BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WAUPACA TEACHERS ASSOCIATION	Case 22 No. 49720 MA-8042
and	
SCHOOL DISTRICT OF WAUPACA, CITY OF WAUPACA et al, STATE OF WISCONSIN	

Appearances:

Mr. David W. Hanneman, Executive Director, Central Wisconsin UniServ Council-South, 2805 Emery Drive, P.O. Box 1606, Wausau, Wisconsin 54402-1606, appearing on behalf of the Waupaca Teachers Association, referred to below as the Association.

Mr. James R. Macy, Godfrey & Kahn, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of School District of Waupaca, City of Waupaca et al, State of Wisconsin, 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 on behalf of Al Becker, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on November 9, 1993, in Waupaca, Wisconsin. The hearing was transcribed, and the parties filed briefs and reply briefs by February 7, 1994. An evidentiary dispute arose during the briefing schedule. I summarized that dispute in a letter to the parties dated February 24, 1994, which reads thus:

> I write to confirm the conclusion reached at our conference call of February 24, 1994.
>
> The record in the above-noted matter is closed, and ready for my review. If I determine that I am unable, based on the current state of the record, to make a conclusion on the degree to which the Grievant received preliminary notice of reduction on April 30, 1993, and if this fact is crucial to resolving the grievance, I may direct further hearing on that point. If, in my review, I find the DPI publication cited by Mr. Hanneman

to be both relevant and of a non-disputable nature (analogous to a dictionary or to published arbitration award), I may consider it in my review.

. . .

ISSUES

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

Did the Board's reduction of the hours in the Grievant's teaching position violate Article VI of the collective bargaining agreement?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE VI
STAFF REDUCTION

A. The provisions set forth in this Article shall apply if the Board determines that a reduction in the number of teachers for the forthcoming school year is necessary. This Article shall supercede the individual teaching contract. Teachers selected for layoff under this procedure shall be given preliminary notice of such selection no later than May 1 of the current school year. A teacher laid off will be given first consideration according to the usual procedures, as a short-term substitute teacher (one to ten days) within the District for one full school year following the year in which he/she was laid off. In the event a long-term substitution (more than 10 days) would become available, a laid-off teacher would be given first consideration in his/her area of certification.

B. The selection of teachers to be laid off shall be made according to the following guidelines:

1. Normal attrition . . .

2. Volunteers . . .

3. Part-time employees, covered by the Master Contract, will be considered next.

4. If steps 1, 2, and 3 are insufficient to accomplish the desired reduction in staff, the least senior teacher teaching within their area of certification or group where the reduction is to occur, will be laid off according to Section C . . .

5. If a teacher has a major certification in a

special area such as music, art, physical education, learning disabilities, educable mentally retarded, guidance, librarians, speech therapy, or other special areas, the Board may retain such teacher rather than a more senior teacher.

6. No bumping shall occur between the grouping specified in Section C, unless the teacher is certified for such other grouping and has had one year of successful teaching experience within such grouping within four years immediately preceding the year in which the layoff occurs. If such teacher meets these requirements for bumping, they may only bump the least senior member of such group. This section shall not diminish number 5 above.

C. SENIORITY: "Seniority" for the purposes of this agreement shall be defined as the number of years of uninterrupted service, on a group basis, within one of the three groups designated. The groups shall be: (1) K through Grade 5; (2) Grades 6, 7, and 8; and (3) Grades 9 through 12.

1. All teachers must be certified to teach in the grade or area of certification they are currently assigned.

2. "Seniority" dates from when they start their first teaching assignment in the District.

3. "Certification" will be determined by the current certificates on file in the District Office.

4. "Seniority" shall be applied in the inverse order of the earliest date on which the individual teacher began his/her first teaching assignment with the District in the specified group or area of certification.

5. Any teacher who teaches in more than one (1) specified group shall have seniority rights based on years in the District and shall retain all bumping rights.

. . .

