BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
STOUGHTON EDUCATION ASSOCIATION	
and	Case 32 No. 40625 MA-5126
STOUGHTON AREA SCHOOL DISTRICT	

Appearances:
Ms. Mallory Keener, Executive Director, Capital Area UniServ-South, 4800 Ivywood Trail, McFarland, WI 53558, for the Association.
Mr. Michael Julka, Lathrop & Clark, 122 West Washington Avenue, Suite 1000, P.O. Box 1507, Madison, WI 53701-1507

ARBITRATION AWARD

Stoughton Education Association, hereafter referred to as the Association, and the Stoughton Area School District, hereafter referred to as the District, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the District concurred, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance involving the meaning and application of the terms of the agreement. The Commission designated Stuart Levitan as the impartial arbitrator. Due to procedural challenges which the District raised, consideration of this grievance was bifurcated. On August 24 and September 16, 1988, hearings were held in Stoughton, Wisconsin, solely on the issue of procedural arbitrability. Stenographic transcripts of the proceedings were prepared and delivered to the parties by September 6 and October 26, 1988. Briefs and reply briefs were submitted by December 6 and December 22, 1988, respectively. On February 3, 1989, the undersigned issued an Interim Award finding that the grievance was procedurally arbitrable. Hearings as to the merits of the grievance were held in Stoughton on May 31 and June 13, 1989; stenographic transcripts of these proceedings were prepared and delivered to the parties by June 26, 1989. Briefs and reply briefs were submitted by July 31 and August 28, 1989, at which time the record was closed.

ISSUE

As expressed by the District, and agreed to by the Association, the issue at hearing was, "Whether the Board of Education violated Sections 121.0, 121.1, 124.0 or 124.1 of the 1986-89 collective bargaining agreement between the parties when it reduced the 1987-88 assignment of the grievant from full-time to part-time. If so, what is the remedy?"

At the close of the hearing, the District moved for dismissal of the grievance in its entirety. After hearing oral argument, I granted the District's motion as regarded Section 121.0, and denied the District's motion as it regarded the remaining Sections. Accordingly, the parties did not further address Section 121.0 in their written briefs, and the statement of the issue noted above is amended by deletion of reference to Section 121.0.

RELEVANT CONTRACTUAL LANGUAGE

> Section 121.0 - Innovation and Experimentation:
>
> The Stoughton Schools encourage the development of innovative and experimental approaches to teaching and staff organization that may result in changes in teaching procedures, staff behavior and organization. Such new approaches shall be developed and evaluated jointly between the teaching and administrative staffs. (Joint Exhibit 1, page 7).

Section 121.1

The Board agrees to confer with the institutional staff pursuant to the procedures contained in this contract over the development and implementation of programs for which funds may be requested from the state or federal governments. (Joint Exhibit 1, page 7).

Section 124.0 - Lay-Off:

When the Board determines that lay-off of teachers in a department or departments is necessary because of decreases in enrollment, budgetary or financial limitations, or educational program changes, the administration, in determining which teachers are to be laid off, will give consideration to the following criteria:

A. Appropriateness of training, experience, or certification with respect to the teaching assignments which must be filled.

B. Co-curricular assignments or activities held.

C. Length of service in the District: Length of service in the District shall be determined from the date that the employee actually began work for the District. Such date shall be for the period of total service in the District. (Joint Exhibit 1, page 7-8).

Section 124.1

The term department shall be defined as the subject area or level in which the teacher is teaching during the current year. Elementary departments are grades K-5, Middle School departments are grades 6-8, High School departments are social studies, math, science and language arts. All other departments are K-12. (Joint Exhibit 1, page 9).

RIGHTS AND RESPONSIBILITIES OF THE BOARD OF EDUCATION

Management Rights: Nothing herein contained shall abridge the right of the Board of Education to establish such rules and regulations as may be necessary to maintain the Board-directed level of services providing, however, that such rules and regulations are not inconsistent or in conflict with the provisions of State statutes, this agreement, or any other agreements arrived at by the Board of Education and the S.E.A. The right to hire, suspend, discharge for just cause, promote or demote employees shall remain vested in the Board of Education. Such right and power vested in the Board of Education shall not be used for the purpose of discrimination against an employee solely because he or she is a member of an association or union. Nothing in this article shall be interpreted as limiting the negotiability of any of the items mentioned herein for future contracts.

BACKGROUND

Dennis Sheehan, the grievant, is a teacher in the Stoughton Area School District. This grievance concerns the process which the District followed in identifying Sheehan for layoff through reduction in hours.

