BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MELLEN EDUCATION ASSOCIATION	Case 23 No. 49437 MA-7953
and	
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF MELLEN	

Appearances:

Mr. Barry Delaney, Executive Director, Chequamegon United Teachers, P.O. Box 311, Hayward, Wisconsin 54843, appearing on behalf of the Mellen Education Association, referred to below as the Association.

Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Board of Education of the School District of Mellen, referred to below as the Board, or as the District.

ARBITRATION AWARD

The Association and the Board are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed by the Association on March 23, 1993, regarding the layoff of several teachers. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on September 28, 1993, in Mellen, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by December 14, 1993.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the Board violate Article IV, Section E, of the collective bargaining agreement by not including Shari Booth and Gerald Opperman in the "Selection For Reduction" process regarding potential reductions at the K-8 level for the 1993-94 school year?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I: ASSOCIATION RECOGNITION

. . .

> THAT the Board of Education recognizes the MEA to be the sole bargaining agent for all full time and regular part-time professional employees employed by the School District of Mellen but excluding supervisors,

administrators . . .

. . .

ARTICLE II: MANAGEMENT RIGHTS CLAUSE

A. The management of the school and the direction of all school employees is vested exclusively with the Board of Education and the District Administrator acting as its agent. The Board retains the sole right to direct the employees of the District; to assign work or co-curricular assignments: . . . to layoff . . .

. . .

ARTICLE IV: WORKING CONDITIONS

. . .

D. **Retention Of Teachers**

. . .

3. Efficient, cooperative and loyal teachers will be secure in their positions. Teachers failing to meet these requirements after a reasonable length of time for adjustment will not be retained.

. . .

E. **Lay-Off Clause**

If a reduction in the number of employees or in the number of hours in any position (partial lay-off) is necessary, the provisions set forth in this subsection shall apply. The Board may lay-off employees only where such lay-offs are for valid and lawful reasons.

. . .

1. **Selection For Reduction**

Step 1, Attrition . . .

Step 2, Seniority. If further reduction is still necessary, the Board shall select teachers, to be laid off, in the inverse order of length of service in the District (those with the shortest length of service shall be laid off first) . . . This order of lay-off shall be used to every extent possible while filing the remaining positions with employees who are qualified for those positions.

. . .

3. **Definition Of "Qualified"**

For the purposes of this "lay-off clause", "qualified" means certified by the Wisconsin Department of Public Instruction if such certification is required by the position.

. . .

F. **Teacher Assignments And Load**

. . .

2. In general, teachers will be assigned only to teach in those areas in which they are certified.

BACKGROUND

The grievance reads thus:

. . . The Union is the grievant and the grievance involves the teacher lay-offs that the Board of Education took action on March 11, 1993.

1. Article IV (D,3) states . . .

It is our position that all of the teachers who were laid off are efficient, cooperative and loyal; and, consequently, should not have been laid-off. For relief we are requesting that all laid-off teachers be reinstated.

2. Article IV (E, 1st paragraph) states . . .

The number of elementary positions that need to be filled are 13 (including a Chapter 1 position) according to the sign-up sheet supplied by you to all of the elementary teachers. There are only eleven teachers currently on staff (after the lay-offs) to fill the thirteen positions. Consequently, we believe that two teachers should not have been laid off and their lay-offs were not necessary or valid. For relief, we are requesting that the two teachers with the most seniority be reinstated.

3. Article IV (E, 1-Step 2) states . . .

Article IV (E, 3) states . . .

The sign-up sheet that you supplied to the teachers indicates that a Chapter 1 position will be posted and filled at a later date. It is our position that since the District is not eliminating the Chapter 1 position, one teacher should not have been laid off even if this would mean that one of the remaining teachers who is certified to teach Chapter 1 be transferred to the Chapter 1 position and the laid-off teacher be assigned to a regular elementary classroom if he/she is not certified to teacher (sic) Chapter 1.

4. It is also our position that the District violated the order of lay-off when it laid off Mr. Opperman as the Dean of Students (50% time) and as Chapter 1 teacher (50% time) and then rehired Mr. Opperman as half-time Dean of Students and half-time instructor at the same Board of Education meeting. We believe this violates Article IV (1, Step 2) of the Collective Bargaining Agreement since it was possible to fill the half-time teaching assignment with a teacher who was laid-off (but had more seniority than Mr. Opperman) or such position could have been filled by one of the teachers who was not laid off and their vacated position (or partial position) could have been filled by one of the laid-off teachers. We feel that the same thing should have been done for the position of half-time Dean of Students' position.

