STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RIVER VALLEY EDUCATION ASSOCIATION, Complainant, vs. RIVER VALLEY SCHOOL DISTRICT, Respondent.	Case IV No. 28501 MP-1246 Decision No. 18993-A

Appearances:
Mr. David B. Nance, Attorney at Law, 618 Division Street, Madison, Wisconsin 53704, appearing for the Complainant.
Mr. John N. Kramer, Attorney at Law, 1038 Lincoln Avenue, Fennimore, Wisconsin, 53809, appearing for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

River Valley Education Association having, on August 14, 1981, filed a complaint with the Wisconsin Employment Relations Commission alleging that River Valley School District had committed a prohibited practice within the meaning of Section 111.70(3)(a)(5), Wis. Stats.; and the Commission having appointed Christopher Honeyman, a member of its staff, to act as Examiner in the this matter and to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Section 111.07(5), Wis. Stats.; and hearing on said complaint having been held at Spring Green, Wisconsin on November 23, 1981 before the Examiner; and briefs having been filed with the Examiner by both parties, and the record being closed on March 3, 1982; the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That River Valley Education Association, herein the Complainant or Union, is a labor organization within the meaning of Section 111.70(1)(j), Wis. Stats.

2. That Complainant is the exclusive representative of all employes of the Respondent engaged in teaching, including classroom teachers, librarians, and guidance counselors, but excluding administrators, coordinators, principals and supervisors, non-instructional personnel such as nurses, office clerical, maintenance and operating employes, and persons employed on a per diem basis.

3. That River Valley School District, herein the Respondent or District, is a public school district organized under the laws of the State of Wisconsin having its principal offices at Spring Green, Wisconsin 53588, and is a municipal employer within the meaning of Section 111.70(1)(a), Wis. Stats.

4. That Complainant and Respondent are parties to a collective bargaining agreement, herein the Agreement, effective for the 1980-81 and 1981-82 school years, which among its provisions contains the following:

ARTICLE 3. MANAGEMENT CLAUSE:--

> The Board of Education on its own behalf, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by applicable law, rules, and regulations to establish the framework of school policies and projects including but without limitation because of enumeration, the right:

A. To the executive management and administrative control of the school system and its properties, programs and facilities, and the activities of its employes during working hours.

B. To employ and re-employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and their work assignments. In considering the above, the recommendations of the administration will be taken in to account.

C. To establish and supervise the programs of instruction, selection of textbooks and other teaching materials, the use of teaching aids, class schedules, hours of instrution, and length of school year.

The exercise of the foregoing powers, rights, authorities, duties, and responsibilities by the Board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes; and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin.

. . .

18. TEACHING LOAD:

A. No teacher in the junior or senior high school shall be assigned more than five (5) teaching assignments with one non-teaching assignment or with the teacher's consent six (6) teaching assignments and non-teaching assignments. No teacher shall have more than three preparations if at all possible. Assignment of the above classes shall be at the discretion of the Administration.

B. Whenever conditions require a teaching load in excess of that provided therein, the teacher shall receive additional compensation equivalent to fourteen and two-sevenths per cent (14-2/7%) of that teacher's salary on schedule for each assignment beyond those provided therein and will be paid only to those teachers who give up their preparation period with their approval.

C. It is recommended that class size be considered when scheduling classes K through 12. It is further recommended regular classes try to maintain a maximum of 25 students; fewer students in areas where equipment determines usable class size, such as labs, shop, home economics, etc.

. . .

5. That Ray B. Stone, herein Stone or the grievant, was employed by Respondent as an industrial arts and driver education teacher from 1969 to 1981; that on March 13, 1981 the District's School Board, by a notice signed by its Clerk Helen Silko, refused to renew Stone's teaching contract for 1981-82; and that said non-renewal stated in pertinent part as follows:

> "You are further informed that the reason for your nonrenewal is due to a reduction in staff arising out of a reduction in student enrollment which reduced the requirement of the present staff in your department of teaching and is made pursuant to the provisions of the master agreement between the School District and the Teachers Association pertaining to reduction in staff."

