

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**NORTHWEST UNITED EDUCATORS**, Complainant,

vs.

**SCHOOL DISTRICT OF SHELL LAKE**, Respondent.

Case 36  
No. 66393  
MP-4305

**Decision No. 31983-A**

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**Appearances:**

**Jesse L. Reschke**, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, for the labor organization.

**Richard J. Ricci**, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for the municipal employer.

**FINDINGS OF FACT,**  
**CONCLUSIONS OF LAW AND ORDER**

On October 20, 2006, Northwest United Educators filed a complaint with the Wisconsin Employment Relations Commission alleging that the School District of Shell Lake had committed a prohibited practice within the meaning of Sec. 111.70(a)(5), Wis. Stats., by violating the parties' collective bargaining agreement in its refusal to allow Marlene Stariha to bump a less senior member of the Aide Personnel department. On January 19, 2007, the District filed an Answer in which it denied the allegations and legal conclusions, raised affirmative defenses, and demanded the complaint be dismissed with prejudice as frivolous and the District be awarded attorney fees and costs. Hearing in the matter was held on January 22, 2007, in Shell Lake, Wisconsin; a stenographic transcript was made available to the parties by February 2, 2007. The parties filed written arguments on March 5 and March 29, 2007, at which time the record was closed.

**FINDINGS OF FACT**

1. At all times material hereto, Northwest United Educators ("the Association") and the Shell Lake School District ("the District") have been parties to a collective bargaining

No. 31983-A

agreement covering “all regular full-time and regular part-time non-certified employees employed by the Shell Lake School District including teacher aides, but excluding all supervisory, managerial, confidential and casual employees, and all other employees of the District.” The parties’ collective bargaining agreement includes a grievance procedure which culminates in a decision by the School Board; the procedure does not provide for final and binding arbitration of grievances.

2. The parties’ collective bargaining agreement for 2004-05, 2005-06, 2006-07 also contains the following provisions:

## **ARTICLE II – MANAGEMENT RIGHTS**

Except as expressly modified by other provisions of the contract, the School Board possesses the sole right to operate the school District and all management rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the School District;
- B. To hire, promote, transfer, schedule and assign employees in positions within the school District;
- . . .
- D. To relieve employees from their duties;
- E. To maintain efficiency of School District operations;
- . . .
- I. To determine the kinds and amounts of services to be performed as pertains to School District operations; and the number and kind of classifications to perform such services;
- J. To determine the methods, means and personnel by which School District operations are to be conducted;
- . . .
- L. To determine the services, supplies and equipment necessary to continue its operation and to determine all methods and means of distributing the above in establishing standards of operations, the means, methods, and processes for carrying on the work, including automation or subcontracting thereof or changes therein.

. . .

#### **ARTICLE XI – SENIORITY/LAYOFF**

- A. Seniority: Seniority shall commence upon the last date of hire in the District. It shall be based upon actual length of continuous service, including approved paid leaves of absences. Employees on layoff or unpaid leaves shall retain their seniority prior to the date of layoff or leave, however, no benefits shall accrue to employees while on layoff status or unpaid leave.
- B. Departments: For the purpose of the Article, there shall be separate departments defined as follows:
1. Maintenance and Custodian employees
  2. Clerical and Secretarial employees
  3. Food Service employees
  4. Aide Personnel
  5. Bus Drivers

. . .

- D. Layoff: When the Board decides to reduce the number of personnel, employees will be laid off in whole or in part in inverse order of seniority within departments provided the remaining employees are qualified to perform the remaining work.

. . .