For relief on this portion of the grievance we are requesting that one of the laid-off teachers be reinstated (as per seniority) to both of Mr. Opperman's positions or to a position (or positions) vacated by another teacher (or teachers) being transferred to one or both of Mr. Opperman's positions.

> 5. It is also our position that the District violated the order of lay-off when it retained Shari Booth as the school counselor. Mr. James Wiener is certified as a counselor and had previously been a counselor for the District for many years. Teachers were laid off who are certified for elementary positions and who have more seniority than Shari Booth. Article IV (E, 1 - Step 1) clearly states that the order of lay-off shall be used to every extent possible while filling the remaining positions with employees who are qualified for those positions. If the District had laid off Shari Booth and placed Mr. Wiener in the counselor position, one of the laid-off teachers (who has more seniority than Ms. Booth) could have filled the elementary position vacated by Mr. Wiener.

The grievance ties together a series of events surrounding the issuance of lay-off notices in February and March of 1993. 1/

Richard Stokes is the Board's District Administrator. At time of his hire, and prior to the start of the 1992-93 school year, the Board was attempting to fill a Principal position. Stokes was unable to fill the position and recommended the Board create a position of Dean of Students on a trial basis. The Board did so, and Gerald Opperman was placed in the position. Opperman was, at that time, a member of the bargaining unit represented by the Association. While Director of Students, Opperman also taught as a Chapter I instructor. In January, Stokes discussed the unit status of the Dean of Students position with Jeff Ehrhardt, the Association's President. Stokes informed Ehrhardt by letter dated January 12, that "the Dean of Students position has been removed from the bargaining unit." Ehrhardt responded by letter dated January 13, that "the Dean of Students/Chapter I position is part of the bargaining unit." On February 10, Opperman received a preliminary notice of lay-off.

The Association filed a Unit Clarification Petition with the Commission on February 11. The petition read thus:

> Dean of Students/teacher combination position: The Union does not know if this position should or should not be in the Unit. Presently, the District is providing wage, hours and conditions of employment as per the collective bargaining agreement . . . The position is in a gray area. Some facts point to the conclusion that the position should be in the bargaining unit and other facts indicate the position should be excluded. The Union is seeking a unit clarification so that it will know if it has a duty to represent.

The Association eventually withdrew the petition, which the Commission formally dismissed on February 24.

1/ References to dates are to 1993, unless otherwise noted.

Sometime in February, the Board publicly advertised to fill the position of "Administrative Assistant/Dean of Students." Opperman and several other unit employes were among the applicants for that position. The Board, at its March 11 meeting voted to approve the creation of the position of Administrative Assistant/Dean of Students, and to offer a two year contract in that position to Opperman. The Board also voted at that meeting to issue Opperman a notice of lay-off from his teaching position. The Board has treated the Administrative Assistant/Dean of Students position as a non-unit position.

As early as August of 1992, the Board and Stokes had discussed enrollment concerns, especially concerning the elementary levels. By the middle of the 1992-93 school year these concerns were compounded by budgetary concerns related to Chapter I funding and funding traceable to the budget of the State of Wisconsin. At its February 9 meeting the Board authorized the issuance of:

> . . . a notice of preliminary consideration of layoff to Kathy Kretzschmar, Steve Kurtz, Dale Neibauer, Jerry Opperman, William Plizka, Bruce Seiffert, Alice Bertolino, and class advisors Pam Richardson, Jerry Acosta, Shari Booth, Jan Evans, James Wiener, Charles Gretzlock, Arden Clapero due to anticipated budgetary constraints, anticipated cost controls, levy limits, and/or enrollment for the 1993-94 school year . . .

At its March 11 meeting, the Board voted to issue lay-off notices to each of the teachers noted above. Those notices were issued on March 12. The Board also voted, at its March 11 meeting, "to staff grades K-8 with 12 teachers for the 1993-94 school year."

On March 15, Stokes called a meeting of K-8 instructors. At the start of the meeting, Stokes passed out a sheet of paper headed "STAFFING 93/94 TEACHERS." The upper third of the sheet consisted of a box with thirteen separate lines stating the available grade assignments. Twelve of these lines were blank to the right of the grade assignment, to permit the entry of a teacher's name. The thirteenth, for the Chapter I assignment, stated "To post". Below this box were the names of Dale Neibauer, Bill Plizka and Kathy Kretzschmar. The bottom third of the sheet consisted of a box with twelve

separate lines stating the remaining K-8 staff and their certification. Stokes explained to the teachers that he wanted the teachers whose names appeared in the box at the bottom of the sheet to state their preferences for classroom assignments in the 1993-94 school year. He hoped the teachers could reach a consensus decision on those assignments. Stokes had invited Neibauer, Plizka and Kretzschmar to attend, but Stokes did not seek their preferences. Kurtz was included in the teachers whose assignment preferences were sought. The teachers did not reach a consensus on their 1993-94 assignments. Plizka repeatedly asked, during the meeting, if the positions listed on the top third of the sheet were vacant. Stokes responded that they were.