Certain procedural issues were detailed in the Background section of the earlier Interim Award. That narrative is herein incorporated by reference, as is the full record of the hearing as to procedural arbitrability.

It was during the negotiations for the 1975-76 collective bargaining agreement that the parties first sought to include provisions related to layoff and recall. At that time, the parties agreed to the criteria to be utilized when the District determined that layoffs were necessary, but they did not agree on the definition of the term department. In an arbitration hearing before Byron Yaffe, a member of the WERC staff, the Association proposed that, "(t)he term 'department' shall be defined as the subject areas or levels in which the teacher is certified." The District proposed the following:

> The term 'department' shall be defined as the subject areas or levels in which the teacher is teaching during the current year. Examples of elementary departments are elementary art and grades K-3. Examples of middle school departments are middle school art and middle school science. Examples of high school departments are high school art and high school science.

By an Award dated March 12, 1976, Arbitrator Yaffe ordered that the parties' 1976-76 collective bargaining agreement include the language as proposed by the District. Under that language, the District on February 13, 1978 promulgated a seniority list for 1977-78 indicating 19 High School Departments, 13 Middle School Departments, and 10 Elementary School Departments. The 1979-80 seniority list, dated October 25 and November 11, 1979, shows a change in one High School department (from Title I to Gifted and Talented), but otherwise the same structure.

Both aspects of the layoff provisions -- the list of criteria to be considered in identifying individuals, and the definition of departments -- have undergone modifications over the years. A criterion relating to teaching performance in the District was amended to delete a reference to formal evaluations in the 1976 agreement, and deleted in its entirety in the 1980-82 agreement. Otherwise, the criteria -- appropriateness of training, experience or certification; co-curricular assignments; seniority -- have remained unchanged. An Association proposal to put primary emphasis on seniority was rejected in an interest arbitration award by Joseph Kerkman on October 11, 1977.

The definition of "department" remained unchanged until the 1980-82 contract, when the following language was agreed to:

> The term 'department' shall be defined as the subject area or level in which the teacher is teaching during the current year. Examples of elementary departments are elementary art and grades K-5. Examples of middle school departments are middle school art and middle school 6-8. Examples of high school departments are high school art and high school science.

The 1980-81 seniority list, dated February 19, 1981, list 19 Senior High Departments, 11 separate Middle School Departments plus a department listed as "Grades 6-8," and 10 elementary school departments, of which one is Elementary K-5. The 1981-82 seniority list, dated January 13, 1982, has the same composition.

During negotiations for the 1982-84 contract, the Association proposed to amend Section 124.1 with language providing that, "(t)he term 'Department' shall be defined as K-12 by teacher certification." On May 21, 1982, the District made a counter-offer, as follows:

> The term 'department' shall be defined as the subject area or level in which the teacher is teaching during the current year. Elementary departments are Grades K-5, Middle School Departments as Grades 6-8, High School Departments are social studies, math, science and language arts. All other departments are K-12.

With the minor difference of the capitalization of the word "Grades," it was the District's version which was agreed to at that time, and which is found in the contract in force at all times material to this grievance.

The 1982-83 seniority list, dated September 3, 1982, lists 18 District-Wide Departments, four Senior High Departments, one Middle School Department, and one Elementary School Department. The 1983-84 seniority list, dated November 9, 1983, shows the same departments for the Senior, Middle and Elementary Schools, and one additional District-wide Department, "Parent Place." Comparison of the 1980-82 lists with those of 1982-84 indicates that the result of the 1982-84 contract amendment was the combination of such subject areas a Reading, Art, Music, Physical Education, Home Economics, Industrial Arts, etc., into District-wide, or K-12 Departments. Previously, such subjects had been separately listed by High School, Middle School and Elementary School.

Both before and since the 1982-84 modification, the District has created various departments to address the special needs of certain students (i.e., needs based on learning disabilities, emotional problems, family stress, exceptional skills, etc.). For 1982-83, those departments were Title I, Gifted and Talented, Pupil Services, and Special Education; for 1983-84, the District added a department called "Parent Place," and renamed Title I to Chapter I. For the 1984-85 school year, the District dropped the Gifted and Talented and created Alternative Learning Programs in Stoughton (ALPS), a structure replicated in the 1985-86 seniority list, dated December 5, 1985. The 1986-87 seniority list, dated January 13, 1987 and February 2, 1987, shows the retention of Chapter I, ALPS, Pupil Services, Parent Place and Special Education, the restoration of the Talented and Gifted, and the creation of a department called "Perkins," after U.S. Rep Carl Perkins (D-Ky), chief sponsor of the federal funding measure. The 1987-88 seniority list, dated November 18, 1987, retains this structure.

