

negotiations with the MEA on matters concerning hours, wages and conditions of employment, but per diem substitutes, supervisory and confidential personnel are excluded.

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SECTION III - MANAGEMENT RIGHTS

It is expressly agreed and recognized that the School Board shall retain exclusive right and responsibility in accordance with all applicable laws, rules and regulations to establish all aspects of educational policy, and shall be limited only by the specific terms of this agreement.

SECTION XVII - LAYOFF

1. If necessary to decrease the number of teachers by reason of a substantial decrease of pupil population, or lack of adequate funding, or for any other reason within the school district, the governing body of the school system or school may layoff the necessary number of teachers in the inverse order of the appointment of such teachers within a department based on qualifications. Department shall be defined as K-8 and high school; qualifications shall include certification by the state, past experience within the system, and ability of individual to perform in alternate positions. No teacher may be prevented from securing other employment during the period he/she is laid off under this subsection. Such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies. Such reinstatement shall not result in a loss of credit for previous years of service. No new or substitute appointments may be made while there are laid off teachers available who are qualified to fill the vacancies. Teacher re-employment rights shall extend two (2) years from completion of last contract.

2. If a layoff is necessary, teachers to be laid off shall be notified as soon as possible. Since teachers do have recall rights up to two (2) years, it is their responsibility to keep the Board notified as to their whereabouts.

5. That Cheryl Martinsek was employed by the District as a full-time teacher starting in the 1977-78 school year through the 1980-81 school year; that Martinsek taught half-time during the 1981-82 and 1982-83 school years; that in 1982-83 she taught one English 7 class, one English 8 class and one "cluster" involving library skills for seventh and eighth grade students; that she has taught SEN students in her mainstream English class; that Martinsek holds a lifetime license to teach Secondary School English, and a five-year license, expiring on June 30, 1988 to be an elementary and secondary librarian and audio-visual co-ordinator; that on February 25, 1983 2/, District Administrator James M. Kenyon gave Martinsek preliminary notification that based on declining enrollment and lack of funds she would be layed off, effective on or about June 10, 1983, and that subsequently she was layed off according to that notice.

6. That District students having difficulties are evaluated by a multi-disciplinary team (M-team), which determines whether they are Exceptional Educational Need (EEN) students; that EEN students are further identified by the area or areas of special needs such as Learning Disability (LD) or Emotionally Disturbed (ED); that prior to the 1983-84 school year, ED students were offered placement outside the District, but their parents usually chose to have the students taught in the District's special education classes by Stephanie Kichak, who is certified to teach LD but not ED students; that on August 25, the State

2/ Unless otherwise noted, all dates herein refer to 1983.

Special Education Supervisor, Emotionally Disturbed Programs wrote the following letter to Herb Bierman:

Mr. Herb Bierman
Director of Special Education
CESA #12
P.O. Box 848
Minocqua, WI 54548

Dear Mr. Bierman:

It has come to the attention of department staff that seven students, who are enrolled in the Mercer School District have been identified as emotionally disturbed and in need of special education but are not currently enrolled in a special education program.

In order to be able to advise you of possible placement options, please submit to this office copies of the student's IEPs and placement recommendations.

Following a review of these materials, this office will be in touch with you.

Sincerely,

DIVISION FOR HANDICAPPED CHILDREN
AND PUPIL SERVICES

Stephanie J. Petska /s/
Stephanie J. Petska
Special Education Supervisor
Emotionally Disturbed Programs

SJP:mge

cc: James Kenyon, District Administrator
Paul Halverson, Director, Bureau of Exceptional Children
Tom Stockton, Program Administrator

that State regulations allow an EEN student to be taught by a teacher not certified in the area of need, if an Individual Educational Plan (IEP) is prepared by a teacher certified in the area of need and said student is placed in regular classes of non-EEN students (mainstreamed); that Special Educational Need (SEN) students are those who have some learning deficit, usually one to two years behind grade level, but whose educational problems are not as severe as the EEN students; and that DPI does not require that SEN students be taught by specially certified teachers or that an IEP be designed for them.

