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In the Matter of the Arbitration between	)	
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<b>BREVARD FEDERATION OF TEACHERS</b>	)	AAA Case No. 01-17-0005-6182
	)	Article XVIII, Sections A & K; Article XIX
and	)	
	)	
<b>SCHOOL BOARD OF BREVARD COUNTY</b>	)	Grievant: Ronald Peters
	)	
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BEFORE : Mark Lurie, Arbitrator

APPEARANCES

Brevard Federation of Teachers	: Dan Bennett, Esq. Advocate
School Board of Brevard County	: Shannon Kelley, Advocate

This is a grievance arbitration decision issued pursuant to the collective bargaining agreement effective December 14, 2016 through midnight of the day immediately preceding the first day of the beginning of the 2017-2018 teacher work year (the "CBA") between the School Board of Brevard County (the "School Board") and the Brevard Federation of Teachers, Local 2098, Florida Education Association, AFL-CIO, Inc., American Federation of Teachers, National Education Association (the "Union") representing, among other job classifications, the Board's classroom teachers.

Upon due notice, the parties appeared at the prescribed arbitration hearing time and place: November 3, 2017 at 10:00 a.m. at the Brevard School Board offices in Viera, Florida, where they presented their respective positions and the evidence in support of those positions. The hearing was transcribed; the transcription is the official record. The advocates furnished written closing arguments that the Arbitrator received and exchanged by email attachment on December 18, 2017, as of which date the hearing was declared closed.

## BACKGROUND

The Union represents the District's teachers and persons in other job classifications.<sup>1</sup> On June 8, 2017, the Board posted a job opening for the position of head coach for the Viera High School varsity girls' softball team. The duties of the coaching position will commence on January 4, 2018 and will continue for about four months (the "season"). CBA Article XVIII, DIFFERENTIATED PAY PLAN, sets the compensation for a bargaining unit member performing that function at \$3,648.00.

The job posting drew six responses, five of which were from Brevard classroom teachers and one of which was from Ms. Megan Hudson, who was not and is not a Brevard teacher. The grievant, Ronald Peters, a teacher at Viera High School, was one of the five teacher candidates who responded and was the only one of the five who had been currently teaching at Viera High School. He possessed the requisite qualifications for the position, timely submitted his application and was interviewed.

Viera High School Principal Michael Alba chose Ms. Hudson – the non-teacher candidate – for the job. Mr. Peters filed this grievance asserting that the choice of a non-teacher violated CBA Article XVIII. Article XVIII requires, *inter alia*, that

1. the Board "shall make an effort to find" a "teacher volunteer" for the position,<sup>2</sup>
2. that part of that effort must include emailing all teachers of the availability of the position,<sup>3</sup> and
3. that if the qualifications of candidates are judged to be equal, the "teacher applicant" from the school where the position exists will be chosen.<sup>4</sup>

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### 1 ARTICLE I – RECOGNITION

*The Board hereby recognizes the Union as the sole and exclusive bargaining representative for the following Type "E", "J", (full and part-time) and "G" employees of the Board, whether under contract or on leave, and such other employees as may be hereafter prescribed by law:*

*Area Counselors, Child Find Specialists, **Classroom Teachers**, Coordinating Teacher Units, Exceptional Education Teachers, Exceptional Student Education, Staffing Specialists, JROTC Teachers, Guidance Counselors (elementary and secondary), Lead Teachers, Learning Director, Media Specialists, Occupational Specialists, Resource Teachers, Title I Parent Educator, Title 1 Teachers Title I Teacher Trainer [Arbitrator's emphasis]*

### 2 ARTICLE XVIII - DIFFERENTIATED PAY PLAN

A. The Board shall make an effort to find teacher volunteers for all positions pursuant to this Article. Part of such effort shall include e-mailing all teachers. The principal shall establish minimum qualifications for differentiated pay positions within a school and shall review all applicants who meet the minimum qualifications and make his/her determination as to who should fill the position. When other factors are judged to be equal, it is the intent of the district that teacher applicant(s) from the school with the vacant position shall be chosen.

3 Ibid.

4 Ibid.

There is no dispute that the District did not perform the second of the above three requirements. It did not send an email to teachers advising them of the opportunity. The Arbitrator finds that that omission did not adversely affect Mr. Peters having timely received such notice. Mr. Peters further charges that Principal Alba's failure to issue the email revealed his (Alba's) intention, from the start, to hire someone other than a Brevard teacher for the position. Quoting Mr. Peters' grievance,

*By neglecting **any efforts** to find teacher volunteers and making it unlikely teachers would find out about the vacant position on their own and meet a summer deadline for application, it is clear that it was never Mr. Alba's intention to fill the vacancy with a member of his staff. [Arbitrator's emphasis]*

The Arbitrator finds the premise of this accusation to be untrue and the conclusion drawn from that premise to therefore be unproven.

Mr. Peters asserts in this grievance that Article XVIII, Section A, "explicitly obligates a principal to grant a clear preference to qualified teacher volunteers" and that Principal Alba violated that obligation by having selected Ms. Hudson, who was not a "teacher volunteer." And he charges that, as the sole candidate who had been teaching at Viera High School for at least 99 days, under CBA Article XVIII, Section K, he was the sole candidate eligible for the differentiated pay position.

CBA Article XVIII, Section K.

*In order to be eligible for the differentiated pay, teachers must have taught at the site(s) for more than 99 days.*

As stated by Mr. Peters in his grievance,

*My claim is that Paragraph K proves it is the intention of the Board to fill differentiated pay positions with qualified teacher volunteers...*

and as stated by the Union in its post-hearing brief,

*Of the six candidates, Mr. Peters was the only one who currently taught at Viera High and the only one who should have enjoyed the benefits of the CBA.*

The School Board, in response, asserts that

*there is no provision whatsoever in the Agreement that required the School Board to select a teacher for the varsity softball coach position.<sup>5</sup>*

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<sup>5</sup> Quoting the School Board's post-hearing brief.

Mr. Peters also contests Principal Alba's conclusion that Ms. Hudson is more qualified than he, and charges that she was selected for reasons that constituted age and/or sex discrimination, in contravention of CBA Article XIX.

#### ISSUE

Did the District violate CBA Articles XVIII, Sections A or K or Article XIX and, if so, what should the remedy be?

#### DISCUSSION

In Article XVIII, the Board has promised that it "shall make an effort to find teacher volunteers [for all differentiated pay positions]." The phrase *shall make an effort to find* is arguably unclear as to whether it means (1) an obligation to merely "find" a qualified teacher candidate or (2) an obligation to "find" that candidate and, if found, to then "hire" him or her. The Arbitrator observes that the ambiguity is resolved when the sentence is parsed:

Without the words *make an effort to*, the sentence reads – *The Board shall find teacher volunteers for all positions pursuant to this Article*. The sentence thus denotes the Board's obligation to award such positions to volunteer teachers.

The words – *shall make an effort* – recognize that the Board may be unable to find such volunteers for all positions, and so reduces the Board's obligation from "finding" to "making an effort to find." Nonetheless, once the effort succeeds – once a teacher volunteer meeting the minimum qualifications for a differentiated pay position is found – then the *make an effort* condition falls away, and the District is required to fill the position with that teacher. It is only if and when the Board has made an effort and has failed to find minimally qualified teacher volunteers that, under Article XVIII, it can open the differentiated pay positions to non-teachers.

As noted, the Union asserts the violation of two other contractual provisions.<sup>6</sup>

- Article XVIII, Section K requires that “to be eligible for the differentiated pay”... the teacher must have been a *situs teacher* for more than 99 days. The Union asserts that, under this Article, any person who had not been a *situs teacher* at Viera High School for at least that duration (and, of the six candidates, only Mr. Peters was) was ineligible to be a candidate for the Viera High coaching position. It asserts that Mr. Peters’ unique experience – his knowledge of the Viera High School team players, his previous handling of the team’s finances and his relationship with local sponsors – made him more qualified than the other five candidates.

The Board replies that Article XVIII, Section K applies to only the differentiated pay given for teaching in challenging school settings; i.e., those settings described in Sections I and J of Article XVIII.<sup>7</sup>

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<sup>6</sup> Other bases for violations are potentially arguable.

- It can be argued that the Board did “make an effort” to find a teacher volunteer but that the “make an effort” requirement, if satisfied, did not preclude consideration of non-teacher volunteers.
- It can be argued that, even though the Board failed to issue the email notice required by Article XVIII, Mr. Peters was not prejudiced by that contractual violation because he received sufficiently timely notice of the posting to file his application. And, even if he had received the requisite email, he would not have been awarded the position.
- It can be argued that while Mr. Peters met the minimum standards for consideration, the CBA provides that the position would be awarded to the most qualified, with the Viera High School principal making “his/her determination as to who should fill the position.”
- It can be argued that the winning candidate being young and female and Mr. Peters being middle-aged and male, the Article XIX prohibition against age or sex discrimination was violated. There is evidence that those factors affect the thinking of some on a panel that advised the principal, but there is little evidence that it is the basis upon which the principal made his decision.

<sup>7</sup> Article XVIII has eleven sections: Section A through K. Here is a description of the subject matter of each:

- A The Board will make “an effort” to find teachers for differentiated pay positions, and will use the process and apply the selection priority prescribed in this section.
- B The differentiated pay positions are described in Article XVIII.
- C Differentiated pay will be taken from central internal accounts.
- D Teachers who participate in revenue generating activities will be paid for their time.
- E Not all differentiated pay positions need be filled, and teachers may be paid for work outside of the normal workweek, even if it is not a defined differentiated pay position.
- F Describes the timing of differentiated pay payments.
- G Describes the procedure to be followed for elementary school differentiated pay.
- H Lists the differentiated pay positions and pay rates.
- I Sets the differentiated pay amount for teachers at Area Alternative Learning Centers.
- J Sets the differentiated pay amount for teachers and support teachers at State-designated “F” schools.
- K (Verbatim) *In order to be eligible for the differentiated pay, teachers must have taught at the site(s) for more than 99 days.*

The Arbitrator agrees with the Board for the following reasons:

Article XVIII, Section I prescribes the differentiated pay amount for teachers working at Area Alternative Learning Centers and Section J prescribes the amount for teachers and support teachers working at State-designated “F” schools. Neither the Area Alternative Learning Center nor the “F” school differentiated pay provisions (Sections I and J) set the minimum duration of work required to earn the differentiated pay. Certainly, a single day or single week would not suffice. The omission of minimum durations from Sections I and J is remedied by Section K (which immediately succeeds those two paragraphs). It states that “to be eligible for **the** differentiated pay”... the teacher must have been a *situs teacher* for more than 99 days. The use of the article “the” indicates that Section K is referring to a specific differentiated pay, and not to all differentiated pay positions, including coaching. **The** differentiated pay refers to solely the differentiated pay earned for working in an Area Alternative Learning Center or at an “F” school.

Second, if *situs teacher* status for at least 99 days were a prerequisite for team coaching positions, then the Article XVIII solution for choosing among equally qualified candidates would not favor the candidate from “the school with the vacant position” since, to have qualified for the coaching position, all candidates would already have had to have been from the school with the vacant coaching position.

- Mr. Peters is a 50-year-old male; Ms. Hudson is a 29-year-old female. CBA Article XIX prohibits discrimination on the bases of age or sex.<sup>8</sup> The Union cited various statements attributed to participants in the coach-selection decision-making process as evidencing such discrimination. In view of the remedy that will be prescribed below, the Arbitrator deems these charges to be moot.

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8 ARTICLE XIX - NONDISCRIMINATION

The Board agrees that it shall not illegally discriminate against any teacher with respect to wages, hours, or conditions of employment by reason of race, color, creed, national origin, sex, religion, or age....

**DECISION**

The Union has sustained its burdens of proving that, by having failed to issue an email advising teachers of the coaching position and by having selected a non-teacher over qualified teacher volunteers, the School Board violated CBA ARTICLE XVIII, Section A. However,

because CBA ARTICLE XVIII, Section K did not apply, and

because, for lack of email notice, not all teachers who might have applied did so, and additional teachers might reasonably have been deemed more qualified than Mr. Peters, the make-whole remedy for Mr. Peters cannot presume that, but for the aforesaid CBA violations, he would have been awarded the coaching position.

**AWARD**

The grievance is sustained. The School Board shall undertake, de novo, the posting of the coaching vacancy, and shall do so in accordance with the terms of CBA ARTICLE XVIII, Section A. If, as a result thereof, there shall be one or more teacher volunteers who meet the requirements of the position, the School Board shall award the position to one of those teacher volunteers. If and only if the posting results in no qualified teacher volunteering for the coaching position, the School Board may then award the position to a non-teacher volunteer. The Arbitrator will retain jurisdiction over the remedy.



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Mark I. Lurie, Arbitrator

December 20, 2017