The seniority of the teachers listed on the staffing memo can be summarized thus:

TEACHER	DATE OF HIRE 2/
K. Kretzschmar	7/14/92
D. Neibauer	8/7/90
W. Plizka	8/16/88
S. Kurtz	7/12/88
R. Mueller	8/12/86
L. Tanula	7/9/85
C. Reithel	11/12/85
J. Wiener	7/8/80
G. Radke	?/?/78
M. Ehrhardt	7/14/77
M. Ellias	5/9/74
P. Malovrh	?/?/71
T. Turonie	?/?/70
S. Witt	?/?/69
C. Gretzlock	?/?/67

Wiener is certified as a School Counselor, and served in that capacity, on a one-half time basis, for roughly eight school years. Wiener chose to leave counseling so that he could teach on a full time basis. Shari Booth serves as a Counselor for the Board. Her date of hire was July 9, 1991.

As noted above, the Association filed a grievance regarding the lay-offs on March 23. The Board made the following settlement proposal, which was unanimously rejected by the Association:

2/ A question mark in this column indicates that neither seniority list entered into the record lists the applicable month or day.

. . .

2) Mr. Steven R. Kurtz, Mr. Dale Neibauer, and Mr. Bill Plizka shall be retained as full-time teachers for the 1993-94 year as if they had not been laid-off.

3) The parties will consider the position of "Dean of Students" as a non-bargaining unit position if the position contains teaching duties which reflect less than 50% of a full-time teaching position. If the position involves teaching duties of 50% or more (of what a full-time teacher works) the parties agree that the Dean of Students position is a bargaining unit position.

4) The parties agree that the District retains the right to assign teachers to specific positions as per Article II of the collective bargaining agreement except as restricted by the Letter of Agreement concerning Mr. Plizka that was signed by the parties on October 29, 1991.

. . .

The Letter of Agreement referred to in Paragraph 4) above reads thus:

> Any vacancy that occurs in the 5th or 6th grades or junior high during the 1992-93, 1993-94, 1994-95 school years, up to the last regular student contact day of the 94-95 school year, will be awarded to William Plizka, if he should apply for it. After the last student contact day of 94-95, if a vacancy in 5th or 6th grades or junior high occurs and Mr. Plizka is the only applicant from within the School District to apply for it, the position shall be awarded to him.
>
> The position shall be awarded to Mr. Plizka only once under the terms of this agreement.
>
> This agreement is in settlement of grievance filed by Mr. Plizka, WERC Case #17, MA-6758, and serves as no precedent for any other purpose.

The grievance underlying this settlement agreement arose when Plizka was a Chapter I teacher. The certification requirements for Chapter I changed, and Plizka did not have the requisite certification to continue in that position. The grievance sought to have Plizka reassigned to an area for which he was certified. Plizka served, in the 1993-94 school year as a sixth grade teacher, and in the prior school year as a third grade teacher.

The Board voted to recall Kurtz at its April 13 meeting. Kurtz found employment with another school district, and in so doing, made Plizka's recall possible. The Board recalled Plizka in mid-summer. The resignation of two other teachers resulted in the recall of Neibauer and Kretzschmar. By July 30, each of the K-8 teachers who had been put on lay-off had been recalled.

Plizka's Lake Home

Plizka testified at length concerning the damages he felt his lay-off had caused. He stated he owned a lake front home, which was one of four homes he once had an ownership interest in. His interest in that property was complicated by a divorce proceeding which preceded any of the events at issue here. The lake front home at issue here was unoccupied at all times relevant here. He purchased the home in 1978 with no money down. The mortgage which the property secured was executed in April of 1974 in the amount of $21,000. He estimated his monthly payments were roughly $170. By the winter of 1992-93, the home's roof needed repairs badly. Plizka estimated the repairs would cost roughly $2,000. In April, Plizka attempted to obtain a loan to make the repairs. He was unable to find any financial institution which would make the loan. Unusually heavy Spring rains caused extensive damage to the interior of the home. Plizka estimated that with the roof repairs made, he could have sold the home for roughly $38,000, but that the home was worth no more than $25,000 after the rain damage.

He was unable to recall when he last made a monthly payment on the home. He could not remember making any monthly payments in 1993. Documentation supplied after the hearing indicates that as of May, Plizka was $9,378.32 "past due." The mortgage holder initiated foreclosure proceedings in June or July. The Board pays its teachers on an annualized basis, and Plizka collected unemployment compensation for roughly six weeks during the summer. Stokes testified he considered renting the home, and looked at it when he was hired by the Board. He did not rent the home, and noted that at the time he inspected it, the house needed a new roof.

Further facts will be noted in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Association's Initial Brief

The Association states the issues for decision thus:

> Did the District violate the collective bargaining agreement when it laid off Kathy Kretzschmar, Steve Kurtz, Dale Neibauer, and Bill Plizka?
>
> If so, what is the appropriate remedy?

The Association notes it is not challenging the lay-offs of Bruce Seiffert and Alice Bertolino.

The Association argues initially that the Board laid off more teachers than was necessary. Stokes acknowledged this directly to Delaney, and in correspondence with the Board's legal counsel, as well as indirectly through a settlement offer made to the Association. Section IV, E, mandates that lay-offs must be "necessary" and for "valid reasons." The Association contends that, at a minimum, the lay-off of Kurtz was unnecessary.

Subsections 1 and 3 of Article IV, Section E, are "very clear," according to the Association. Those subsections do not permit "exceptions to the order of lay-off" including exceptions traceable to departments, qualifications, or the Board's or an Arbitrator's view of educational policy, the Association contends. Acknowledging that the Board properly "applied the correct order of lay-off within the three departments," the Association argues that the Board

failed to "apply it to the entire group of bargaining unit members as called for in the Agreement." More specifically, the Association argues that the Board improperly excluded Booth and Opperman "from the pool of employees that could be laid off." The Association argues that it was possible for the Board to "lay off Ms. Booth, transfer Mr. Wiener to the counselor position, and not lay-off Mr. Neibauer, Mr. Plizka, or Mr. Kurtz." Because this was possible, the Association concludes the Board failed to use inverse seniority "to every extent possible." The Association concludes that the Board improperly restricted the pool of employes available for lay-off, and improperly viewed qualifications as something more than certification.

Beyond this, the Association notes that the "only certification needed for" the Administrative Assistant position is "a regular teaching certificate and a 316 certification." The Association asserts that among the several ways the Board could have filled Opperman's position was to transfer "Ms. Ehrhardt to Mr. Opperman's position . . . and then . . . (transfer) one of the laid-off elementary teachers to her regular elementary classroom position."

The Association specifically challenges any Board claim that Opperman does not fill a bargaining unit position. Arguing that it has never waived interest in representing the position, that his duties have not changed from his prior position and that only the Commission has the authority to remove a position from the bargaining unit, the Association concludes Opperman remained available for lay-off.

The Association concludes that as the remedy appropriate to the Board's conduct, it should be given "an award that states that the Board violated the lay-off clause in the Collective Bargaining Agreement." Beyond this, the Association requests that Plizka be made whole for damages he suffered due to the Board's issuance of an improper notice of lay-off. More specifically, the Association notes that Plizka is entitled to an award of $13,000 equity he lost in a vacation home due to the Board's wrongful conduct.

The Board's Initial Brief

The Board states the issues for decision thus:

A. Prior to implementing any layoffs, is the District required to involuntarily transfer more senior teachers in order to assure the continued employment of less senior teachers?

B. If so, what is the appropriate remedy?

The Board asserts that "this case is as clear as mud," but argues that it has not violated the agreement either by issuing the lay-off notices or by recalling the laid off teachers. More specifically, the Board contends that the Association is "not challenging the Board's authority to have issued the lay-off notices, the timing of those notices, or the due process procedures utilized when issuing the notices." The grievance turns, the Board concludes, on whether it must involuntarily transfer "more senior teachers . . . so as to ensure the continued employment of less senior teachers."

The Board contends that its right to assign under Article II has not been limited except by Article IV, Section F, 2, and by a settlement agreement affecting Plizka. The Board specifically denies that Step 2 of the lay-off procedure requires it to transfer teachers prior to implementing a lay-off. Rather, the Board argues that "remaining positions" under that section clearly and unambiguously are "positions which remain after the layoffs have been implemented." The Board laid off the least senior full-time elementary teachers, and sought input from all elementary teachers on which of the available positions each would prefer to fill. This conduct complies with, and exceeds contractual requirements, according to the Board. The Board denies that the contract can be read to dislodge more senior teachers from their positions to assure less senior teachers can be retained. There is no relevant past practice or bargaining history supporting such a result, the Board asserts. Beyond this, the Board argues the Association's view can produce the absurd result of forcing a teacher to assume a position he is certified for, but unwilling to take.

The Board notes that "all the teachers who had been laid off were recalled to full-time teaching positions prior to the start of the 1993-94 school year." It follows, the Board concludes, that no teacher suffered economically, and that those teachers who received unemployment compensation actually received "more money during calendar year 1993 as a result of the short-term layoffs." It follows, according to the Board, that no make-whole relief is appropriate even if the contract was violated. An analysis of Plizka's claim for lost equity reveals, the Board contends, that his "whole claim is bogus." The lay-off was neither the proximate nor the remote cause of his damages. The Board concludes that "the case before the Arbitrator is moot," and that if any issue of remedy is posed it is simply written "clarification of the disputed language."

The Association's Reply Brief

The Association acknowledges that the labor agreement does not provide for bumping rights, and contends that if the selection procedure had been properly implemented there would be no need for bumping "because all of the remaining employees would have greater seniority" than the laid off employes. Beyond this, the Association challenges the Board's claim that Opperman was not

available for lay-off. The Association asserts that it "is incredible that the Board takes the position that by its unilateral changing the title of the position, but not the duties, the position should be moved outside of the bargaining unit."

The Association denies that it seeks to force the Board to "transfer any teacher prior to a layoff." Rather, the Association seeks to make transfers "(w)hen the layoff takes place . . . to insure that the least senior teachers are laid off." The Association summarizes the impact of its interpretation thus:

> The intent of the parties is to lay off the least senior teachers without any exceptions other than having the remaining positions filled with certified teachers.

Such transfers may or may not be involuntary, according to the Association. The Association notes that the absence of contractual restrictions on the Board's right to assign underscores the significance of applying the lay-off clause as the Association seeks. Otherwise, the job security of lay-off by seniority is gutted. The Association contends that "the parties did not grant individual employee rights for specific positions, transfers or for preventing involuntary transfers." The "quid pro quo" for this, according to the Association, is that "employees were given the absolute inverse order of seniority lay-off rights (to every extent possible) without any exceptions except that the remaining positions must be filled with certified employees."

The Association notes that Article II is subject to limitations expressed elsewhere in the agreement. To adopt the Board's interpretation would, the Association concludes, use Article II to engulf the lay-off procedure bargained by the parties, and would afford the Board a right it never secured in negotiation.

The Association agrees that the reference to "remaining positions" is clear and unambiguous if read in relation to other agreement provisions. The Association asserts that the contract cannot be read to permit the Board to split the entire bargaining unit into discrete pools of employes for lay-off purposes. Beyond this, the Association challenges the harshness of transferring a teacher to a position the teacher may not wish to fill. This view ignores the point of view of the teacher otherwise subject to the loss of employment, according to the Association. The Association's final line of argument is that the Board's improper lay-off of Plizka directly caused the loss of $13,000 equity in a home he owned.

The Board's Reply Brief

The Board challenges the assertion that it "laid off one too many teachers." Stokes notified Kurtz he could expect to be recalled as soon as possible, and, in any event, the lay-off was not effective until the end of the school year. It follows, the Board concludes that "Kurtz' layoff never went into effect."

Noting that the statutes require the Board to follow rigid timelines in implementing a lay-off, and that missing those timelines "would have prevented (the Board) from making any further reductions in its teaching staff for another year," the Board concludes that the absolute precision sought by the Association "is not possible."

The Board contends that Kurtz' lay-off was for valid reasons, since the Board had to guard against revenue losses, and could not afford to risk being one year behind those revenue losses. As the Board puts it: "It was only prudent for the Board to be conservative rather than to come up short."

The Board then asserts that the Association has failed to establish why, under either party's theory of the grievance, Kretzschmar's lay-off was improper. She is the least senior elementary teacher, and it necessarily follows according to the Board that "there can be no merit to the Union's challenge of Ms. Kretzschmar's layoff."

"(R)egarding the issue of the appropriate remedy," the Board argues that "the best remedy would be for the parties to bargain a later timetable for the issuance of layoff notices." Noting that the Association withdrew its challenge of three lay-offs, the Board asserts that each of those teachers was unnecessarily placed into an employment limbo.

The Board repeats its challenge to the validity of Plizka's claim, specifically questioning his withdrawal from consideration for the Administrative Assistant position and his failure to apply for a home equity loan. The Board concludes the grievance should be dismissed "in its entirety."

DISCUSSION

The grievance is broad, and to meaningfully address it the factual and contractual background must be defined. This poses problems defining the issue. Each party seeks to clarify the lay-off clause, but interpretation not rooted in disputed facts risks creating problems.