It has been the District, through its administrators and administrative council, which has determined departmental designations and published seniority lists. At various times over the past decade, the matter of the seniority

lists has generated some conflict between the Association and the District. Some disputes were over ministerial matters (i.e., the computation and recording of seniority); these were generally resolved by the parties. Other disputes have had broader implications (i.e., the definition of, and differentiation into, departments).

The first such controversy in the record involved the seniority list for the 1977-78 school year. On or about December 1, 1977, Superintendent Fricke sent to the then-Association President, Eileen Dickman, a proposed seniority list for her review and approval prior to his submission of same to the District Board. On Or about December 2, 1977, Dickman responded that the Association Senate had "serious concerns about several aspects" of the list. Such concerns were ministerial (the method used to calculate length of service), procedural (the length of time given the Association to respond) and substantive. Chief among the substantive concerns was the following:

> (4) The listing of middle school departments represents a shift of the departmental definition included in the present contract.

On or about December 5, 1977, Fricke responded to Dickman's letter, as follows:

> By all means, I will concur with your request to recommend to the Board a delay in further consideration of designation of departmental assignments for the 1977-78 school year. Your reaction was surprising to me as you apparently have forgotten about the developmental work on our initial listing of departments completed in early December, 1975. In addition, we consulted with the IIC of the middle school staff last year in order to gain their ideas of how to properly classify their assignments during their current transition. In any event, a delay is now in order regardless of the circumstances.
>
> You will find enclosed a photocopy of the original departmental list given to all staff members in 1975, after consultation with SEA leaders. At that time it was our intent to periodically update the list, reflecting changes in assignment and/or organization, especially when a chance existed that lay-off would take place. (The copy was made from an office list, used to update changes that occurred last year. Hence, its penciled deletions and additions.)

In response to your itemized concerns, may I offer the following:

1) The groupings by department are identical in all but two cases to those worked out and presented to all staff members in 1975. The exceptions are a) a separation of Special Education, Title I, and SEN into separate components; b) a regrouping of the academic departments in the middle school from 6th grade, math, science, English, and social studies to grades 6-8, grades change was an attempt to meet in part the wishes of the middle school faculty and practice. The current plan is based on the recommendation of our district's attorney as best doing so.

2) I assume you mean the designation of month (plus year) as shown for individuals within the various departments. This data is strictly for information purposes only as an individual's seniority is a matter of historical record and cannot be changed by action of the Board. You will note that the list for 1975 contained a number of such inconsistencies, entering the date the contract was approved rather than the initial day worked. Your own name is an example of this. Our current list attempts to correct these inconsistencies and the two not corrected (Schulte and Landfried) are errors on our part. If you know of any others, I will appreciate receiving the corrected information. However, I again stress that the date of actual seniority stands on its own historical record and cannot be changed by fiat. If lay-off is considered, we will have to determine actual day of seniority, if all other factors are equal.

3) If you determine that some teachers have not been given proper credit, please send me the corrected information as soon as possible. Again, such data is for information only as the actual facts stand on their own value.

4) Please refer to 1-b above.

5) 6) My informational letter to you was sent as a courtesy to alert you to the action of the Personnel Committee and the potential action of the total Board. Since you apparently did not refer to the 1975 list nor to the wishes of the middle school staff, your accusation can be somewhat understood.

You have asked for additional time to study this significant area of concern. In talking to Steve Landfried, I gain the impression that two weeks or so would be a satisfactory amount of time. If this is true, will it be possible for you to submit all corrections, etc., to me by Thursday, December 22, 1977? If additional work is needed on our part, we will then be able to handle it before finalizing the agenda for the January Board meeting.

I trust that you will refer the above information to members of the SEA Senate and to those concerned.

My office is open to your personal visits. We may not agree, but let's at least do it honestly and openly.

As noted above, the seniority list ultimately promulgated on February 13, 1978, included 19 Senior High School Departments, 13 Middle School Departments, and ten Elementary School Departments. At hearing, Dickman testified that this structure was acceptable to the Association, and that it resolved the concerns which the Association had expressed about the earlier version.

A little less than a decade later, another dispute arose about the definitions of departments, this time directly related to the general area of programs for students with special needs. On or about September 23, 1987, the Association filed a grievance as follows:

> It has been brought to the SEA's attention that "departments" for lay-off purposes have been defined by the administration contrary to the terms specified by the Master Contract. Of specific concern are the definitions of department for "District-Wide Departments" in the following areas: Health, Computer Literacy, ALPS, Perkins and WECEP. No changes in the definition of a "department" have been negotiated during the bargaining process nor have such changes been communicated to the SEA President. Thus, Section 124.1 of the Master Contract has been violated.