E. APPEAL OF LAYOFF DECISION: If a teacher who has been or will be laid off wishes to contest such action, the teacher must file a written grievance with the Superintendent within ten (10) working days after receiving the final written notice of layoff. The grievance will enter the grievance procedure at the Superintendent's level and the layoff decision shall stand unless, in making the layoff determination, the Superintendent or the Board acted contrary to the procedures provided in this Article.

F. RECALL: Full-time teachers laid off under the terms of this Article will be given first consideration for such vacancies that shall occur in the area of certification and group from which the layoff occurs for two (2) years following the layoff . . .

ARTICLE VIII
GRIEVANCE PROCEDURE

. . .

C. General

. . .

4. The written grievance shall give a clear and concise statement of the alleged grievance including the facts upon which the grievance is based, the issue involved, the specific section(s) of the Agreement alleged to have been violated, and the relief sought. The written grievance shall be filed on the agreed forms.

. . .

D. Initiation and Processing

. . .

4. Level Four. (a) . . . The sole function of the arbitrator shall be to determine whether or not the rights of a teacher have been violated by the

> District contrary to an express provision of this Agreement. The arbitrator shall have no authority to add to, subtract from, or modify this Agreement in any way . . .

BACKGROUND

The grievance, signed by the Grievant on May 17, 1993, 1/, but dated May 18, 1993, lists "April 30th, 1993" as the "DATE FACTS BECAME KNOWN," and lists Article VI, Section C as the "ALLEGED CONTRACT VIOLATION." The grievance states the following after the heading "GRIEVANT EXPLANATION OF ALLEGED VIOLATION:"

> According to the Waupaca School District low enrollment classes in the Tech Dept. requires (sic) one full time position to be reduced to part time. The District believes my certification does not allow me to teach in other areas of Tech Ed. I contend that my certification is not only appropriate but also I was told by my department administrator no other certification was necessary.

The grievance seeks "(t)o exercise seniority rights and bump the least senior member and regain full time teaching status."

The Grievant worked as a full-time teacher in the Board's High School's Technical Education Department in the 1992-93 school year. A full-time instructional load consists of from five to six classes of instruction during the Board's eight period day. For the first semester of the 1993-94 school year, the Grievant taught three classes. For the second semester, he taught two. The seniority and certifications of the Technical Education teachers for the 1993-94 school year can be summarized thus:

Instructor	Years Of Service	DPI Certification
D. Larson	5	Subject 220 Subject 299
T. Stults	14.5	Subject 220 Subject 296
The Grievant	15.5	Subject 220

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

J. Richmond	18.5	Subject 220 Subject 292 Subject 299
J. McElroy	20	Subject 220 Subject 295 Subject 299

Each of the listed instructors holds a Position 27 license which is for secondary school teacher. Larson and Richmond hold a Position 65 license which qualifies them as a Local Vocational Education Coordinator. Stults holds a Position 10 license which qualifies him as a Supervisor/Coordinator-Director of Instruction. A Subject 220 license qualifies an instructor to teach entry level Tech Ed courses. The Subject 292, 295, 296 and 299 licenses require a combination of course work and work experience. These licenses are required for upper level Tech Ed courses. The Board offered, in the 1993-94 school year, four sections of upper level Tech Ed courses.

Low enrollment in Tech Ed courses has been a continuing concern of the Board since at least 1984. In the 1992-93 school year, low enrollment in Tech Ed courses coupled with budget uncertainties led the Board to consider staff reductions in certain departments. The Grievant received the following letter, dated April 30, from David Poeschl, the Board's District Administrator:

> It has been determined that a reduction in the number of teacher hours for the 1993-94 school year may be necessary. For this reason, your position of Industrial Arts Teacher is being reduced from 100% to 12.5%. The reduction in time will be discussed by the Instructional Committee of the School Board at a time to be determined.

Several other teachers received similar notices. Three Chapter I teachers had their hours reduced to 45% of a full instructional load. None of these teachers were full-time in the 1992-93 school year. A Reading Specialist who was full-time in the 1992-93 school year was reduced to 25% time. Wayne Verdon, the Board's Director of Instruction, delivered one of the April 30 notices to a Chapter I teacher on Saturday, May 1.

The Board informed the Grievant on May 6 that the Instructional Committee would meet May 11 to formulate a recommendation on staff reductions. The Board ultimately acted to reduce the Grievant's contract, and formally advised him of the reduction in a letter dated May 13, which reads thus:

> The Waupaca Board of Education has determined that your position of Industrial Arts Teacher shall be reduced from 100% to 25% for one semester and 12.5% for the

> other semester of the 1993-94 school year. This determination was made at the May 12, 1993 School Board meeting . . .

The Association responded by filing the grievance noted above.

Gunderson responded to the grievance in a May 29 letter which states:

> It is my understanding that the meeting referred to in Level One of the grievance procedure is no longer necessary because of our 5/17/93 meeting . . .
>
> Therefore, the attached grievance is denied. Article VI B 5 supercedes Article VI C.

Poeschl denied the grievance in a letter dated July 1, which noted "It is my position that Article VI.B.5 supercedes Article VI.C." Rosalene Lund, the Chairperson of the Board's Personnel Committee responded to the grievance in a letter dated July 8, which did not cite any contract provision, but noted: "The Committee believes that the contract has not been violated as stated in your grievance."

Evidence of Bargaining History

In the bargaining for a contract to cover the 1980-81 school year, the Board made an initial proposal governing staff reductions which was entitled thus: "ARTICLE _____ - REDUCTION IN STAFF (Full Time Positions Only)." The Association's initial proposal on this point was entitled "LAY-OFF AND RECALL PROCEDURE," and contained the following provisions:

> A. This procedure shall apply only when the District is required to reduce the professional staff. The District and the Association shall jointly determine the teaching position or positions to be eliminated . . .
>
> H. Recall: Full-time teachers laid off under the terms of this Article will be given priority for such vacancies which shall occur in their grade or discipline for a period of two (2) years following the layoff . . .

The parties agreed to title Article VI of the 1980-81 contract "STAFF REDUCTION."

In April of 1981, the Association proposed to add the following provisions to Article VI of the 1981-82 agreement:

> Any employee who is selected for a reduction in hours (partial layoff) and who is not able to exercise bumping rights in order to retain a position with hours and compensation substantially equivalent to the hours and compensation the employee currently holds, may choose to be fully laid off without loss of rights and benefits as set forth in this article.

. . .

> All reduction in staff or in the hours in any staff position shall be governed by the provisions of this Article. Layoffs shall not be accomplished by non-renewal of individual contracts, nor shall contract non-renewals be accomplished through layoff procedures. Layoffs shall be made only for the reason(s) asserted by the Board as provided in Section ___ above, and not to circumvent the other job security or discipline provisions of this agreement.

In a proposal dated March 31, 1982, the Association resubmitted the first of these two proposals for inclusion in the 1982-83 agreement.

In a document dated April 12, 1983, the Association proposed a series of changes to Article VI for inclusion in a labor agreement covering the 1983-84 school year. Those proposals modified Section A of Article VI in a manner similar to the second of the two cited proposals from 1981. Those proposals also amended Article VI, Sections B and C to expressly address "full or partial layoff," and included an extensive bumping proposal which permitted a more senior teacher to "assume the assignment, or that portion of the assignment" of a less senior teacher "which will allow the employe to retain a position substantially equivalent in hours and compensation to the position the employe held prior to receiving the notice of layoff."

In its proposals for a 1985-86 labor agreement, the Association proposed, among other changes to Article VI, that Section B 5, be eliminated. The Association also made the following proposal:

> Any employee who is selected for staff reduction by the steps listed above, may elect in writing, within ten (10) working days of receipt of a staff reduction notice, to assume the assignment, or that portion of the assignment which will allow the employee to retain a position substantially equivalent in hours and compensation to the position the employee held prior to receiving notice of staff reduction of the employee with the shortest length of service in the District who holds an assignment for which the former employee is certified or certifiable.

The Association also sought to base teacher assignments on a grade or area for which the teacher was "certified or certifiable to teach."

Patrick Phair has been employed by the Board as a teacher since 1977. He has served the Association in a variety of positions, and served on the Association's bargaining team in the negotiations for a 1980-81 labor agreement. He could not recall any specific discussions, during that bargaining, concerning the title to Article VI proposed by the Board. He did, however, recall that Section B 5, was discussed in relation to one or two teacher departments in which the application of seniority could work to deny the Board teachers with unique certifications.

The background sketched above is essentially undisputed. The balance of the background will be set forth as an overview of witness testimony.

The Grievant

The Grievant acknowledged that he signed the April 30 notice, but stated he did so when he received it from Poeschl on May 5. He could not recall where the meeting occurred at which Poeschl gave him the notice. He stated that on April 30, Jim Richmond, who serves as the Board's Local Vocational Education Coordinator, left the following note in his mailbox:

> Would you please inform (the Grievant) that Mr. Peschl (sic), you, and I want to m-et (sic) with him right after school to discuss reducing his contract and that he is entitled to have a union representative with him at this meeting.
>
> Mr. Poeschl and I would like to meet with you at 2:45PM.
>
> Thank you.

The note was to "Jim" from "BG." The Grievant noted he was shocked to receive the note, and discussed the matter with the Association's President, who attempted to set up a meeting, but was informed Poeschl could not meet with them until May 3. The May 3 date proved impossible, and Association and Board representatives met to discuss the matter on May 5. The Grievant noted that the insensitivity reflected by the notice process he testified to played a significant role in his decision to grieve the Board's actions.

The Grievant noted that he has a lifetime 220 license, and once held a 299 license. He let that license lapse because Richmond informed him the license was not necessary for his teaching duties. The Grievant detailed the conversation thus:

> I inquired in 1992, knowing that my license was expired, if I needed to renew it for any practical purposes because I wasn't teaching that class, and I was informed that I did not need to renew it as long as I was not teaching that class. 2/

A 299 license would require him to take further course work, but he noted that the Department of Public Instruction had informed him he could obtain a provisional 299 license if he enrolled in the necessary courses.

David Poeschl

Poeschl stated that he relied on Bruce Gunderson, the High School Principal, for an analysis of enrollment trends in Tech Ed courses. Poeschl determined, in consultation with Richmond, that the department was trying to emphasize school to work transition type courses which require certification beyond Subject 220. From Verdon, Poeschl determined the certifications of Tech Ed. teachers.

Poeschl stated that he met with the Grievant personally on April 30, and delivered the notice dated April 30. The Grievant signed that notice on that date, Poeschl testified.

Poeschl noted he cited Article VI, Section B 5, in his July 1 response to clarify that if Article VI applied to a reduction in hours, then Section B 5, superceded Section C. He assisted Lund in drafting the July 8 response and did not cite any contract provision to establish the Board did not feel Article VI applied to a reduction in hours.

Bruce Gunderson

Gunderson sent the memo to Richmond calling for a meeting with the Grievant on April 30. Poeschl came to Gunderson's office, and called the Grievant into the office to discuss the potential reduction in hours. Gunderson waited in an outer office until the Grievant and Poeschl concluded their meeting. Gunderson noted he typed the memo to Richmond on April 30, and did so because he wanted to get the notice to the Grievant before May 1.

Jim Richmond

Richmond noted he is used as a resource on staffing issues, but has no authority over determining staffing levels or on evaluating teachers. Low enrollment in Tech Ed courses was, he noted, an ongoing concern discussed at staff meetings and with the Board. Richmond denied he had ever steered students away from the Grievant's courses, and denied he ever told the Grievant not to renew his Subject 299 license. Richmond noted he encouraged teachers to seek as much outside training as possible. He also noted that DPI requirements had changed in July of 1988 so that a Tech Ed teacher had to have certification beyond Subject 220 to teach upper level Tech Ed courses.

On April 30, Richmond received Gunderson's memo regarding the Grievant. He then called the Grievant into his office, at roughly 9:00 a.m. The Grievant

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2/ Transcript at 118.

was, Richmond noted, stunned. The Grievant asked Richmond for a copy of the note, and Richmond gave him one. He advised the Grievant, three times, that he should report to Gunderson's office at 2:45 p.m. for a meeting on the proposed reduction.

Richmond is not a member of the bargaining unit represented by the Association. He does, however, perform certain instructional duties.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Association's Initial Brief

The Association phrases the issues for decision thus:

> Have the rights of (the Grievant) under the terms of the 1992-93 master contract between the School District of Waupaca and the Waupaca Teachers' Association been violated? If so, what should be the remedy?

The Association argues that this issue must be addressed in the context of the entire labor agreement. Acknowledging that the grievance cites only one provision, the Association asserts that it controls the grievance, and believes the grievance impacts the entire agreement. Any other conclusion would, according to the Association, frustrate the purposes of the grievance procedure.

As preface to the merits of the grievance, the Association notes that the Grievant is "a qualified, competent, and caring teacher," who could, on request, receive a 299 license. Turning to the merits of the grievance, the Association urges that Article VI, Section A, is "clear and unambiguous on its face" and requires preliminary notice of layoff by May 1. While acknowledging that there is dispute on when the Grievant received his notice, the Association urges that the more direct impact of the notice on the Grievant than on administrators indicates the date of receipt "would be emblazoned on the memory of the recipient." The note received by the Grievant on April 30 is not, the Association asserts, clear notice of an intent to layoff. An examination of the evidence establishes, according to the Association, that the Grievant did not receive a notice of reduction of contract until May 5. That date does not meet the requirements of Article VI, Section A.

The Association contends that Article VI applies directly to the grievance and was negotiated in 1980. Because the District failed to gain acceptance of its proposal to title the reduction in staff section "Full Time Positions Only"; because there is no evidence the language has been so restricted in the past; because the District issued to the Grievant a notice of reduction; and because the Board relied on Article VI in its denial of the grievance, the Association concludes that the "District cannot argue that ARTICLE VI does not apply to" the Grievant. Since Article VI, Section B 5, applies only to the listed special areas, the Association contends that it cannot support the Board's action. Because seniority is critical to the operation of Article VI, and because the Grievant is not the least senior Technical Education teacher, the Association concludes that Article VI cannot support his reduction in hours.

The Association contends that Article VI, Section B 5, is not available as a defense for the Board's actions. Bargaining history indicates this provision was not meant to be applied generally. Even if it was, the Association argues that it does not apply to the Grievant, who could have had a 299 license on demand, and arguably did not need one, given the limited student demand for courses requiring that certification.

The Association asserts that a "reduction of hours is a partial layoff unless expressly defined otherwise in the Master Contract." Arbitral and Examiner precedent support this assertion, according to the Association, as does the number and significance of agreement provisions bearing on seniority. A contrary conclusion would, the Association avers, gut the principle of seniority by permitting the Board to avoid seniority rights by making a full time teacher part-time before effecting a layoff. This would produce, according to the Association, harsh and unjust results.

A review of the evidence establishes, the Association argues, that the Board's reduction of the Grievant was arbitrary and capricious, and thus beyond the scope of its management rights. Among the evidence cited by the Association is that Richmond told the Grievant not to renew his 299 license; no effort was made to schedule classes in a fashion to preserve full-time employment for the Grievant; and Poeschl acted outside the scope of his authority in reducing the Grievant.

The Association concludes by requesting that the Grievant be made whole for the wages and benefits he would have earned had he retained full-time status. The Association also requests that "the Arbitrator retain jurisdiction until such time that the remedy has been accomplished."

The Board's Initial Brief

The Board phrases the issue for decision thus:

> Did the District violate Article VI, Section C of the collective bargaining agreement when it reduced the

> Grievant's individual teaching contract for the 1993-1994 school year from 100% to three-eighths time for the first semester and one-fourth time for the second semester?

The Board argues initially that the agreement "is very precise in what is required in filing a grievance" and requires that arbitral review be restricted to the provision cited in the grievance. The grievance cites Article VI, Section C as the controlling provision.

Article VI, Section C, applies only to a reduction in the number of staff, and thus, according to the Board, "is not applicable to this reduction in hours grievance." Section A of Article VI is, according to the Board, clear and unambiguous on this point, and Article II underscores that "no express terms modify the District's unilateral right to reduce hours." Any other conclusion, the Board argues, modifies the contract in violation of Article VIII.

Even if the contract could be considered ambiguous, the Board contends that bargaining history underscores that the Association has never successfully negotiated that Article VI apply to a reduction in hours. Because past Association proposals to bring this about were rejected, the Board concludes the Association seeks in this grievance what it could not achieve in negotiations. That the Board failed to have the reduction in staff language headed "Full Time" does not undercut its reading of Article VI, since the absence of any mention to a reduction in hours in the first labor agreement made it "not necessary for the District to have that provision clarified in its title." The Board also notes that the Association has not been able to secure bumping rights in bargaining, and has not been able to limit the reasons for which the Board may reduce staff.

Even if the reduction in staff provision applied to the grievance, the Board urges that specific provisions preclude the result the Association seeks. Article I, for example, gives the Board the sole right to schedule, thus precluding the sort of schedule adjustment the Association urges should be made to assure the Grievant continuing full-time employment. Beyond this, the Board argues that Article VI, Section B 5, grants it the authority to "retain a teacher with a major certification in special areas over that of a more senior teacher."

The District concludes that the grievance must be denied.

The Association's Reply Brief

After a review of disputed facts, the Association contends that the reference to "special area" in Article VI, Section B 5, cannot be equated to the reference to "special subject" in the Wisconsin Administrative Code, since the contract predates the relevant portions of the Code. Beyond this, the Association denies the Board's contention that the Grievant was available for a reduction since he lacked a 299 certification. That certification was available on demand, the Association notes, and was unnecessary given the small number of courses requiring it. The Association disputes that Poeschl either gave, or could contractually give, the Grievant proper notice of his layoff, and denies that the Grievant ever acknowledged the grievance was untimely filed.

The Association contends that the Board's citation of its rights under Article II is misplaced. That citation presumes the Association is challenging

its right to layoff. The Association contends, however, that this is not the case:

> The Association assumes that it was necessary for the District to reduce its FTEs. However, we demand that the District follow the terms of the Master Contract in the methods and procedures that the District uses to accomplish that reduction.

The Association then contends that Article VI governs this grievance. That article applies to a reduction in hours, the Association argues, since the "elimination of the full-time position of (the Grievant) eliminated an FTE and created a partial FTE in its place." Because there are fewer FTEs in the Technical Education department in 1993-94 than in 1992-93, it follows, according to the Association, that there has been a layoff. This reduction is exemplified, the Association contends, in the BASIC FACTS publication authored by DPI. That publication affirms that teaching staff totals are rarely stated in whole numbers. This reflects, the Association concludes, that "(t)he number of teachers in Waupaca is the number of FTEs." The Board acted to break the Grievant's full time contract, and failed to follow the proper procedures to do so, according to the Association.

Nor does Article VI, Section B 5, apply to this case, according to the Association. The 299 license was available to the Grievant on request, and the Board could have advised him of the need to do so. The Association contends that enrollment figures do not dictate the need for the Grievant's acquiring this license, and that Subsection B 5, cannot be read generally enough to bring a 299 license within its scope.

That Article VI governs this dispute is shown, according to the Association, by bargaining history; by the absence of relevant past practice limiting layoff to a complete severance of employment; by the Administration's conduct in issuing notices and in responding to the grievance; and by DPI and Board methods of accounting for the number of teaching staff.

The Association challenges any Board assertion that a make whole remedy violates Article VIII. Such an assertion flies in the face of established arbitral precedent, the Association argues. Beyond this, the Association dismisses as "tongue in cheek" any technical argument by the Board that the grievance form limits the contractual scope of the grievance. Accepting this argument flies in the face of Article VIII, Section A, according to the Association. The Association concludes by restating its request for a make-whole remedy.

The Board's Reply Brief

The Board contends that the Association's brief is "an emotional plea" which stretches the facts and "asks this Arbitrator to violate as many as seventeen (17) provisions of the bargaining agreement." The schedule modifications sought by the Association violate its management rights, the Board argues. The Association's reading of Article V, Section G, elevates form over substance, and if taken to its logical conclusion would void the Grievant's teaching license, according to the Board. The Board then contends that the Association's view of Section A of Article VI improperly questions the basis of the reduction in hours, and improperly erects a barrier between Board actions and those of its agents regarding the preliminary notice. Beyond this, the Board questions the Association's view of Article VI, Section B 3. That view, according to the Board, misreads "Part-time employes" as "Part-time

assignments," and ignores Larson's full-time status and certification. The Association's view also improperly expands the layoff process beyond areas based on certification or groups, according to the District. To accept the Association's view of Article VI, Section B 5, would, according to the District, "completely negate and eliminate this provision from the contract."

The Board then argues that the Association's requested remedy would permit bumping which violates Article VI, Section B 6. That the Grievant does not have a 299 license reflects "the Grievant's choice" and is, according to the Board, the only fact relevant to the operation of Article VI, Section B 6. The Association's processing of the grievance undermines their contention that an hours reduction is a layoff, and flies in the face of Article VI, Section E, according to the Board. That section requires the filing of a layoff grievance with the Superintendent, and restricts the scope of such a grievance. The Board argues that the Association's processing of the grievance violates this section and manifests a continuing pattern of the Grievant's blaming every Board employe but himself for the reduction. Two provisions of Article VIII restrict the Association to the contractual violation and remedy cited by the grievance, yet, according to the Board, the Association's case continually expands the scope of the grievance and the remedy requested. Any review of the Association's procedural objections must, the District contends, account for the fact that the grievance was not timely filed. Further Association arguments, according to the Board, modify the contract in violation of Articles VIII and IX, and set "up an elaborate maze for the Arbitrator in order to reach their desired result."

The Board's next major line of argument is that the Association's contention that the Grievant did not receive timely notice of his reduction is "not only contrary to its stipulation before the Arbitrator, contrary to the facts in the Record of the case, but also irrelevant." Beyond this, the Board asserts that the Association's suggestion that a complete high school schedule can be easily manipulated to create a full work load for the Grievant is contrary to the evidence and violative of the Board's contractual rights.

The Board's final major line of argument is that the authority cited by the Association does not stand for the principles asserted by the Association here, and ignores substantial arbitral and examiner precedent supporting the Board's position. The Board concludes that the grievance must be denied.

DISCUSSION

The parties have not stipulated the issues. The issues I have adopted are broad enough to subsume each party's arguments, but do not isolate a series of procedural concerns raised by them. Those concerns should, however, be addressed before an examination of the merits of the grievance.

Whether viewed under Article VI, Section E, or Article VIII, the grievance is timely. Article VI, Section E, slots the grievance of "a teacher who has been or will be laid off" at "the Superintendent's level" of the grievance procedure, and requires the grievance to be filed within "ten (10) working days after . . . the final written notice of layoff." The Board issued the final written notice of layoff on May 13. The Grievant signed the grievance May 17. Phair filed it on May 18. The filing fell within the 10 working day time limit.

