

BEFORE THE ARBITRATOR

-----  
 :  
 In the Matter of the Arbitration :  
 of a Dispute Between :  
 :  
 SHEBOYGAN EDUCATION ASSOCIATION :  
 :  
 and : Case 91  
 : No. 41647  
 : MA-5430  
 SHEBOYGAN AREA SCHOOL DISTRICT :  
 :  
 -----

Appearances:

Mr. Charles S. Garnier, Executive Director, Kettle Moraine UniServ Council, 3841 Kohler Memorial Drive, Sheboygan, Wisconsin 53081, appearing on behalf of the Association.  
Mr. Paul C. Hemmer, Mulcahy & Wherry, S.C., 607 Plaza 8, Sheboygan, Wisconsin 53081, appearing on behalf of the District.

ARBITRATION AWARD

The Sheboygan Education Association, hereinafter the Association, and the Sheboygan Area School District, hereinafter the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Association, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint an Arbitrator to hear and decide the instant dispute. The Commission appointed Coleen A. Burns, a member of its staff as Arbitrator. Hearing in the matter was held on May 9, 1989 in Sheboygan, Wisconsin. The record was closed upon receipt of the post-hearing briefs on August 14, 1989.

ISSUE

The parties stipulated to the following statement of the issue:

Did the District violate Section 4.9 of the Collective Bargaining Agreement when it reduced the grievant from full-time status to part-time status while a part-time teacher with less seniority than the Grievant was rehired?

If the District violated the Collective Bargaining Agreement what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

PREAMBLE

The general intent of the agreement is to further the purpose of the parties in providing maximum educational opportunities for the children of the District.

ARTICLE II - BOARD FUNCTIONS

2.1 Nothing in this Agreement shall interfere with the rights of the Employer in accordance with applicable laws, rules and regulations to:

- A. Carry out the statutory mandate and goals assigned to the Board of Education utilizing personnel, methods and means in the most appropriate and efficient manner possible.
- B. Manage the employees of the Board of Education; to hire, promote, transfer, assign or return employees to positions within the employment of the Board of Education, and in that regard to establish reasonable work rules.
- C. Suspend, demote, discharge, non-renew, place upon probation, and take other appropriate disciplinary action against the employee for just cause; to layoff employees in the event of lack of work or funds pursuant to Article IV, Section 4.8.

2.2 The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms hereof and in conformance with the Constitution and laws of the state of Wisconsin. . . .

ARTICLE IV - EMPLOYMENT CONDITIONS

4.7 Assignment and Transfer.

The Board of Education retains the right to make grade, subject and activity assignments and to make transfers between schools as necessary in the best interest of the district.

. . .

4.9 Layoff Procedure.

A. Board Rights. It is agreed that the Board has the right to lay off employees.

B. Definition. A laid off employee is one whose contracted position has been eliminated or reduced.

C. Staff Reduction.

1. In the event that the Board decides to reduce the number of employees, the reduction, insofar as possible, will be effected through normal attrition. If the reduction cannot be effected through normal attrition, part-time employees will be laid off before full-time employees in the inverse order of service with the Sheboygan Area School District, as provided in this section for the positions available. Seniority of part-time employees shall be determined as follows:

a. Part-time employees maintain seniority within the part-time seniority list based on the provisions of this section.

b. A part-time employee who is hired for a full-time position enters the full-time list with all years of seniority accrued through continuous service to the Sheboygan Area School District. A full-time employee who is hired for a part-time position enters the part-time list with all years of seniority accrued through continuous service to the District.