As a remedy, the Association sought that, Seniority lists of SEA bargaining members will conform to the 1986-89 Agreement. Furthermore, that all determinations to lay-off teachers or reduce their hours of work shall be consistent with the Master Contract language."

On or about October 2, 1987, Fricke denied this grievance as being both "without basis" and "not timely." On or about October 6, 1987, the then-Association President, Kathleen Laffin, proposed a revision of the remedy sought, as follows:

> All teachers in any of the Alternative Learning Programs will be considered as one department for 1987-88. In the future if there are any changes in department designation the SEA President will be notified.

On or about November 17, 1987, Laffin wrote to Fricke as follows:

> As I have already informed you, the teachers in the ALPS and Carl Perkins departments have decided that they do not want to become one department. SEA believes that what constitutes a department for lay-off purposes is a negotiable item and any changes in department are negotiable at the table.
>
> Any future changes in departments are to be negotiated between SEA and the board. Non-negotiated changes will be viewed as violations of previously negotiated contract language defining departments and thus grounds for a grievance.

On or about December 15, 1987, Fricke responded to this letter as follows:

> The issues involved in lay-off perhaps have no "good" final answer, a situation which may be inherent in the negative implications which are inherent in lay-off itself. I will be happy to continue to discuss the issue with you to see if a completely satisfactory solution can be found.
>
> In response to your letter of November 17, 1987, I make no statement as to the mandatory nature of department definition language. However, our past practice clearly supports the district's position that under our collective bargaining agreement it has been regarded and treated as a management rights of the school district.

On or about January 21, 1988, Laffin closed this chapter by (a), expressing concerns and making suggestions about the uniform calculation and listing of seniority dates, and (b) stating that, "SEA negotiators believe that the intent of our contract language and bargaining history is clear that additions or deletions in departments are negotiable."

POSITIONS OF THE PARTIES

The Association

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

> The District failed to confer in a meaningful manner with the grievant over the development and implementation of programs funded with state or federal funds, thereby violating Section 121.1 of the collective bargaining agreement. While there were frequent meetings of certain administrators and ALPS faculty, such sessions were group meetings on program matters, not individual meetings or meeting which focused expressly on funding issues. Periodic faculty discussions are not the same as specific position conferences, and the general repartee which took place did not satisfy the contractual requirement for meaningful conferring.
>
> The District then selected the grievant for layoff solely on the basis of his seniority, thereby violating Section 124.0 of the collective bargaining agreement. That Section requires the District to consider such criteria as (a), training, experience or certification, and (b), co-curricular assignments in making layoff decisions. However, as Superintendent Fricke's testimony makes clear, the District selected the grievant for the reduction in hours solely on the basis of his seniority, without any consideration at all of the other criteria. That is, the District ignored the fact that the grievant was the boy's swim coach during the period of his layoff, and that he held all necessary and appropriate certification for the ALPS and Perkins posts, and considered only his seniority. Thus, since seniority was the only criteria the District considered, it is necessary to examine the manner in which it applied this test.
>
> The record establishes that, at the time the District decided to reduce the grievant's ALPS job, the grievant had greater seniority than at least two other employes for whose job he was certified, namely Shelley Anderson and David Harried. These employes and the grievant should all be in the same K-12 category. Since Anderson and Harried held jobs for which the grievant was certified and qualified, one of them -- and not the grievant -- was the appropriate choice for layoff through reduction in hours.
>
> The bargaining history between the parties supports the Association's interpretation of the definition of department as found in the collective bargaining agreement. That history shows a trend towards consolidation of departments, thus providing employes with greater protection against layoff. But by its artificial division of the workforce into 21 separate departments, the District is making a concerted attempt to gain through unilateral imposition what it has failed to obtain through negotiation. The District's stated rationale of pigeon-holing employes on the basis of funding source or program affinity is neither plausible nor workable.
>
> The Association has never bargained seniority lists with the District, and any ex parte policy, rule or regulation which is in conflict with the terms of the collective bargaining agreement are void. The District seniority lists are inconsistent with an in conflict with the negotiated contract language. The grievant was reduced in hours based on the District's interpretation of its own, unilaterally-imposed seniority lists. Since the grievant was thus laid off through a process inconsistent with negotiated procedures, he must be restored to his previous full-time status.

District

In support of its position that the grievance should be denied, the District asserts and avers as follows:

> Given that it has the burden of proving its case by a preponderance of the evidence, it is clear that the Association has failed to marshall sufficient evidence to prove that the District violated any of the cited Sections of the collective bargaining agreement. The grievant and

the Association have repeatedly changed their minds about whether to grieve; indeed, no two Association witnesses could even agree on the nature of the District's alleged offenses. Association name calling against the District is no substitute for proof, and the Association has been completely unable to offer sufficient evidence to support its allegations.

