BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between BOARD OF EDUCATION OF SCHOOL DISTRICT OF HARTFORD JOINT NO. 1 and HARTFORD ELEMENTARY EDUCATION ASSOCIATION	Kim Ickert grievance dated 1-27-92 Case 11 No. 47159 MA-7186

Appearances:

Mr. Roger E. Walsh, Davis & Kuelthau, Attorneys at Law, 111 East Kilbourn, Milwaukee, WI 53202, appearing on behalf of the District.

Mr. John Weigelt, Executive Director, Cedar Lake United Educators, 411 North River Road, West Bend, WI 53095, appearing on behalf of the Association and Grievant.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Arbitrator to hear and decide issues concerning the above grievance under the grievance arbitration provisions of the parties' 1989-92 collective bargaining agreement. Pursuant to notice, the Arbitrator conducted a hearing on June 3, 1992, in Hartford Wisconsin, at which the parties were afforded a full opportunity to present evidence and argument. The hearing was not transcribed, but the parties agreed to permit the Arbitrator to make an audio cassette tape recording of the hearing exclusively for his own use in award preparation. Post-hearing briefing was completed on October 20, 1992, marking the close of the record.

STIPULATED ISSUES

At the hearing, the parties' discussion as to the issues for determination revealed that there were disputes both as to the procedural arbitrability and the merits of the grievance. In order to preserve their ability to address all of those matters, the parties authorized the Arbitrator to decide an issue generally framed as follows:

1. What shall be the disposition of the grievance dated

January 27, 1992?

PORTIONS OF THE AGREEMENT

Article III - Board Functions.

3.01. It is recognized and agreed by the Association that the Board has and will continue to retain the exclusive rights and responsibilities to operate and manage the school system and its programs, facilities, properties and teaching activities of its employees, unless such rights and responsibilities are specifically abridged, delegated or modified by another provision of this Agreement. Included in these exclusive rights and responsibilities, but not limited thereto, are:

. . .

(b) The direction of all the working forces in the system, including the right to hire, promote, suspend, demote, discharge, discipline, lay off or transfer employees;

. . .

Article XXVIII - Grievance Procedure.

28.01. Should differences arise between the School Board and an employee of the Association [sic] as to the interpretation and application of the written Agreement between the parties, including the Salary Schedule, hereinafter referred to as "Agreement," there will be no suspension of work or interference with the operations on account of such differences, but a determined effort shall be made to settle them promptly under the provisions of this procedure.

28.02. A reasonable effort shall be made to settle such differences between the employee and his or her principal or supervisor. A representative of the Association may accompany such employee if requested by the employee. If, as a result of such effort, a satisfactory adjustment is not made within ten (10) working days, the complaint shall be immediately designated a grievance and reduced to writing, clearly stating all the specific sections of the Agreement that are violated, time of violation, place of violation, the people who are involved and any other pertinent information and processed in the following manner.

28.03. No grievance shall be processed under this procedure, unless the employee or the Association files a grievance in writing within twenty (20) workdays from the day that the grievance first arose or that the employee or the Association, if the Association has filed the grievance, should have had reason to know of the existence of such a grievance.

28.04. The failure of the principal, supervisor, District Administrator or the Board of Education to give a written answer within the time due shall be deemed a denial of the grievance at that step and the person and/or Association filing the grievance may proceed to the next step:

Step 1. The grievance shall be submitted first to the employee's principal or supervisor and a meeting between the employee and/or a representative of the Association and the employee's principal or supervisor shall be held within ten (10) working days after receipt of the grievance. The principal or supervisor shall give a written answer thereto within ten (10) working days after such meeting.

Step 2. The grievance shall be considered settled in Step 1 and not subject to further appeal, unless, within ten (10) working days after the answer of the principal or supervisor is received or is due, the employee or the Association shall, in writing, submit the grievance to the District Administrator. The District Administrator shall hold a meeting on the grievance within ten (10) working days after receipt of the grievance and shall give a written answer thereto within ten (10) working days after such meeting.

Step 3. The grievance shall be considered settled in Step 2 and not subject to further appeal, unless, within ten (10) working days after the answer of the District Administrator is received or is due, the employee or the Association shall, in writing, submit the grievance to the Board of Education. The Board shall consider the grievance at the next scheduled Board meeting after receipt of the grievance and shall give a written answer thereto within ten (10) working days after such Board meeting.