6. That in the 1981-82 school year Respondent assigned to Roger Kraemer, an industrial arts teacher, four class preparations.

7. That the Complainant filed and processed a timely grievance alleging that Respondent was violating Articles 18 and 30 of the Agreement by its layoff of Stone; that Respondent denied said grievance at all steps of the grievance procedure; and that said procedure does not provide for final and binding arbitration of unresolved grievances.

8. That the reasons given in the notice of nonrenewal referred to above were not the only reasons for which the District decided to reduce staff in the industrial arts department; that the reasons given in said notice of nonrenewal were not unrelated to the essential reasons for said nonrenewal; and that Respondent did not violate the Agreement by laying off Stone from the industrial arts department.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

That Respondent, by refusing to renew the teaching contract of Ray Stone for 1981-82, has not committed and is not committing a prohibited practice within the meaning of Section 111.70(3)(a)(5), Wis. Stats.

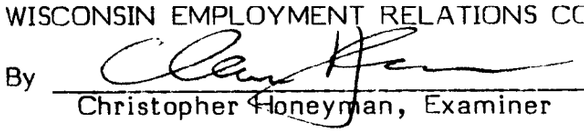
Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

ORDER

That the Complaint filed in this matter be, and the same hereby is, dismissed. 1/

Dated at Madison, Wisconsin this 4th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complaint, as originally filed, alleged that the District violated the parties' collective bargaining agreement (which does not provide for final and binding arbitration) and thus violated Section 111.70 (3)(a)(5), Stats., by selecting teacher Ray Stone for layoff from the industrial arts department. During the hearing, the parties stipulated that the issue be changed to whether the District violated the agreement by effecting a layoff at all in 1981-82 in that department, and further stipulated that if any layoff was justified, Stone was the correct choice. The Union's position as to which contract provisions were allegedly violated - Articles 18 and 30 - remained the same.

The pertinent provisions of the parties' 1980-82 Agreement are spelled out in Paragraph 4 of the Findings of Fact. The Union contends in part that the layoff of Stone violated Article 18 because another teacher, Roger Kraemer, was overloaded within the meaning of that Article as a result. At the hearing the Union disclaimed, however, any intent to treat the alleged violation of Article 18 as a violation of Kraemer's rights; the remedy expressly sought by the Union is reinstatement of Stone.

Background:

Ray Stone had been employed by the District for twelve years when, in February, 1981, he was informed that the District was considering not renewing his contract for the 1981-82 school year. Stone had been employed over the years to teach a variety of subjects, but in latter years had divided his time between industrial arts courses and driver education. There is no dispute that Article 30 requires that Stone be considered, and that he was considered, as being wholly within the industrial arts department for purposes of a layoff in that department.

At the hearing Stone testified without contradiction that he was first told of the possible layoff on February 25, 1981 by then - High School Principal Michael Manning, who allegedly stated that the reason was "decline in enrollment". The official notice of consideration of nonrenewal given to Stone at that time refers only to "a reduction in student enrollment" as the reason for the proposed nonrenewal. On March 13, 1981 a formal notice of refusal to renew Stone's contract was issued, which gave the reason as "a reduction in staff arising out of a reduction in student enrollment which reduced the requirement of the present staff in your department of teaching . . ." A grievance was thereafter filed 2/ and timely processed, alleging that "class enrollment is such that a regular full time contract should be offered. . . " At each stage of the grievance procedure, the District's denial of the grievance was phrased in terms referring to declining enrollment. At the hearing, however, Manning testified that the total number of children in the High School continued at about 450, and that the layoff in industrial arts was not necessarily even because of fewer students enrolling in industrial arts generally, 3/ but because there were "fewer students in sections". Manning testified that there were seven less sections of class offered in industrial arts in 1981-82 than in 1980-81, but indicated that the cancellation of a crafts class was part of this total. It is apparent from Manning's testimony that although he contended that low enrollment for this class would alone have resulted in its cancellation, the fundamental reason for dropping it was that it had been taken only by girls in the past and the District no longer considered such a class acceptable, as a matter of policy. What is not clear is exactly when the District's policy changed. The crafts class was included in the January student-preference survey, which showed only eight students interested: this may have been comparable to preceding years, in which, Manning testified, students had had to be recruited for the class at the last minute.

