LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF ARBITRATION BETWEEN

SHIKELLAMAY EDUCATION ASSOCIATION, PSEA/NEA	:	
	:	Grievance: Salary Schedule Placement
and	:	Brett Michaels, et. al.
	:	
SHIKELLAMAY SCHOOL DISTRICT	:	

GRIEVANCE:	The grievance alleges the improper placement of the Grievants on the salary schedule.
HEARING:	May 17, 2017 Shikellamay, Pennsylvania
ARBITRATOR:	John M. Skonier, Esq.

APPEARANCES

FOR THE ASSOCIATION:	FOR THE DISTRICT:
Matthew Cravitz, Esq.	Richard B. Galtman, Esq.

Procedural History

The undersigned was notified by letter of his selection by the Shikellamay Education Association, PSEA / NEA (Association) and the Shikellamay School District (District or Employer) to hear and decide a matter then in dispute. Pursuant to due notice, a hearing was held on May 17, 2017, in Shikellamy, Pennsylvania, at which time both parties were afforded a full opportunity to present testimony, examine and cross-examine witnesses, and introduce documentary evidence in support of their respective positions. Following the receipt of the transcribed notes of testimony[1], the parties filed post-hearing legal briefs. The matter is now ready for final disposition.

Background Facts

On August 22, 2016, the Association filed a grievance with the District on behalf of bargaining unit member Brett Michaels and "any other similarly situated bargaining unit members." The grievance listed the date of violation as "July 11, 2013, and ongoing." (Exhibit J-2) The Association's grievance contains a "Statement of Grievance", which reads, in pertinent part, as follows:

[1] References to the transcribed notes of testimony will be by "NT" followed by the relevant page number(s).

> Brett Michaels was hired according to board policy of hiring all experienced teachers at step six. When hired he was placed on step six of the SEA salary schedule even though he had eight (8) years experience. On July 11th 2013, Todd Tilford was hired as an experienced teacher and placed on step nineteen (19) of the SEA salary schedule. This is an ongoing violation of the collective bargaining agreement Article XIV Section 14.14 the hiring of experienced teachers <u>being equitably</u> placed on the SEA salary schedule.

(Exhibit J-2, emphasis in original)

The District denied the grievance on the merits and on procedural grounds. The parties processed the matter to the instant arbitration for final resolution.

Relevant Contractual Provision

> Article II - Grievance and Arbitration Procedure
>
> Section 2.1
> A grievance is hereby defined to be a dispute between the District and the Association or any Employee represented by the Association, relative to wages, hours or working conditions involving the interpretation of a written provision of this Agreement arising during the period from the execution of this Agreement to the execution of a successor agreement except during the time of any Employee strike or work stoppage.
>
> * * *
>
> Section 2.3
> Grievances, as defined in Section 2.1 of this Article shall be adjusted by and between the parties involved in the following manner:
>
> > Step I - Principal or immediate supervisor
> > An Employee(s) with a grievance shall, within twenty (20) working days from the date of the act or omission giving rise to the grievance, discuss it with his principal or immediate supervisor, either directly or through the Association's designated representative, with the objective of resolving the matter informally.
> >
> > The grievance will be submitted by the aggrieved Employee(s) to the supervisor, in writing, on a form to be provided by the Association, stating the matter of the

grievance. Copies of the grievance statement will be supplied by the aggrieved Employee(s) to the Association. The decision of the first line supervisor or his designated representative shall be rendered within ten (10) working days from the time the aggrieved Employee(s) presents the grievance. A written decision will be issued to the Association within ten (10) working days.

Step II
In the event the grievance is not settled as provided in Step I, the Employee(s) may within ten (10) working days from the time the decision is rendered by the supervisor or his designated representative submit the grievance to the Superintendent. The Superintendent shall give his reply to the grievant(s) and the Association within ten (10) working days from the time the grievance is submitted to him. A written decision will be issued to the Association within ten (10) working days.

Step III
In the event the grievance is not settled as provided in Step II, the Employee(s) may within ten (10) working days from the time the decision is rendered by the Superintendent submit the grievance to the Board by providing a written copy of the appeal to the Superintendent. The Board may hold a meeting with the Association or decide the grievance without conducting such a meeting, but shall give its reply to the grievant(s) and the Association within ten (10) working days from the time the grievance is submitted it. A written decision will be issued to the Association within ten (10) working days.