2. In the event that the Board decides to lay off full-time employees, this shall be done in the inverse order of service to the Sheboygan Area School District. The seniority list shall be divided according to certification held by the employee at the date of employment by the Board and any subsequent seniority earned pursuant to this section.

a. Each employee shall maintain seniority within either a part-time seniority list or a full-time seniority list. Seniority for a part-time employee shall be prorated according to the percent of the contract.

b. Full-time employees who are laid off and recalled for a part-time contract shall remain on the full-time seniority list with all part-time experienced prorated. Such employees shall be offered the next full-time vacancy in any area for which they are certified. They must accept this full-time vacancy or revert to the part-time seniority list.

c. An employee who is moved into a position for which certification was not held upon entering the employment of the school district shall continue to accrue seniority in the old areas of certification and upon entering the new position shall begin to accrue seniority in the new area of certification.

d. A full-time employee who is forced to become part-time due

to layoff, shall remain on the full-time seniority list.

e. The seniority list shall be published by the Board no later than November 1 of each school year.

f. When a teacher earns a new certification, seniority does not accrue until he/she teaches in that area. Said seniority begins at zero (0) years.

3. The administration has the discretion of selecting between employees having the same seniority.

D. Method of Layoff. The method of layoff is as follows: An employee who is directly affected by the elimination or reduction of a particular position will be allowed to displace that employee in the District who has the least amount of seniority within the area of certification of the employee directly affected, and who is in a position for which the employee directly affected is certified, provided the displacing employee gives written notice of such displacement with ten (10) calendar days after receiving an initial notice of layoff. The employee so displaced may also, if possible, displace another employee on the above basis, provided such employee gives written notice of such displacement within ten (10) calendar days after receiving his or her notice of layoff. Nothing prevents any employee initially affected by the elimination or reduction of a position or displaced by the above procedure from voluntarily accepting the layoff in lieu of displacing another employee. An employee displacing another employee in an area or subject which he has not taught or worked in within the past five (5) years may be required to take up to six (6) college credits or their equivalent by the Superintendent. If an employee pays tuition for such required credits, the employee will be reimbursed at the rate of \$40 per semester credit hour.

E. Notification of Layoff. . . .

F. Benefits During Layoff. . . .

G. Recall. Laid off employees shall have the following reemployment rights:

1. Laid off employees shall be recalled to service in the inverse order of their layoff.

2. Recall rights shall extend for two (2) full school years following the last date of service of the laid off employees.

3. Laid off employees shall be recalled to any position for which they hold certification.

4. No part-time employees shall be recalled until full-time laid off employees, in the same area of certification, have been offered full-time employment. If full-time employment is not available in that area of certification, the full-time employee shall be offered whatever employment is available for which he is certified.

5. Recall Procedure.

a. An employee will be recalled by written notice given personally to the employee or sent by certified mail, return receipt requested, to the employee's last address on file with the District's administrative office. The employee is solely responsible for maintaining a current address on file in the administrative office. Such notice will be deemed received on the date

shown on the return receipt.

- b. The school district must be notified in writing, within ten (10) calendar days of receipt of the vacancy notice, of the acceptance or rejection of the position. If an employee does not respond to the notice within ten (10) calendar days of its receipt, the employee shall forfeit any further recall rights. If an employee does not receive the notice, the employee shall have sixteen (16) calendar days from the date of post-mark in which to respond. Failure to respond within such sixteen (16) calendar days shall be a forfeit of any further recall rights. The Association shall be simultaneously notified of all recall notices.
- c. If a recalled employee cannot accept the position(s) as notified, that teacher shall continue to be recalled pursuant to the limits set forth in this Paragraph G.
- d. A full-time employee on layoff status may refuse recall offers of part-time, substitute or other temporary employment without loss of recall rights under Paragraph G(2) above. Further, such employee shall not lose recall rights under Paragraph G(2) above to a full-time position by accepting part-time or substitute appointments. Nothing in this sub-paragraph is to be construed as affecting the eligibility or intel-igibility of any employee for unem-ployment compensation.

6. Definition of Vacancies.

- a. A vacancy is a position which is expected to be open and unfilled for 90 working days or more.
- b. Any position which is expected to be open or unfilled for less than 90 working days shall be considered a substitute position and not subject to this clause.
- c. Employees filling vacancies of more than 90 days shall receive all benefits as provided under the terms of this agreement.
- d. The Board is not obligated to fill vacancies of less than 90 days with an employee on layoff. If the Board does hire a laid off employee for less than 90 days, that employee is entitled to receive all benefits as provided under the terms of this agreement.
- e. Any employee subject to recall shall be recalled as provided in paragraph one (1) above to any vacancy provided he/she is certified for the position.
- f. Recalled employees filling vacancies for individuals who are on an approved leave of absence or who are otherwise due to return shall return to layoff status upon the return of the regular employee. The recall rights of the employee returning to layoff status shall be renewed.

- g. This section does not create any obligation on the part of the employer to fill any vacancy or position and is only operative after the decision to fill a vacancy or position has been made.

ARTICLE VII - GRIEVANCE PROCEDURE

7.5 Grievance Procedure.

. . .

D. Step Four - Arbitration

. . .

3. . . . The arbitrator shall have no power or authority to add to, disregard, subtract from, or modify any of the terms of this Agreement or any amendments hereto, nor to establish or change any wage or wage structure, nor to change the structure of a classification, nor to interpret an administrator's evaluation of a teacher or guidance counselor.

. . .

5. In rendering a decision, an arbitrator shall give due regard to the responsibility of management and shall so construe the Agreement that there will be no interference with such responsibilities, except as they may be specifically conditioned by this Agreement.

ARTICLE VIII - TERM OF AGREEMENT

8.3 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. It is agreed that any matters relating to the current contract term, whether or not referred to in this Agreement, shall not be open for negotiations except as otherwise provided herein, or as otherwise mutually agreed by the parties. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control, provided, however, that the bargaining agent shall be notified in advance of any changes having a substantial impact on the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter.

RELEVANT STATUTORY PROVISIONS

Section 111.70, Wisconsin Statutes. Municipal Employment.  
(1) Definitions.

. . .

(d) "Collective bargaining" . . . The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions the wages, hours and conditions of employment of the employees. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employees by the constitutions of this state and of the United States and by this subchapter.

. . .

Section 120.12, Wisconsin Statutes. School board duties.

The school board of a common or union high school district shall:

(1) Management of school district. Subject to the authority vested in the annual meeting and to the authority and possession specifically given to other school district officers, have the possession, care, control and management of the property and affairs of the school district, except for property of the school district used for public library purposes under s. 43.52.

(2) General supervision. Visit and examine the schools of the school district, advise the school teachers and administrative staff regarding the instruction, government and progress of the pupils and exercise general supervision over such schools.

. . .

Section 120.13(1)(a), Wisconsin Statutes. School board powers.

The school board of a common or union high school may:

(1) SCHOOL GOVERNMENT RULES; SUSPENSION; EXPULSION. (a) Make rules for the organization, graduation and government of the schools of the school district, including rules pertaining to conduct and dress of pupils in order to maintain good decorum and a favorable academic atmosphere, which shall take effect when approved by a majority of the school board and filed with the school district clerk.

. . .

Section 120.44(2), Wisconsin Statutes. School board powers and duties.

(2) The public schools of a unified school district shall be under the management, control and supervision of a school board. The school board shall have the powers and duties of the school board and annual meeting in a common school district. The officers of a unified school district shall have the powers and duties of the officers of a common school district.

BACKGROUND

As of June, 1988, LuAnn Cleary Benninghaus, hereinafter Grievant, was certified in 250 Business and 281 Business Office-Vocational. According to the full-time seniority list in effect at that time, the Grievant had 14.525 years of seniority in each area of certification. During the 1987-88 school year, the Grievant was employed as a full-time teacher. At the end of the 1987-88 school year, the Grievant was notified that she would be offered a 70% position for the 1988-89 school year. Prior to the start of the 1988-89 school year, the Grievant was notified that her assignment had been increased to 80% of a full-time contract. During the 1988-89 school year, the Grievant worked as a part-time teacher at 80% of a full-time contract.