Step 4. The grievance shall be considered settled in Step 3

and not subject to further appeal unless, within ten (10) working days after the answer of the Board of Education is received or is due, the employee or the Association shall, in writing, notify the Board of Education that the grievance is being submitted to arbitration.

. . .

28.07. The arbitrator to which any grievance shall be submitted, in accordance with the provisions of this procedure, shall have jurisdiction and authority only over grievances involving the interpretation and application of a specific provision of the Agreement.

28.08. The arbitrator shall not entertain any issues or arguments not raised in writing in Steps 1, 2 or 3 of the Grievance Procedure, or have any power to alter or change any of the provisions of the Agreement or to substitute any new provisions for any existing provisions, nor to give any decisions inconsistent with the terms and provisions of the Agreement. Nor shall any past practices nor customs become binding unless they are in writing and signed by both the Board of Education and the Association. The arbitrator shall have no authority to grant wage increases or wage decreases. The arbitrator shall expressly confine himself/herself to the precise issue submitted for arbitration and shall have no authority to determine any other issue not so submitted to him/her or to submit observations or declarations of opinion which are not directly essential in reaching the decision. In any arbitration award, no right of management shall be taken away from the School Board nor limited or modified except only to the extent that the Agreement clearly and explicitly permits such right to be taken away, limited or modified. The decision of the arbitrator shall be in writing and shall be final and binding upon the parties.

28.09. Working days shall include vacation periods, but shall not include Saturdays, Sundays or legal holidays.

28.10. All the limits set forth in the Grievance Procedure can be modified by written mutual agreement between the parties.

. . .

Article XXXI - Reduction in Force.

31.01. In the event of a layoff of employees in the bargaining unit to take effect at the beginning of a school year, a preliminary notice of such layoff shall be given no later than the previous May 1 and a final notice no later than the previous June 1. In the event of a layoff of such employees to take effect at the beginning of the second semester, a preliminary notice of such layoff shall be given no later than the previous December 1 and a final notice no later than the previous January 1. Such layoffs will be in the inverse order of appointment of such employees who are then currently employed within the specific grade, subject area, teaching area or job function involved in the layoff. Any employee affected by the layoff may, if the affected employee has more service with the District, displace the employee with the least amount of service with the District in the affected employee's area of certification. An employee's appointment date refers to the first day the employee is scheduled to start employment in the District. In the event two (2) or more employees have the same appointment date, the order will be determined by a coin toss. This coin toss will occur the first day of the start of employment.

BACKGROUND

The facts of this case are undisputed.

The District is an elementary district and feeder to Hartford Joint Union High School District. The Association represents a bargaining unit of certificated full-time and part-time teachers employed under contract by the District.

The Grievant, Kim Ickert, was laid off from her 50% physical education position in the bargaining unit effective at the beginning of the second semester of school year 1991-92. The first day of the second semester was January 22, and Grievant's first day of scheduled work missed was January 23, 1992.

The District's Board of Education had been discussing possible staff cuts in specialist areas (physical education, art, music) since the preceding May, and it had done so in open session meetings with Association President and Chief Negotiator present on May 22, October 28, and November 25, 1991. At the last mentioned meeting, one of the open session decisions voted by the Board was to cause preliminary notices of layoff or workload reduction regarding four District employes, including Grievant.

The following day, November 26, 1992, District Administrator Glenn Broker had the four preliminary notices typed. Due to the clerical workload, those notice forms bearing a date of November 26, 1991, were returned to Broker ready for delivery late that day. On the afternoon of the next day, November 27, Broker personally hand-delivered the preliminary notices to employes working day at Rossman School where his office is located. Broker then had his secretary make a phone call to determine whether and at what school Grievant would be working that day. As a result, Broker learned that November 27 was not a regular work day for Grievant, but that she was working as a substitute that day at the District's Central Middle School (CMS). Broker went to that school at 2:00 or 2:15 PM. Upon inquiry following his arrival there, he learned that Grievant was away from the building with students on a roller skating field trip to Hartland. Broker waited for the possible return of the field trip group, but at 2:30 or 2:40 PM, he concluded that other duties required him to be elsewhere. He left the envelope containing the preliminary notice of Grievant's layoff with CMS secretary Beverly Weinheimer to deliver it to Grievant upon Grievant's return from the field trip. Broker did not tell Weinheimer what was in the envelope, but he told her that it was important that Weinheimer give it to Grievant.

