

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
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DELAVAN-DARIEN SCHOOL DISTRICT : Case 18  
 : No. 42566  
and : MA-5732  
 :  
DELAVAN-DARIEN EDUCATION ASSOCIATION :  
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Appearances:

Mr. Barry Forbes, Staff Counsel, Wisconsin Association of School Boards, Inc., on behalf of the District.  
Ms. Valerie Gabriel, Associate General Counsel, Wisconsin Education Association Council, on behalf of the Association.

ARBITRATION AWARD

The above-entitled parties, herein the District and Association, are privy to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this matter on January 31, 1990 in Delavan, Wisconsin. The hearing was transcribed and both parties filed briefs and reply briefs which were received by April 27, 1990.

Based upon the entire record, I issue the following Award.

ISSUE:

Whether the District violated the contract by not reinstating grievant Robert Behrens to a full-time position and, if so, what is the appropriate remedy?

DISCUSSION:

Behrens, who is not certified to teach any subject other than driver education, has been employed by the District as a certified driver education instructor since 1979-80. He has worked on half-time status since the end of the 1985-86 school year when the District reduced him from full-time to half-time, at which point he was placed on layoff status. In a February 12, 1986, layoff notice, Superintendent D. L. McGinnis told Behrens, inter alia, "Perhaps some day the enrollments will level off and there can be a little more job security for you."

Throughout this time, the District employed Don Breidenbach as a full-time driver education teacher. Breidenbach informally told High School Principal Greg Westcott in the 1987-88 school year that he would be retiring at the end of the next school year and he formally announced his resignation in 1989. Westcott in March or April, 1988, told Behrens that if another full-time job came along, he should take it because he, Westcott, could not promise him a full-time job after Breidenbach left.

On May 11, 1989, Breidenbach became seriously ill, so much so that Behrens had to finish out his classes starting on May 18, 1989.

In the meantime, Westcott prepared a study of how much money could be saved if Breidenbach's full-time position were eliminated for the 1989-90 school year and if the driver education program could be restructured so that classroom courses were offered during the summer, as opposed to the regular school year. He estimated that such changes could save the District about \$37,000. Westcott also recommended that driver education no longer should be a graduation requirement, thereby giving students greater flexibility as to when they wanted to take it. The District's Board of Education on April 6, 1989, adopted Westcott's recommendations, thereby eliminating Breidenbach's full-time position for the subsequent school year. The District did so as part of its overall plan to reduce about \$163,100 from the school budget.

The grievance challenges that decision, claiming in essence that Behrens should have been recalled from layoff and offered Breidenbach's former full-time position so that he could have been a full-time teacher for the 1989-90 school year. In support thereof, the Association argues that the District has violated Article IV, Section A, 1, of the contract because it deprived Behrens of equal treatment by relying upon invalid financial projections prepared by Westcott; because the District's decision was directly tied to Breidenbach's resignation, hence giving him more favorable treatment than Behrens; and because the District, in an attempt to prevent Behrens from being recalled as a full-time teacher, deliberately delayed in hiring him as a substitute for Breidenbach when he became sick on May 11, 1989. The Association also contends that Behrens is entitled to reinstatement under Article IV, Section I, 5, of the contract and says that "Any balance of equities must tip dramatically . . ." in his favor. As a remedy, the Association asks for a traditional make-

whole remedy and reinstatement to a full-time position.

The District sees things differently. It contends that the Association has failed to establish any contractual violation; that it has failed to prove that the District's actions were arbitrary, capricious, or in bad faith; and that "there are no other circumstances, either legal or equitable, requiring the District to offer a full-time position to Mr. Behrens."

In resolving this issue, it is first necessary to consider the contractual layoff language found in Article IV, Section I, 5, which provides:

5. Such teachers shall be recalled and reinstated within twenty-four (24) months without loss of any benefits, if it is determined they are qualified to fill the vacancies. Such reinstatements shall be made in reverse order of layoffs. No new or substitute appointments shall be made while there are laid off teachers available and qualified to fill the vacancies.