The evidence concerning projected student enrollment and numbers of sections to be taught, as expected at the time Stone's layoff was announced, is complex. The general parameters of assignment of courses, however, are relatively clear. In 1980-81, with Stone partly in the industrial arts department, there were an

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2/ The District initially raised, but in its brief withdrew, an objection concerning the grievance's timeliness.

3/ Tr. p. 77.

equivalent of 2 1/2 full-time teachers available in that department. In 1981-82 this number was reduced to 2. 4/

In 1980-81 a total of 26 sections was taught in industrial arts: ten by Kraemer, seven by Stone and nine by the other full-time industrial arts teacher, Anding. Actual sections (two of which, one per semester, equal one full-year course) to be taught in 1981-82 by Kraemer, as of the date of the hearing, were estimated at 10; for Anding, nine. (Another teacher, Schwartz, is technically in the same department but specializes in auto shop classes and has not been considered by the District as part of the industrial arts "pool" for purposes of layoff). More relevant to the dispute, however, are the calculations as of February, 1981 on the basis of which the District justified the layoff. Manning testified that he based his calculations of the necessary number of class sections on a survey of student preferences for courses, anually conducted about January by the guidance counselors. Manning testified that this survey, when tabulated, showed sufficient students for one fewer section in the courses taught by Anding; three fewer for Kraemer; and three fewer for Stone. The stipulation that Stone was correctly selected if any layoff was justified makes irrelevant much of the record evidence. It now makes no difference which teacher's courses could accurately be said to have declining enrollment; but in two instances, both involving Stone, the Union successfully attacked the District's reasoning. The crafts section, as noted above, was apparently finally dropped principally because of sex-discrimination concerns, and in regard to an advanced drafting course, formerly taught by Stone, Manning was unpersuasive in his explanation of why only one class 5/ was offered in 1981-82 when twenty-eight students had signed up for the course. Though he testified that eighteen students were actually taking it, this could be a self-fulfilling prophecy given space limitations in the drafting room, and certainly Manning's testimony in general was to the effect that the layoff plans were intended to allow students their choices rather than limit them. Stone testified credibly that in 1980-81 the advanced drafting course had been held with only twelve students. All witnesses agreed that the February projections are frequently proved wrong by last-minute registrations, scheduling conflicts and changes of heart by students. But it is evident both that the District, needing some objective basis for decisions, generally relies on these projections, and that Drafting II advance enrollment was sufficient to justify, in past terms, two classes for 1981-82.

The record contains unrebutted evidence to the effect that a number of 1981-82 industrial arts sections contain more students than their 1980-81 counterparts. At the same time, there is no evidence that the District has exceeded the "recommendation" of a 25-student limit expressed in Article 18 of the Agreement. Four new drafting tables, however, were added to the 18 formerly available during the summer of 1981, and it appears that the drop in sections of (beginning) Drafting 1 from 4 to 3 may be partly accounted for by greater numbers of students per section. Also, as alleged by the Union and admitted by the District, Kraemer was assigned six sections involving four class preparations (i.e. four different subjects) in the first semester of 1981-82.

Stone testified that early in the 1980-81 school year he had no knowledge that the District's administration had concerns about declining enrollment. But he also stated that, apparently about that time, "there had been some talk a time or two in some of our inservice meetings with Mr. Manning where he stated that some time we were going to have to face up to the fact that, of declining enrollments, but there was nothing definite and nothing to indicate that it was going to happen overnight." 6/

4/ After the layoff Stone was offered and accepted part-time hourly employment, without fringe benefits, to teach driver education to certain students whose schedules made it impossible to take this class during the regular school day. As the Agreement clearly provides that Stone was to be considered fully within the industrial arts department for layoff purposes, this driver education work is irrelevant to the merits of this dispute.

5/ Drafting II is a year-long class; each class therefore counts as two sections.

6/ Tr. p. 32.