Weinheimer went to the CMS physical education area and told Physical Education teacher David Pietsch to have Grievant see her upon Grievant's return from the field trip. At approximately 3:30 PM -- the time at which all teachers were free to leave because November 27 was the day before a holiday -- Weinheimer made further unsuccessful attempts to contact Grievant by means of two public address system announcements asking her to report to the office. Weinheimer then placed the envelope in the School vault over the extended holiday weekend and ultimately succeeded in delivering it to Grievant at work on the next school day, Monday, December 2, 1991. That morning, Grievant came to the office in response to a note left for her in her school mail box to the effect that there was a letter for her at the office. Weinheimer obtained Grievant's signed acknowledgement of the date and time of Grievant's receipt of the document, and at Grievant's request, Weinheimer counter-initialed noting the date and time, as well. Weinheimer then forwarded the copy of the notice with Grievant's signature to Broker. Only when Broker received that document back from Weinheimer did he become aware that Weinheimer had not been successful in delivering it to Grievant on November 27.

Grievant testified that she had been called to work at CMS as a physical education substitute on November 27. She worked at that building until noon, at which time she left with a group of students and others for a roller skating field trip in Hartland. The field trip group returned to CMS at about 2:55 or 3:00 PM. The students were told to go to their 9th hour classes. The work schedule of the teacher for whom Grievant was substituting did not involve any 9th hour responsibilities, however. For that reason, Grievant states, she went to the Physical Education office for about five minutes and then left CMS to attend to coaching duties which she performs for a different employer, the Hartford Union High School District located a few blocks from CMS. Grievant states that she spoke with no CMS teachers between her arrival from the field trip and her departure for the High School. Grievant also states she was unaware of the School Board's November 25 decision concerning issuing her a preliminary notice of layoff until she received the notice on December 2, and she denies that she had at any time attempted to avoid

receiving such notice.

On December 19, 1991, the School Board met, heard the comments of Association representatives and others regarding the contemplated layoffs, and voted to issue final layoff notices to Grievant and the three others. Final notices to that effect were personally delivered to each of those employes, including Grievant, on December 20, 1991.

On January 6, 1992, Barbara Falkenthal, Association Grievance Chairperson wrote the School Board as follows:

> THIS LETTER IS TO INFORM YOU THAT MRS. KIMBERLEE ICKERT DID NOT RECEIVE THE PRELIMINARY NOTICE OF LAYOFF BY DECEMBER 1st. DEADLINE AS STATED IN THE MASTER AGREEMENT BETWEEN THE H.E.E.A. AND THE SCHOOL BOARD. WE RESERVE THE RIGHT TO GRIEVE THIS ERROR IN THE EVENT OF FINAL LAYOFF. THIS IS A VIOLATION OF TIMELINES SET DOWN BY BOTH PARTIES IN NEGOTIATIONS.
>
> PLEASE CONTACT UNISERV DIRECTOR JOHN WEIGELT AT THE CLUE OFFICE WITH ANY QUESTIONS CONCERNING THIS MATTER.

Then, on January 27, 1992, Weigelt wrote Broker (with copies to Grievant and others) as follows:

> As you are aware, the Association has notified the District on several occasions regarding the intended layoff of your employee, Kim Ickert. The Association has discussed with you the notion that Ms. Ickert did not receive her preliminary notice of layoff pursuant to the timelines required by the collective bargaining agreement.
>
> The Association had determined not to file a grievance in the hope that the District might consider the compelling educational reasons for retention of professional staff. It seemed to us that the current attention given to education in America might provoke a thought on the part of your Board of Education relative to enhancing the quality of education in Hartford.
>
> Since it has come to my attention that Kim Ickert is no longer employed effective the second semester of the current school year, the enclosed grievance is being filed by the Hartford Elementary

Education Association. It is my suggestion that we waive step 1 of the grievance procedure and initiate a meeting with you pursuant to the requirements of step 2. If you feel that such a meeting is unnecessary, please advise me accordingly. Assuming that you should desire a step 2 meeting, please contact my office and we will select a date which is mutually agreeable.