During the 1987-88 school year, Hariett Berglund worked as a part-time teacher. During the 1988-89 school year, Berglund was employed at 30% of a full-time contract. Berglund taught 7th Grade Keyboarding and 8th Grade Keyboarding, both of which the Grievant was certified to teach. As of June, 1988, Berglund had 2.5 years of seniority in 250 Business on the District's part-time seniority list.

Berglund's 7th Grade Keyboarding class met during the first semester only, from 9:22 a.m. to 10:13 a.m. on each day of the school week. In each semester, the Grievant taught 8th Grade Work Processing on each day of the school week from 8:43 a.m. to 9:34 a.m. and from 9:37 a.m. to 10:28 a.m. Berglund's 8th Grade Keyboarding class was taught both semesters and met each day of the school week from 1:00 p.m. to 1:51 p.m. The Grievant's 7th Grade keyboarding class was taught both semesters and met each day of the week from 12:21 p.m. to 1:12 p.m. Thus, the Grievant's teaching schedule overlapped Berglund's teaching schedule.

During the 1988-89 school year, Consumer Economics, was offered as a business course at North High School and taught by Harland Lee, a full-time teacher with more 250 Business and 281 Business Office-Vocational seniority than the Grievant. At South High School, Consumer Economics, was offered as a Social Studies course and was taught by John Schrank. Schrank, who has a Social Studies certification, was a new employe of the District.

The Grievant was certified to teach the Consumer Economics course taught

by Schrank. At South High, the Consumer Economics course was offered both semesters at 4th and 6th periods, and during the second semester at 7th period. With the exception of the second semester 7th period, the Grievant was teaching during times when Schrank taught Consumer Economics at South. 1/

On or about September 1, 1988 the Grievant filed a grievance alleging that the District violated Sec. 4.9 of the collective bargaining agreement because "The Grievant was reduced from a 100% contract 1987-88 to an 80% contract 1988-89. There are less senior employees rehired for part-time for 88-89 positions for which the Grievant is certified." The grievance was denied at all steps and, thereafter, submitted to arbitration.

#### POSITIONS OF THE PARTIES

##### The Association

The Association asserts that the District violated Section 4.9.C., Staff Reduction, of the agreement when it reduced the Grievant from full-time status while rehiring Harriet Berglund for a 30% teaching load. The Association maintains that Section 4.9.C.1 of the Collective Bargaining Agreement does not allow the retention of a part-time employee in layoff situations when there are full-time employees certified and qualified to work. Alleged problems in scheduling or in the determination of "staffing patterns" are not legitimate reasons for not adhering to the provisions of this section of the Collective Bargaining Agreement.

It must be strongly emphasized that the so-called "availability of work" only becomes applicable upon recall to partial or to full-time employment, as codified in Section 4.9.G.4 of the Collective Bargaining Agreement. The Association asserts that once the District determined that certain classes or sections of classes were to be eliminated in the business education area for the 1988-89 school year, it had the contractual obligation to fully lay off Harriet Berglund (who did not teach full-time in 1987-88) before it partially laid off the Grievant (who did teach full-time in 1987-88). This result is compelled by the fact that Harriet Berglund had less seniority than the Grievant, and the Grievant was certified and qualified to teach Ms. Berglund's classes.

The Association also claims that, pursuant to Section 4.9.G.4 & 5 of the Collective Bargaining Agreement, the District should have recalled the Grievant to all the additional work that was available in the Business Education area for 1988-1989.

The Association argues that at least 20% of Harriet Berglund's business classes should have been assigned to the Grievant and maintains that, in this regard, the language in Section 4.9 G.4 is consistent with that found in Section 4.9 C.1. mentioned earlier. Secondly, the Association argues that one of Virginia Lorenz's classes could have been assigned to the Grievant without reducing the teaching load of Ms. Lorenz below 100% because Ms. Lorenz's job, as the system-wide department chair for the education area, was the equivalent of teaching class. Thirdly, the Association argues that the "Consumer Economics" class which was offered at South High School should have been assigned to the Grievant rather than to a first-year teacher because the Collective Bargaining Agreement requires that the "full-time employee shall be offered whatever employment is available for which he is certified."

##### THE DISTRICT

The District claims that the burden of proof and persuasion rests with the Association. It argues that the limitations of the middle school schedule required that additional business education classes be assigned to Harriet Berglund, and precluded the classes from being reassigned to the Grievant. The District maintains that the labor agreement does not require the restructuring of student schedules in order to afford full-time employment on the basis of seniority. The Collective Bargaining Agreement did not require that classes in consumer economics be assigned to the Grievant. Pursuant to longstanding educational policy and consistent with DPI recommendations, the Consumer Economics course at South High, offered as a social studies course, has been taught by a teacher with Social Studies certification.

The District advocates that the arbitrator must construe the labor agreement to avoid interference with the management responsibilities of the School District, which in this case are not constrained by a specific term of the agreement. The District is not required to assign release time to the chairperson of the Department Business Education or to the Grievant in order to make additional employment available to the Grievant.

Section 4.9, C., 1. of the labor agreement provides that when layoffs

---

1/ On Wednesday, Schrank's 6th period class met from 12:50 p.m. - 1:36 p.m., conflicting with the Grievant's 6th period class.



cannot be accomplished through normal attrition, part-time employees in an area of certification where a reduction is to occur will be laid off on the basis of seniority as defined by the terms of the labor agreement. Section 4.9, C., 2. of the agreement states that when the Board of Education decides to lay off full-time employees, this will be accomplished in the inverse order of service to the Sheboygan Area School District, as determined on the basis of the sub-parts of Section 4.9, C., 2.

At the end of the 1987-1988 school year, three members of the business education department were laid off, including the Grievant and Harriet Berglund. Subsequently, the Grievant and Ms. Berglund were partially recalled.

Under the labor agreement, employees are not "partially laid off." Employees are laid off and recalled if possible. The Grievant was not partially laid off while Harriet Berglund was retained. Rather, both were laid off and partially recalled. Since both the Grievant and Ms. Berglund were laid off and then recalled, Section 4.1, C., 1. is not applicable to the issues in this case. The Grievant was not laid off while a part-time employee was retained.

The labor agreement does not state, and has never been applied, to require full employment for all full-time teachers before a part-time employee may be recalled from layoff on a part-time basis. The operative labor contract clause in this case is Section 4.9.G., Recall. The position of the Association, i.e., to guarantee 100% employment for full-time teachers, before recalling part-time teachers, would require the School District to make work "available" for full-time teachers recalled from layoff. This is not required by the labor agreement.

Ms. Lorenz was not assigned release time for her department chairmanship duties. The Grievant could not have been assigned any of Ms. Lorenz's classes without reducing Ms. Lorenz to less than full-time employment.

#### DISCUSSION:

The Association argues that the District violated Sec. 4.9.C., Staff Reduction, by not fully laying off Berglund, a part-time employee in the Grievant's area of certification, prior to laying off the Grievant, a full-time employee. The District does not dispute the Association's assertion that Sec. 4.9.C. required the District to fully lay off Berglund prior to laying off the Grievant. 2/ The District, however, denies the Association's claim that it did not fully lay off Berglund prior to laying off the Grievant.

Given the record presented herein, the undersigned is unable to determine whether or not Berglund was fully laid off prior to laying off the Grievant. According to Director of Personnel Born, Berglund was laid off and partially recalled. 3/ While Born applied the same terminology to the Grievant's case, the Grievant's testimony was sufficient to establish that the Grievant's layoff was, in fact, a reduction from a full-time to part-time position, i.e., from full-time to seventy per cent, with a subsequent "recall" of an additional ten per cent assignment. 4/ Berglund, however, did not testify at hearing and there is no other record evidence which addresses either the timing or extent of Berglund's layoff or recall. Assuming arguendo, that Sec. 4.9.C. required the District to fully lay off Berglund prior to laying off the Grievant, it is not evident that the District's conduct was contrary to such a requirement. Accordingly, the undersigned does not find the District to have violated Sec. 4.9.C. as claimed by the Association.