The evidence demonstrates that the District did confer with staff regarding the development and implementation of programs funded through the state or federal governments, thereby complying with Section 121.1 of the collective bargaining agreement. Indeed, the grievant himself testified of the discussions he had held with High School Principal Olin Harried in the summer of 1987 on this matter. Moreover, there is compelling evidence as to frequent consultations between the instructional staff and administration representatives Dan Wiltrout and Mark Mullholland, which corroborates Dr. Fricke's testimony that such consultation was standard procedure. Further, Wiltrout, the District's principal grant-writer, testified that he conferred specifically with the grievant on the progress of the middle-school WECEP coordinator grant application as early as March, 1987, if not sooner. The plain language requires only that the District confer with instructional staff on the development and implementation of certain programs, not that it confer with individuals about funding their specific positions; and the Association's prior description of the District's "virtual monopoly" in making of decisions as to the raising and spending of funds is an implicit concession that Section 121.1 does not afford the Association or any staff member the power to dictate to the District in this regard.

Because the evidence demonstrates that the District complied with every element as to layoffs, the District has not committed an independent violation of Section 124.0 of the collective bargaining agreement. There is neither any dispute that the District experienced a reduction in funds available to support the ALPS program, nor that departmental designation is crucial in layoff determinations. Nor is there any dispute that the grievant was a member of the ALPS department, and the least senior member therein, during the time in question. And there is no dispute that the District applied the layoff criteria exclusively to members of the 1986-87 ALPS department. But the Association has not raised any suggestion that proper application of the layoff criteria to the ALPS department would have resulted in any other individual being laid off, instead making only comparisons between the grievant and members of a different department. Thus, the conclusion is ineluctable that the Union's real complaint is that the 1986-87 seniority lists reflect improper departmental designation under the contract. That is, the Association's real dispute is over the application of Section 124.1, governing departmental

definitions, not 124.0, making any violation of 124.0 necessarily derivative of a proven violation of 124.1.

The evidence demonstrates, however, that the District did not violate Section 124.1, in that it complied with the only applicable requirement in designating K-12 departments, which requirement is not limited by contractual language, bargaining history or past practice.

First, the District has complied with the plain language of the contract, in that all district-wide departments listed in the 1986-87 seniority list, are indeed K-12 departments. The plain language contains absolutely no restriction on what the contract calls "other departments," other than that they be K-12 (i.e., district-wide). Nor does the plain language of Section 124.1 contain any express or implied requirement that the District negotiate with the Association changes in the K-12 departments; the authority to establish such changes is inherent in the District's management rights, limited only by the requirements that rules and regulations not be inconsistent with statutes, the bargaining agreement, or other agreements between the parties.

Further, the bargaining history establishes the District's authority to unilaterally designate K-12 departments. Contract language on layoffs and departmental designation was first instituted via an arbitration award by Byron Yaffe in the 1976-76 contract; at that time, the Association was proposing district-wide seniority by certification. Arbitrator Yaffe rejected this proposal, and instituted the District's language defining department in terms of subject areas and grade levels. The District thereupon implemented this award by developing a seniority list consistent with the contract terms; said list was shared with the Association, and was not challenged or grieved. In a subsequent arbitration before Joe Kerkman, the Association again sought district-wide seniority by certification, again unsuccessfully. Throughout this period, the District amended the seniority list consistent with the terms of the contract.

The current departmental language dates to the negotiations for the 1982 contract. Again, the Association sought district-wide seniority by certification; again, the District resisted such a sweeping and unmanageable proposal, countering with the language which, having been accepted by the Association, remains in the contract. Per its usual practice, the District then published a new seniority list to reflect the new departmental structure. The practice of adding and deletion K-12 departments has been consistent, has never been grieved, and has never brought about an Association request to bargain department definitions.

That the District's interpretation is correct and accepted by both parties is further supported by the Association's acquiescence in the District's consistent practice of designating departments.

Finally, the remedy the Association seeks -- back pay and benefits to restore the grievant to full-time status for 1987-88 -- is inappropriate to the nature of the alleged violations and beyond the scope of the arbitrator's authority.

In its reply brief, the Association posits further as follows:

It is natural that the defenses raised to the District's challenge to procedural arbitrability are different to the issues now raised as to the merits. The timeliness of the grievance involved decisions made about funding; the merits of the grievance relate to the incorrect selection of the grievant for layoff.

Regarding the violation of Section 121.1, it is not disputed that the District altered certain staff members about possible changes in funding and staffing levels. But, by definition, "to confer" is something else, involving the seeking of advice and counsel. This the District did not do. The District's claim that this provision does not apply because the funds in question were neither state nor federal is also not supported by the record.

Regarding the seniority lists unilaterally promulgated by the District, the clear and unambiguous language of the contract, plus past practice, establishes that the list used in the layoff of the grievant was not consistent with the definition of departments set forth in the collective bargaining agreement. The Association has periodically notified the District that unilateral lists did not conform to the contract and would be challenged.

It is noteworthy that the definitions ordered included in the contract pursuant to the Yaffe award used the introductory phrase, "Examples of"; the current language does not refer to any "examples," but instead states what the departments are.

The District is apparently confused about the origin of the proposed K-12 designation; in fact, contrary to the District's assertion, it was the Association which proposed that all departments other than those specifically stated in Section 124.1 were to be K-12 departments. In any event, just because the Superintendent interprets contract language in a particular manner does not signal agreement by the Association.

It is well-settled that collective bargaining agreements supersede any instrument issued unilaterally; thus, seniority lists which conflict with negotiated language are superseded by the contract, and any layoff implemented under them are in conflict with the contract and must be overturned. Departments other than those expressly stated in the collective bargaining agreement are to be K-12 departments within areas of certification; ALPS, WECEP and Perkins staff are not rightly segregated in separate departments for layoff under the contract.

As the District apparently did not consider co-curricular assignments significant in determining whom to layoff, the appropriate application of seniority and the correct composition of departments is crucial in identifying the individual(s) to take the necessary reduction in hours. And there is no rational basis for segregating the grievant from the other members of the ALPS/ WECEP/Perkins pool, over whom he had greater seniority. Sequestration based on the source of funds is artificial, contrary to the contract, and an interpretation which eviscerates seniority rights and is counter to a sound labor-agreement relationship.

It is apparent that seniority was the sole criteria the District used in making its layoff decision. If Anderson and Harried -- persons with less seniority -- were in the appropriate layoff pool with the grievant, then the grievant was improperly laid off, and should be restored to full employment. The remedy sought is consistent with arbitral authority, the authority of the arbitrator, and the collective bargaining agreement.

In its reply brief, the District posits further as follows:

> The Association has failed to muster any evidence that the District violated Section 121.1 of the contract, but, apparently conceding its failure, instead proposes to rewrite the agreement. Its effort to do so (in terms of numerous additions to the District's existing obligation to confer with staff) is without support in the record or bargaining history.
>
> The District's designation of K-12 departments, and its identification of the grievant for reduction in hours, was consistent with the contract. The Association's argument that the District violated Section 124.0 by identifying the grievant for reduction solely on the basis of seniority is astounding, inasmuch as the Association foreswore such argument at hearing. First, the District applied all the layoff criteria to this determination, not just seniority. The District compared the grievant to the other members of his department (ALPS), and nothing in the record suggests that his training, certification, or co-curricular assignments would offset the fact that the next junior member of ALPS had five years greater seniority. Moreover, given that the Association has consistently been proposing that seniority be the sole or major criteria for layoff, it is hard to take this argument seriously at this time.
>
> Clearly, the Association contention on an alleged Section 124.0 violation is derivative from an alleged violation of Section 124.1, relating to departmental definitions. Here again, the Association is implicitly proposing that the contract be rewritten, again without support in the record or bargaining history. The Association would have the contract interpreted to hold that academic subjects in K-5 and 6-8 constitute two departments; there be four additional departments in high school math, science, social studies and language arts; and everyone else belong to a single department designated "K-12." Such a theory is directly contrary to the plain language of the contract, the established bargaining history, and common sense.
>
> The Association is correct in stating that the seniority lists have not been bargained collectively, and that any District policies in conflict with the contract are void. But the Association is incorrect in asserting that the specific departmental designations and seniority lists developed thereunder are in conflict with the contract. This matter never should have been brought as a grievance, especially one marred by the Association's shifting positions, inconsistent allegations, and shrill accusations. The Association has failed to prove, either by the language of the agreement, bargaining history, or past practice, that the District violated any provision of the contract when it reduced the grievant's assignment during the 1987-88 school year. Accordingly, this grievance should be dismissed in its entirety.

DISCUSSION

It is apparent that the vortex of this controversy is the departmental designations which the District made as a condition precedent to its preparation of the seniority list. The critical question is whether such designations supplement in a complementary fashion the terms of the collective bargaining agreement, or whether they seek to supersede the contract in a manner in conflict with its language and application.