Here, since Behrens was reduced from full- to part-time employment at the end of the 1985-1986 school year and therefore was placed on laid-off status, he clearly falls outside the first sentence of this proviso which states "Such teachers shall be recalled and reinstated within twenty-four (24) months without loss of any benefits . . ."

While recognizing this fact, the Association asserts that the remaining part of this language has no fixed time period and that the District therefore is required to give Behrens all bargaining unit work which he is qualified to perform, irrespective of whether or not more than 24 months have lapsed from the time he was first laid off.

To the contrary, the entire thrust of this proviso establishes that no such right exists after 24 months. For by providing in the second sentence that "Such reinstatements shall be made in reverse order of layoffs," it is clear that the term "Such reinstatements" refers back to the reinstatements provided for in the first sentence, i.e., those which occur within twenty-four (24) months after the layoff. The last sentence, by providing that "No new or substitute appointments shall be made while there are laid off teachers available and qualified to fill the vacancies" thus can only refer to those teachers on layoff status for the twenty-four (24) month period in issue and those vacancies to which they are entitled to be "recalled and reinstated," i.e., those which arise during those twenty-four (24) months. Hence, it must be concluded that Behrens had no recall rights when the instant grievance was filed on May 3, 1989, because that was nearly three (3) years after his 1986 layoff.

In so finding, I am of course aware of the Association's claim that the District relied on incorrect financial figures in computing how much money it would save by eliminating Breidenbach's full-time position. Assuming arguendo that some of the District's figures are incorrect as the Association asserts however, the fact nevertheless remains that the District saved at least about \$12,640 in direct payroll costs when it eliminated his position. It therefore was a legitimate cost-saving measure, one it was entitled to make pursuant to Article II of the contract, entitled "Rights and Responsibilities of the Board" which, inter alia gives it:

"all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the Constitution and the laws of the State of Wisconsin and of the United States."

This right gives the District the power to establish its own budget and to make all necessary decisions on how its education program should be run provided, of course, that the exercise of that right does not negate other provisions of the contract, which is not the case here. Furthermore, the District also eliminated said position in part because it wanted to restructure the driver education program and remove it as a graduation requirement so that students could have greater flexibility in taking courses. This too, then, also represented a legitimate management prerogative.

The Association also claims that the District treated Behrens unfairly because it treated Breidenbach better than him by not eliminating Breidenbach's position until after he retired. This claim, too, is without merit, since the District's treatment of Breidenbach was the kind of consideration employers routinely give their long-term employes -- something it was entirely free to do under its inherent managerial prerogatives.

The Association also asserts that the District deliberately refused to hire Behrens until May 17, 1989, as Breidenbach's substitute because it did not want Behrens to work the twenty (20) days needed to qualify as a full-time teacher, who then again, would have received the layoff protection of Article IV, Section 1, 5.

The record does not support this allegation, as Westcott credibly denied having any such ulterior motives, stating instead that he did not immediately hire Behrens as a substitute because he then genuinely did not know whether or when Breidenbach would return to teaching after his illness. In all the circumstances surrounding Breidenbach's sudden illness, it can only be concluded that the District did the best they could under difficult circumstances.

Lastly, the Association argues that the balancing of the equities here dictates that Behrens be offered a full-time position. While equitable principles can be considered in certain situations, it would be improper to do so here in the face of clear and unambiguous contract language which gives laid-off teachers the right to be recalled for a twenty-four (24) month period -- and no more. Moreover, there in any event is no basis for finding that the District treated Behrens unfairly in any of its dealings with him over the years, particularly when it is remembered that Westcott told Behrens in March or April, 1988, that he could not promise Behrens a job after Breidenbach left.

In light of the above, it is my

AWARD

That the District did not violate the contract by refusing to reinstate grievant Robert Behrens to a full-time position; the grievance therefore is denied.

Dated at Madison, Wisconsin this 21st day of August, 1990.

By \_\_\_\_\_  
Amedeo Greco, Arbitrator