In arguing that the District has violated the recall rights of the Grievant, the Association relies, inter alia, upon the language of Sec. 4.9.G.4., which provides as follows:

4.No part-time employees shall be recalled until full-time laid off employees, in the same area of certification, have been offered full-time employment. If full-time employment is not available in that area of certification, the full-time employee shall be offered whatever

---

2/ District's reply brief, p. 1-3.

3/ T. 43-43.

4/ Section 4.9.C.2 address the "layoff" of full-time employees. Given the language of Sec. 4.9.B., such a "layoff" can involve either an elimination of the full-time employee's position, commonly referred to as a complete lay off, or a reduction in the full-time employee's position, commonly referred to as a partial layoff. The record establishes that, at the time the Grievant was notified of her layoff, she was also notified that she was being offered a seventy per cent contract for the 1988-89 school year. Under such circumstances, the Grievant's position must be considered to be reduced, rather than eliminated. Accordingly, the Arbitrator rejects the District's argument that the Grievant was fully laid off at the end of the 1987-88 school year.

employment is available for which he is certified.

Specifically, the Association argues that the provision required the District to offer full-time employment to the Grievant prior to recalling Berglund to work.

At all times relevant hereto, Berglund has been a part-time employe in the same area of certification as the Grievant. Berglund was recalled to work during the 1988-89 school year at a time when the Grievant, a full-time employe, had been laid off, i.e., reduced from a 100% to an 80% contract. The Grievant was certified to perform the work assigned to Berglund and the work assigned to Berglund was sufficient to provide the Grievant with a full-time contract. Given the circumstances presented here, the District violated Sec. 4.9.G.4. of the parties' collective bargaining agreement when it recalled Berglund prior to offering the Grievant full-time employment.

In reaching this conclusion, the undersigned has considered and rejected the District's argument that full-time employment was not available to the Grievant because of scheduling conflicts. Section 4.9.G.4. expressly preserves work for full-time employes, at the expense of part-time employes. The District's right to schedule classes, which may be implied from the provisions of Article II, Board Functions, must be considered to be subordinate to the express requirements of Sec. 4.9.G.4. To prevail upon its argument that full-time employment was not available to the Grievant, the District must demonstrate that it was not possible to schedule the work in dispute in such a manner as to provide the Grievant with full-time employment. The District does not argue and the record does not demonstrate such an impossibility.

In summary, the District violated the Grievant's contractual recall rights when it recalled Berglund prior to offering the Grievant full-time employment. Since the Grievant was entitled to full-time employment during the 1988-89 school year, it is appropriate to order the District to make the Grievant whole for all wages and benefits lost as a result of the District's failure to provide the Grievant with full-time employment during the 1988-89 school year.

The Association has not cited and the undersigned does not find any contract provision which required the District to assign to the Grievant any work which was performed by Virginia Lorenz, a more senior teacher.

During the course of the hearing, the Association raised, for the first time, the issue of whether the District violated the Grievant's recall rights when it hired a new employe, John Schrank, to teach Consumer Economics. Inasmuch as the Association's claim falls outside the scope of the parties' stipulated issue, the undersigned is without jurisdiction to determine the merits of the Association's claim.

Based upon the above and the record as a whole, the Arbitrator issues the following

AWARD

1. The District did violate Sec. 4.9. of the Collective Bargaining Agreement when it reduced the Grievant from full-time to part-time status while a part-time teacher with less seniority than the Grievant was rehired.

2. The District is to immediately make the Grievant whole for any and all wages and fringe benefits lost as a result of the District's failure to provide the Grievant with full-time employment during the 1988-89 school year.

Dated at Madison, Wisconsin this 6th day of March, 1990.

By \_\_\_\_\_  
Coleen A. Burns, Arbitrator