**SNAP-ON TOOLS —**

**Decision of Arbitrator**

In re SNAP-ON TOOLS and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LODGE 34, FMCS File No. 91/13035, February 18, 1992

Arbitrator: Lamont E. Stallworth, selected by parties through procedures of the Federal Mediation and Conciliation Service

**DISABILITY**

**— Absences — Discharge — Post-traumatic stress disorder ▸118.6366 ▸118.306 ▸118.655**

Just cause did not exist to discharge 20-year fork lift driver because of absences following his resumption of regular duties eight months after work-related injury that necessitated amputation of part of middle finger of his right hand and reconstruction of ring finger. Company knew that grievant was having personal and financial problems related to accident, but it never had its psychologist examine grievant to determine reason for his absences; grievant's inability to continue his physical activities such as basketball and martial arts, horror of accident itself, and related problems make it likely that he suffered from post-traumatic stress disorder, as his psychiatrist testified; employer had duty to accommodate grievant as disabled person, and notice that it had of his post-injury problems required further investigation before discharge.

**REMEDY**

**— Reinstatement — Post-traumatic stress disorder ▸118.806 ▸118.6366 ▸118.655**

Grievant who was improperly discharged for excessive absenteeism following return from absence due to work-related injury shall be reinstated without back pay, where grievant bears substantial responsibility for not making employer better aware of his disability due to post-traumatic stress disorder; company and union are to agree on physician and/or psychiatrist to examine grievant regarding his suitability for return to work and his job assignment.

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Appearances: For the employer — Thomas A. Langwell, labor relations manager; Pat Ryan, plant personnel manager; James E. Devine, psychologist; Mark E. Kober, distribution shop superintendent; Gregory Beck, safety supervisor. For the union — Robert K. Weber, attorney; Joseph Ziccarelli, psychiatrist.

**STRESS DISORDER**

**Issues**

STALLWORTH, Arbitrator: — The Parties presented the following issue(s) to the Arbitrator:

1. Was the Grievant discharged for just cause?
2. If not, what shall the remedy be?

**Relevant Contract Provisions**

ARTICLE I
RECOGNITION

*Section 1.6:* The Company and the Union agree that they will not discriminate against any employee or applicant for work because of race, sex, color, age, creed, nationality, handicap, or veteran's status.

ARTICLE XI
MANAGEMENT

*Section 11.1:* The management of the Company and the direction of the working force, including the right to hire, suspend, or discharge for cause, transfer, promote, demote, and the right to relieve employees from duty because of lack of work or for other legitimate reasons, subject to the provisions of the Agreement, is vested exclusively in the Company.

**Background**

The Grievant was employed as a Raymond fork lift driver in the Company's Distribution Department at the time the incidents giving rise to this dispute occurred. On January 4, 1990, the Grievant suffered an injury on the job. His right hand was caught between his vehicle and another vehicle, part of one finger was nearly severed and a second finger was badly crushed. At the hospital immediately after the accident, part of the Grievant's middle finger was amputated and his ring finger was reconstructed, treatment which included placing a pin in his finger. The Grievant is right-handed.

The Grievant returned to work more than six months later, on June 24, 1990, after being released to return to duty by a physician authorized by the Company. The Grievant was released for light duty at that time and was given a labeling job. In July, 1990 he was released from work for two weeks because of problems with his left elbow. He testified that he was told that the problems with his left arm were related to the problems with his right hand.

In August, 1990, the Company's medical expert released the Grievant to return to regular duty, and he began to work again on the forklift. On September 11, 1990, the Grievant was

issued a verbal warning for violating Rule No. 2 and 11. Rule No. 2 deals with habitual tardiness or repeated absences from work. Rule No. 11 involves failure to provide notice of absence within one hour of the start of the shift. On September 13, 1990, the Grievant suffered a laceration to his hand while lifting a pan. The lifting of a pan is a necessary part of his job.

The Grievant was issued a written warning for violation of the same rule on November 7, 1990, and a suspension of three (3) days on December 7, 1990 for violating Rule No. 2. The Grievant returned to work on December 13, 1990. He was late on that day and had several more instances of tardiness, early departures, or absences during the week following his return. He was suspended pending investigation on December 19, 1990 and ultimately was discharged via letter postmarked December 21, 1990.