The grievance enclosed with that letter was signed by Weigelt and hand-dated January 27, 1992. It read as follows:

GRIEVANCE COMPLAINT
filed by the
Hartford Elementary Education Association
with the
Board of Education of the School District of Hartford Joint No. 1

January 27, 1992

I. This document constitutes a grievance complaint filed in compliance with Article XXVII of the current collective bargaining agreement between the Hartford Elementary Education Association and the Board of Education of the School District of Hartford Joint No. 1. The Grievant, Kim Ickert, is filing this grievance with the assistance of and the agreement of the Hartford Elementary Education Association. Such Association is the principal representative of employee Ickert and should be viewed by the District as the primary party of interest representing Ms. Ickert for all correspondence. That correspondence shall be directed through John Weigelt, UniServ Director for the Cedar Lake United Educators located at 411 North River Road, West Bend, Wisconsin 53095.

II. Employee Ickert and the HEEA complain that the District violated the collective bargaining agreement Article XXXI - Reduction in Force, when the District issued her a preliminary notice of layoff for the beginning of the second semester 1991-92. It is the position of the grievants that the issuance of such notice was violative of the timelines contained within paragraph XXXI.01 of the article referenced.

III. As relief the grievants demand that Ms. Ickert be reinstated in full to her prior employment position and that all rights and benefits which she may have lost due to this invalid layoff be restored with

appropriate interest payments as well.

That letter and grievance were received by the District two days later on January 29, 1992.

On February 4, 1992 the Broker and School Board President Patti Schultz wrote Weigelt as follows:

> In response to the grievance filed by the Association on January 29, 1992 relating to the layoff of Kim Ickert, it is the position of both the District Administrator and the Board of Education that the grievance be denied on the following bases:
>
> > 1. The grievance is not timely filed in that it was not presented to the School District within the twenty (20) day period provided for in Section 28.03.
> >
> > 2. The School District did not violate the Contract by laying off Kim Ickert.
>
> Inasmuch as it is highly unlikely that this grievance could or would be resolved by meetings between the Association and the District Administrator or the School Board, and in the interest of expediency, the District Administrator and the School Board would suggest that the parties waive the meetings in Steps 1, 2 and 3 of the Grievance Procedure in Article XXVIII, and if the Association desires to pursue the matter further, the Association should appeal the grievance to Arbitration under Step 4. The time period for commencing the Step 4 appeal would begin with your receipt of this letter.
>
> If you have any question on this procedure, please contact Mr. Broker.

The matter remained unresolved and was ultimately submitted to arbitration as noted above. At the hearing it appeared undisputed that, in all events, the back pay dispute in this case would be limited to Grievant's losses experienced in the second semester of the 1991-92 school year.

POSITION OF THE DISTRICT

The grievance should be dismissed because it was not timely filed. The Agreement violation alleged in the grievance is a failure to give grievant a preliminary notice of layoff no later than December 1, 1991. There is no evidence that Ickert attempted to settle her differences

with the supervisor prior to filing the grievance as provided for in Sec. 28.01. Moreover, the written grievance was received by the District on January 29, 1992. Applying the Sec. 28.09 definitions, the grievance was filed 40 workdays from the day Grievant received the preliminary notice. Hence, it was not filed within the 20 workday period specified in Section 28.01. The District is therefore relieved of any obligation to process the grievance by the clear and express provisions of Sec. 28.03, and the Arbitrator is without jurisdiction or authority to rule on the merits of the grievance.

Even if the preliminary notice of layoff were not viewed as the day the grievance first arose, the School Board voted in open session on December 19, 1991 to give Grievant a final notice of layoff, and that final notice written was delivered to Grievant on December 20, 1991, putting her on clear and unambiguous notice that she was to begin her layoff as of January 22, 1993. The grievance was initiated on January 29, 1992, which was 26 workdays after Grievant's receipt of the final notice, such that Sec. 29.03 would require dismissal of the grievance even on that alternate basis. If the merits of the grievance are reached, the preliminary notice of layoff was given in accordance with Sec. 31.01. The Agreement did not require delivery by December 1 in the instant circumstances. Because December 1, 1991 fell on a Sunday, delivery on the following day would meet the legal requirements of the Wisconsin Statutes as set forth in Sec. 990.001(4)(b), which provides, "If the last day within which an act is to be done . . . falls on a Sunday or legal holiday the act may be done . . . on the next secular day." The same policy should apply in interpreting the Agreement which, in Sec. 28.09, expressly does not count Sundays as regards grievance procedure timelines.

