A. COLLINS

:
:
:
: No. 00-1091-CD
:
:

ORDER

NOW, this 7th day of September, 2000, upon consideration of
recusal of both Judges sitting in the 46th Judicial District, it is the ORDER of this
Court that the Court Administrator of Clearfield County refer the above-captioned
civil matter to Administrative Regional Unit II for assignment of a specially presiding
judicial authority.

BY THE COURT:

JOHN K. REILLY, JR.
President Judge

FILED

SEP 07 2000

William A. Shaw
Prothonotary

FILED

SEP 07 2000

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William A. Shaw
Prothonotary

ESB

C.A.

IN THE COURT OF COMMON PLEAS
OF
BLAIR COUNTY, PENNSYLVANIA

CLEARFIELD AREA SCHOOL
DISTRICT,

Petitioner

vs.

CLEARFIELD EDUCATION
ASSOCIATION AND
SCOTT A. COLLINS,

Respondents

ANSWER TO PETITION TO
VACATE LABOR ARBITRATION
AWARD AND NEW MATTER

RANDALL C. RODKEY

ATTORNEY AT LAW

300 PENN TRAFFIC BUILDING

319 WASHINGTON STREET

JOHNSTOWN, PENNSYLVANIA 15901

FILED
01:50 pm
SEP 22 2000

William A. Shaw
Prothonotary
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CLEARFIELD AREA SCHOOL
DISTRICT,

Petitioner

vs.

CLEARFIELD EDUCATION
ASSOCIATION and SCOTT A. COLLINS,

Respondents

IN THE COURT OF COMMON PLEAS
OF
CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

No. 00-1091 - CD

TYPE OF DOCUMENT: ANSWER TO
PETITION TO VACATE LABOR
ARBITRATION AWARD AND NEW
MATTER

Counsel for Respondents:

Randall C. Rodkey, Esq.
300 Penn Traffic Building
Johnstown, PA 15901
(814) 535-3513
PA. I.D. 05952

FILED

SEP 22 2000

William A. Shaw
Prothonotary

CLEARFIELD AREA SCHOOL
DISTRICT,

Petitioner

vs.

CLEARFIELD EDUCATION
ASSOCIATION and SCOTT A. COLLINS,

Respondents

IN THE COURT OF COMMON PLEAS
OF
CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

No. 00-1091 - CD

**ANSWER TO PETITION TO VACATE LABOR
ARBITRATION AWARD AND NEW MATTER**

AND NOW, comes the Respondents, Clearfield Education Association and Scott A. Collins, by and through their Attorney, Randall C. Rodkey, Esquire, and files this response to the Answer to the Petition to Vacate Labor Arbitration Award and in support thereof, avers as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted, with the qualification that the retiring teachers at various times, taught male students as well as female students.

7. Admitted in part and denied in part. It is admitted that Scott A. Collins, individual Grievant and member of the Association, applied for a transfer to the High School for one (1) of the two (2) Physical Education positions that were posted and that his transfer request was denied. For

the reasons set forth in New Matter hereinbelow set forth, it is denied that Mr. Collins' request was denied because the position in question required supervision of female students in the locker room.

8. Admitted.

9. Admitted, with the qualification that the transfer requested by Mr. Collins was to one of the High School Physical Education positions previously posted by the District.

10. Admitted.

11. Admitted.

12. Denied as stated. It is alleged that by letter dated August 24th, Arbitrator Parkinson issued a correction of the Arbitration Award previously entered August 7, 2000. It was clear from the original Award that the correction submitted by Arbitrator Parkinson under date of August 24, 2000, was only a correction of an obvious typographical error. A copy of the letter of transmittal of Arbitrator Parkinson is attached as Exhibit "F" to the Petition and is made a part hereof.