Step IV
In the event the grievance is not settled as provided in Step III, the Association may within twenty (20) working days from the time the decision is rendered to the aggrieved Employee(s) by the Board (or from the date the Board's decision is last due), state in a writing received by the Superintendent, an intent to submit the grievance to arbitration in the manner provided herein.

Section 2.4 - Arbitration
The Association and the District may request the services of the Pennsylvania Bureau of Mediation ("the Bureau). Method of selection of the arbitrator shall be determined by the rules set forth by the Bureau. Notwithstanding anything herein to the contrary, no Employee may submit a grievance to arbitration without the written agreement of the Association at the time that the Employee files the appeal to arbitration.

The arbitrator's final decision or award that is not inconsistent with the terms of this Agreement shall be final and binding upon the parties hereto; provided, however, that the arbitrator has no authority or power to add to, delete from, disregard, or in any other manner alter any of the written terms, provisions or conditions of this Agreement. The arbitrator shall render his decision within thirty (30) days of the hearing or the filing of post-hearing briefs if such briefs are to be filed. The failure of an arbitrator to issue a decision within the timelines set forth herein shall not affect the binding nature of the decision.

The fees and expenses of the arbitrator hereunder and the charges incurred in connection with the arbitration shall be borne equally by the District and the Association.

* * *

Article XIV - Miscellaneous Provisions

* * *

Section 14.14 Hiring of New Employees (Permanent Positions)
Employees hired shall be given salary placement credit on the salary scale equal to one (1) year of credit for each year of experience up to and including five (5) years. This provision may be exceeded at the discretion of the District and shall be equitably and objectively applied.

* * *

Discussion and Opinion

The instant matter involves the question of arbitrability of the grievance as well as whether the District violated the parties' collective bargaining agreement in its placement of various teachers on the contractual salary schedule.

The District asserts that the Association's grievance is without merit. In addition, the District asserts that the grievance is not arbitrable on the basis of timeliness and that it is barred by the doctrine of *res judicata*.

The District argues that the Association's grievance is untimely as the parties' contract requires that grievances must be brought at step 1 within 20 working days from the date of the act or omission giving rise to the grievance. (Exhibit J-1) More specifically, the District notes that the Association challenged the placement of Mr. Tilford on the salary schedule as a violation of Article 14, § 14.14 of the collective bargaining agreement and argues that this is the act that gave rise to the grievance. Mr. Tilford's placement on the salary schedule was effected in a public school board meeting on July 11, 2013 and set forth in the minutes of that board meeting. (Exhibit A-1) The District argues that under the relevant language of the contract, the action giving rise to the grievance occurred on July 11, 2013. Given that the grievable offense took place during the summer of 2013 (when school was not in session), under § 2.3 of the contract, the grievance as to this issue had to be initiated no later than the twentieth work day of the following 2013-2014 school year, which would be no later than the last week of September, 2013. However, it points out that the Association's grievance was filed *3 years later*, on August 22, 2016. As such, the District asks that the grievance be denied on the basis of timeliness.

The Association argues that the District did not raise the issue of timeliness until the instant arbitration hearing in this matter. The Association maintains that the

District has waived its right to argue timeliness of the grievance and, therefore, its argument should fail.

The record reveals that the Association is grieving the manner in which the District placed Mr. Mitchell and similarly situated bargaining unit members onto the parties' collective bargaining agreement salary schedule. If true, the violation(s) would be continuing each time these individuals draw a pay check from the District. As such, I find that the matter is timely for the purpose of resolving this distinct issue; however, any remedy would be limited twenty working days prior to the date of the filing of the grievance.

The District also argues that because Article II, Section 2.1 limits a "grievance" to a dispute between the parties . . . involving the interpretation of a written provision of the collective bargaining agreement arising during the period of the execution of the Agreement to the execution of a successor agreement, this dispute does not fall with in that temporal window. It maintains that to qualify as a "grievance" as defined under Section 2.1 of the current collective bargaining agreement, the triggering event at issue must have arisen during the period between October 8, 2015 and June 30, 2019. As the District is defining the triggering incident as the July 2013 hiring of Mr. Tilford, it maintains

the grievance is procedural barred. While the District asserts that the event that gave rise to the grievance occurred in July 2013 when Mr. Tilford was hired, as stated above, the matter has been found to be a continuing violation. As such, as the issue involves the interpretation of a provision of the collective bargaining agreement in existence at the time the grievance was filed, it meets the definition of a "grievance" under the contract.