Moreover, Sec. 31.01 does not require that the preliminary notice be in writing or even that it be given to the employee involved in the layoff. Therefore, the School Board's November 25, 1991 open session approval of giving preliminary notice to Grievant, done as it was with Association representatives present, also substantially complied with the Sec. 31.01 preliminary notice requirement.

In any event, Grievant's receipt of the preliminary notice on Monday, December 2 at 10:40 AM rather than at some time on the preceding day made no difference whatsoever in allowing Grievant or the Association to attempt to change the Board's mind about the layoff. Indeed, Association officials knew about the Board's decision to give a preliminary notice of layoff on November 25, 1991, and Grievant and the Association had ample time to attempt to change the Board's mind about the layoff. Because Grievant sustained no real injury, either Sec. 31.01 should be liberally construed so that no violation is found or Grievant should be denied any monetary relief on grounds that any violation was de minimis in nature.

In response to the Association's brief, the District argues further as follows. The District had no obligation to object to the Association's January 6, 1992 letter which did not, itself, constitute initiation of a grievance within the meaning of Sec. 28.03, and which would have been untimely initiated even if it were so viewed since it was received by the District 23 workdays after

the December 2 delivery of the preliminary notice to Grievant. The District's efforts to deliver the preliminary notice to Grievant on November 27 coupled with its actual delivery on December 2 constitute substantial performance of the preliminary notice requirement, making a monetary remedy inappropriate where, as here, there was no evidence that Grievant or the Association suffered any harm by reason of the date on which Grievant actually received the notice. If a monetary remedy is deemed appropriate, the Arbitrator should retain jurisdiction to resolve disputes about the appropriate amount of back pay, including offsets, payable to the Grievant.

POSITION OF THE ASSOCIATION

The grievance was timely initiated. Under any construction of the timelines, the Association timely notified the District by its January 6, 1992 letter notification it reserved the right to grieve because of the date on which Grievant received the preliminary notice. That letter invited questions about the grievance, but the District remained silent rather than responding with an objection that the grievance had to be filed immediately or not at all. The Association acted in good faith and in pursuit of the objective of settlement of the grievance short of the formal stages of the grievance procedure. The District ought not be permitted to benefit by having ignored the Association's January 6 letter.

The Agreement clearly and unambiguously required the District to present preliminary notices of layoff to all affected employes by December 1. Broker told Weinheimer that it was important that she get the document to Grievant, indicating the District's understanding that it needed to get the letter to Grievant as quickly as possible given the Agreement timelines. The notice was written on November 26, delivered to the CMS secretary on November 27, but then put in the vault until the next school day, December 2. The District could have left a note for Grievant on November 27 but it did not. It also could have but did not attempt to deliver the notice by mail or otherwise once it was determined that Grievant had left CMS on November 27. Grievant was working for the District and available for receipt of the notice on November 26 and 27, and she did not alter her normal routine to avoid receiving the notice. The District therefore had reason to know where Grievant was at all times and had adequate time and various ways to deliver the notice to her by the December 1 deadline. Yet, it made no significant effort to contact her despite the acknowledged importance of doing so. As a result, it failed to comply with the express deadline specified in the Agreement.

By way of remedy, the Arbitrator must restore the status quo ante as requested in the grievance. To do otherwise would indicate that the District is not required to abide by any of the Agreement's requirements.

DISCUSSION

Procedural Arbitrability of the Grievance

The Sec. 28.03 time limit for filing a grievance in writing starts to run "from the day that the grievance first arose or that the employee or the Association, if the Association has filed the grievance should have had reason to know of the existence of such a grievance."

The District would have the Arbitrator treat the event giving rise to the grievance as the failure to give Grievant preliminary notice of layoff by December 1, 1991 or, alternatively, Grievant's December 20, 1991 receipt of the final notice of layoff. It is the Arbitrator's opinion, however, that the event giving rise to the grievance was the layoff itself, which the District Board identified as effective January 22, 1992, but which actually had its initial effect on Grievant when she first lost work on account of it on January 23, 1992.

It is true that the specific Agreement violation cited in paragraph II of the grievance is the time at which the preliminary notice of layoff was issued. However, paragraph III of the grievance expressly requests relief from "this invalid layoff." It is the layoff itself that first adversely affected Grievant. The grievance, read as a whole, alleges that the layoff was invalid because it was not preceded by a timely preliminary notice. To read the grievance more narrowly as the District urges would be particularly inappropriate in view of the care the Association took to inform the District on January 6, 1992 that it considered the December 2 notice insufficient under the Agreement, even though the January 6 letter was not a grievance and did not toll the running of a grievance procedure time limit.