Neither party's statement of the issues has been accepted as that appropriate to this record. The Association's focuses on the lay-off of four employes. This does not highlight the facts necessary to pose the contractual issue. The Association's arguments pit Booth's and Opperman's rights against those of the four K-8 teachers, but its statement of the issue ignores Opperman and Booth. Since all six teachers were laid off at the same time, it is not

clear from the Association's statement of the issue how the Board could have violated the lay-off clause. This makes the grievance look like a recall dispute, but the order of recall is less than clear on this record.

The Board's statement of the issue clarifies that the dispute focuses on the "Selection For Reduction" process, but is too broad. Step 2 of Article IV, Section E, 1, refers to the use of the order of lay-off "to every extent possible." This general reference makes the facts of the specific case significant, while the Board's statement of the issue makes it appear the contract must be applied "black or white" without regard for the facts. Even if the Association's interpretation of Step 2 is accepted, it may be possible in one case to "involuntarily transfer more senior teachers in order to assure the continued employment of less senior teachers," but not in another.

The statement of the issues adopted above addresses the problems posed by each party's view of the issues by stating the specific contract provision at issue and by focusing on Opperman and Booth.

Ultimately, the factual focus of the parties' dispute is the sheet distributed by Stokes to K-8 staff on March 15. The Association argues that Plizka's and Neibauer's names should not have been on the middle of the sheet, but should have been among those teachers whose input was sought on 1993-94 classroom assignments. Putting their names among those teachers would require selecting Opperman and Booth for lay-off, and transferring Wiener to a Counselor position. Kretzschmar has the least seniority of any of the six employes at issue here. Thus, her name would have been on the middle of the sheet even if the Association's interpretation of the lay-off clause is accepted.

The contractual focus of the dispute is the Selection For Reduction process stated at Article IV, Section E, 1. Before addressing this provision, however, certain prefatory points must be resolved. The grievance cites Article IV, Section D, 3, but the Association has not extensively argued this subsection. It is, in any event, inapplicable to the grievance. The subsection states a discipline policy. There is no contention that the six employes were laid off for disciplinary reasons. The lay-offs reflected, at most, enrollment and fiscal concerns.

The Association's contention that the first paragraph of Article IV, Section E, governs these lay-offs is unpersuasive. Noting that as early as March 15 Stokes acknowledged that Kurtz would be recalled from lay-off, the Association argues that the lay-offs were not "necessary" or for "valid and lawful reasons." The settlement agreement offered the Association by the Board also underscores that the Board realized not all of the teachers who received notice of lay-off would actually be laid off for the following year.

These facts support the Association's position, but the Association argues for a conclusive link between the number of teachers given notice of lay-off and the number of teachers ultimately laid off. This position ignores that the enrollment cycle and the budgetary cycle of non-Board sources of funding do not necessarily link to the notice requirements of the lay-off process. If enrollment or funding may reduced to the point that a lay-off is necessary, and notice of the lay-off must be given before certainty is possible on enrollment or funding issues, the only way to assure "necessary, valid and lawful" expenditure cuts are possible is to give notice of lay-off. The alternative locks in staffing expenditure levels when funding or enrollment may not meet those levels. The Association accurately notes that notice of lay-off disrupts the lives of those affected. This is unfortunate, but the contractual issue is whether a lay-off may be "valid," "necessary" or "lawful" even if the Board believes events subsequent to the lay-off can reasonably be expected to

obviate the need for the lay-off.

There is, on this record, no reason to doubt that the Board had a good faith belief that enrollment and revenue declines might require staffing cuts. There is no persuasive evidence the Board sought to lay-off teachers for reasons other than to assure that potential expenditure cuts could be made. The lay-offs have not been shown to be excessive in light of the Board's enrollment or fiscal concerns. There is, then, no reason to accept the assertion the lay-offs were "unnecessary," "invalid" or "unlawful." The action taken by the Board was not without cost. By giving notice of lay-off, the Board exposed itself to the loss of teachers who would seek more secure employment elsewhere and to the expense of Unemployment Compensation. To affirm the conclusive link between notice of lay-off and actual lay-off which the Association seeks here would impose costs beyond these without, on these facts, solid support in the language of the first paragraph of Article IV, Section E.

This focuses the dispute on Article IV, Section E, 1, Step 2. Before addressing this provision, it is necessary to address a threshold dispute involving Plizka. At the March 15 meeting, Stokes affirmed that the positions listed on the top third of the hand-out were "vacant." Plizka and, apparently, the Association take the position that this means the October 29, 1991 settlement agreement became operative. The record will not support this assertion. The 1991 agreement was negotiated to move him from an area he was no longer certified to teach. There is no reason to believe the parties, at that time, addressed lay-off issues. The terms of the 1991 agreement bear this out. A teacher does not, under Article IV, Section E, "apply" for a position. The settlement agreement, however, specifies the conditions under which Plizka's application for a position was to be honored.

It is an unpersuasive reading of the settlement agreement to conclude the parties, outside of a lay-off situation, sought to resolve an assignment dispute by re-writing the lay-off clause applicable to all unit employes for the benefit of only one of those employes. To find a modification of the contract requires a clearer statement of the parties' intent than the October, 1991 settlement agreement. Plizka did not, then, acquire additional seniority for lay-off purposes through this settlement agreement. To the extent the settlement agreement is applicable here, it became applicable when it was apparent no other teacher possessed a superior right under Step 2 to a remaining fifth or sixth grade position. Thus, Stokes' acknowledgement of vacant positions on March 15 affirmed only that no teacher had been assigned to any of the listed positions.

This focuses the dispute on whether Opperman or Booth should have been selected for lay-off to permit Plizka or Neibauer to assume a K-8 assignment for the 1993-94 school year.

This dispute poses the interpretation of the first and third sentences of Article IV, Section E, 1, Step 2. Each party advances a plausible reading of these sentences, and it follows that they cannot be considered clear and unambiguous. The most appropriate guides for the resolution of contractual ambiguity are past practice and bargaining history since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. In this case, however, neither guide is available. Thus, the interpretive issue focuses squarely on the language of the two sentences.

Because the Association's reading of the two sentences gives meaning to each, it is the more persuasive. The Board's view of the two sentences takes the reference to "remaining positions" in the final sentence and asserts that the lay-off selection process must be completed before seniority is considered.

This view effectively guts the first sentence. The first sentence refers to the selection of "teachers," not positions, for lay-off. Beyond this, the first sentence mandates that teachers "with the shortest length of service shall be laid off first." The final sentence underscores the significance of the seniority rights thus noted by stating "(t)his order of lay-off shall be used to every extent possible." Under the Board's view, seniority plays a role only after it has defined the positions subject to lay-off. By separating Booth and Opperman's positions from the lay-off process, the Board assured that the greater seniority of Neibauer and Plizka would not come into play. This view honored the inverse seniority selection process to the extent the Board chose to. However, this unpersuasively limits the scope of the introduction of the final sentence of Step 2, which mandates that the inverse seniority selection process be "used to every extent possible."

The Association's view more effectively gives meaning to each sentence. Under that view, the reference to "remaining positions" establishes that the Board determines the program areas subject to a reduction. For the purposes of this grievance, the K-8 area is that subject to the reduction. Having determined the program area subject to a reduction, the first sentence required the Board to select the least senior teachers for lay-off. This determination requires not just that the least senior teacher be selected, but that teachers who fill the "remaining positions" be qualified to do so. Article IV, Section E, 3, defines "qualified" as DPI "certified" for the position. This, read together with the first portion of the final sentence, mandates that lay-off by inverse seniority "be used to every extent possible" provided the remaining positions are filled by certified teachers.

To focus this on the grievance, the Board, having determined that the reductions would occur at the K-8 level, was obligated under Step 2 to select the least senior teachers for lay-off. Opperman and Booth are less senior than Plizka and Neibauer. Moving Wiener to the Counselor position would have made possible the selection for lay-off of teachers with less seniority than Plizka and Neibauer. Step 2 mandates that inverse seniority "shall be used to every extent possible" provided certified teachers fill the remaining positions. Bringing Opperman and Booth into the selection process was possible, since the remaining positions would have been filled with certified employes, provided Wiener became the Counselor. Thus, Step 2 offers no shield to protect Booth or

Opperman from the selection process. This view permits the inverse seniority selection process to be honored "to every extent possible while filling the remaining positions with employees who are qualified . . ."

The Board characterizes a transfer of Wiener as a harsh and absurd result. An involuntary transfer is arguably not the hallmark of sound educational policy. The issue posed for arbitration is, however, contract interpretation, not the definition of sound educational policy. The equity of an involuntary transfer is, in any event, an unreliable guide to contract interpretation. As the Association notes, the equity of honoring Wiener's choice of assignment is different from Wiener's or the Board's point of view than from that of the laid off teachers. Beyond this, if the involuntary transfer is viewed as a harsh result requiring the amendment of the selection process of Step 2, it is not apparent how the principle of teacher choice would be applied to other agreement provisions. The Board asserts, for example, that it was not required to elicit teacher input on classroom assignments as it did on March 15. This appears to be the case under Article II, which reserves the right to assign to the Board, and does not limit that right based on teacher choice. However, if an involuntary transfer can be the basis to amend Step 2 of Article IV, Section E, 1, it is not apparent why the Board's Article II right to assign would not also have to be limited by teacher choice. The arguably involuntary nature of Wiener's transfer does not, then, form a persuasive basis on which to interpret the contract. The goal of contract interpretation is to give the bargaining parties the benefit of their agreement. In this case, the parties agreed to a lay-off selection process based on inverse seniority. An involuntary transfer may be an unfortunate result of that process. The process must, however, be enforced as bargained.

By shielding positions from the lay-off process without regard to the seniority or certification of the incumbent, the Board failed to follow the selection for reduction procedure specified in Step 2. The discussion above has referred indiscriminately to the Board's shielding of Booth and Opperman from the reduction process, but the facts posed here require further comment on the application of Step 2 to Opperman.

Opperman was a "teacher" available, under Step 2, for selection for lay-off only if his position is a unit position. The Association has asserted that Opperman must be considered a unit employe until a Commission decision permits his removal from the unit. This assertion is tenuous, as a matter of law, under Commission precedent. 3/ As a matter of contract, the unit status of Opperman's position requires the application of Article I to the duties of his position. More specifically put, the issue is whether Opperman's duties make him an "administrator" or "supervisor" excluded from the unit under Article I. The Association asserts that the Board has applied a different job title to the same duties Opperman performed while a unit member. This may be true, but in the absence of evidence, stands as an unproven assertion. The Association's withdrawal of its unit clarification petition, coupled with its assertion that the unit status of Opperman's position is not within the jurisdiction of an arbitrator, yield a record on which it is impossible to determine this issue. This does not, as the Association asserts, definitively show Opperman remains in the unit. Rather, it indicates the record is insufficient to determine if Opperman is or is not covered by the labor agreement. No Board violation of Article IV can be premised on Opperman's availability for lay-off until his unit status is determined.

3/ See State of Wisconsin, Dec. No. 18696 (WERC, 5/81), discussed in City of Greenfield, Dec. No. 27606-A (McLaughlin, 8/93).

In sum, the Board violated Article IV, Section E, 1, Step 2 by shielding Booth from the lay-off selection process manifested by the hand-out distributed by Stokes on March 15. It was possible, within the meaning of Step 2, to select her for lay-off while filling the remaining positions with qualified teachers.

This statement of the application of Article IV to the grievance resolves the issues posed with the exception of the make-whole remedy the Association asserts Plizka is entitled to.

That the Board could conceivably cause the damages Plizka seeks compensation for by violating the labor agreement can be granted. That if it did so, the remedy sought could conceivably be appropriate can also be granted. Granting both propositions will not, however, support the remedy requested here. That the rain damage may have occurred after his receipt of the lay-off notice does not establish any link between the contract violation found above and his real estate difficulties. The violation found above establishes that Booth does not have rights to employment greater than Plizka, who should have been among the K-8 teachers invited, on March 15, to state their preference for a 1993-94 classroom assignment. This does not, however, establish that Plizka was wrongfully selected for lay-off, or that his selection for lay-off caused the damages he seeks to be compensated for. As noted above, the Board laid off both Booth and Plizka. Also as noted above, this selection did not violate the requirement of Article IV, Section E, 1, that a lay-off be necessary, for valid and lawful reasons. At the point in time Plizka claims he was being denied a loan to repair his lake front property, the Board had done no more than note his employment status for the 1993-94 school year was in doubt. Placing his name on the March 15 hand-out would not have removed from his record the notice of lay-off which, among other points, stood between him and the desired loan. No conclusion stated above would require the removal of that notice of lay-off.

This states that as a general matter of contract there is no causal link between Plizka's lay-off and the damages he claims. On the facts, there is no demonstrated link whatsoever. That the damaging rains came after his loan denial is unproven. Beyond this, the lay-off played no role in the cash-flow problems he experienced prior to the 1992-93 school year. The lay-off played no role in the deferral of the roof repairs from the point of purchase through 1993. The lay-off did not cause him to fall several thousand dollars behind in his mortgage payments. The lay-off did not even disrupt his 1993 income stream, since the Board paid his salary on an annual basis, and paid unemployment compensation during the summer. Plizka's remedial claim has no factual support.

Because Plizka is entitled to no make-whole relief, the Award entered below states the contract violation without further mention of remedy.

AWARD

The Board did violate Article IV, Section E, 1, Step 2 of the collective bargaining agreement by not including Shari Booth in the "Selection For Reduction" process regarding potential reductions at the K-8 level for the 1993-94 school year.

Dated at Madison, Wisconsin, this 18th day of March, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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