7. That Cheryl DuBrava is certified to teach Emotionally Disturbed students, Kindergarten through twelfth grade; that prior to coming to Mercer, DuBrava taught at the Ethan Allen School for Boys for two years; that during her interview, DuBrava was told she would teach one English class; that DuBrava was first hired by the District in September, 1983 and began teaching roughly two weeks after the start of school; that her original assignment was as follows:

<u>Hour</u>	<u>Class Title</u>	<u>M-Teamed Exceptional Needs Students</u>	<u>Learning Disability Students</u>	<u>Emotionally Disturbed Students</u>	<u>Other</u>
First	Reading Block	2	Unknown	Unknown	Unknown Number All second thru 6th grade

<u>Hour</u>	<u>Class Title</u>	<u>M-Teamed Exceptional Educational Needs Students</u>	<u>Learning Disability Students</u>	<u>Emotionally Disturbed Students</u>	<u>Other</u>
Second	English 3/	3 4/	0	0	7 Special Educ. Needs
Third	Math Block	No students actually assigned			
Fifth	Secondary Skills Lab	6	3	3	1 (first semester)
Sixth	Secondary Skills Lab	6	4	2	0
Seventh	Secondary Skills Lab	4	3	1 (determined ED at previous school)	6 sixth seventh and eighth graders for study hall, Monday, Wednesday Friday

and that on September 29 DuBrava's first and third hour assignment was revised to be the following:

First	Secondary Skills Lab	4	0	4	0
Third	Secondary Skills Lab	4	2	2	0

8. That Ruth Levenson has been employed by the District for ten years as a Library Aide, that she performs primarily clerical functions such as preparing new books to be included in the library, shelving books and periodicals; that she does not perform the duties of a certified librarian and does not teach research skills, nor help students prepare bibliography nor select books and periodicals for acquisition; 5/ that during the five periods she is in the library during the 1983-84 school year, she is the only adult present and must supervise roughly the following number of students using the library as a student hall:

Period	1	2	3	4	5
Students	2	2	6	30	17

that Levenson has supervised study halls since January, 1974; that non-certified personnel have supervised study halls in the District since November, 1970; that in 1982-83, in order to accommodate Levenson's request to work mornings only, Band Teacher Bruce Hering monitored the library Study Hall fifth period by occasionally leaving his band sectional class in the adjacent room to supervise the study hall; that neither Hering nor District Administrator Kenyon were satisfied with this combined band sectional and library study hall assignment.

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- 3/ These students receive English credit toward their graduation requirements.
- 4/ The category of these students is clear only to the extent that DuBrava testified that they were not ED students. However, all other M-Teamed students taught by Du Brava were either LD, ED or both.
- 5/ Levenson testified that she annually removes the "swimsuit issue" of Sports Illustrated from the shelves, but this action is taken at the direction of Librarian Jean Babic.

9. That on September 16, the Association grieved the District's action in failing to recall layed off teachers to assignments and/or positions for which they are qualified; that the original grievance signed by layed off elementary teacher Janis Flesch, did not specify the aggrieved layed off teacher; that on October 7, after the District denied the Step One grievance, and after the schedule change dropping the elementary students from DuBrava's assignment had been made, the Association filed a Step Two grievance specifying Martinsek as the aggrieved, layed off teacher; that the parties do not dispute that the matter has been properly grieved and the grievance procedure has been exhausted.

10. That a single class, Period Two English, which Martinsek was qualified to teach existed in the 1983-84 schedule, but that one class does not constitute a vacancy.

On the basis of the above and foregoing Findings of Fact, the Examiner issues the following

CONCLUSIONS OF LAW

1. That inasmuch as the parties' collective bargaining agreement does not provide for final and binding arbitration, the Examiner exercises the jurisdiction of the Wisconsin Employment Relations Commission to determine the alleged contract violation pursuant to Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

2. That the District, by not recalling Grievant Cheryl Martinsek did not violate the collective bargaining agreement and therefore did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5, of MERA.

3. That the Association did not meet its burden of proof that the District violated Section 111.70(3)(a)1 of MERA.

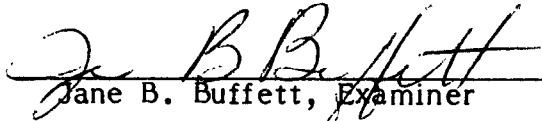
On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 6/

It is ordered that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 16th day of January, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By  _____
Jane B. Buffett, Examiner

6/ 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

(Footnote 6 continued on Page 6)

(Footnote continued)

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.

SCHOOL DISTRICT OF MERCER

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. POSITIONS OF THE PARTIES

The Association argues Cheryl Martinsek's layoff was not necessary as there was not a declining enrollment at the secondary level, not a lack of funds, and not a binding state mandate to hire a teacher certified in teaching the emotionally disturbed. It asserts the District created and filled a new position while failing to recall a layed-off employe. The Association contends that the District shifted work outside the bargaining unit by assigning five daily hours of library work to Ruth Levenson, a non-certificated employe in order to lay off Martinsek. It argues that the District layed off a half-time employe and replaced her with a full-time employe whose specialized certification was not necessary for three of her classes. Finally, it claims the District's decision to lay off Martinsek must be justified by the class assignments made at the beginning of the school year, as well as the revised schedule created in response to parents' objections.