For those reasons, the Arbitrator concludes that the subject matter of the instant grievance first arose on January 23, 1992, such that the grievance was filed in compliance with Sec. 28.03 time limit.

The District also asserts in its initial brief, "The Association presented no evidence of any attempt by Ickert to settle her differences with the supervisor prior to filing the grievance as is provided for in Section 28.02." No such objection was included in the District's February 4, 1992 response to the grievance, in which the District itself proposes waiver of various pre-arbitral discussions otherwise called for by the grievance procedure. In these circumstances, and especially in the context of the first sentence of Sec. 28.08, the Arbitrator deems the District to have waived its right to contend for the first time in its arbitration brief that the procedural requirements of Sec. 28.02 were not met in this case. The Arbitrator therefore has no occasion in this case to decide whether noncompliance with Sec. 28.02 would render procedurally non-arbitrable a grievance that has otherwise been processed in accordance with Article 28.

For the foregoing reasons, the Arbitrator rejects the District's procedural defenses and finds it appropriate to reach and decide the merits of the grievance.

Validity of the Layoff

The positions of the parties present various issues regarding the proper interpretation of the preliminary notice requirement in Sec. 31.01: (1) whether it requires actual receipt of a notice in written form by the affected employe; (2) whether reinstatement/make whole relief for the entire semester is mandated regardless of the extent to which the District has attempted in good faith to comply, regardless of whether the District provided the notice within hours of the nominal deadline, and regardless of whether the District's delayed notice-giving caused the affected employe and Association any harm; and (3) whether the December 1 deadline applies where the December 1 in question falls on a Sunday.

In addressing these questions, the Arbitrator finds it appropriate to consider, in part, the manner in which Sec. 31.01 has historically been administered. (Consideration of past practice for this purpose is not, in the Arbitrator's view, precluded by Sec. 28.08, whereas consideration of a past practice unrelated to an agreement in writing between the parties would be.) The Arbitrator also finds it appropriate to consider the implications of Sec. 118.22 of the Wisconsin Statutes. Section 31.01, which applies both to full- and part-time bargaining unit personnel, has been agreed upon within the context of Sec. 118.22, Stats., which has a direct bearing on full-time teachers' employment security. Notably, the statute includes preliminary and final notice provisions similar in structure to those contained in Sec. 31.01.

Since at least 1983, Section. 118.22, Stats. has provided as follows:

> Renewal of teacher contracts. (1) In this section:
>
> (a) "Board" means a school board . . . .
>
> (b) "Teacher" means any person who holds a teacher's certificate or license issued by the state superintendent . . . and whose legal employment requires such certificate, license or classification status, but does not include part-time teachers or teachers employed by any board of school directors in a city of the 1st class.
>
> (2) On or before March 15 of the school year during which a teacher holds a contract, the board by which a teacher is employed or an employe at the direction of the board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or teacher who does not receive a notice of renewal or refusal to renew his contract for the ensuing school year on or before March 15, shall accept or reject in writing

> such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board.
>
> (3) At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request therefor with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew his contact.
>
> (4) A collective bargaining agreement may modify, waive or replace any of the provisions of this section as they apply to teachers in the collective bargaining unit, but neither the employer nor the bargaining agent for the employes is required to bargain such modification, waiver or replacement.

In the context of the record evidence that the District has always given preliminary and final notices of layoff pursuant to Agreement Sec. 31.01 in writing to the affected employes, and in the additional context of the Sec. 111.18, Stats., requirement that preliminary and final nonrenewal notices to full-time teachers must be given to the affected teacher in writing to be effective, the Arbitrator concludes that the preliminary and final notices of layoff called for in Sec. 31.01 must be given to the affected employes in writing to meet the notice of layoff requirements of the Agreement, as well. Accordingly, the District's November 25 open session School Board approval -- with Association representatives present -- of issuance of preliminary notices of layoff to various teachers including Grievant did not satisfy the Sec. 31.01 preliminary notice requirement as regards Grievant's layoff. Nor, for the same reasons, did the Board's previous open-meeting discussions of the possible layoffs at earlier meetings satisfy that requirement, either.