#### **ARTICLE XVII – ENTIRE MEMORANDUM OF AGREEMENT**

This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties, and supersedes all previous agreements between the parties. Any supplemental amendments to this Agreement or past practices shall not be binding upon either party unless executed in writing by the parties hereto. Waiver or any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

3. Sometime in the late summer of 2002, the School District posted an announcement of a job opening, described as “Special Education Aide from 12:00 – 3:30 P.M., at the Primary School.” Among the applicants was Marlene Stariha, who at that time was employed by the District driving a school bus until about 8:10 or 8:15 in the morning and from 3:00 P.M. to 4:30 P.M. or later. After considerable internal deliberations, the

District on December 16, 2002 hired Stariha to the Aide position, modifying her work hours to 11:30 A.M. to 3:00 P.M. so she could perform both the Aide duties as well as her full driving responsibilities. Throughout Stariha's tenure as a dual hire, the District did not replace her with an aide for the period 3:00 to 3:30 P.M. Stariha's particular responsibilities as an aide were in the "4K" program, a general education program, helping younger children from age 4 to kindergarten get used to interacting with persons outside their families, and as an aide in the early childhood – special education field.<sup>1</sup> For the first year, the District had money available which it used to hire students with disabilities to replace Stariha in the afternoon when she had to leave to perform her bus driving duties. The student workers did not maintain perfect reliability, and so for the following year the District hired two students, so there would be a back-up. Again, that did not prove entirely satisfactory, and for the 2004-2005 school year and thereafter, the classroom teacher performed the aide duties, in addition to her own.

4. On June 20, 2006, Superintendent Jerry Gauderman wrote to Stariha as follows:

This is to advise you that the Board of Education at its regular meeting on June 19, 2006, voted to discontinue the part-time aide position that you now occupy as of the end of the 2005-2006 school year. This will result in your hours being partially reduced for the 2006-2007 school year to the full extent of your aide's position's hours. Your current position as bus driver with its current hours is anticipated to remain the same as it was in 2005-2006, however.

This partial layoff is being done for budgetary reasons and is not to be seen as a negative reflection on your performance as an aide.

Consistent, however, with the provisions of Article XI, paragraph E. Layoff – the Board, when faced with a decision to reduce personnel, must layoff "in reverse order of seniority within departments, provided the remaining employees are qualified to perform the remaining work." Inasmuch as you have more seniority than other aides within the aides department, you should review your rights under the Collective Bargaining Agreement to determine whether other aides' hours may be available to you based on seniority and qualifications. You may wish to contact your Union representative to clarify your rights in this regard.

As any decision you make will have the potential for affecting other aides, you are asked to consider your options and to advise the undersigned as soon as possible but no later than June 30, 2006, as to your decision in this matter.

Thank you for your consideration in this matter.

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<sup>1</sup> Stariha herself did not testify about her duties as an aide; the only evidence in the record is the testimony of the CESA 11 employee, Mary Kampa, who oversees special education services in the Shell Lake School District.

5. By letter also dated June 20, 2006, NUE Executive Director Jesse Reschke wrote Gauderman as follows:

So as to be best able to respond to the District's letter of June 20, 2006, please send Marlene Stariha a complete seniority list for the classification of Aide Personnel. Please also send a list of Aides that Marlene is qualified to bump.

Thank you in advance for your expedited response.

The District subsequently provided the Association with the following seniority list for Aides:

	<i>Hire Date</i>	<i>Hrs Weekly</i>	<i>Start Time</i>	<i>End Time</i>
<i>Naglosky, Patti</i>	2/1/1986	37.5	7:30 AM	3:30 PM
<i>Kidder, Diane</i>	1/1/1987	37.5	7:30 AM	3:30 PM
<i>Greene, Joane</i>	11/16/1988	37.5	7:45 AM	3:45 PM
<i>Smith, Jacqueline</i>	8/1/1994	37.5	7:45 AM	3:45 PM
<i>Foss, Julie</i>	2/11/1995	37.5	7:30 AM	3:30 PM
<i>Buck, Kathleen</i>	12/21/1995	22.5	7:45 AM	3:45PM/11:30 AM
<i>Samson, Larry</i>	11/12/2001	17.5	9:40 AM	1:20 PM
<i>Stariha, Marlene</i>	12/16/2002	14	11:30 AM	3:00 PM
<i>Labomascus, Jessica</i>	1/9/2004	37.5	7:30 AM	3:30 PM
<i>Williams, Danielle</i>	9/28/2004	19.5	7:30 AM	11:15 AM
<i>Shoberg, Kimberly</i>	9/15/2005	37.5	7:30 AM	3:30 PM

6. On June 28, 2006, Reschke wrote Gauderman as follows:

In accordance with the Collective Bargaining Agreement, Marlene Stariha is asserting her bumping rights for the 14 hours that she is being laid off. Marlene wishes to bump the least senior person in the aide classification, Kimberly Shoberg, for the 14 hours which Marlene has been laid off.