13. Denied. On the contrary, and as more fully set forth in New Matter hereinbelow, Arbitrator Parkinson awarded the position to Collins as required by the terms of the Collective Bargaining Agreement and consistent with long-standing past practices of the District, permitting male instructors to instruct and supervise female Physical Education and Swimming students. It is further denied that it is improper for a male teacher to supervise the girls' locker room. While it is conceded by Respondents that a male teacher would not physically enter the girls' locker room, supervision under such teacher's direction is and has been provided by locker room aides, locker room monitors and other staff members of the proper gender.

14. Denied for the reasons set forth in paragraph 13 above and for the reason that the conduct of Petitioner, as hereinafter more specifically set forth below in New Matter, violated several

provisions of the Collective Bargaining Agreement, to wit: the provisions related to posting of job vacancies and to seniority.

15. Denied for the reasons set forth in paragraphs 13 and 14 above and as further set forth in the New Matter hereinbelow.

16. Respondents believe and therefore aver that the allegations of paragraph 16 are conclusions of law to which no response is necessary.

17. Respondents believe and therefore aver that the allegations of paragraph 17 are conclusions of law to which no response is necessary. To the extent that paragraph 17 is deemed to contain factual allegations, it is averred that the Award is a rational interpretation of the Collective Bargaining Agreement, at least in particular, Art. II, K. 1, and L. 4 and thus has its foundation squarely in said Collective Bargaining Agreement.

18. Respondents believe and therefore aver that the allegations of paragraph 18 are conclusions of law to which no response is necessary.

19. Admitted.

WHEREFORE, Respondents, Clearfield Education Association and Scott A. Collins, pray that the District's Petition to Vacate Labor Arbitration Award be dismissed.

NEW MATTER

By way of further and more complete response, Respondents herein assert the following New Matter and in support thereof, allege as follows:

20. Paragraphs 1 through 19 above are incorporated herein by reference as if they were fully set forth hereinbelow.

21. Article II, paragraph K. 1, provides that all vacancies or newly created positions must be posted by the District and the announcement or notice of such available positions must clearly state the qualifications necessary for said positions and that a job description will be available in the Superintendent's Office. The notice of the position in this case did not indicate any job qualifications or skills for the position. It did not even state whether the positions were for a boys' or girls' Physical Education instructor.

22. The job description for the Physical Education position in the District does not contain any language or requirement that Physical Education instructors must be of the same gender as the students being taught.

23. Historically in the Clearfield Area School District, both in the High School and in the Middle School, male Physical Education instructors have taught co-ed or female Physical Education and/or Swimming classes without difficulty stemming from gender differences.

24. The job description for the position of Physical Education teacher does not list gender specific qualifications nor does it set forth teaching or supervisory duties in the locker room.

25. Arbitrator Parkinson found that the Grievant, Mr. Collins, met the qualifications set forth in the posting, i.e., that the District needed two (2) High School Health and Physical Education instructors. The Arbitrator found therefore that the qualification was that a person wishing to transfer to such position, must be certified to teach Health and Physical Education (Arb. Award, p. 15). The Arbitrator went on to find that Grievant Collins is certified as K through 12 for Health and Physical Education and therefore has the necessary qualifications, pursuant to the posting, in accordance with Article II, Section K.1.

26. Article II, Section L. 4 provides that all reassignments, transfers and furloughs will be made on the basis of seniority. Further, Article II, K 1 provides that where qualifications for vacancies or newly created positions are equal, seniority in the School District shall prevail.

27. Arbitrator Parkinson found that Grievant Collins was more senior than at least one of the two persons that the District assigned or transferred to the High School Physical Education position.

28. The Pennsylvania Supreme Court has articulated a two-prong test for lower courts who are called upon to overturn an arbitrator's award:

"First, the court shall determine if the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement, and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the collective bargaining agreement. That is to say, a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement. *Id.* At 412, (Emphasis supplied).

State System of Higher Education (Chaney University) v. State College University Professional Ass'n, Pa. , 743 A.2d 405 (Pa. 1999).