The Grievant presented information at the arbitration hearing indicating that he became depressed and anxious after the accident, and has been treated by a psychiatrist for these symptoms. The Grievant also presented evidence that he has had other personal problems since the accident, including financial problems.

The Union filed the instant grievance over the discharge. The Parties were unable to resolve the instant grievance and the matter proceeded to arbitration. It is within this factual context that the instant dispute arises.

**The Company's Position**

The Company argues that the discharge was justified and that the instant grievance should be denied. The Company argues in support of this position that, first, the Grievant had full knowledge of the rules violated. The Company points out that the rules in question are actually made a part of the collective bargaining agreement, and notes that the Grievant was a Union Committeeman at one time.

The Company argues further that its rules are reasonable and argues that an employer must be able to discipline and even discharge an employee who cannot maintain regular attendance, even if the reasons for the absences involve genuine illnesses. In support of this view, the Company points to arbitration awards in which arbitrators have stated that an employer need not retain an employee who has in effect become a part-time employee. The Company argues further that the evidence in this case establishes that the Employer suffered detrimental financial effects from the Grievant's frequent absences during the applicable period.

The Company also contends that the Grievant's absences clearly were outside the guidelines established by the Absenteeism Policy. That policy defines excessive absenteeism as one day per month. The Company argues that the Grievant's record demonstrates that he clearly exceeded these limits.

In addition, the Company argues that the Grievant did not provide sufficient documentation relative to his absenteeism. According to the Company, none of the dates on these documents corresponded with the dates of the Grievant's absences or tardiness, or provide sufficient reasons to excuse the Grievant's absenteeism.

The Company argues further that it has consistently administered Company Rule Nos. 2 and 11 and the Absenteeism Policy. As support for this position, the Company notes the evidence introduced at the arbitration hearing that the Company has discharged employees for violation of the absenteeism policy. The Company also notes that a discharge under the policy, preceded by progressive discipline, has been upheld by an arbitrator. The Company contends that progressive discipline was applied in this case. The Company contends further that the Grievant's overall work record supports the action.

According to the Company, the discharge in this case meets the just cause standard. The Company also notes that the Unemployment Compensation authority reached the same conclusion relative to the Grievant's discharge.

Having allegedly established a *prima facie* case that the Grievant was discharged for just cause, the Employer contends, the burden shifts to the Union to put forth sufficient evidence to refute that case. The Company contends that the Union has failed to do so in this case.

In support of this contention, the Company disputes the Union's argument that the Grievant was suffering from Post Traumatic Stress Disorder. According to the Company, its own medical witness testified that the usual problems caused by the disorder do not appear in the Grievant's medical records. In addition, the Company argues that the Grievant's psychiatrist did not describe the specific treatment he prescribed for the Grievant. The Company argues that the Grievant's physician did not testify regarding the normally accepted means of treating the disorder, which includes placing the person in the situation associated

with the stress which precipitated the disorder.

The Company notes that the Grievant acknowledged that he never made any Company representative aware of his fears about working. The Company argues further that the Grievant's testimony regarding his absences, especially regarding the three absences for which he presented documentation, was unbelievable. The Company contends that the Grievant displayed a contempt for the Company's policies and simply scheduled personal matters during work time, when they could have easily been taken care of during non-working hours.

The Union has failed to establish that the Company acted in an arbitrary or capricious fashion, according to the Grievant. The Company contends that the Union's case has merely been fashioned in order to gain leniency from the Arbitrator, and leniency is not a prerogative for the Arbitrator, but rather for management.

The Company contends that the Union has not presented any compelling evidence that the Company abused its discretion or that the Grievant's rights under the Agreement have been violated. Therefore, the Company requests that the instant grievance be denied.

**The Union's Position**

The Union contends that the Employer did not meet its burden of proving that just cause existed for the Grievant's termination. As support for this view, the Union argues first that the Company's refusal to accommodate the Grievant's disability contributed to his excessive absenteeism, and ultimately resulted in his discharge.

The Union contends that the Grievant is both physically and emotionally disabled. The Union argues that he has lost part of his finger and that he suffers from post-traumatic stress disorder. The Union argues that the Company was more concerned with getting the Grievant back to work and reducing its workers' compensation liability than in his medical condition.