7. On July 13, Gauderman replied as follows:

I have received your letter regarding the partial layoff of Marlene Stariha indicating her wish to "bump" the least senior person in the aide classification.

This is to advise that the least senior person in the aide classification is Kim Schoberg who is scheduled to work from 7:30 A.M. to 3:30 P.M. each day with a one-half hour lunch, Monday through Friday, during the school year.

It is the District's position that is simply not practical to carve out 14 hours from Ms. Schoberg's position and provide those to Mrs. Stariha as Mrs. Stariha drives a bus for the District with the following schedule: 6:30 A.M. to

8:10 A. M. and 3:00 P.M. to 4:30 P.M. each day, five days a week during the school year.

As you can see, there is an overlap in the two employees' schedules. This begs the question of whether it is Mrs. Stariha's wish to give up her bus driving duties to take Ms. Schoberg's entire scheduled hours. Please advise.

8. On August 3, Reschke wrote back as follows:

As per our phone conversation today, the following is NUE's response to your last letter regarding the Marlene Stariha matter.

Marlene was laid off from 14 hours per week of aide duties. She was laid off despite not being the least senior person in the aide classification. Nothing in the collective bargaining agreement allows the District to require Marlene to resign from her bus driver position in order to bump 14 hours from Kim Schoberg. The hours Marlene is able to bump, due to her duties as a bus driver, are 11:30 a.m. to 3:00 p.m. Monday through Thursday. Therefore, under Article XI (E) of the collective bargaining agreement, Marlene is entitled to bump the above-stated time slot from Kim Schoberg's aide position.

If you have any questions or concerns feel free to contact me.

9. On August 24, Gauderman replied as follows:

I have received your letter regarding the partial layoff of Marlene Stariha. I disagree with your assessment of the situation.

First, Marlene is not in a position to dictate the hours of any position. That is the Board's prerogative per the management rights clause of the contract.

If one were to follow your suggestion, the District would be required to change its schedules to accommodate her. There is nothing in the collective bargaining agreement that mandates that be done. It is the Board's responsibility and right to establish schedules and job duties considering what is in the best interest of its students.

Secondly, as a result, she cannot physically be at two different places at the same time. The District is not requiring her to resign anything but was providing her a choice between two positions. That was the purpose of my letter.

If you have any questions, kindly advise.

10. On September 7, the Association grieved the matter, per correspondence from Reschke to Gauderman, as follows:

In response to your letter received August 28, 2006 NUE is filing a grievance regarding the layoff of Marlene Stariha. Please consider this Step 1 of the grievance procedure.

As of the receipt of your letter on August 28, 2006 the District has violated Article XI(E) of the collective bargaining agreement. Marlene is not the least senior person in the "Aide Personnel" classification and therefore was improperly laid off when the District decided to limit her right to bump fourteen hours from Kim Schoberg. Kim is the least senior person in the aide classification and therefore, if the District decided to reduce hours, she has to be the first person reduced.

As for the Board's right to establish schedules and job duties with the best interests of the students in mind, that right is limited by the collective bargaining agreement with NUE. The Board has certain rights to run the District, however any and all management rights are limited by the collective bargaining agreement. When the Board made a decision to disallow Marlene Stariha to bump the least senior person in the "Aide Personnel" classification its decision cannot be protected by the management rights clause.

Further, Marlene cannot be physically in two places at once, as you note in your letter. However, during the fourteen hours a week she worked as an aide last school year she was not required to be in two places at once. Since she is not the least senior person in the classification her right to be both a full-time bus driver and a fourteen-hour-a-week aide are protected by Article XI(E) of the parties' collective bargaining agreement.

Therefore, NUE respectfully requests that Marlene Stariha be immediately reinstated as a fourteen-hour-per-week aide and that she be paid retroactively to the first day of the 2006-07 school year.

If you have any questions, feel free to contact me. Otherwise I look forward to your response to this grievance.