29. The issue of this case is clearly within the terms of the Collective Bargaining Agreement as set forth above in the transfer and seniority provisions.

30. The Award of Arbitrator Parkinson is rationally derived from the Collective Bargaining Agreement inasmuch as he found that no gender qualifications were noted in the posting of the vacancy nor in the job description for the Physical Education provision. He likewise found that historically and currently the District allows male Physical Education instructors to teach co-ed or all girls' Phys. Ed or Swimming classes.

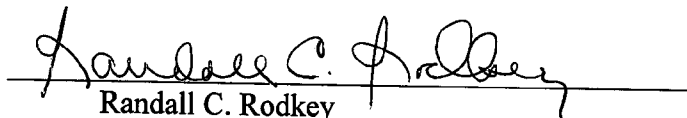
31. The Award of Arbitrator Parkinson in the instant case indisputably and genuinely has foundation in and logically flows from the Collective Bargaining Agreement.

32. Based upon the clear pronouncement of the Pennsylvania Supreme Court as to the review of public arbitration awards by the lower courts, the Petition to Vacate Labor Arbitration Award should be dismissed.

33. The Petition herein fails to state grounds upon which an Arbitration Award may be vacated.

34. Pursuant to the provisions of 42 Pa. C.S.A. Sec. 7314(d), the Court has the power to and is hereby requested to confirm the Award of Arbitrator Parkinson dated June 7, 2000.

WHEREFORE, Respondent prays that the Arbitration Award between the Clearfield Area School District and the Clearfield Area Education Association, dated August 7, 2000 be confirmed.

A handwritten signature in dark ink, appearing to read "Randall C. Rodkey", is written over a horizontal line.

Randall C. Rodkey
Attorney for Respondents
300 Penn Traffic Building
Johnstown, PA 15901
Pa. I.D. No. 05952
(814) 535-3513

CLEARFIELD AREA SCHOOL
DISTRICT,

Petitioner

vs.

CLEARFIELD EDUCATION
ASSOCIATION and SCOTT A. COLLINS,

Respondents

IN THE COURT OF COMMON PLEAS
OF
CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

No. 00-1091 - CD

CERTIFICATE OF SERVICE

I hereby certify that on I am this 8th day of September, 2000, serving a copy of the foregoing Answer to Petition to Vacate Labor Arbitration Award and New Matter on the following persons by U. S. First Class Mail, postage pre-paid:

Carl P. Beard, Esq.
Andrews and Wagner
3366 Lynwood Drive
P. O. Box 1311
Altoona, PA 16603

BY THE CLERK:


Randall C. Rodkey,
Attorney for Respondents

CLEARFIELD AREA SCHOOL
DISTRICT,

Petitioner

vs.

CLEARFIELD EDUCATION
ASSOCIATION and SCOTT A. COLLINS,

Respondents

IN THE COURT OF COMMON PLEAS
OF
CLEARFIELD COUNTY, PENNSYLVANIA

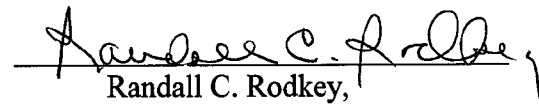
CIVIL ACTION - LAW

No. 00-1091 - CD

CERTIFICATE OF SERVICE

I hereby certify that on I am this 18th day of September, 2000, serving a copy of the foregoing Answer to Petition to Vacate Labor Arbitration Award and New Matter on the following persons by U. S. First Class Mail, postage pre-paid:

Carl P. Beard, Esq.
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P. O. Box 1311
Altoona, PA 16603


Randall C. Rodkey,
Attorney for Respondents

CLEARFIELD AREA SCHOOL
DISTRICT,
Petitioner,

V.