The record evidence reflects a good faith District effort to give Grievant a written preliminary notice on November 27. It also establishes that neither Grievant nor the Association were in any way adversely affected by Grievant's receipt of the written notice on the morning of December 2 as opposed to, say, the late evening of December 1. The District has cited Fruehauf Trailer Co., 13 LA 163, (8/49) for the proposition that, "the task of an arbitrator is to effectuate [the agreement's] true purpose and intent rather than to penalize a party for technical violations when no real injury is sustained by the other party." In a similar regard, the District cites Canadian Porcelain Co., Ltd., 41 LA 417 (Hanrahan) 4/63) for the proposition that no remedy

should be awarded where there is no evidence that the employees involved have suffered any loss by reason of failure to give a notice called for by the agreement. On the foregoing bases, the District argues that provision of a notice December 2 rather than December 1 was "de minimis, insignificant and totally insufficient to overturn the School Board's subsequent layoff of Ms. Ickert."

That argument might well be persuasive but for the parallels between Agreement Sec. 31.01 and Sec. 118.22, Stats., noted above. Subsection (2) of 118.22 makes it clear that "if no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year", so that full reinstatement/make whole relief would be mandated in case of noncompliance with the notice requirement. In the context of that Wisconsin law, the persuasiveness of the District's argument based on equity principles is seriously undercut. There remains, however, the question of whether the fact that December 1, 1991 fell on a Sunday renders the written notice given notice to Grievant on the following Monday sufficient to meet the Sec. 31.01 notice requirement. Section 31.01 makes no specific exception for that Sunday circumstance.

Section 31.01 does place emphasis on working days as regards time computation by defining an employe's appointment date for amount of service computations as "the first day the employe is scheduled to start employment in the District." Elsewhere in the Agreement, the Sec. 28.09 definition of the term "working days" used in grievance timelines expressly excludes Sundays (as well as Saturdays or legal holidays) even though it expressly includes "vacation periods." Without more, those considerations would not warrant exceptions for notice deadlines when they fall on a Sunday. However, it is appropriate to seek additional interpretive guidance on this issue by reference to Sec. 118.22, Stats., just as it was on the questions of the need for actual written notice to the affected employe and the sufficiency of substantial performance.

Section 118.22, Stats., is subject to the general interpretation rules set forth in Sec. 990.001, Stats., including that in Sec. 990.001(4)(b) cited by the District, which has provided since at least 1983, as follows:

> "Construction of laws; rules for. In construing Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature. . . . (4) Time, How Computed . . . (b) If the last day within which an act is to be done or proceeding had or taken falls on a Sunday or legal holiday, the act may be done or the proceeding had or taken on the next secular day."

The application of that rule to the nonrenewal notice requirements of Sec. 118.22 does not appear to "produce a result that would be insistent with the manifest intent of the legislature" within the meaning of the general language at the outset of Sec. 990.001(4)(b). Similarly, its application does not appear inconsistent with the manifest intent of the parties as regards the notice of layoff

deadlines referred to in Sec. 31.01 of the Agreement. Teachers and school administrators do not ordinarily report to work on Sundays or legal holidays. Sec. 28.03 confirms that the parties have taken that reality into account in developing their Agreement.

For those reasons, the Arbitrator concludes that, because December 1, 1991 fell on a Sunday, the District complied with the Sec. 31.01 deadline for preliminary notice of its layoff of Grievant that took effect on January 23, 1992, by giving Grievant written notice on Monday, December 2, 1991.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUE, noted above that the disposition of the grievance dated January 27, 1992 shall be as follows:

1. The grievance is procedurally arbitrable. Read as a whole it constitutes a challenge to what it expressly asserts was the District's "invalid layoff" of Grievant. That layoff took effect on January 23, 1992, the first day of work lost to Grievant on account of it. The grievance was received by the District on January 29, 1992, within the Sec. 29.03 time limit. The District cannot rely on any effects on grievance arbitrability that noncompliance with Sec. 28.02 might otherwise have had because the District did not raise that issue in its written response to the grievance.

2. Because December 1, 1991 was a Sunday, the District met the Sec. 31.01 requirement for preliminary notice of layoff by delivering such a notice in writing to Grievant on December 2, 1991. Accordingly, the District did not violate Sec. 31.01 of the Agreement when it laid off Grievant Kim Ickert effective at the beginning of the second semester of school year 1991-92.

3. The request for relief contained in the grievance dated January 27, 1992 is denied.

Dated at Shorewood, Wisconsin
this 16th day of January, 1993 by Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator