BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
NORTHWEST UNITED EDUCATORS	
and	Case 24 No. 42064 MA-5551
FLAMBEAU SCHOOL DISTRICT	

Appearances:
Mulcahy & Wherry, S.C., Attorneys at Law, 715 South Barstow Street, Eau Claire, Wisconsin, by Ms. Kathryn J. Prenn, appearing on behalf of the District.
Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin, by Mr. Kenneth J. Berg, appearing on behalf of the Union.

ARBITRATION AWARD

Northwest United Educators, hereinafter the Union, and the Flambeau School District, hereinafter the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, 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 July 25, 1989 in Tony, Wisconsin. The record was closed on October 4, 1989, upon receipt of post-hearing briefs.

ISSUE

The District frames the issue as follows:

1. Is the grievance procedurally arbitrable?

2. Did the District violate the collective bargaining agreement when it reduced the Grievant's employment contract for the 1988-89 school year?

If so, what is the appropriate remedy?

The Union frames the issue as follows:

1. Did the District violate the collective bargaining agreement when it reduced the Grievant's employment contract for the 1988-89 and 1989-90 school years?

RELEVANT CONTRACT LANGUAGE

ARTICLE XI

Grievance Procedure

A. The purpose of the Grievance Procedure is to provide an orderly method for resolving the differences arising during the terms of this agreement. A determined effort shall be made to settle any differences through the use of the grievance procedure.

B. For the purpose of this agreement, a grievance is defined as any dispute involving the interpretation or application of any provision of this agreement.

C. Whenever a grievance shall arise the following procedure shall be followed:

Step #1

1.An earnest effort shall first be made to settle the matter informally between the teacher and his immediate supervisor.

2.If the matter is not resolved, the grievance shall be presented in writing within fifteen (15) school days after the facts upon which the grievance is based first occur or first become known. The immediate supervisor shall give his written answer within fifteen (15) school days of the time the grievance was presented in writing. For grievances arising within fifteen (15) days of the end of the school year, the time limits above shall be either those stated or twenty (20) calendar days, whichever is longer.

. . .

E.If the employer or employee fails to give a written answer within the time limits set out for any step, the employee or employer may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped.

ARTICLE XII

Layoff Clause

A.If the teaching staff is decreased, the School Board will lay off teachers in the inverse order of appointment of such teachers, by department or elementary grades, and subject to the qualifications needed. If vacancies occur, teachers laid off shall be reinstated in the inverse order of being laid off, if qualified to fill the vacancies and within a two (2) year period from the beginning of the school year for which they were laid off. The Board agrees that no new or substitute appointments will be made while there are laid off teachers available who are qualified to fill the vacancies. Qualifications will be based on state certification and experience in the subject or grade level.

BACKGROUND

In preparation for issuing teacher contracts for the 1988-89 school year, the District Administration recommended several layoffs, whole and in part, for the 1988-89 school year. Pursuant to these recommendations, the Grievant was notified on February 25, 1988, that the Administration was recommending that her position as Business Education teacher be reduced from full time to 6/8 time. Subsequently, the Board took action to reduce the Grievant's contract from full time to 7/8 time, effective with the 1988-89 school year.

The Grievant was provided a 7/8 contract for the 1988-89 school year. On February 3, 1989 the Grievant filed a written statement alleging that she, rather than less senior teachers, should have been assigned to supervise a study hall and/or to teach Consumers Math so as to provide the Grievant with a full-time contract. On March 1, 1989, the Grievant filed a written grievance which alleged that the District violated "at least Article XII when it placed teachers who are less senior" in classes that the Grievant was certified to teach.

On February 28, 1989, the Grievant received notice that she would be issued a 7/8 contract for the 1989-90 school year. On or about March 10, 1989, the Grievant provided the District Administrator with a written statement which provided, inter alia, as follows:

I am accepting the 7/8 contract which is described in the copy of the enclosed letter dated February 24, 1989, to maintain my contractual rights in that regard.

However, I am not by this action waiving my right to a full contract which I am currently seeking through the grievance procedure.

On March 21, 1989, the District received the Grievant's written request to process her grievance to Step 2 of the grievance procedure. The District denied the grievance and the grievance was subsequently advanced to arbitration.

POSITIONS OF THE PARTIES

Union

The controlling section of the contract is Article XII, Layoff Clause. Not only does this Article provide the procedure for the layoff of teachers, it also provides for the recall of teachers. The provision providing for layoff by department is certainly applicable in this instance. By reducing a senior teacher, the Grievant, and assigning an extra class to a first-year teacher, Chris Vanderheyden, the District deliberately circumvented the seniority rights of the Grievant.

At hearing, Mr. Schomisch testified that study halls do not count as a class for purposes of a teaching load. However, an examination of Employer's Exhibit 7 appears to indicate otherwise. During the 1988-89 school year, the Grievant could have and should have been given an additional study hall. In the past, the District has substituted a study hall for a class to provide a teacher with a full assignment and we contend has established a past practice in this regard.

When the Grievant signed her 1989-90 contract, she did not waive rights that she was seeking under the instant grievance. In 1989-90, the District violated the agreement when they transferred an algebra class from Vanderheyden to a first-year teacher, Gloria Lyons, and left Vanderheyden with two classes of Consumers Math. The District should have given the Grievant at least one of the two classes in Consumers Math and not given Lyons the algebra class. The District's conduct is a clear violation of the recall provision of Article XII. Specifically, there was a vacancy, the Grievant was on layoff, and the District should have provided the Grievant with full-time employment before they contracted with Lyons. To have provided the Grievant with Consumers Math would comply with the DPI/U of W-Stout team evaluation report which recommended that "Business Math and Business Communications should be included in Business Education Department." Assuming arguendo, that the District's conduct was an attempt to strengthen the Math Department, the District cannot ignore contract language when it attempts to implement such a program.

In conclusion, the District has violated Article XII by reducing the Grievant's contract in 1988-89 and by failing to recall her to a full-time position for the 1989-90 school year. In accordance with the established past practice, the Grievant should have been assigned a study hall to complete her teaching assignment in 1988-89 and in 1989-90. While the District contends that it is beyond belief that the Grievant did not know who was teaching Consumers Math during the fist semester of the 1988-89 school year, the record demonstrates otherwise. As the Grievant testified, she assumed a more senior teacher was teaching the class. Since her day was shorter and she left earlier, she had little contact with the rest of the faculty. Assuming arguendo, that the grievance is found to be untimely to the extent that she cannot make a retroactive claim, the grievance is continuing and each day represents a new violation. Therefore, the grievance would be timely at least from the time it was filed.

Contrary to the District's argument, it was arbitrary and capricious in its assignment of non-teaching duties. They allowed Joe Salsbury, Bill Pfalzgraf, and Doug Spielman to teach a study hall, thereby ensuring full-time employment. Denial of this same right to the Grievant is arbitrary and capricious.

District

Article XI of the collective bargaining agreement requires the Grievant to present the grievance to his/her immediate supervisor "within fifteen (15) school days) after the facts upon the which the grievance is based first occurred or first became known." Section F of the grievance procedure provides that grievances which are not timely processed by the employe shall be considered dropped. As the testimony of Director of Curriculum Kuechler demonstrates, copies of the master class schedules were handed out to all teachers, including the Grievant, during the first inservice day of the 1988-89 school year. Additional copies of the schedule were available in the Pupil Services Office. This schedule indicates teaching and supervisory assignments for the high school teachers for both semesters. The schedule remained unchanged during the entire school year. The written grievance, filed on February 1, 1989, failed to comply with the timelines set forth in Article XI of the collective bargaining agreement.

Even if the Grievant had not received a copy of the master schedule, one could reasonably expect that the Grievant would have known the teaching assignments at the high school where the teaching staff totals 21 teachers. However, to claim that she received a schedule and still did not know the teaching assignments is beyond the boundaries of logic and reason. Clearly, the Grievant did have knowledge of the high school teaching assignments, but for whatever reason chose to delay her filing of the grievance. The grievance is not procedurally arbitrable because it was not filed within the contractual time limits.

The District's decision to reduce the Grievant's contract, effective with the 1988-89 school year, was within its contractually reserved management rights as set forth in Article II of the collective bargaining agreement. Decline in enrollments caused the Board of Education to reduce staffing levels in the Business Education Department. Since the Grievant is the only teacher in the Business Education Department, the reduction necessarily impacted her teaching contract.

The District has no obligation to assign the Grievant to teach Consumers Math. As the District Administrator testified at hearing, the Consumers Math course has been assigned to the Math Department since the 1985-86 school year. Prior to the 1985-86 school year, there were years during which the course was assigned to the Business Education Department. The decision to assign the Consumers Math course to the Math Department was made for legitimate business purposes, i.e., to improve the math education program. Pursuant to the Board's directive, all junior high and high school math courses are taught by math certified teachers. As the Grievant admitted at hearing, she is not licensed in math and she cannot teach the Consumers Math class as the class is assigned to the Math Department. Contrary to the argument of the Union, the District is not required to move the Consumers Math course to the Business Education Department so as to provide the Grievant with a full-time contract.

The clear and unambiguous language of Article 12 governs the layoff of teaching positions and does not apply to study hall assignments. Construing this language as a whole, it is clear that the layoff clause does not apply to non-teaching assignments such as study halls. Not only does the clause refer to the layoff of teachers, but the procedure for layoffs requires that layoffs be in inverse order of seniority by department or elementary grades, subject to the qualifications needed. Qualifications are based on State certification and experience. The references to qualifications clearly excludes study hall supervision, which cannot, by any stretch of the imagination, be considered a teaching assignment area. During the 1986-87 school year, all the study halls were assigned to the Library and were supervised by the Library Aide, a non-teaching employe. There is no merit to the Union's argument that the Grievant should be allowed to bump into the study hall supervision of less senior teachers. The argument that study hall assignments are subject to the layoff provision has been addressed and rejected by numerous other arbitrators (cites omitted).

Article II, Section A, of the collective bargaining agreement provides that a normal high school teaching load is six classes, a study hall supervision and a preparation period or seven classes and a preparation period. Teachers assigned a seventh class are compensated an additional $500 per semester. According to the uncontroverted testimony of Administrative Assistant Van Doorn, study halls are the last assignments to be made and are assigned to full-time teachers who have a "free" period. On a comparative basis, the Grievant was assigned less teaching time and more supervisory time and lunch time than any other teacher on staff. Detentions, which had previously been held after school, were scheduled during the student day, in part, to fill up a "free" hour in the Grievant's 7/8 work day. During the 1989-90 school year, the Grievant again was assigned to teach a maximum of five classes. As during the 1988-89 school year, the Grievant has one supervisory duty (detention supervision) and will be provided the longer 42-minute lunch period. The Grievant's schedule remains more than comparable, on a relative basis, to schedules of the District's full-time high school teachers who are teaching six or seven classes. Absent bad faith, or arbitrary or capricious

conduct, the District has absolute discretion to assign non-teaching duties to "round out" teachers' schedules. (Cites omitted.) In the present case, the District's exercise of this management right was not in bad faith, nor was it arbitrary or capricious. Rather, the assignment of non-teaching duties was in furtherance of a sound educational policy, i.e., full employment contracts for teachers with full classroom loads.

The layoff clause has remained unchanged since the 1980-81 collective bargaining agreement. The workload language has remained unchanged since the 1987-89 agreement. As the District Administrator testified at hearing, the negotiations for the 1987-89 agreement did not contain any discussions regarding converting a study hall as a "class" or requiring the extra $500 as a result of being assigned a study hall. This testimony, as well as the contract language, demonstrates that the parties have long acknowledged and agreed that study halls are non-teaching duties to which the provisions for extra compensation and the layoff clause do not apply. The argument of the Union leaves the impression that seven classes is not a normal teaching load. The language of Article IV, Section 8, and the class schedules presented at hearing, establish that, indeed, it is normal for teachers to carry a full teaching load which does not include a study hall assignment. In arguing that there is a past practice which requires the District to fill up the Grievant's schedule with study halls, the Union cites three instances in the last seven years in which teachers have been assigned more than one study hall. The Union fails to acknowledge that teachers must be issued contracts by March 15 for the subsequent year. If a class falls through after March 15, the District is still obligated to pay the teacher according to his/her individual teaching contract. As Administrative Assistant Van Doorn testified, this is exactly what happened with Joe Salsbury's schedule in the first semester of the 1988-89 school year. While there is no evidence regarding what the circumstances were surrounding the assignment of a second study hall to Bill Pfalzgraf or to Doug Spielman, it is reasonable to assume that the circumstances were similar to those of Joe Salsbury. In the present case, there were no unexpected or unanticipated circumstances which created a last-minute "hole" in the Grievant's schedule. The District denies that it has any duty to add assignments so as to expand the contract that the Grievant was issued for the 1988-89 school year.

The assigning of the Consumers Math course to the Math Department, the granting of math credit for the course, and the requirement that all junior high and senior high math courses be taught by math certified teachers are basic and fundamental educational policy decisions which are reserved to the Board of Education. In conclusion, the grievance must be dismissed in its entirety.

DISCUSSION

Arbitrability

The Grievant did not object to her 7/8 contract for the 1988-89 school year until February, 1989. On February 4, 1989, the Grievant presented the following written statement to District Representative Kuechler:

> This letter is written as per your request after our conference yesterday afternoon.

I was laid-off from a full-time to a 7/8 contract for the 1988-89 school year with the understanding that there was not enough enrollees to support a full contract for the year.

However, the following facts were brought to my attention on Wednesday, February 1, 1989:

1.The new math teacher, Chris Vanderheyden, is being paid extra for the seven (7) periods, including two (2) sections of consumers math, to which he is assigned.

2.I am certified and qualified to teach consumers math. As a matter of fact, I taught all sections of it for at least 15 years in the district.

3.During first hour, when I am not contracted, there are two teachers, Doug Spielman, first semester, and Bob Farrell, second semester, who are assigned study halls when in fact, I have seniority over each of them.

I accepted the lay-off to a 7/8 contract in good faith but realize, according to the above facts, that I should have had a full-time contract for 1988-89, with either a study hall first hour of the day or a section of consumers math.

I am of the opinion that I should be compensated at full-time pay for the first semester and

1.given a section of consumers math and full pay,

2.a study hall and full pay, or

3.full pay for the second semester also.

Your immediate consideration of this matter will be greatly appreciated.

The Grievant also stated that she was reserving the right to file a grievance pending the Administrator's reply to her letter. On March 1, 1989, the Grievant presented the following written grievance to Dr. Kuechler:

This letter is written to comply with Section C, Step 1, Paragraph 2 of the Grievance Procedure.

I believe that the District is in violation of at least Article XII when it placed teachers who are less senior than myself in classes that I am certified and qualified to teach.

I ask that I be made whole for lost wages until such time I am properly placed in a full teaching assignment.

The question to be determined herein is whether the District is correct when it argues that the Arbitrator lacks jurisdiction to hear the grievance because the grievance was not filed within the timelines set forth in Article XI, C, Step No. 1, Paragraph Two. 1/ Article XI, C, Step No. 1, Paragraph Two, states that the written grievance "shall be presented in writing within fifteen (15) school days after the facts upon which the grievance is based first occur or first become known." 2/ Given the strictures contained in Article XI, E, i.e., "grievances not processed to the next step within the prescribed time limits shall be considered dropped," the undersigned is persuaded that the parties intended the time limits set forth in the grievance procedure to be strictly construed. 3/

At the inservice held at the beginning of the 1988-89 school year, the Grievant received a 1988-89 class schedule which clearly indicated the class and study hall assignments made to each teacher. Given the relatively small size of the teaching staff and the Grievant's twenty years of service to the

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1/ At hearing, the parties stipulated to the fact that the timeliness issue is limited to the question of whether the Step 1 grievance was timely filed.

2/ For grievances arising within fifteen (15) days of the end of the school year, the time limits are either those stated or twenty (20) calendar days, whichever is longer. This exception is not applicable to the instant dispute.

3/ The Union does not argue and the record does not demonstrate that there is any custom or past practice which demonstrates otherwise.

District, it must be concluded that, on the date of the inservice, the Grievant possessed sufficient facts to conclude that there were less senior teachers who were assigned study halls. Additionally, the class schedule expressly indicated that a "new" teacher had been assigned the Consumers Math sections. The undersigned is persuaded that "the facts upon which the grievance involving the Grievant's layoff and 1988-89 contract are based" first became known to the Grievant at the beginning of the 1988-89 school year. The fact that the Grievant did not take cognizance of these facts at that time does not serve to extend the time for filing the grievance. 4/ Nor does the Grievant's layoff and 1988-89 contract assignment involve a continuing violation as alleged by the Union.

The grievance challenging the Grievant's layoff, which was effectuated at the beginning of the 1988-89 school year, was not filed within fifteen school days "after the facts upon which the grievance is based first occurred or became known." Since the grievance was not filed within the time limits set forth in Article XI, C, Step 1, Paragraph Two, the undersigned lacks jurisdiction to determine the merits of the grievance which challenges the Grievant's layoff and the 1988-89 contract which resulted therefrom. 5/

On February 28, 1989, the Grievant was notified that she would be issued a 7/8 contract for the 1989-90 school year. By letter of March 10, 1989, the Grievant notified the District that she would accept this 1989-90 contract, but by doing so, was not waiving her right to the full contract which she was currently seeking through the grievance procedure. The undersigned considers this letter to serve notice upon the Employer that the grievance filed on March 1, 1990 was amended to include the 1989-90 contract year. Since this notice was filed within fifteen school days of the date upon which the Grievant was apprised of her 1989-90 contract, the grievance alleging that the District violated the contract when it issued the Grievant's 1989-90 contract is timely. Accordingly, the undersigned is contractually entitled to assert jurisdiction to decide the merits of this grievance.

Merits

For the reasons discussed supra, the undersigned is without jurisdiction to determine the merits of the grievance challenging the layoff which was effectuated at the beginning of the 1988-89 school year and the 1988-89 contract which resulted therefrom. The undersigned has concluded that she does have jurisdiction to determine the merits of the grievance challenging the Grievant's 1989-90 contract.

The Grievant's layoff, i.e., her reduction from full-time to 7/8 time, was effectuated at the beginning of the 1988-89 school year. Thus, the rights which govern the initial layoff, i.e., those set forth in the first sentence of Article XII, A, do not govern the issuance of the 1989-90 contract. It is the reinstatement rights set forth in Article XII, A, which are determinative herein. Specifically, whether these reinstatement rights entitle the Grievant to be assigned any of the study halls and/or Consumers Math courses which were assigned to less senior teachers.

Article XII, A, inter alia, states that "The Board agrees that no new or substitute appointments will be made while there are laid-off teachers available who are qualified to fill the vacancies." Given this language, the undersigned is persuaded that the "vacancies" which are the subject of the reinstatement right involves work which has not been assigned to other bargaining unit members. In other words, there is no "reinstatement" right to "bump" into the work assignment of another bargaining unit employe. Rather, the "reinstatement" right is limited to work which otherwise would be performed by a new or substitute employe.

During the 1989-90 teaching year, the Consumers Math sections were taught by Vanderheyden, who was in his second year of teaching. Since Vanderheyden was neither a new employe nor a substitute employe, the Grievant did not have any right to be reinstated to teach Vanderheyden's Consumers Math sections for the 1989-90 school year. 6/

4/ The written statement filed on February 4, 1989 contains the claim that the Grievant did not learn of the study hall or Consumers Math assignments to less senior teachers until February 1, 1989. The Grievant acknowledges receipt of the 1988-89 class schedule at the beginning of the school year, but claims that "she did not look to see who was teaching what."

5/ The Union does not argue and the record does not demonstrate that the District, by word or deed, has agreed to extend the time limits for filing this grievance. Indeed, the District Administrator raised the issue of untimeliness when he responded to the Grievant's letter which was filed on February 4, 1989. (See Joint Ex. No. 3)

6/ As discussed supra, the grievance which challenged this assignment during the 1988-89 school year, when Vanderheyden was a new employe, was not timely filed.

Lyons, who was a new employe during the 1989-90 school year, did not teach any classes for which the Grievant was certified to teach. Since the Grievant was not qualified to fill the vacancy to which Lyons was appointed, Lyons' appointment did not violate any of the Grievant's reinstatement rights. Contrary to the argument of the Union, the language of Article XII, A, does not require the District to reassign any of Lyons' math sections to Vanderheyden so as to make Vanderheyden's Consumers Math sections available to the Grievant.

Article XII, A, does not expressly state that reinstatement rights are limited to course assignments. However, as the District argues, this is the most reasonable interpretation of the provision. A review of the provision reveals that reinstatement rights are limited to "vacancies" for which the laid-off employe is qualified. The provision further states that "Qualifications will be based on State certification and experience in the subject or grade level." Given this language, it is reasonable to conclude that "vacancies" within Article XII, A, are limited to assignments for which there is a requirement of State certification. As the District argues, a study hall is not such an assignment. The undersigned is not persuaded that the language of Article XII, A, provides laid-off employes with a "reinstatement" right to study hall assignments. Nor is such a right established by the evidence of past practice.

As the Union argues, Employer Ex. No. 7, which lists course assignments since the 1982-83 school year, demonstrates that on three occasions, full-time teachers, i.e., Salsbury, Pfalzgraf and Spielman, were assigned two study halls. 7/ There is no evidence, however, that any of these three occasions involved a laid-off employe who was recalled to perform a study hall assignment, or that study halls were assigned for the purpose of providing full-time employment. Indeed, the record demonstrates that, when Salsbury received his contract for the 1988-89 school year, it was not anticipated that he would be assigned a second study hall. Since the record is silent with respect to the circumstances involved in the issuance of the 1982-83 Spielman and 1984-85 Pfalzgraf contracts, one cannot determine if the contracts were issued with the knowledge that the full-time assignment would involve two study halls, or whether subsequent changes, such as a decline in student enrollments, altered anticipated assignments.

7/ During the 1989-90 school year, the Grievant was assigned to supervise detention. Apparently, the Union concedes that this assignment is the equivalent of a study hall assignment and, thus, it is the assignment of a second study hall which is at issue herein.

During the seven-year period covered by Employer Ex. No. 7, there were at least one hundred full-time teaching schedules which included less than two study hall assignments. Indeed, the vast majority of these teaching schedules did not have any study hall assignments. 8/ As the District argues, the evidence of "past practice" indicates that the decision to assign, or not assign, study halls lies within the sole discretion of the District. As the District further argues, it is not evident that the District's failure to assign the Grievant a study hall so as to provide her with a full-time contract during the 1989-90 school year involved any abuse of this discretion.

CONCLUSION

The grievance challenging the layoff, which was effectuated at the beginning of the 1988-89 school year, which included a claim for reinstatement during the 1988-89 school year, has been found to be untimely. Accordingly, the Arbitrator does not have jurisdiction to determine whether the District's conduct in effectuating this layoff and failure to reinstate the Grievant to a full-time contract during the 1988-89 school year was violative of the parties' collective bargaining agreement.

The grievance involving the Grievant's 1989-90 contract was timely filed. For the reasons discussed supra, the Arbitrator has concluded that the District did not have any contractual obligation to provide the Grievant with a full-time contract by assigning the Grievant study halls which were assigned to less senior teachers or by assigning the Grievant any of the Consumers Math courses which were assigned to Vanderheyden.

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

AWARD

1. The grievance challenging (1) the Grievant's layoff, which was effectuated at the beginning of the 1988-89 school year, and (2) the failure of the District to recall the Grievant to a full-time contract during the 1988-89 school year is not arbitrable.

2. The grievance which alleges that the District violated the collective bargaining agreement when it failed to issue the Grievant a full-time contract for the 1989-90 school year is arbitrable.

3. The District did not violate the collective bargaining agreement when it provided the Grievant with a 7/8 contract for the 1989-90 school year.

4. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 11th day of April, 1990.

By_____
Coleen A. Burns, Arbitrator

8/ Individual teachers did not receive any study hall assignments during one of the seven years because study halls were scheduled in the Library and monitored by Library personnel.