CLEARFIELD AREA EDUCATION
ASSOCIATION and
SCOTT A. COLLINS,
Respondents

IN THE COURT OF COMMON PLEAS
CLEARFIELD COUNTY, PENNSYLVANIA

NO. 00-1091-CD

CIVIL ACTION – LAW

Type of Document:

Reply to New Matter

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FILED

OCT 06 2000

William A. Shaw
Prothonotary

CLEARFIELD AREA SCHOOL
DISTRICT,
Petitioner,

V.

CLEARFIELD AREA EDUCATION
ASSOCIATION and
SCOTT A. COLLINS,
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IN THE COURT OF COMMON PLEAS
CLEARFIELD COUNTY, PENNSYLVANIA

NO. 00-1091-CD

CIVIL ACTION – LAW

REPLY TO NEW MATTER

AND NOW, comes the Petitioner, Clearfield Area School District, by and through its Attorney, Carl P. Beard, Esquire, and files this Reply to New Matter, avers as follows:

21. Denied as stated. By way of further answer the provision of the Collective Bargaining Agreement is a document that speaks for itself. The notice for the position also is a document that speaks for itself. By way of further answer, Grievant was aware that the posting in question was to replace two retiring female physical education instructors at the High School. In addition, Grievant was aware prior to the actual transfer day itself that he was not being considered for the transfer due to his inability to provide the proper supervision for students in the girls' locker room.

22. Denied as stated. By way of further answer, the job description for the Physical Education position is a document that speaks for itself. Contrary to the allegations of paragraph 22, it clearly would be improper for a male high school physical education teacher to be selected for a position which would require supervision of female students in the locker room and which the Grievant himself stated would be improper.

23. Denied as stated. It is specifically denied that Physical Education instructors have taught female physical education students at the Clearfield Area High

School. By way of further answer, at no time has any Physical Education Instructor been required to supervise opposite gender students in the locker room at the Clearfield Area School District in the High School.

24. Denied as stated. The job description for the position of Physical Education Instructor is a document that speaks for itself. By way of further answer, clearly the supervision of the locker room is intrinsic to a physical education class, and therefore is part of the duties for the Physical Education Instructor. The Job Description does clearly outline supervisory responsibilities for students.

25. Denied as stated. The arbitration award is a document that speaks for itself and which contains legal conclusions to which no response is required. By way of further answer, it is admitted that the arbitrator held that and ordered Collins' to be transferred to the position. However, the Arbitrator's Decision is not rationally related to the Collective Bargaining Agreement inasmuch as supervision of a locker room is a required part of Physical Education instruction, and opposite gender supervision of the locker room is inappropriate. To this end, the Arbitrator's decision does not draw its essence from the Agreement.

26. Denied as stated. The Collective Bargaining Agreement and its provisions are documents that speak for themselves. By way of further answer, Scott Collins was not qualified for the position and therefore his seniority is irrelevant.

27. Admitted in part, denied in part. The Arbitration Opinion Award is a document that speaks for itself which contains legal conclusions to which no response is required. By way of further answer, it is admitted that the Grievant Collins was more senior than one of the two persons that the District reassigned to the High School. However, Collins was not qualified for the position and therefore seniority is immaterial.

28. The averments of paragraph 28 are legal conclusions to which no response is required. By way of further answer, the Arbitrator's Award clearly cannot be rationally derived from the Collective Bargaining Agreement and therefore should be overturned.

29. The averments of paragraph 29 are legal conclusions to which no response is required. To the extent a further response is required, the averments of Paragraph 29 are denied.

30. Denied. The Opinion Award of Arbitrator Parkinson are legal conclusions to which no response is required. To the extent that further response is required, the allegations of paragraph 30 are denied. It is specifically denied that the Arbitration Award is rationally related to the CBA. To the contrary, the Award of Arbitrator Parkinson is clearly irrational and does not draw its essence from the Agreement. It is specifically denied that the School District permits high school physical education teachers to teach opposite gender students in physical education classes and provide supervision in the locker room.