The relevant language in the contract under consideration, Section 124.1, reads as follows:

> The term department shall be defined as the subject area or level in which the teacher is teaching during the current year. Elementary departments are grades K-5, Middle School Departments are grades 6-8, High School departments are social studies, math, science and language arts. All other departments are K-12.

The District represents that this means there are two departmental designations based on grade levels (the K-5 and 6-8 departments), four designations based on subject areas (the four subject areas in the High School), and an unspecified number of "other departments," which are all K-12. The District further asserts that it has the implicit and explicit management right to add and/or delete such "other departments," based on educational needs, financial resources, and so on.

To a certain extent, the Association apparently concurs in this conceptual framework, stating in its brief that "all other (i.e., non-science, math, social studies and language arts) high school faculty are to be listed as part of K-12 departments." Thus, contrary to the District's analysis of the Association's position, the Association is not advocating that all faculty in the non-specified areas be grouped in <u>one</u> K-12 department. Rather, it is the Association's position that the instant separation of ALPS, WECEP and Perkins is artificial, and productive of a result which is counter to sound labor/ management relations.

That may well be true. But the question before me is not whether the District <u>was</u> right in terms of public policy in making the departmental designations it did; my authority is limited to determining whether the District <u>had</u> the right in terms of the collective bargaining agreement to take such actions.

It is axiomatic that an arbitrator must first consider the language of the collective bargaining agreement; only if that language is ambiguous is recourse to to bargaining history and past practice appropriate.

The benchmark of ambiguity is not whether the advocates disagree on interpretation, but rather whether the arbitrator finds some uncertainty or confusion in the language. Here, by the treatment of singular and plural nouns and verbs in the second and third sentence, I find such confusion. That is, the contract states that, (e)lementary departments <u>are</u> grades K-5, (m)iddle (s)chool departments <u>are</u> grades 6-8, (h)igh (s)chool departments <u>are</u> K-12." The parties apparently concur, however, that, notwithstanding the use of the plural forms, the second sentence is more accurately stated, "(t)he elementary department is grades K-5, the Middle School department is grades 6-8, and High School departments are social studies, math, science and language arts." Since the contract thus creates some confusion by its use of plural forms instead of singular in the second sentence, some uncertainty arises over the issue of plural-versus-singular in the third sentence as well. As ambiguities go, this might seem a minor matter, but it is sufficient in my mind to sanction consideration of other means of contract interpretation.

In that light, I find especially helpful the documented bargaining history, particularly the negotiations for the 1980-82 and 1982-84 contracts. In the earlier agreement, the relevant provisions were as follows:

> Examples of elementary departments are elementary art and grades K-5. Examples of middle school departments are middle school art and middle school 6-8. Examples of high school departments are high school art and high school science.

It is undisputed that the parties have sought through negotiations to advance well-defined, and generally competing, interests in departmental designation. As testified to by the Association's chief negotiator, the Association has sought to broaden the definition as much as possible, with the idealized goal (from its perspective) of one districtwide department, and seniority measured by certification rather than subject or grade level currently taught; conversely, as testified to by the Superintendent, the District's goal has been on maintaining as narrow a definition of department as possible.

The issue was joined most directly during the negotiations which led to the voluntary settlement of the contract for 1982-1984. During these negotiations, the Association proposed to replace the existing Section 124.1, noted above, with the following: "The term 'Department' shall be defined as K-12 by teacher certification." Subsequently, the District responded with a counter-offer, as follows:

> The term department shall be defined as the subject area or level in which the teacher is teaching during the current year. Elementary departments are Grades K-5, Middle School

> Departments are Grades 6-8, High School departments are social studies, math, science and language arts. All other departments are K-12.

Apart from the insignificant discrepancy as to the capitalization of the word "grades," this is the language which the parties agreed to, and which is found in the contract currently under review. Thus, while the Association may claim that it was the initiator of the discussion of the issue of changes in the relevant language, it was the District's proposal which was ultimately adopted by the parties.

From the onset of departmental definitions pursuant to the 1975 Yaffe Award, the parties have taken well-defined positions on this topic in their negotiations. There is no doubt that the offer and counter made during the negotiations for the 1982-84 contract were well understood by all involved. Nor should there be any doubt that the eventual agreement provided broader departmental definitions than before, but not so broad as that sought by the Association.