The Parties' Contentions:

The Union's Position:

The Union contends that Article 30 of the Agreement requires the District to state its reason for a layoff, and that the propriety of the layoff must be measured against the reason originally given. The Union argues that there was in fact no reduction in anticipated student enrollment in industrial arts courses between 1980-81 and 1981-82 or in the number of sections of courses that might appropriately be offered. The Union analyses the record evidence concerning student enrollment, in essence, thus: in 1979-80 five hundred and thirty-nine students enrolled in industrial arts courses and thirty-seven class sections were offered, in 1980-81 there were five hundred and six students and again thirty-seven sections, but in 1981-82 a projected five hundred students were offered only twenty-eight sections. 7/

From these figures, the Union argues that the drop in enrollment, even if viewed over the "long" two-year term, was about 7% and far short of the 24% drop in sections offered.

The Union further argues that the District could have maintained the crafts class, increased its enrollment and solved its sex-discrimination concerns by "opening enrollment to boys", and that on the basis of past experience the District could expect enrollment in this course to pick up in the first week of class. The Union alleges that, together with the 1981-82 increase in certain class sizes, this shows that the District's real concern was not with declining enrollment but with saving money, and that the District opted to increase class sizes and reduce course offerings without telling Stone that this was what motivated his layoff. The Union maintains that the District should be estopped from using these reasons now.

With respect to Article 18 of the Agreement, the Union contends that assignment of four preparations to Kraemer violates Section 18A, that the alleged consent of Kraemer to this arrangement is not permitted by the Article's language, and that the only appropriate remedy for Kraemer's overload is the recall of Stone.

The Union further argues that the question of the mandatory or nonmandatory nature of the layoff language is irrelevant to this dispute, as the language already exists within the contract and is as enforceable as any other contract language.

The District's Position:

The District contends that layoff decisions are a nonmandatory subject of bargaining and that only the impact of layoffs need be bargained. The District argues that Article 30 is not a waiver of its absolute discretion to lay off teaching staff, that it merely provides for "impact provisions" once the Bord decides to exercise that discretion, and that the District fulfilled all the procedures required in these provisions. The District contends that use of the term "discretion" in Article 30 explicitly reinforces its free and unfettered right to act.

With respect to the facts of the case, the District argues that the record does support its decision to lay off a teacher in the industrial arts department, in that necessary sections of courses were reduced by a total of seven from an existing "underload" even in 1980-81. Both the increases in class size and the elimination of craft classses, even if the latter is solely based on sex-disrimination concerns, are defended by the District as management decisions which the District had the unfettered right to make but which were, moreover, reasonable under the circumstances.

The District additionally argues that the presence of certain possible specific reasons for layoff in Article 30 does not mean that the District must establish that the reason given was the sole operative reason for layoff and was correct on the facts; the District distinguishes layoff situations from certain

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7/ These figures include auto shop enrollments.

cases cited by the Union on the ground that the cited cases referred to "just cause" nonrenewal in the context of the teachers' performance, where a due process right is generally recognized which does not exist where the teacher's performance is not the basis of the employer's action.

The District responds to the claim of violation of Article 18 by asserting that the Union "agreed it was not seeking any remedy for the alleged violation..."

Analysis:

The undersigned does not agree with the District that the Union has waived any remedy for the alleged violation of Article 18; the record shows rather that the Union's attorney, at the hearing, disclaimed any intent to grieve or obtain any remedy on behalf of Kraemer.

Although the District admitted in its Answer that Kraemer was assigned to teach four sections, its assertion that Kraemer agreed to this arrangement was neither proven nor disproven by any record evidence. The Union concedes, however, that Kraemer has not filed a grievance. The undersigned concludes that the Union's construction of Article 18A is the more persuasive as to whether consent waives any issue here: the language of that section clearly places the "teacher's consent" in the context of teaching six rather than five teaching assignments (i.e. classes). In the following sentence, dealing with number of preparations (i.e. different subjects or courses) there is no reference to a teacher consenting to more than three.