Finally, the District argues that the Association is barred by collateral estoppel, issue preclusion and *res judicata.* The District points out that to the extent that the instant grievance is based upon Mr. Tilford's salary placement in July 2013, it is unrebutted that the Association filed an identical grievance in January 21, 2015 on behalf of Ms. Fessler. The Association advanced that grievance through the grievance process to the arbitration step, but then withdrew the grievance without invoking any reservation of rights, prior to the arbitration hearing. (Exhibits D - 1, 2 and 3.) *See Bradford Area School Dist. v. Bradford Area Educ. Ass 'n*, 663 A.2d 862 (Pa. Cmwlth. 1995).

The Association argues that there was been no previous final determination on the merits on the same claim as the present grievance. In addition, the identities of the parties are separate and distinct. As a result, it argues that the elements of *res judicata* have not been met and therefore, the present grievance is arbitrable.

Res judicata is recognized when there has been a final judgment and the matter is no longer subject to appeal. Litigation on the same issues between the same parties will be prohibited. In the case at issue, the record reveals that a prior grievance filed by bargaining unit member Fessler was never taken to final judgment. The matter was withdrawn by Ms. Fessler prior to arbitration. As such, I find that *res judicata* is not applicable.

Turning to the merits, the record demonstrated that in 1994, the parties inserted language into the contract that would enable the District to exceed the number of years of prior experience it could recognize when hiring a new member of the bargaining unit. This provision allows the District to exceed the five year cap for prior experience at its "discretion", however it [the provision] must be "equitably and objectively applied."

Dr. James Hartman, Superintendent and District bargaining team member at the time that the relevant language was bargained into the parties' collective bargaining agreement, provided testimony regarding the bargaining history. He explained that the purpose of the language was to provide discretion for the School Board to exceed the recognition of 5 years of prior service, if the District were faced with a situation where it would be extremely challenging to recruit an effective certified teacher for a particular

teaching position. (NT-257) He further testified that the parties had no intention of eliminating the existing 5 year cap on salary placement. (NT-258)

After retiring from the Superintendent's position, Dr. Hartman sat on the School Board. He was a member of the School Board at the time that Mr. Tilford was hired. He explained that he was well aware of the requirements of the position. He explained that it was a high level mathematics teacher position, involving the instruction of Calculus courses and a college level mathematical statistics course. While the then Superintendent had advertised for the mathematics position, his search only produced one acceptable candidate with the necessary qualifications, Mr. Tilford, therefore, the Superintendent recommended that Mr. Tilford be placed on the salary schedule with full recognition of his prior years of service in another district. (NT- 260-263)

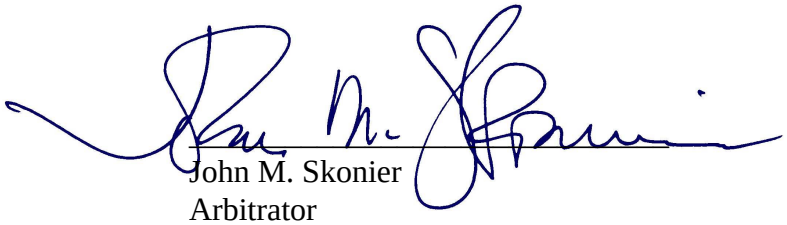
Dr. Hartman testified that when he served as Superintendent, he did not find it necessary to utilize the discretionary language to place any new hire beyond the 5 year cap that was contained in Article XIV, § 14.14. He explained that they had "an ample number of qualified applicants." (NT- 264)

The Association presented testimony from 19 teachers. Their testimony and the evidence presented by the Association demonstrates that the various Grievants are highly qualified teachers in their various areas of instruction, however, there was no showing that the District found their talents and skills hard to find at the time of their hiring. For the Association to prevail, it would be necessary to demonstrate that each of Grievants was in a similar position to Mr. Tilford, i.e., possessing teaching skills that were sorely needed at the time of hiring, or that the District was finding their position challenging to fill. The record does not support such a finding.

As the credible evidence of record reveals that the District equitably and objectively applied its discretion in recognizing Mr. Tilford's prior teaching experience when placing him on the District's salary schedule, and it did not find itself in a similar challenging position when filling any of the other positions raised in this grievance, no violation of the contract is found. As such, the District's actions will not be disturbed and the grievance must be denied.

Award

On the basis of the record as a whole and for the reasons discussed, the District did not violate the parties' collective bargaining agreement when it failed to provide additional years of service to the Grievants at the time of their hire.



John M. Skonier
Arbitrator

January 17, 2018