The District asserts that no vacancy existed to which Martinsek could be recalled. It contends the District had merely exercised its management rights when it determined that a teacher trained in Special Education should teach the second hour English class of three EEN (Exceptional Educational Needs) students and seven SEN (Special Educational Needs) students. Since these students were not being mainstreamed, it was not possible that Martinsek teach the class with an Individual Education Plan designed by a Special Education Teacher. As to the Monday, Wednesday, and Friday study hall taught by Kichak and DeBrava they were assigned to these teachers because they had an available room. Finally, the District argues that the Library Study Hall monitored by Ruth Levenson has been monitored by the non-certified Library Aide for ten years, therefore, assigning such a non-certified aide to Library Study Hall has risen to the status of a binding past practice, and Martinsek does not have bumping or recall rights into a non-certified position. The District cites arbitration awards involving other contracts and parties in support of its position.

II. DISCUSSION

A. Necessity of Layoff

In arguing that the District has not met the necessary conditions for layoff, the Association refers to the collective bargaining agreement which provides three reasons for layoffs: (1) "substantial decrease of pupil population," (2) "lack of adequate funding," or (3) "any other reason within the school district." Inasmuch as the agreement provides that any one of these conditions may be the basis for layoff, it is not necessary to belabor the minimal record evidence on decrease of pupil population or funding. Pursuant to the agreement, "any other reason within the school district," by itself can be a sufficient basis for a layoff. In this case, the District's reason was the decision to shift resources away from the seventh and eighth grade course in library skills and to make other realignments in teaching assignments, thereby eliminating the seventh and eighth grade English class available for Martinsek to teach. Those decisions were reserved to the District as educational policy under SECTION III - MANAGEMENT RIGHTS. Furthermore, there was no showing that the decision to eliminate the library skills class, and shift two sections of middle school English to other teachers 7/ were made in bad faith, with the ulterior motive of displacing Martinsek. Consequently, the original decision to lay off Martinsek did not violate the agreement.

B. MARTINSEK'S RECALL RIGHTS

In addition to challenging the original decision to lay off Martinsek, the Association also alleges that she was entitled to be recalled in September. It

7/ The Association did not claim that those teachers were less senior than Martinsek.

points to the recall provision, SECTION XVII - LAYOFF, 1. and asserts the District violated the contract by hiring DuBrava while Martinsek was on layoff, since Martinsek was qualified to teach some of the classes for which DuBrava was hired. Moreover, it asserts additional work, study hall supervision, was available for Martinsek.

To test the Association's theory, DuBrava's assignment must be analyzed to determine which, if any of DuBrava's classes Martinsek was qualified to teach, and the additional work must also be evaluated.

1. Reading Block and Math Block Periods One and Three (Before the September Schedule Modification)

The Association correctly argues that the propriety of DuBrava's appointment must be judged in the light of her schedule at the beginning of the school year, as well as her schedule after it was modified in mid-September. Neither the Elementary Reading Block nor the Math Block scheduled for DuBrava, periods one and three prior to the schedule change, involved classes that Martinsek was certified to teach. Martinsek is certified to teach English in grades seven through twelve, a certification which by definition does not include teaching elementary reading. Likewise, Martinsek was not certified to teach the Math Block. The Association's argument that DuBrava's ED certification was not necessary for those two class assignments is not relevant to the instant dispute that involves the District's failure to recall Martinsek.

2. Secondary Skills Lab-Periods One and Three (After the September Schedule Modification) and Periods Five, Six, and Seven

The Secondary Skills Lab involved EEN students, both LD and ED who come to DuBrava's classroom to work and to receive special help in any needed academic area. Additionally, DuBrava's responsibilities for these students extended beyond the classroom contacts, requiring her to design Individual Educational Programs and make reports to DPI for them.

The Association pointed out at the hearing that the letter from the Special Education Supervisor, Emotionally Disturbed Programs of the Wisconsin Department of Public Instruction (DPI) did not threaten a sanction against the District for failing to have a special program for ED students. Moreover, the Association presented evidence that DPI allows ED students to be taught by teachers not certified ED if the students are mainstreamed under an individual Educational Program. Nevertheless, the Association's brief did not question the District's prerogative to establish an ED classroom with a ED certified teacher. Likewise, the Association concedes that DuBrava's certification was necessary for the Secondary Skills Lab involving the ED students. Therefore, the Secondary Skills Labs, Periods One, Three, Five, Six and Seven were not classes which Martinsek was certified to teach.

3. English - Period Two

Although this class appears on the master schedule as Secondary Skills Lab, the students in DuBrava's Period Two class receive English credit towards graduation, and during DuBrava's hiring interview, Kenyon referred to this class as an English class. The class consisted of three LD students and seven SEN students, none of whom required DuBrava's ED certification. Although it is clear this small-enrollment class was especially designed to benefit these faltering English students, it is equally clear that it did not require DuBrava's certification. Similarly, while DuBrava's experience at the Ethen Allen School for Boys gave her experience in this area, there is also evidence that Martinsek had positive experiences in teaching these students in previous years when they were mainstreamed into her class. Therefore, the crucial fact remains that DuBrava was not certified to teach any students in the Period Two English class, whereas Martinsek was certified to teach English to the seven SEN students, and could teach the three LD students under an IEP.