The phrasing in Article 18A that "no teacher shall have more than three preparations if at all possible" has led the Union to claim that it was certainly possible for the District to avoid four preparations for Kraemer, by retaining Stone. This is technically correct, but the undersigned must wonder whether so extreme an interpretation would not also require the District to scour the countryside for a teacher to hire, should four preparations fall to the lot of another teacher sometime when no layoff was planned. The dubiousness of this idea indicates that a rule of reason must govern the intepretation of "if at all possible". But that being so, to order the recall of Stone because of this language alone would be using the proverbial sledgehammer on the gnat: the Union has not attempted to prove any greater violation of the Agreement's various teaching load provisions than this one instance of one excess preparation. Moreover, the Union has never grieved on behalf of the teacher most directly affected and ignores the possibility that some lesser action by the District might remedy this alleged violation. The undersigned finds, therefore, that even if Article 18 was violated by Kraemer's four preparations, reinstatement of Stone would be an inappropriate remedy.

With respect to the alleged violation of Article 30 the Union's arguments are again well put and again ultimately unpersuasive. The undersigned does not read Article 30 as being so favorable to management's discretion as the District urges. The fact that various reasons for layoff are spelled out in that article does imply that lack of a reason may cause a layoff decision to be overturned. But the reference to the Board's discretion shows that the parties did not intend the Board's actions in this area to be easily challenged. The conflict of ideas expressed in: "When the Board in its discretion determines to eliminate a teaching position because of a decrease in enrolment (sic), budgetary or financial limitations, educational program changes or to reduce staff for reasons other than the performance or conduct of the teacher . . ." requires resolution, and the undersigned interprets it as meaning that the District is under an obligation to have reasons for a layoff and, by implication, make them known to the Union and teacher involved; but that the Board's latitude is broad and its decision may be successfully challenged only if its stated reason is wholly unreasonable or unrelated to the actual reasons. In this connection the undersigned must note, contrary to the Union, that this language is not addressed to the same problems, and does not create the same protections, as the common "just cause" or similar provision relating to discharge, discipline or performance-based nonrenewal.

The record shows that certain factors not specified by the District at the time of the nonrenewal did enter into it. Although the overload on Kraemer was a de minimis factor in Stone's layoff, as noted above, the fundamental reason for cancelling the crafts class appears not to have been decline in enrollment. Also, one class, or two more sections, of Drafting II could have been justified on the basis of the February projections. And while the mere fact that a class can be

justified does not mean that the District has to offer it, and the District's sex-discrimination concerns may well have been a sound reason for cancellation of crafts in their own right, the Union was harmed, to a degree, in its ability to defend the grievant by the District's failure to specify these reasons at the time of the layoff.

To say this much, however, is not necessarily to find that the District's only reason given - decline in enrollment - was unreasonable or unrelated to the true reasons. Enrollment in the crafts class was low and had been low for some time, and Manning's testimony that some "sales" work had been required to get the class even 12 or 13 students was unrebutted. And more significantly, with seven fewer industrial arts sections, and only six fewer students overall, the fact that the recommended class size of 25 was nowhere exceeded implies that teaching loads had been under tolerable levels for a considerable time. The record contains evidence of a loss of thirty-five students between 1979 and 1981; there is no evidence as to numbers of students or courses before 1979. Yet Stone's testimony that Manning had said in inservice sessions that the District must "face up to" declining enrollment implies that the District thought of this problem not as a sudden arrival but as something that had been developing over a very long time. In view of the broad latitude given the District by the language of Article 30, it would be necessary for the Union to demonstrate that historical levels of student enrollment in industrial arts were at or about their present level; since this is not shown, since there has been at least a degree of decline in the last two years and since even the present class sizes do not exceed recommended limits, the undersigned can only conclude that the benefit of the doubt lies with the District and that it has not been established that viewed over the long term, there has not been a decline in enrollment in industrial arts. Once that conclusion is reached, it is sufficient to the purposes of Article 30: even if the District did not give its full reasons for the layoff and even if one of its actions (the one class set up of Drafting II) was perhaps an error, the reason it did give has not been shown to be either unreasonable or unrelated to the layoff. Accordingly, it is the undersigned's conclusion that the grievance is without merit and that, in consequence, Section 111.70(3)(a)(5), MERA has not been violated.

Dated at Madison, Wisconsin this 4th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

Christopher Honeyman, Examiner