31. Denied. It is specifically denied that the Award of Arbitrator Parkinson in the instant case logically flows from the Collective Bargaining Agreement. To the contrary, the Arbitrator's Opinion and Award is clearly irrational and does not logically flow from the Collective Bargaining Agreement or draw its essence from same.

32. Denied. The averments of paragraph 32 are legal conclusions and no response is required. To the extent a further response is required, the averments of paragraph 32 are denied. By way of further answer, the Pennsylvania Supreme Court has clearly and undisputedly held that an arbitrator's Decision must be rationally related to the Collective Bargaining Agreement to be upheld. Therefore, the Petition to Vacate

the Labor Arbitration Award should be granted and the Award vacated because the Arbitrator's Award does not draw its essence from the Agreement.

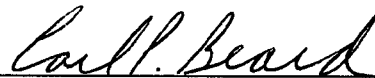
33. Denied. It is specifically denied that the Petition fails to state grounds upon which an Arbitration Award can be vacated. To the contrary, the Petition specifically stated that the grounds to which the Arbitration Award could be vacated.

34. This is a legal conclusion to which no response is required. To the extent that further response is required, the allegations of paragraph 34 are denied and strict proof is demanded.

WHEREFORE, Petitioner requests that this Honorable Court grant the Petition and Vacate the Arbitration Award.

Respectfully submitted,

ANDREWS, WAGNER & BEARD

A handwritten signature in cursive script, reading "Carl P. Beard", is written over a horizontal line.

Carl P. Beard, Esquire
Pa. I.D. No. 33479
Counsel for Petitioner
3366 Lynnwood Drive
P.O. Box 1311
Altoona, PA 16603
(814) 932-3304

VERIFICATION

I, Carl P. Beard, Esquire authorized representative of Clearfield Area School District, verify that the statements and averments of fact contained in are true and correct to the best of my knowledge, information, and belief. I understand that my statements are made subject to 18 Pa. C.S.A. Section 4904 providing for criminal penalties for unsworn falsification to authorities.

10-5-00
Date

Carl P. Beard
Carl P. Beard, Esquire

CLEARFIELD AREA SCHOOL
DISTRICT,
Petitioner,

V.

CLEARFIELD AREA EDUCATION
ASSOCIATION and
SCOTT A. COLLINS,
Respondents

IN THE COURT OF COMMON PLEAS
CLEARFIELD COUNTY, PENNSYLVANIA

NO. 00-1091-CD

CIVIL ACTION – LAW

CERTIFICATE OF SERVICE

I, Carl P. Beard, do hereby certify that on October 5, 2000, I served a true original copy of the attached Reply to New Matter on behalf of Clearfield Area School District by first class mail to the following:

Randall Rodkey, Esquire
319 Washington Street; Suite 300
Johnstown, PA 15901

ANDREWS, WAGNER & BEARD



Carl P. Beard, Esquire
Pa. ID. No. 33479
3366 Lynnwood Drive
P.O. Box 1311
Altoona, PA 16603
(814) 943-3304

FILED

OCT 06 2000

11/11/03/110000

William A. Shaw

Prothonotary

[Handwritten signature]

CLEARFIELD AREA SCHOOL
DISTRICT,
Petitioner,

V.

CLEARFIELD AREA EDUCATION
ASSOCIATION and
SCOTT A. COLLINS,
Respondents

IN THE COURT OF COMMON PLEAS
CLEARFIELD COUNTY, PENNSYLVANIA

NO. 00-1091-CD

CIVIL ACTION - LAW

ACCEPTANCE OF SERVICE

I, Randall Rodkey, attorney for Respondents, do hereby acknowledge and accept service of Petitioner's Petition to Vacate Arbitration Award on behalf of the Clearfield Area Education Association and Scott A. Collins.

Date: September 15, 2000

Randall C. Rodkey
Randall Rodkey, Esquire
319 Washington Street
Suite 300
Johnstown, PA 15901
814-535-3513

FILED

OCT 06 2000

William A. Shaw
Prothonotary

CD-1087-02

FILED

OCT 06 2000

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07/10/02/1087

William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

CLEARFIELD AREA SCHOOL
DISTRICT,
Petitioner

v.