The Union argues that there was sufficient evidence that the Grievant did suffer from post-traumatic stress disorder. The Union notes his weight loss, his withdrawal from other people, the bad dreams and flash backs all as evidence of this disorder. In addition, the Union points out that the Company's medical expert psychologist never even examined the Grievant. The Union argues further that even the medical records of the Company's independent expert indicate that in October, 1990, the Grievant still was experiencing severe sensitivity of the finger amputation stump.

The Union also disputes the Company's argument that the Grievant erred in not consulting the Company's Employee Assistance Program. According to the Union, the Grievant was seeing his own psychiatrist and to see another expert would be at least duplicative, and perhaps counterproductive.

The Union argues further that psychoneurosis with depression is a recognized disability in the state of Wisconsin, and therefore must be accommodated, under state law. Even if there were no legal protection for the employee's disability, however, the Union argues that simple equity suggests that the Employer should bend the attendance rules somewhat upon an injured employee's return to work. This is especially true where there is still physical suffering, the Union argues.

The Union argues further that under these circumstances the Company had a duty to accommodate the Grievant by placing him in one-handed work.

In addition, the Union argues that at least some of the documents relied upon by the Grievant to explain his absences should have resulted in excused absences. According to the Union, the documents in question all provided some corroboration of the occurrences which caused the Grievant's absences. In support of this position, the Union argues that the Company knew that the Grievant was experiencing a slew of personal problems during this period, including financial difficulties, problems with his ex-wife, his car and his house financing. The Union argues that while every absence cited by the Company may not be excusable, certainly some of them should have been excused. According to the Union, the Company cannot unreasonably refuse to accept a justification given by an employee under the terms of its absentee policy.

Furthermore, the Union argues that mitigating factors present in this case require at least a reduction in the penalty. The Union notes in particular the Grievant's tenure of more than twenty (20) years with the Company as a mitigating factor. The Union argues further that the Grievant's reinstatement agreement from 1989 is not relevant to this case because it involved discipline for producing too much scrap on his machine job at that time. The instant discipline involves only absenteeism issues, and the Union argues that the Arbitrator would have to go back ten years to find any discipline relating to absenteeism.

The Union argues further that none of the Grievant's other terminations for excessive absenteeism involved lost time due to an industrial injury. According to the Union to dismiss the Grievant from work in this economic climate, with his injury will ensure that he will not work again. Such an action, the Union asserts, would be unjust in view of the mitigating circumstances in the instant case.

As a remedy, the Union requests that the Grievant be awarded back pay and benefits for the period between December 21, 1990 and June 12, 1991, when the originally-scheduled arbitration had to be rescheduled due to the unavailability of one of the Union's witnesses. The Union also requests a back pay between the date of the arbitration and the date of the award.

**Opinion**

This is a case involving the discharge of the Grievant for excessive absenteeism. The Parties have presented the following issue(s) to the Arbitrator:

1. Was the Grievant discharged for just cause?
2. If not, what shall the remedy be?

The Arbitrator has carefully considered the testimony, evidence and arguments put forth by the Parties and concludes that the Grievant was not discharged for just cause. The Arbitrator's findings, conclusions and reasoning are set forth below.

About one year prior to his discharge the Grievant was involved in a serious accident on the job. The Grievant got his hand caught between his vehicle and another vehicle, crushing one finger and nearly severing part of another. Part of one finger was amputated and he did not return to work for more than six months.

When the Grievant did return to work he was given a light duty labeling job for a number of weeks and then was assigned back to his regular job as a fork lift driver. As soon as he returned to work he began accruing a higher than normal amount of absenteeism. This pattern continued through several stages of progressive discipline, until the Employer finally discharged him in December, 1990.

The Union has argued on the Grievant's behalf that the Company forced the Grievant to return too quickly to the job on which he was injured, considering both the physical and psychological suffering and limitations he was undergoing during the Fall of 1990. Because these physical and emotional problems were the direct result of the Grievant's injury on the job, the Union asserts, the Grievant should not have been discharged.

The Grievant's attendance record for the Fall of 1990 is very poor. As a threshold matter, the Union has argued that the Company has not given adequate consideration to the documents which the Grievant did submit in order to excuse his absences on several of the disputed dates. The Company has argued that the documents do not correspond to the dates in question and furthermore, that the reasons given for the absences are not justifiable anyway.

