STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ELROY-KENDALL-WILTON EDUCATION ASSOCIATION, Complainant, vs. ELROY-KENDALL-WILTON SCHOOL DISTRICT, Respondent.	Case 22 No. 48460 MP-2671 Decision No. 27609-A

Appearances:
Mr. Gerald Roethel, Executive Director, and Mr. James C. Bertram, Executive Director, Coulee Region United Educators, 2020 Caroline Street, P.O. Box 684, LaCrosse, Wisconsin 54602-0684, appearing on behalf of the Complainant.
Mr. Robert W. Butler, Jr., Staff Counsel, Wisconsin Association of School Boards, Inc., 122 West Washington Avenue, Madison, Wisconsin 53703, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 10, 1992, Elroy-Kendall-Wilton Education Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the Elroy-Kendall-Wilton School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act. On April 8, 1993, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on May 18, 1993 in Elroy, Wisconsin. The parties filed briefs and reply briefs, the last of which was received on July 12, 1993. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Elroy-Kendall-Wilton Education Association, hereinafter referred to as the Association, is a labor organization and its address is P.O. Box 684, 2020 Caroline Street, LaCrosse, Wisconsin 54603.

2. Elroy-Kendall-Wilton School District, hereinafter referred to as the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. and its principal offices are located in Elroy, Wisconsin 53929.

3. The Association and the District have been, at all times material herein, parties to a collective bargaining agreement covering all regular teaching personnel under contract including guidance counselors and librarians, but excluding substitute per diem teachers, office and clerical employes, the Superintendent, principals and other supervisory employes. The collective bargaining agreement contains a grievance procedure which does not culminate in the final and binding arbitration of grievances. The agreement also contains the following provisions:

ARTICLE III. MANAGEMENT RIGHTS RESERVED

A. Except as otherwise expressly provided in this Agreement, the management of the school system and its personnel are vested exclusively in the Board, including, but not limited to the right to hire, the right to discharge, suspend or otherwise discipline, the right to establish and revise reasonable rules subject to the grievance procedure, and the right to determine hourly and daily schedules of employment. The Board shall be the exclusive judge of all matters relating to the conduct of its business, including, but not limited to the building, equipment, methods and materials to be utilized. Nothing in this agreement shall limit in any way the Board's contracting or subcontracting of work, or shall require the Board to continue in existence any of its present programs in its present form and/or location, or on any other basis.

B. Nothing in this article is to be construed as limiting the negotiability of any items related to wages, hours, and conditions of employment.

. . .

ARTICLE VI. SALARY AND FRINGE BENEFIT STIPULATION

. . .

B. Advancement on Schedule

. . .

3. Denial of Increase

. . .

d. Should conditions fail to be corrected by March 1, said teacher would be given notice of non-renewal as prescribed in the statutory procedure for non-renewal of contract.

e. The parties recognize the authority of the Board to suspend, discharge, non-renew, or take other appropriate disciplinary action against teacher for just cause.

If, after an immediate hearing, the teacher and the Association allege that non-renewal was not based on just cause, the following procedures may, upon agreement between the Board and the Association, be used to resolve the issue:

1. Advisory arbitration
2. Binding arbitration

f. Teachers new to the District shall be on a probationary contract for the first three (3) contract years and shall not be subject to the "just cause" stipulation for Denial of Increment, or non-renewal procedures. A teacher on probation who is denied increment or contract

renewal may immediately appeal to Step 3 of the grievance procedure. All contracts issued as of July 1, 1980, shall contain an addendum above the teacher signature: "I, also, have been informed of District policy regarding Denial of Increment and non-renewal for teachers new to the District."

. . .

ARTICLE VII. NON-SALARY PROVISIONS

. . .

M. Lay-Off Clause--Reduction in Force

When a staff lay-off becomes necessary in the judgment of the Board, the Board will confine such lay-offs to become effective at the end of the school year, only. However, final notification may occur at any time-prior to May 15 of the school year prior to the lay-off.

When the necessity of a lay-off occurs, the parties agree that the Association will be informed of the need and the reasons therefore in advance and shall be invited to participate in discussions relating to the decision as to which staff member shall be recontracted and which shall not be recontracted.

Only factors to be considered in the process of determining lay-offs are:

1. Certification as per statutes of the State of Wisconsin and regulations of the Department of Public Instruction (no weighted points).

2. Factors, weighted

   a. Experience (22.5 points--maximum aggregate total)

      (1) In District -- 1.5 points up to 15 years maximum (22.5 points maximum)

      (2) Experience, other -- .75 points per year of service outside District (5 points maximum)

   b. Evaluation * (20 points--maximum total)

      Points on evaluation instrument:

Evaluation Instrument Score	0-60 = 0 points 61-70 = 2 points 71-80 = 4 points 81-up = 5 points	Evaluation Equivalency Points

   Last five years' evaluation, not including current year.

   Multiply years of experience up to four years times average

Evaluation Equivalency Points.

* Must transpose former scoring process to new process, or vice-versa.

c. Extra Pay for Extra Duties and Responsibilities

(5 points--maximum total)

Total dollars per year based on schedule

$0 - 00 = 0 points
$100 - 499 = 3 points
$500 - up = 5 points

In the event of point tie length of service in the District shall prevail as the basis for final consideration.

Laid off teachers shall be reinstated in the inverse order of being laid off, if certified and qualified to fill a vacancy. The governing body of the District may, but is not obligated, to reinstate those teachers laid off who have rejected a previous opportunity of reinstatement. A lay-off that exceeds the first day of school in the second year of the lay-off, shall be considered a termination. Any lay-off shall relieve the employer of any direct District payment of salary and/or fringe benefit obligations during that period.

Teachers with more than one current certification area shall be exempt from consideration for lay-off, if the employer determines there is a need to retain the teacher in another area of certification.

Point totals are based on the previous years' records in all categories, not to include the year in which consideration for non-renewal occurs. Maximum total points for any year under current Lay-off Clause equals 47.5 points.

4. Joan Gavin was employed as a Special Education teacher by the District beginning in 1979. Gavin is licensed as a teacher for Learning Disabilities and Emotionally Disturbed K-12 and as an Elementary Teacher 1-8. Gavin was hired for and taught special education in the Cooperative Program at the elementary level for all the time she was with the District. The Cooperative Program was an arrangement whereby students from Districts in Juneau County, Wonewoc and Norwalk-Ontario were brought to the District which in turn, employed the teacher for these students with costs then prorated back to the individual Districts. In 1992, the District decided to no longer act as host of the special education program and the function was transferred to CESA #5.

5. With the elimination of the hosting of the Cooperative Program, the District sent Gavin a "Preliminary Notice" of non-renewal for the 1992-93 school year. Gavin asked for, and received, a private conference after which she received the following letter from the District's Superintendent:

The Elroy-Kendall-Wilton Board of Education voted

> unanimously to nonrenew your contract under s. 118.22 of the Laws of Wisconsin, following the private conference on Thursday, March 19, 1992.
>
> The justification for cause is herein reiterated to directly, and only, related to the administrative restructuring and proposed physical transfer of the Emotionally Disturbance Unit classroom from the Kendall School to a site outside this School District.
>
> You are further advised that you will be properly and promptly notified of the listing of the position by CESA #5, and also, of any elementary openings within the Elroy-Kendall-Wilton School District. You will be interviewed and considered for employment for any of the aforementioned positions that may arise for which you are interested, qualified and certified.
>
> Your termination here is not related to employe misconduct or teaching performance.
>
> Personally, we have enjoyed and appreciated your services these past 13 years as the Primary Level ED teacher in this District. We will do anything possible to support your relocation to an ED unit, or to a regular elementary education position, here, or elsewhere, wherein you have an interest and meet the qualifications and certification requirements.
>
> The best of luck to you in this transitional deployment of the Primary Emotional Disturbance unit at Kendall Elementary School in this District.

6. Gavin filed a grievance over her non-renewal and asserted that the lay-off procedures of the parties' agreement applied rather than the nonrenewal provision. The District denied the grievance. The Association requested binding arbitration to resolve the grievance and the District denied this request.

7. Gavin was hired for the 1992-93 school year by CESA #5 in the same program and was paid $35,650 for the year. Her salary with the District would have been $34,735 for the year. At CESA #5, Gavin had to pay $109/month toward the health insurance premium. Gavin paid this for two months and then went on her spouse's health insurance plan.

8. Gavin's termination was not related to probationary status, employe misconduct or teaching performance, so the non-renewal provisions of the contract were inappropriately applied to her. Gavin's termination was directly related to the District's elimination of the Cooperative Program with the resulting staff reduction, thus Article VII, Sec. "M" of the parties' collective bargaining agreement should have been applied to Gavin. Inasmuch as the District did not apply Article VII to Gavin, it violated the terms of the collective bargaining agreement.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The parties' collective bargaining agreement does not contain a grievance procedure culminating in final and binding arbitration, and thus, the jurisdiction of the Wisconsin Employment Relations Commission may be invoked to

determine whether said agreement has been violated in violation of Sec. 111.70(3)(a)5, Stats.

2. The District's nonrenewal of Gavin violated the layoff provisions of Article VII, Sec. "M" of the parties' collective bargaining agreement, and consequently, was violative of Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

IT IS ORDERED that the Elroy-Kendall-Wilton School District, its officers and agents, shall immediately:

1. Cease and desist from violating the parties' collective bargaining agreement;

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

   (a) Expunge the non-renewal of Joan Gavin and apply the provisions of Article VII, Sec. "M", of the parties' agreement, consistent with Gavin's seniority had she not been non-renewed, effective July 1, 1992. Gavin shall receive no backpay or benefits for the 1992-93 school year.

   (b) Notify the Wisconsin Employment Relations Commission in writing within 20 days from the date of this Order as to what steps it has taken to comply therewith.

Dated at Madison, Wisconsin this 19th day of July, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

(Footnote 1/ appears on the next page.)

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

ELROY-KENDALL-WILTON SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the District violated Sec. 111.70(3)(a)5, Stats. by not applying the layoff provisions of the parties' collective bargaining agreement to Joan Gavin. The District denied any violation of the agreement asserting that Joan Gavin was nonrenewed for just cause and the layoff provision is not applicable to her.

Association's Position

The Association contends that the collective bargaining agreement provides that Gavin should have been laid off rather than nonrenewed. It states that Article VII, Sec. "M", gives the District the discretion to determine the size of the workforce, so by eliminating the ED position, it was

reducing the workforce, and Sec. "M" is applicable. It refers to the language of Sec. "M" which requires certain obligations on the part of the District after it has made a decision to reduce the work force and gives certain rights to the employe who is laid off as a result of this decision. It submits that the District's nonrenewal of Gavin nullified a major portion of the contract, the layoff and reduction in force provisions. It questions why the layoff provision is even in the contract if the District can simply ignore it.

The Association takes the position that the just cause standard provides greater protection than the District has brought forward. The Association argues that the just cause standard provides for job security and some contracts require specific grounds for discipline, whereas the present contract merely requires just cause and the elimination of a position does not meet this just cause standard. The Association claims that the parties recognized the potential for a reduction in force and bargained specific language to deal with it and the District is bound by the language.

The Association asserts that the District's reliance on its practice in the past is not a factor in this case. It claims that it was unaware of Fred Flasher's nonrenewal in 1991-92 and thought he was just laid off. It states that there can be no binding past practice absent awareness and acquiescence by both parties and the Association was not aware of the situation. It further asserts that the record fails to establish that Flasher or the other two vocational teachers had other certifications to allow for their recall. It insists that the clear language of the contract controls the instant matter and past practice is irrelevant.

The Association contends that court and arbitration decisions support its position. It submits that arbitrators have held that termination due to a reduction in force is a "layoff". It cites two arbitration cases that reached an opposite conclusion but distinguishes them because one involved a probationary teacher who had no recourse under the grievance procedure and the other involved narrow contract language stating that a layoff had to be due to a decrease in the number of pupils. It maintains these cases do not compare to the instant case as Gavin is not a probationary employe and the layoff clause is synonymous with reduction in force.

The Association refers to the March 20, 1992 letter to Gavin from the District's Superintendent which indicated that her termination was not related to misconduct or performance and the Superintendent promises to support her relocation to an ED unit or regular classroom position "here or elsewhere". It takes the position that this promise is the same as that contained in Article VII, Sec. "M". It maintains that this clause should have been applied to Gavin and she should have been recalled to vacant positions at the elementary level in 1992-93 and now in 1993-94 and the District's failure to do so violated the contract.

With respect to remedy, the Association asks that Gavin be made whole for the District's misconduct. It notes that Gavin was employed by CESA #5 for the 1992-93 school year but she should be paid the insurance contribution plus interest that was not incurred by CESA #5 because she obtained insurance through her spouse. It further asks that she be employed as an elementary teacher in the District in accordance with her seniority as of 1979 as well as the sick leave she would have accrued for 1992-93.

District's Position

The District contends that there is an established past practice that whenever a program is eliminated, the nonrenewal procedure is used. It points to the 1991 nonrenewal of Fred Flasher, who was in the ED unit in the High School, which action was not contested by the Association, as well as the earlier elimination of two vocational programs in the middle school, Industrial

Technology and Home Economics, and the nonrenewal of these teachers, again with no objection by the Association. The District claims that the Association was aware of these nonrenewals and condoned the practice for at least eight (8) years. The District notes that the Association made no proposals in bargaining for language to change this past practice.

The District claims that the Union has not cited any clear and unambiguous contract language to contradict the past practice and also failed to cite any bargaining history to support its claim. The District submits that it has established by the evidence a binding past practice supporting its actions.

The District relies on the Management Rights clause giving it the right to terminate programs and to determine whether there should be a layoff. The District believes that the Management Rights language, the past practice interpreting the language and the past practice on the use of nonrenewal when a program is eliminated indicates the Association has waived its right to contest the District's action in this case.

The District alleges that Gavin is not qualified to teach in any potential vacant positions in the District because she has not had the experience in teaching non-special education students. It maintains that Gavin was hired to teach the emotionally disturbed and the District never intended that she teach non-special education students. The District argues that it is in the best interest of the District for Gavin not to teach non-special education students as she doesn't have the relevant qualifications or experience. It asks that the complaint be dismissed.

While the District urges dismissal of the complaint, it submits that if the Association prevails, the remedy it seeks is inappropriate. The District contends that Gavin is only entitled to minimal back pay. It disputes the Association's claims related to health insurance and asserts that the cost of health insurance provided by CESA #5 is irrelevant because the benefit is the same. The only difference, according to the District, is that at CESA #5, Gavin had to make a contribution toward health insurance, whereas the District required none. It concludes that Gavin would have gotten $353 more in the District for 1992-93.

Association's Reply

The Association contends that the District's arguments with respect to past practice must fail because the District could not show that the Association was aware that teachers were nonrenewed when programs were eliminated. The Association believed that the teachers were not certified in other areas so they could not assert any right to other positions and the Association did not know they were nonrenewed but understood that they were laid off. The Association agrees that the District's statement of the Management Rights clause is correct as far as it goes, but it points out the District ignored the component that states these rights are controlled by other portions of the contract. It states that under the District's logic, it could ignore any provision including the just cause requirement for discipline. It maintains that it is wishful thinking on the part of the District to claim that the right to eliminate programs also gave the District the right to decide whether or not it is a layoff. The Association argues that the claim of past practice must fail in light of the express layoff language in the contract because past practice cannot contradict clear contract language. It asks that Gavin be reinstated and made whole because the District violated the clear provisions of the contract.

The Association asserts that the District's claim that Gavin lacks the qualifications and experience for any position is an attempt by the District to exclude Gavin from employment. It submits that Gavin has sufficient experience

in teaching and had to obtain six (6) credits every five (5) years to keep her elementary license, so the District's position that Gavin is not qualified is beyond absurd. On the remedy, the Association states that the difference between the costs to CESA #5 and what the District should have paid is the appropriate remedy which it calculates at $4,491.24 plus interest. It asks that Gavin be reinstated and made whole for her financial loss.

District's Reply

The District contends that there are many misperceptions on the part of the Association regarding this case. It claims that the Association is in error by suggesting that layoff is the exclusive option available in this matter. The District submits that nonrenewal was the proper way to handle the matter and also was in Gavin's best interest. The District maintains that the justification for the nonrenewal was the transfer of the Emotional Disturbance Unit to CESA #5. It argues that Gavin's position was not eliminated as the Association claims but rather her job was transferred from the District to CESA #5. It points out that Gavin's job was not eliminated and was in the same location as before. It alleges that the District insured that Gavin went into CESA #5 as a transfer rather than a new hire. It argues that the instant case is a unique situation and the result was that Gavin was employed in the same locale with close to the same student population as she had taught in the past with the only change being that CESA #5 was her new employer. It insists that layoff was not proper in this case as her job had not been eliminated and nonrenewal was the appropriate method to comply with Sec. 118.22(2), Stats., otherwise Gavin would have been under contractual relationships with two separate boards. It suggests that Gavin is greedy in that the District was doing everything to obtain her employment by CESA #5 yet she also wanted layoff status to claim an elementary position for which she was not qualified. The District takes the position that it severed the employment relationship with Gavin so she could secure the position with CESA #5.

The District contends that even if Gavin had been laid off, Article VII, Sec. "M" requires teachers to be certified and qualified to fill a vacancy, and Gavin was not qualified for any elementary positions. The District notes that it has the sole authority to determine a teacher's qualifications and the Association has no such authority. The District claims that it did not find Gavin's qualifications suitable for any position. It points out that her teaching experience is inappropriate to the best interests of non-special education students.

With respect to past practice, the District submits that the Association knew of the nonrenewals of teachers when programs had been eliminated in the past and no grievances were filed on these nonrenewals. It insists that knowledge of the employe must be knowledge of the Association, so the Association's arguments must fail.

With respect to the remedy, the District states that health insurance costs should not be considered at all because Gavin was offered health insurance benefits but declined them. The District asserts that the complaint should be dismissed and the remedy marked as moot.

DISCUSSION

Initially, it is noted that pursuant to Sec. 111.70(4)(a), Stats., the Commission has jurisdiction to determine, among other allegations, those involving a breach of contract. The Commission will, however, decline to exercise that jurisdiction if the parties have an alternative dispute resolution mechanism, most commonly, a grievance and arbitration procedure. This policy is based on the presumed exclusivity of the contractual procedure

and a desire to honor the parties' agreement. 2/ Here, the parties' agreement does not provide for final and binding arbitration, so the Commission will exercise its jurisdiction to determine whether there has been a contractual breach.

The District has relied on past practice to support its nonrenewal of Gavin and the non-application of the layoff provisions. The District pointed to three instances where it eliminated a program and nonrenewed the teacher and no grievances were filed. A binding past practice must be unequivocal, clear and unambiguous and acted upon over a reasonable period of time. 3/ Although three instances usually might not be enough to establish a practice, the elimination of a program appears to be a rare event, so in this case, arguably three instances are enough. The Association argued that it didn't know of the "practice"; however, a party may be assumed to know what is transpiring and the Association should have reasonably known what was happening. 4/ The Union does raise a good point in that the record fails to show that any of the three prior nonrenewed teachers had other certification or wanted to continue to teach at the District. Under these circumstances, the effect of a nonrenewal or a layoff would be the same and whether the District called it a nonrenewal or not, it would still be a layoff.

The main problem with the District's assertion of past practice is that past practice cannot be used to modify clear contract language. 5/ Article VII, Sec. "M" is clear and unambiguous language and therefore past practice cannot be used to modify it or - as argued by the Association - to render it meaningless in the case of the discontinuance of a program. Additionally, the Association's past failure to file grievances does not prevent it from grieving future violations of clear language. 6/ The District's argument that it did not discontinue the program but merely transferred it is without merit. Otherwise, there would be no reason for the nonrenewal. The collective bargaining agreement binds the District and the Association and the provisions of this contract applied to Gavin. When the ED unit was transferred to CESA #5, the District eliminated it from its control, however, the terms of the contract still applied to Gavin and her rights and benefits and the District's obligations were controlled by that contract. Gavin was entitled to the benefits under Article VII, Sec. "M". Gavin had no relationship with CESA #5 at the time of her nonrenewal, so the District's arguments that transfer of the position included the transfer of Gavin must be rejected.

It should be noted that Article VI provides for nonrenewal in the case of a denial of an increment which is not involved in this case. It also provides for nonrenewal as discipline for just cause and for probationary employes. Gavin was not a probationary employe and the Superintendent's letter set out in Finding of Fact #5 states that her termination was not related to employe misconduct or teaching performance. 7/ Although nonrenewal may be used in other situations such as for a teacher who was not certified in the area she

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2/ Waupun School District, Dec. No. 22409 (WERC, 3/85); Monona Grove School District, Dec. No. 22414 (WERC, 3/85).

3/ Elkouri and Elkouri, How Arbitration Works, (4th Ed., 1985).

4/ Id., at 452-453.

5/ Id., at 454.

6/ Id.

7/ Jt. Ex. 4.

was teaching and there was no evidence of a contract or if there was one, the contract had no standard for nonrenewal, 8/ or the teacher failed to earn six credits in the area required as a condition in her initial contract, 9/ and discharge may be used where the teacher was not certified to teach any of the subjects he was assigned, 10/ Gavin's situation is not comparable to any of these cases. Gavin was nonrenewed solely because of the transfer of the ED unit to CESA #5 and nonrenewal or discharge under these circumstances was inappropriate because Gavin's position was eliminated and a reduction in force followed. The contractual layoff procedures apply to a reduction in force. The District could not use the nonrenewal procedures to void the contractual layoff procedures. 11/ Thus, the District's reliance on past practice is without merit.

The District's reliance on the Management Rights clause is also misplaced. Article III, Sec. "A" expressly states as follows:

> "Except as otherwise expressly provided in this Agreement. . ." ,

the District can eliminate programs and can subcontract or contract out work. There is no dispute that the District could eliminate the ED unit or contract it out but Article VII, Sec. "M" expressly provides for layoff. Article VII, Sec. "M" is very broad and is not limited to a decrease in pupils but applies generally to all reductions in force. The elimination of the ED unit left Gavin without a job with the District. Gavin's position had to be eliminated and this required a reduction in force which under Article VII, Sec. "M" was a layoff. Although Gavin eventually went with the ED unit program to CESA #5, she did not give up her rights under Article VII, Sec. "M", and the District, by not applying Article VII, Sec. "M" to Gavin, violated the express terms of the parties' contract and in turn violated Sec. 111.70(3)(a)5, Stats.

The District argued that Gavin was not qualified for any job with the District; however, the District failed to show that it even applied the layoff clause to her and its arguments with respect to her qualifications appear to be an afterthought because it simply nonrenewed her and never considered her for any positions with the District.

With respect to remedy, the District is directed to apply the provisions of Article VII, Sec. "M" to Gavin effective July 1, 1992, and if she is certified and qualified for a position, she shall be granted that position. As an aside, the undersigned was not impressed with the District's argument that because Gavin's experience was teaching in the ED area, she lacked qualifications to teach non-ED students. The opposite is more logical and reasonable. It is hoped that another hearing is not necessary over whether Gavin is qualified for an elementary 1-8 teaching position.

8/ Grams v. Melrose-Mindoro Joint School District No. 1, 78 Wis. 2d 569 (1977).

9/ Turtle Lake School District, Dec. No. 24687-A (Bielarczyk, 12/87), aff'd by operation of law, Dec. No. 24687-B (WERC, 3/88).

10/ Lisbon-Pewaukee Joint School District No. 2, Dec. No. 13404-B (WERC, 9/76).

11/ School District of Ladysmith-Hawkins, (Greco, 6/80).

With respect to back pay, Gavin worked for CESA #5 in 1992-93 and was paid $35,650.00. If Gavin had worked for the District, she would have been paid $34,735.00, or $915.00 less. Gavin's FICA was higher at CESA #5, but her Wisconsin Retirement contribution was less. The net difference for wages, FICA and Wisconsin Retirement was $847.08 more than at the District. With respect to health insurance, Gavin had to pay $109.00 per month at CESA #5, 12/ which she paid for two months and then went on her spouse's insurance. 13/ Subtracting $218.00 from the $847.08 establishes that Gavin still was paid more at CESA #5. The Commission has held that the remedy for health insurance costs are the premium costs to the extent such costs would not otherwise be incurred as offset by the contribution level the employe would have made under the Employer's plan or if the employe had no insurance, the incurred medical or dental expenses that would not otherwise have been incurred under the Employer's coverage minus offset for any deductibles and/or premium contribution. 14/ In short, only out-of-pocket costs are reimbursable and other than the $218.00, the record fails to show that Gavin had any out-of-pocket expenses. Gavin is not entitled to any monetary relief because she received $629.08 more from CESA #5 than she would have received from the District. Gavin is not entitled to what the District would have paid or what CESA #5 saved on health insurance as this amounts to a windfall and is not the proper test of damages. 15/ Gavin would be entitled to accrued sick leave and other benefits such as seniority as provided in the contract. The District is directed to apply the layoff clause to Gavin and inform the Commission what action it has taken to comply with the Order herein.

Dated at Madison, Wisconsin this 19th day of July, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

12/ Tr. 26.

13/ Tr. 18.

14/ Brown County, Dec. No. 20857-D (WERC, 5/93).

15/ Id.