4. Study Hall Students in Period Seven Mondays, Wednesdays and Fridays

The Association asserts the Study Hall students divided between DuBrava and Stephanie Kichak's classes during Period Seven rightfully constituted a class which Martinsek was qualified to teach. However, the Association does not point to any contract provision that obligates the District to remove these students

from the Skills Lab classroom and put them in a separate classroom for study hall, thereby creating a class which Martinsek could supervise. Absent such a specific provision, the educational policy decision regarding the level of staffing is reserved to the District under SECTION III MANAGEMENT RIGHTS. Therefore, if the District chooses to have those study hall students share a room with a Secondary Skills Lab class and have that teacher supervise them, it is not contractually prevented from doing so. Since the 1983-84 schedule contained no specific Period Seven Study Hall class and District is not contractually obligated to create one, it inevitably follows that there is no Period Seven Study Hall class which Martinsek can claim to be qualified to teach.

5. IMC - Period Five

The Association asserts that Library Aide Ruth Levenson's supervision of Study Hall students in the IMC during Period Five constituted a transfer of work out of the bargaining unit. The Association did not point to any provision it claimed restricts bargaining unit work, but even if such a provision were determined to exist, it is still clear that the District did not remove work from the unit. The Association's contention appears to rely upon the fact that during 1982-83, the Period Five IMC study hall was supervised by band teacher Bruce Hering who was responsible for occasionally checking on those students while he taught band sectionals in the adjacent room. In that instance, the study hall was an additional responsibility and not his primary assignment during that period. There is no evidence that the Association had objected that assigning both duties to Hering reduced bargaining unit work. Therefore, elimination of that additional responsibility for the 1983-84 school year presumably made the band teacher's Period Five assignment more manageable, but did not eliminate bargaining unit work.

Moreover, the District has a thirteen-year practice of using non-certified aides to supervise to some, if not all, Study Halls. The assignment of the band teachers to one period of supervision for the school year 1982-1983 does not purge that practice. Therefore, the use of Library Aide Ruth Levenson to supervise IMC study hall Period Five does not constitute a transferring of workload assignments out of the unit in order to evade the recall provision. Additionally, although Martinsek was qualified to supervise a Study Hall, she does not have seniority rights to the supervision of Study Hall. Since the District's practice of assigning non-certified aides to study Hall indicates that such supervision is not considered a teaching position, and the collective bargaining agreement pursuant to SECTION I - RECOGNITION covers teachers and their employment rights as teachers, Martinsek does not have recall rights to this Study Hall supervision assignment.

6. Summary

Having considered all the classes taught by DuBrava, both before and after the September schedule revision, as well as the IMC study hall supervised by Levenson, the Examiner determines that the only class which Martinsek is qualified to teach and to which she might have recall rights is the Period Two English class. The Association, which as complainant bears the burden of proving, by a clear and satisfactory preponderance of the evidence, that the District violated the collective bargaining agreement 8/, has not shown that such a single class constitutes a vacancy to which the grievant is entitled to recall within the meaning of Section XVII - LAYOFF or any other provision of the collective bargaining agreement. The only evidence of part-time employment of a certified teacher involves Martinsek herself who was employed half-time for the 1981-82 and 1982-83 school year. However, that fifty per cent employment is significantly different from the sixteen percent employment that a single class entails. A sixteen percent work opportunity remains de minimus and cannot be considered a vacancy.

Similarly, there was no evidence of bargaining history that the parties intent was that a "vacancy" meant anything other than a synonym for "position". Upon the record, the Examiner cannot find that the District is obligated to hire employes for one-sixth time by recalling such a layed off employe. Accordingly, although the 1983-84 schedule contained one class a day that Martinsek was

8/ Section 111.07(3) made applicable to MERA pursuant to Section 111.70(4)(a).

certified to teach and for which DuBrava was not certified, that single class does not constitute a vacancy to which Martinsek was entitled to recall under the collective bargaining agreement.

C. ALLEGED VIOLATION OF SECTION 111.70(3)(a)1 STATS.

The Association did not meet its burden of proof that the District's action interfered with, restrained or coerced employes in the exercise of rights guaranteed by Sec. 111.70(2) Stats. Accordingly, the Examiner has also dismissed that portion of the complaint.

Dated at Madison, Wisconsin this 16th day of January, 1985.

By Jane B. Buffett
Jane B. Buffett, Examiner