11. On September 15, Gauderman replied as follows:

Your grievance is hereby denied.

The grievance was thereafter processed to a hearing before the School Board, which on October 5, 2006 also denied the grievance.

12. Kimberly Schoberg, the least senior aide, is a special education aide who since September 2005 has been assigned to the classroom of a male teacher responsible for cross-categorical educational programs, encompassing students with five or six different categories of disabilities (emotional behavior disturbance, cognitive disability, learning disabilities, etc.). Among the students in their care is a teenage girl with an orthopedic impairment, requiring specific positioning in her wheelchair due to limited capacity in her lungs. The student, who also wears a back brace and arm sling, also requires direct assistance going to the bathroom, which is undertaken during the last period of the day (2:15 to 3:20 P.M.). Schoberg has received specific training to deal with this student and her particular handicaps, and has worked with her through elementary school and middle school. If Stariha assumed Schoberg's position and maintained her bus driving duties, the District would have to hire an additional aide for approximately a half-hour in both the morning and afternoon, which would be very difficult if not impossible. It would be unduly disruptive to the student to have two aides sharing responsibility for her care.

13. Other than their hire dates and work hours, there is no evidence in the record about the assignments or duties of the two other aides who are less senior than Stariha, Jessica Labomascus and Danielle Williams.

14. There is no evidence in the record that the District at any time considered whether Stariha was qualified to perform the work assigned to Labomascus or Williams.

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

### **CONCLUSION OF LAW**

By laying off Marlene Stariha without first determining whether she was qualified to perform the work of either of the two less senior aides, Jessica Labomascus and Danielle Williams, the District violated Article XI, Section E of the collective bargaining agreement and thus committed an unfair labor practice under Sec. 111.70(3)(a)(5), Wis. Stats.

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

### **ORDER**

1. To the extent Marlene Stariha would have been qualified to perform the work of Jessica Labomascus or Danielle Williams while working as an aide 11:30 to 3:00 p.m., Monday through Thursday, the District shall reinstate her as an aide and make her whole.

2. The District shall immediately notify the Shell Lake School District Associate Staff represented by NUE for the purposes of collective bargaining by posting, in conspicuous places on its premises where these employees work, copies of the Notice attached hereto and marked "Appendix A." This Notice shall be signed by the District Superintendent and shall



remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced or covered by other material.

3. The District shall notify the Wisconsin Employment Relations Commission, in writing and within twenty (20) days of the date of this Order, of the action taken to comply with this Order.

Dated at Madison, Wisconsin, this 25th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

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Stuart D. Levitan, Examiner

**“APPENDIX A”**

**NOTICE TO SHELL LAKE SCHOOL DISTRICT ASSOCIATED STAFF  
REPRESENTED BY NORTHWEST UNITED EDUCATORS (NUE)**

As ordered by the Wisconsin Employment Relations Commission and in order to remedy a violation of the Municipal Employment Relations Act, the School District of Shell Lake notifies you of the following:

When the Board decides to reduce the number of personnel, employees will be laid off in whole or in part in inverse order of seniority within departments provided the remaining employees are qualified to perform the remaining work.

**SCHOOL DISTRICT OF SHELL LAKE**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

**POSITIONS OF THE PARTIES**

In support of its complaint, the Association asserts and avers as follows:

Marlene Stariha was improperly laid off under the clear and unambiguous language of Article XI (E) of the collective bargaining agreement; the District should have laid off employees in inverse order of seniority and reworked the remaining aide schedules to cover the remaining work.

The collective bargaining agreement clearly requires that the District lay off employees in whole or in part in inverse order of seniority. Stariha was the fourth least senior aide, and no less senior aide was laid off. There can be no dispute that the District did not follow the plain meaning of the applicable language.

There is no dispute that Stariha was “qualified,” in terms of relative ability, to perform the duties of any of the less senior aides. The District only argued that the inability to be in two places at once disqualified Stariha from performing the duties of the less senior aides. Stariha is therefore “qualified” to perform the actual work of the remaining positions.

Stariha also proved during the preceding four years that she was qualified to serve as an aide even while serving as a bus driver. The District did not have any issue with scheduling or it would not have hired her for the aide position at all. The District is simply trying to justify its cherry picking Stariha for layoff by changing the definition of qualified for this employee in mid-stream.

Further, the time in dispute is de minimus, amounting to only a little more than an hour each week. The District had accommodated Stariha’s overlap between her bus driving duties and her aide duties for more than four years. It now asserts this means she is not qualified to perform the duties of any of the three less senior aides – a harsh, absurd and nonsensical result.

Even if reworking the other aide schedules to redistribute the remaining work would not be convenient for the District, the collective bargaining agreement is not a contract of convenience, but an agreement of law, equity and reason which must be upheld.

The District should have laid off aides in whole or in part by inverse order of seniority until it had gotten the financial savings needed. It should then have placed any of the eleven aides possibly affected by the scheduling changes into positions based on seniority. This was not done, and nothing in the record indicates that the District even considered laying off aides by seniority.

Also, since the collective bargaining agreement does not contain a bumping procedure, either implicit or explicit, the District's attempt to create one is to improperly add language to the collective bargaining agreement without bargaining, thereby violating the agreement's zipper clause and placing general management rights above the specific layoff language.

While it would behoove the parties to have a bumping procedure to ensure an orderly resolution of staff reduction, creating such a procedure is a matter for contract negotiations and not grievance arbitrations. The District should not be allowed to use grievance arbitration to both create a bumping procedure and set limits on the process. Nor can it rightly claim power under the management rights clause for such purpose.

The employer violated Article XI (E) of the collective bargaining agreement when it improperly laid off Stariha from the whole of her aide duties. The District should have reduced personnel in inverse order of seniority until it achieved the budget savings in needed and then redone the aide schedules, by seniority, to cover the necessary work. The District also violated Article XVIII of the agreement by creating a bumping procedure and then dictating the standards and qualifications to limit bumping rights. As remedy, Stariha should be made whole by placing her into fourteen hours of aide duties per week as soon as practicable, with back pay to the date of her layoff.

In defense of the complaint, the District asserts and avers as follows:

The reduction of the grievant's contract was within the District's contractually reserved management rights. There is no language in the collective bargaining agreement that would have prohibited the District from reducing the grievant's contract, nor has the grievant challenged the District's right to layoff the aide portion of her contract. Nor can the grievant partially bump a portion of a less senior aide's position so as to retain the amount of time for which she was contracted during the 2005-06 school year.

Stariha was not entitled to be assigned a portion of a less-senior aide's position, which would leave crucial duties of the aide unfulfilled. Hiring another aide to fill those times and perform those duties is not feasible and would not be in the best interests of the student. Contrary to the Union's assertion, the collective bargaining agreement does not entitle Stariha to bump a portion of the least senior aide's position.

The fact that the District accommodated Stariha in her K-4 position has no relevance to the middle school position held by the least senior aide; to equate the accommodations the District made in the K-4 position to those which would be required for Stariha to assume the middle school position is nonsense and totally irrelevant. That the District accommodated Stariha once does not require it to do so again when such accommodation is not in the best interests of the District or its students.

Finally, where the collective bargaining agreement is silent, a standard of reasonableness should apply. Stariha is seeking two positions which overlap in terms of time, which is not reasonable. Because Stariha cannot be in two places at once, the District's response to her request was reasonable.

In response, the Association posits further as follows:

The District errs by continuing its specious argument that the management rights clause allows it to violate the well-defined layoff language of the collective bargaining agreement, which requires the District to layoff in inverse order of seniority. The management rights clause is for reserved powers not otherwise covered by the agreement, and is expressly modified by the layoff language of Article XI (E).

The District also errs in claiming Stariha is not qualified to perform the duties of the less senior aide. The District readily admits Stariha is qualified in terms of relative ability, but claims her duties as a bus driver disqualify her because of the 10-15 minutes of overlap.

The District errs in citing other cases which involve partial bumping; in the instant case, there are no bumping procedures, limitations or rights.

The District further errs in comparing Stariha's schedule only to that of the least senior aide, ignoring the schedule of the other aides who are also less senior to Stariha. The Association has maintained throughout that there are three aides less senior than Stariha who should have been laid off first, but the District has only asserted that Stariha cannot perform the duties of the least senior aide and has not given serious consideration to whether Stariha can perform the duties of the other two aide positions. However, there is no evidence in the record that Stariha cannot perform the duties of the second and third least senior aides.

In response, the District posits further as follows:

The District was not "cherry picking" Stariha, and it did not lay her off improperly. The Association has completely missed the point and disregarded the reason for Stariha's layoff, which was solely because her position as a K-4 aide was eliminated for budgetary reasons.

The Association's suggestion that the District should have laid off another aide so that Stariha could keep a position the District determined it no longer needed would effectively gut the District's sacrosanct management rights; it is folly to suggest the layoff clause removes the District's right to eliminate positions. Since the Association had never proposed this layoff scenario prior to its brief, it should be deemed to have waived the argument it now puts forth as an afterthought.

Although there is not an explicit bumping procedure in the collective bargaining agreement, the Association acquiesced to one when it specifically requested such an accommodation. For the Association to now disavow its request and claim that the District unilaterally established one is simply not supported by the record. Because the Association itself proposed that Stariha should be able to "cherry pick" hours from the least senior aide, it should be foreclosed from this argument.

Having eliminated the position in which Stariha was the sole occupant, the District did not improperly lay Stariha off. The District endeavored to provide her with the hours she lost, which offer she rejected. Stariha has no right to establish her own schedule. The complaint should be dismissed.

### **DISCUSSION**

Section 111.70(3)(a)5, Stats., provides in relevant part that it is a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon by the parties . . . ." Because the parties' collective bargaining agreement contains a grievance procedure which culminates without final and binding arbitration, a claim that the District has violated the terms of the agreement comes to the commission as a complaint over an alleged prohibited practice. Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

The terms of the parties' collective bargaining agreement empower the School Board to exercise certain standard management rights, including determining the kind and amounts of services to be performed, assigning employees, determining the methods, means and personnel by which school operations are to be conducted, and otherwise directing all operations of the District. However, in the exercise of these rights, the District is constrained by any express modifications found in other provisions of the agreement.

One such express modification is Article XI, Section E., Layoff, which provides:

When the Board decides to reduce the number of personnel, employees will be laid off in whole or in part in inverse order of seniority within departments provided the remaining employees are qualified to perform the remaining work.

Article II, Sections A, E, I and J give the District explicit authority to determine that it will no longer provide an aide for the 4K program, and thus to eliminate Stariha's position. But having the authority under the management rights article to abolish Stariha's *position* is not the same as having the authority to lay off *Stariha*; that action is governed by Article XI, Section E. Thus, the District's action laying off Stariha from her 4K aide position must really be analyzed as two separate actions.

Once the District made the decision to abolish the 4K aide position, it had to undertake a separate process to reduce the number of aide hours it provided by 14, laying off employee(s) "in whole or in part in inverse order of seniority ... provided the remaining employees are qualified to perform the remaining work." Proceeding in inverse order of seniority would bring the District first to Shoberg, the least senior member of the Aide department. Thus, under the explicit terms of the collective bargaining agreement, the District should have reduced Shoberg's assignment by 14 hours, unless the remaining employees – Williams, Labomascus and Stariha – would not have been qualified to perform the work no longer undertaken by Shoberg.

If those three were not qualified to perform Shoberg's remaining work, the District then should have undertaken a like process involving Williams, laying her off for 14 hours provided Labomascus and Stariha were qualified to perform the work. And if they were not qualified to assume those duties, the District then should have reduced Labomascus by the necessary time, provided Stariha was qualified to perform her work. Only then – if and when Stariha was not qualified to perform that section of Labomascus' duties – could the District lay off Stariha.

The District, however, failed to follow this process.

In his letter of June 20, Superintendent Gauderman correctly identified for Stariha the relevant contractual provision, and alerted her to the protections it provided. But he incorrectly informed her that it was her burden to "to determine whether other aides' hours may be available" to her based on seniority and qualifications, and to make such determination within ten days. Rather, it was the District's responsibility to identify the least senior employee whose layoff would still leave the District with a sufficient workforce qualified to perform the remaining tasks.

Although Association representative Reschke asserted in his opening statement that the Association had "raised that she (Stariha) can bump any of the other three aides that are below her – or two aides, they've denied that right, also," there is nothing in the record substantiating either element of that claim. The parties may well have had such communication, but if so, it is not reflected in the record.

Nor was there any testimony at hearing – of any sort, offered by either side – as to the positions occupied by William and Labomascus.

In his letter of June 28, Reschke related only that Stariha “wishes to bump the least senior person in the aide classification, Kimberly Shoberg, for the 14 hours” which Stariha had been laid off. In his letter of August 3, Reschke reasserted that claim, adding that the “hours Marlene is able to bump, due to her duties as a bus driver, are 11:30 a.m. to 3:00 p.m. Monday through Thursday,” and thus Stariha was “entitled to bump the above-stated time slot from Kim Shoberg’s aide position.”

I agree with the District in rejecting the union’s claim that Stariha was “cherry-picked” for layoff. There is nothing in the record to even suggest that the District’s action abolishing Stariha’s 4K aide position was anything other than a budget-driven decision of the sort that school Districts are forced to confront with increasing frequency. Indeed, if the District’s motivation was to harm Stariha, it would not have offered her the whole of Shoberg’s position.

And I agree with the District that Stariha’s inability to be present in a classroom when necessary duties are required to be performed make her, by definition, not qualified for the position to which those duties are assigned. The District is further correct that its prior accommodation of Stariha’s bus driving schedule – amending her position from noon to 3:30 to 11:30 to three – does not compel it to continue to do so.

Finally, I agree with the District that it enjoys the right, as expressed in Gauderman’s August 24 letter to Reschke, to establish schedules and job duties.

But the District is wrong when it asserts that there is no language in the collective bargaining agreement prohibiting it from reducing Stariha’s contract – at least, it cannot reduce Stariha’s contract until it has determined that laying off a less senior employee will leave the District without sufficient qualified staff to perform necessary tasks. That is exactly what Article XI (E) says, and why it is in the collective bargaining agreement.

Based on Stariha’s bus driving schedule and the particular nature of Shoberg’s duties, the District was clearly correct in determining that Stariha was not qualified to assume part of Shoberg’s position. The nature of Shoberg’s duties require the daily, full-time presence of a single aide; by virtue of her daily responsibilities as a bus driver, Stariha was simply not available to do Shoberg’s job as well. An employee who is not present to perform necessary functions of a job is, by definition, not qualified to perform the job. The fact that the District made allowances for Stariha’s daily absence morning and afternoon absence from her 4K assignment does not mean it had to make the same allowance for such absences in a different, far more challenging assignment.

But the District never undertook a similar evaluation of whether Stariha could assume part of the positions held by Williams and Labomascus. Indeed, the record is devoid of any evidence regarding their duties, other than their daily hours.



It is entirely possible that the nature of Williams' and Labomascus' assignments would present similarly insurmountable problems for Stariha, especially given the Association's declaration limiting her availability to 11:30 a.m. to 3:00 p.m., Monday through Thursday. However, the District cannot know that until it undertakes a legitimate and meaningful review of this question: As of the start of the 2006-2007 school year, was Marlene Stariha qualified to perform the necessary duties performed by either Danielle Williams or Jessica Labomascus for at least 14 hours per week, while maintaining her position as a bus driver? If the answer is, "yes," the District must make Stariha whole and make such assignment prospective (subject to any other personnel reductions that may have occurred in the interim). If the answer is, "no," no remedy, financial or otherwise, is required.

In undertaking this evaluation, the District may consider matters beyond Stariha's personal competence as an aide, including the impact, if any, of her scheduling constraints on the educational mission of the District and the delivery of services to students.

Were this matter before me as a grievance arbitration, I would retain jurisdiction for the purpose of overseeing this next stage. However, as hearing examiner I cannot do so, and must leave any disputes regarding remedy to the compliance process.

Dated at Madison, Wisconsin, this 25th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

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Stuart D. Levitan, Examiner