The Arbitrator does not concur wholly that the dates for which documentation was ordered are totally incompatible with the dates of the Grievant's absences. The documentation regarding the small claims court date, for example, is the same day that the Grievant said he was absent in order to meet the court date. Although the Grievant left work several hours after the time of his court date, he indicated that he did so in order to avoid missing more work.

The Arbitrator also believes that it is reasonable that the documentation regarding the sale of the Grievant's home could indicate that he was looking for financing several days earlier. However, the Arbitrator does concur with the Company's analysis that under normal circumstances, the reasons for the Grievant's absences during this period are generally not excusable. For example, the Grievant probably could have moved on some date other than a regularly-scheduled work day. If that was the only possible day on which he could move, he should have made arrangements with his Employer ahead of time to do so. And, as the Employer pointed out, it was probably likely that the Grievant could have talked to financing companies during sometime other than his regular work hours.

If the Grievant had experienced the work pattern of the last several months before his discharge for his entire tenure with the Company it is clear that his tenure would have been much shorter. Although the Grievant's record indicates that he had some attendance problems ten (10) years earlier, there was no record of any discipline over attendance since that time period.[1] A pattern of frequent absences over a relatively short

[1] This is not to suggest that the Grievant's overall disciplinary record is stellar, or that the Arbitrator should totally ignore the other instances of discipline which do not involve absenteeism. When considering the long tenure of the Grievant with the Employer, the Arbitrator must consider the quality of that tenure as well.

period of time after a long record of acceptable attendance often indicates a major change in an employee's life which has caused the disruption to his job.

The Company's witnesses testified that the Grievant told them that he was suffering from a combination of personal problems, especially financial problems, including the loss of his home, problems with payments to his ex-wife and problems in keeping his car maintained and running. There is evidence that Company personnel knew that these financial problems stemmed in part from delays in the payment of benefits while the Grievant was out of work due to his on-the-job injury. According to the Company, the Grievant should have sought help from the Company's Employee Assistance Program to help him overcome his personal problems.[2]

The Union contends that the Grievant's problems were more directly caused by his continued pain and suffering from his hand, and from post traumatic stress disorder (PTSD) suffered as a result of the accident on the job. The Union argues that the Company insisted that the Grievant be returned to his regular job before he was physically or emotionally capable of doing so, which led to his excessive absenteeism.

The Grievant's physical state, and his capability to perform his former job, or any two-handed job, is somewhat unclear. The Company's physician released the Grievant to return to his regular job by a report dated September 5, 1990. However, in his report dated October 15, 1990, the same physician reported that the Grievant was still experiencing "severe sensitivity of the right long finger amputation stump." In spite of concern over the Grievant's "severe sensitivity" and the formulation of "neuromas" on the end of his amputated stump, the physician concluded that the Grievant could continue to work his job as a forklift operator, if some kind of splint or protection was placaed over his stump. It is not clear whether such a splint or other kind of protection ever was used by the Grievant.

The Grievant's physician, who had consistently treated him since the injury, was still contending on October 1st that he should be assigned only to light one-handed duty. At that time he already had been reassigned to his forklift job.

The Arbitrator concludes from this information that it is possible that the Grievant was experiencing pain and difficulty working with his right hand during the period which led to his discharge. It is not clear to the Arbitrator even now whether the Grievant has substantial use of his right hand, or even sufficient use to operate the Raymond forklift truck.

Dr. Joseph Ziccarelli, a psychiatrist, testified for the Union that he had treated the Grievant and that in his opinion the Grievant suffered from post traumatic stress disorder. He testified that the Grievant reported experiencing nightmares about the accident, flashbacks, difficulty sleeping, weight loss, loss of energy and depression. He also testified that someone who experiences this disorder often tries to avoid the situation which caused the accident. The Grievant's testimony corroborates that of the psychiatrist.

The evidence presented at the arbitration hearing convinces the Arbitrator that the Grievant's symptoms are symptoms of post traumatic stress disorder, and that it is believable that the Grievant would experience this emotional disorder as a result of the industrial accident which took part of his right hand. The Union has pointed out that prior to this accident the Grievant had been a very physically active man, who played basketball and engaged in martial arts. The loss of these activities, the permanent disfigurement of his hand, the horror of experiencing the accident itself, and the attendant financial problems which occurred when the Grievant was off work for six months of recovery all help to convince the Arbitrator that it was not unlikely that the Grievant would experience this disorder.

The Grievant's conduct when he returned to work also suggests the avoidance and anxiety which his psychiatrist testified are common symptoms when a person is faced with the situation or location associated with the initial event which gives rise to the stress. The Grievant was unable to complete a full day of work on the day he first returned to work, after his six-month recovery period. Furthermore, his psychiatrist noted an intensifying of some of his symptoms around the time he returned to work, such as increased weight loss and a decreased ability to sleep. This caused his physician to increase the dosage of one of his drugs.

The Company presented testimony from a psychologist (not a psychiatrist) that tended to contradict the assertion that the Grievant was suffer-

[2] The Grievant indicated that he already was seeing a psychiatrist, and thought therefore that he need not also see the Employee Assistance Program counselors.

ing from post traumatic stress disorder. This witness noted that there was no report of the symptoms associated with the disorder in the records of the Grievant's primary treating physician, Dr. Shimanek. The Arbitrator has examined the records of the treating physician and notes that there are no notations about the Grievant's mental or emotional state in them. All of the notations relate to the physical state of his hand. It may be that it did not occur to the Grievant to tell the physician treating his hand about his psychological/emotional distress. Clearly the focus of their encounters revolved around the state of his hand.

Even more importantly, the psychologist testifying for the Company never examined the Grievant himself, before forming his conclusions regarding whether the Grievant was suffering from post traumatic stress disorder. The Arbitrator concludes that the psychologist simply did not have sufficient information to decide whether this particular individual was suffering from the disorder, without ever examining the Grievant or talking to him.

The Company's witnesses acknowledged that they did not consider that the Grievant had a fear of returning to work when they issued the discipline leading up to and including his discharge for excessive absenteeism. This is not entirely the Company's fault because, as discussed below, the Grievant never clearly communicated to the Company that he had this fear. However, there was evidence that the Company was "going by the books," without considering the actual physical or emotional state of the Grievant in determining whether he could return to his full duties. For example, the Safety Director testified that in making his determinations regarding the Grievant, he used standardized data indicating that the typical employee can be expected to return to work within four (4) to six (6) weeks after such an injury. As the Union pointed out, at that point the Grievant did not even have the metal pin removed from his ring finger, and until that pin was removed he could not begin his full program of rehabilitative therapy.

The Arbitrator concludes that there is substantial evidence that the Grievant was suffering from post traumatic stress disorder as a result of his industrial accident. The Union has suggested that the Employer had a responsibility to offer reasonable accommodation to the Grievant as a disabled person. The Agreement contains an anti-discrimination clause which covers the disabled (handicapped). If the Grievant was suffering from a permanent or even long-term temporary physical disability because of the injury to his hand during the relevant period, the Employer probably had a responsibility to reasonably accommodate him under federal or state laws prohibiting discrimination against the disabled. In addition, if post traumatic stress disorder is considered a mental or emotional disability, it also may have triggered a responsibility to accommodate the Grievant, within reasonable limits.

The Union has presented evidence that Wisconsin law makes it unlawful for an employer to refuse to "reasonably accommodate an employee's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business." (Wis. Stat. Sec. 111.34(1)(b)). Furthermore, the Union points to a decision from the Wisconsin Department of Industry, Labor and Human Relations as indicating that psychoneurosis with depression is a recognized disability in the state of Wisconsin. *Colloton v. Prudential* (3/31/75). The Union also contends that post traumatic stress disorder falls into this category. It is not clear to the Arbitrator whether federal law applies in this case.[1]

These obligations arise not only from federal or state law, however, but equally important, from evolving principles of industrial common law. A recent treatise on the subject has characterized the current state of the standards arising from grievance arbitration as follows:

> While the quantum of evidence varies, it is generally accepted that a dismissal or refusal to reinstate an employee is inappropriate unless the evidence indicates that the employee's physical disability prevents him or her from performing a job and/or exposes the worker or other employees to the likelihood of serious risk of physical harm or injury.
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> (*Labor and Employment Arbitration*, vol. 2, Bornstein and Gosline, Supplement, 1991, pp. 27-2 to 27-3).

Under these principles and Wisconsin state law, the Arbitrator concludes that the Employer had a duty to reasonably accommodate the Grievant as a disabled person during the time leading up to his discharge. A difficult issue in this case is whether the Employer should have known that the Grievant was suffering from a disabling condition. There is no evidence

[1] Generally the federal Rehabilitation Act applies only to federal contractors. It is not clear yet whether the Americans with Disabilities Act will apply retroactively.

that the Grievant ever told his supervisors, or anyone in management about his fear or anxiety regarding returning to work.

The dismissal of a psychologically/emotionally depressed employee for excessive absenteeism has been upheld in several cases by arbitrators where the employee refused to reveal to management the condition or symptom of his illness. (See cases cited in *Labor and Employment Arbitration, supra*, at p. 27-19, n. 11). However, in the instant case the Arbitrator concludes that there was sufficient notice of problems resulting from the Grievant's injury that the Company should not have discharged the Grievant without further investigation. The evidence indicates that the Grievant's medical records were provided to the Company or its agent. These records indicate that the Grievant's own physician did not believe that he should be off light duty at the time he was returned to his regular job. Furthermore, during the relevant time period the Grievant was involved in a second accident on the job, resulting in a minor injury because he could not lift a pan as part of his forklift job. Furthermore, the Company also at some point discussed the Grievant's psychological state with his psychiatrist. The psychiatrist was treating the grievant for the aftermath of the accident, including his fear of returning to work, and according to the Company's witness, that issue was discussed.

The Company also has argued that the accepted remedy for post traumatic stress disorder is to get the patient back involved in the "stressing" situation as soon as possible. The Union argues that that is not the case where the patient is still undergoing physical problems associated with the injury, however. The Arbitrator concludes that it is very possible that the Grievant's physical condition made him more frightened to return to work, since it limited his ability to perform the work, and once he was assigned to a forklift truck, made it more likely that he might be injured again.

The Arbitrator concludes that under all the circumstances involved here, the penalty of discharge was inappropriate. Nevertheless, the grievant bears a substantial responsibility for not making the company better aware of his alleged disability. The Arbitrator concludes therefore that although the Grievant shall be reinstated, he shall not receive back pay for the period he was out of work.

Furthermore, even the duty of reasonable accommodation is not absolute. If it is found that the Grievant is disabled, and reasonable accommodation is made, but the Grievance's attendance record does not improve substantially, the Employer may still be justified in terminating his employment. Arbitrators have long upheld the right of employers to terminate workers for chronic absenteeism, even though that absenteeism is the result of legitimate reasons such as illness or even on-the-job injury. (See Bornstein and Gosline, *supra*, at p. 27-7). In such cases arbitrators have ruled that the Employer is not really punishing the employee, but rather deciding that the enterprise needs an employee who can maintain regular attendance.

In reaching the ultimate conclusions in the instant case the Arbitrator of course has considered the Grievant's twenty-two (22) year tenure with the Company. The Arbitrator also has considered, however, that the Grievant does not have an exemplary work record.

The Arbitrator has attempted to fashion an award which protects both Parties' rights. The Grievant will be reinstated, without backpay and with certain conditions attached to his reinstatement.

**AWARD**

The instant grievance is sustained in part. The Grievant is to be reinstated without back pay. The Company and the Union are to agree upon one physician and/or psychiatrist to examine the Grievant's suitability to return to work and to his job assignment.

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**DES MOINES INDEPENDENT SCHOOL DIST. —**

**Decision of Arbitrator**

In re DES MOINES [Iowa] INDEPENDENT SCHOOL DISTRICT and DES MOINES EDUCATIONAL ASSOCIATION, FMCS File No. 91/27629, March 27, 1992

Arbitrator: William J. Berquist, selected by parties through procedures of the Federal Mediation and Conciliation Service

**TRANSFER OF EMPLOYEES**

**— Transfer — Seniority — Reverse discrimination — Prior rulings ▸100.08 ▸100.33 ▸100.0783**

School district properly transferred newly hired African/American teacher to position at elementary school over more senior and qualified grievant, despite contentions that