That the bargaining history itself supports the District is further established by the documented history of the way the District arrayed its departmental designations and accompanying seniority lists. Prior to the 1982-84 contract, there were 41 separate departments; upon the introduction of the phrase, "(a)ll other departments are K-12," that number was reduced to 24, as subject areas much as music, art and pupil services, etc., formerly classified as senior/middle/elementary school were combined into unified, district-wide departments. The history pertaining to the area of special needs for certain students is especially convincing, in that the designations which the Association attacks directly -- separate departments for ALPS and Perkins -- were made by the District as early as February 2, 1987, almost six months before the 1986-89 contract was executed by the parties on July 24, 1987. That is, notwithstanding that the parties apparently went though the 1986-87 school year without a new contract, they voluntarily agreed to a contract which made no changes to the pertinent language. For whatever reasons they made this deal (i.e., the District's offer in other respects was so good it didn't wish to prolong negotiations), the Association cannot now disavow the necessary inference that in so doing it gave its imprimatur to the District interpretation and application.

The parties apparently concur that the seniority lists have not been the subject of collective-bargaining, and are not formally part of the contract. This does not mean, however, that their contents are immune from challenge though the grievance process. Indeed, the District explicitly acknowledges this.

The District apparently believes, however, that it can add, modify or delete "all other departments" subject only to the requirement that such departments by K-12, pursuant to its general rights of management and Section 124.1. If by this the District is asserting a right to act in an arbitrary or capricious manner (e.g., designating departments based on astrology or the reading of entrails), it is mistaken. If, however, the District decisions on departmental designations are reasonably related to legitimate educational policies or business interests (as such are understood in the context of public sector employers), it does indeed have the power it asserts.

Here, I do find the necessary rational basis for the District's actions, both as regards both program affinity (a legitimate educational policy) and funding sources (a legitimate business interest). That is, while these programs all deal in a general fashion with the special needs of certain students, there are real and distinct differences in their focus and implementation; such differences might not be so great as to have required the creation of separate departments, but they are not so minor as to have prevented same. Regarding the division based on funding sources, the District's decision to separate ALPS, WECEP and Perkins into distinct departments was not unlike its earlier decisions to establish separate departments for Parent Place and Chapter I. These programs were all created at different times, and funded from different allocations; some had a reasonable expectation of continuance, while others were continually up for review in a process of competitive grantwriting. The District could well have chosen to pool program and staff, but it chose to do otherwise. That the choice not made could also have been "right" does not necessarily mean that the choice made was "wrong."

This is not to say this division was necessarily wise, just, or required. As stated above, my charge is not to review the merits of the District's action but rather to determine whether such action was consistent with the terms of the collective bargaining agreement.

That agreement clearly calls for the designation of departments, without specifying the party responsible for such determinations. The District has given this task to its Administrative Council. I find nothing in the agreement, the bargaining history, or past practice to support the conclusion that this process violated the collective bargaining agreement.

As the parties are well aware, I am expressly prohibited from modifying, adding to or deleting the expressed terms of the agreement. Thus, I cannot explicitly order the District to adopt certain procedures regarding notice to the Association of each year's seniority list. However, I can, and do, note that the District has a well-established practice of publishing preliminary seniority lists within a few months of the start of the school year, for review and necessary corrections. In hopes of preventing future problems before they occur, I respectfully suggest to the parties that they establish a more formalized process for this vital procedure.

Having determined that the District did not violate Section 124.1 in its promulgation of the 1986-87 District-Wide Departments Seniority List, I turn to the issue of the selection of the grievant for layoff through a reduction in hours. This clause of action is largely dependent on the larger question of departmental designations. That is, having found that the creation of a department limited to ALPS was not in violation of the contract, I will examine the application of the specified criteria to the grievant and the three other named members of the Department. The record establishes that the grievant had five years less service in the District than the next junior member of that department. While the record establishes that the grievant did have some co-curricular assignments, and is silent on the like activities of the next junior ALPS department member, there is nothing in the record to indicate that the District, in considering the ALPS department as a distinct grouping, failed to apply the contractual criteria in an appropriate manner. Accordingly, I find that the District did not violate Section 124.0 in its selection of the grievant for layoff through reduction in hours.

Finally, as to Section 121.1, the record establishes that administrative personnel met frequently with the grievant and his colleagues, over a period of time, on matter, both general and specific, relating to their program areas. Accordingly, I find that the District did meet its contractual obligation to confer with instructional staff regarding the development and implementation of programs potentially funded by the state or federal government.

Based on the evidence in the record, and the arguments of the parties, it is my

AWARD

That the Board of Education did not violate Sections 121.1, 124.0 or 124.1 of the 1986-89 collective bargaining agreement between the parties when it reduced the 1987-88 assignment of the grievant from full-time to part-time.

Accordingly, this grievance is denied and dismissed.

Dated at Madison, Wisconsin this 12th day of October, 1989.

By _____
Stuart Levitan, Arbitrator