CLEARFIELD AREA EDUCATION
ASSOCIATION and SCOTT A.
COLLINS,
Respondents

NO. 00 - 1091 - CD

ORDER

NOW, this 17th day of January, 2001, a status conference in the above matter has been scheduled for Tuesday, January 23, 2001, at 3:00 p.m. in Conference Room 1 of the **Blair County Courthouse**, Hollidaysburg, Pennsylvania.

BY THE COURT:



J. Michael Williamson, Judge
Specially Presiding
25th Judicial District of Pennsylvania

xc: Carl P. Beard, Esquire
Randall C. Rodkey, Esquire
Clearfield County Court Administrator
Blair County Court Administrator

J. MICHAEL WILLIAMSON
JUDGE
—
COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURT HOUSE
LOCK HAVEN, PA 17745

FILED

JAN 19 2001

William A. Shaw
Prothonotary

FILED

JAN 19 2001

071.32110cc

William A. Shaw

Prothonotary





JUDGES CHAMBERS
TWENTY-FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
LOCK HAVEN, PENNSYLVANIA 17745

J. MICHAEL WILLIAMSON
Judge

Clinton County Courthouse
230 E. Water Street
Lock Haven, PA 17745
570-893-4014
FAX 570-893-4126

January 18, 2001

William Shaw, Prothonotary
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830

Re: Clearfield Area School District v.
Clearfield Area Education Assoc.
No. 00-1091-CD

Dear Mr. Shaw:

Please file the enclosed Order in the above referenced matter. All copies have
been distributed.

Thank you.

Very truly yours,

A handwritten signature in cursive script that reads "Carol E. Miller".

Carol E. Miller
Secretary to Judge Williamson

Enclosure

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

CLEARFIELD AREA SCHOOL
DISTRICT,

Petitioner

v.

CLEARFIELD AREA EDUCATION
ASSOCIATION and SCOTT A.
COLLINS,

Respondents

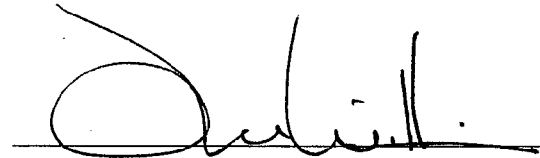
NO. 00 - 1091 - CD

ORDER

NOW, this 25th day of January, 2001, IT IS HEREBY ORDERED as follows:

1. Both parties shall submit written Briefs to the undersigned by 5:00 p.m. on Friday, February 16, 2001.
2. Oral argument shall be held at the Clearfield County Courthouse on Wednesday, March 21, 2001, at 11:00 a.m. in Court Room No. 1 of the Clearfield County Courthouse, Clearfield, Pennsylvania.

BY THE COURT:



J.

xc: Carl P. Beard, Esquire
Randall C. Rodkey, Esquire
Court Administrator

J. MICHAEL WILLIAMSON
JUDGE

COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURT HOUSE
LOCK HAVEN, PA 17745

FILED

JAN 31 2001

William A. Shaw
Prothonotary

FILED

JAN 31 2001

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William A. Shaw
Prothonotary

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JUDGES CHAMBERS
TWENTY-FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
LOCK HAVEN, PENNSYLVANIA 17745

J. MICHAEL WILLIAMSON
Judge

Clinton County Courthouse
230 E. Water Street
Lock Haven, PA 17745
570-893-4014
FAX 570-893-4126

January 29, 2001

William Shaw, Prothonotary
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830

**Re: Clearfield Area School District v. Clearfield Area
Education Association -- No. 00-1091-CD**

Dear Mr. Shaw:

Please file the enclosed Order in the above referenced matter. All copies have
been distributed.

Thank you.

Very truly yours,

A handwritten signature in cursive script that reads "Carol E. Miller".

Carol E. Miller
Secretary to Judge Williamson

Enclosure

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

CLEARFIELD AREA SCHOOL
DISTRICT,

Petitioner

v.

CLEARFIELD AREA EDUCATION
ASSOCIATION and SCOTT A.
COLLINS,

Respondents

NO. 00 - 1091 - CD

ORDER

NOW, this 26th day of March, 2001, counsel for each party having so requested following oral argument on March 21, 2001, we defer entering an Order with respect to Petitioner's Petition to Vacate Labor Arbitration Award until requested to do so, in writing, by either party.

BY THE COURT:



J. Michael Williamson, Judge
Specially Presiding
25th Judicial District of Pennsylvania

xc: Carl P. Beard, Esquire
Randall C. Rodkey, Esquire
Court Administrator

J. MICHAEL WILLIAMSON
JUDGE

COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURT HOUSE
LOCK HAVEN, PA 17745

FILED

MAR 28 2001

William A. Shaw
Prothonotary

FILED

MAR 28 2001

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William A. Shaw
Prothonotary
Shaw

111 CLEARFIELD AREA SCHOOL
DISTRICT,

Petitioner,

V.

111 CLEARFIELD AREA EDUCATION
ASSOCIATION and
SCOTT A. COLLINS,

81 Respondents

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

NO. 00-1091-CD

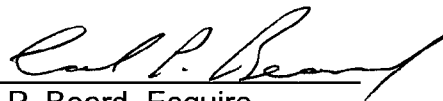
CIVIL ACTION – LAW

PRAECIPE TO DISCONTINUE

TO THE PROTHONOTARY:

On behalf of the Petitioner, Clearfield Area School District, please mark the
action filed at No. 00-1-91-CD settled, discontinued and ended.

ANDREWS WAGNER & BEARD



Carl P. Beard, Esquire
Pa. ID. No. 33479
3366 Lynnwood Drive
P.O. Box 1311
Altoona, PA 16603
(814) 943-3304

Date: May 16, 2001

FILED

MAY 21 2001

William A. Shaw
Prothonotary

CLEARFIELD AREA SCHOOL
DISTRICT,

Petitioner,

V.

CLEARFIELD AREA EDUCATION
ASSOCIATION and
SCOTT A. COLLINS,

Respondents

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

NO. 00-1091-CD

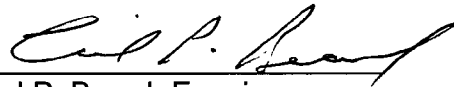
CIVIL ACTION – LAW

CERTIFICATE OF SERVICE

I, Carl P. Beard, do hereby certify that on May 16, 2001, I served a true copy of the attached Praecipe to Discontinue filed on behalf of Clearfield Area School District by first class mail to the following:

Randall Rodkey, Esquire
Suite 302, Richland Square III
1397 Eisenhower Boulevard
Johnstown, PA 15904

ANDREWS, WAGNER & BEARD



Carl P. Beard, Esquire
Pa. ID. No. 33479
3366 Lynnwood Drive
P.O. Box 1311
Altoona, PA 16603
(814) 943-3304

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William A. Shaw
Prothonotary

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**IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA**

CIVIL DIVISION

Clearfield Area School Dist

Vs.

**Clearfield Area Educ. Assoc
Scott A. Collins**

No. 2000-01091-CD

COPY

CERTIFICATE OF DISCONTINUATION

Commonwealth of PA
County of Clearfield

I, William A. Shaw, Prothonotary of the Court of Common Pleas in and for the County and Commonwealth aforesaid do hereby certify that the above case was on May 21, 2001 marked:

Settled, discontinued and ended.

Record costs in the sum of \$80.00 have been paid in full by Carl P. Beard, Esquire.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal of this Court at Clearfield, Clearfield County, Pennsylvania this 21st day of May A.D. 2001.

William A. Shaw, Prothonotary