The parties did not process the grievance as directed by Article VI, Section E, and under the Board's theory, the grievance is not a layoff grievance. Even if viewed as an Article VIII grievance, the filing was timely. Level One of Article VIII, Section D, requires the "grievant" to "first discuss his grievance with his/her Principal . . . within ten (10) days after

the grievance occurred." Timeliness issues are posed only if the grievance seeks exclusively to challenge the preliminary notice of layoff. It is unpersuasive to read the grievance to state such a focus. The focus of the grievance is the reduction in hours finalized on May 13. The timeliness of the preliminary notice is a peripheral issue to the reduction. If the formal notice of reduction is taken as the start of the Level One timelines, the May 17 meeting falls within the ten day time limit. Even if the timelines are measured from the April 30 preliminary notice, the Grievant, Gunderson and various representatives met informally on May 5, well within the ten day time limit. There is no persuasive way to view the grievance as untimely.

The Board asserts the grievance questions only Article VI, Section C, because this is the "specific section(s) of the Agreement alleged to have been violated" under Article VIII, Section C 4. The Grievant cited this section because the May 5 meeting focused on certification, and he understood his reduction in hours to be traceable to his lacking certification possessed by the retained teachers. The grievance challenges the reduction in hours, and seeks the Grievant's return to full-time status. That he did not plead his case as a labor relations specialist might have affords no basis to restrict the scope of the grievance. The grievance put the Board on notice of the Article which governed the dispute. This meets the purposes of Article VIII, Section C 4.

The District seeks in arbitration a stricter reading of Article VIII, Section C 4, than either party gave it in the grievance procedure. Both parties cited various parts of Article VI as the grievance progressed. This is not evidence of contractual impropriety, but evidence that the grievance received the discussion contemplated by Article VIII. Beyond this, the Board seeks that Article VIII be read more strictly against the Association than the Board. Prior to Lund's July 8 response, Board representatives had denied the grievance based on provisions of Article VI. It serves no persuasive purpose to deny the Board the ability to assert that Article VI does not apply to the grievance.

Similarly, it serves no persuasive purpose to deny the Association the ability to argue provisions beyond Article VI, Section C, when those provisions were discussed in the levels preceding arbitration.

At hearing, the Association urged that the Board failed to give the Grievant timely preliminary notice of layoff under Article VI, Section A. Even assuming the applicability of Article VI to a reduction in hours, the record demonstrates the Grievant was aware of the proposed reduction on April 30.

That the Grievant received effective preliminary notice of a reduction is undisputed. The Grievant's and Phair's testimony establish that the events which prompted the scheduling of the May 3 meeting date from April 30. The grievance form lists April 30 as the "DATE FACTS BECAME KNOWN." At most, the Association questions whether the Grievant received the formal preliminary notice of layoff on April 30. Gunderson, Verdon and Poeschl each testified that the Grievant did. The Grievant testified that he did not receive the notice until May 5. His recall on the point was, however, spotty. He could not, for example, recall where Poeschl delivered the notice to him. The other reduced teachers received notices no later than May 1. It is not apparent why the Grievant would be the sole exception. The effort the Board put into meeting the May 1 deadline makes it unlikely that inadvertence played a role in the issuance of the Grievant's notice. If, as the Association has intimated, the Board sought to circumvent Article VI in reducing the Grievant, it is difficult to understand why the Board would overlook the first deadline stated in the governing article. Viewing the record as a whole, there is no persuasive reason to doubt that the Grievant received preliminary notice of layoff on April 30. There is, in any event, no dispute that the Grievant was aware, on April 30, that the Board was considering a reduction in his hours.

There is no procedural basis precluding examination of the parties' dispute on the interpretation of Article VI. The most fundamental aspect of that dispute is whether it applies to a reduction in hours.

The record supports the Board's contention that Article VI does not apply to the Grievant's reduction in hours. Article VI does not clearly and unambiguously address the point, but it does favor the Board's interpretation. Article VI, Section A, governs "a reduction in the number of teachers." This reference can plausibly be read as "a reduction in the number of full time equivalent teaching positions." The strain on the words is, however, apparent. Article VI refers to "teachers" not "teaching positions," and the balance of the Article uses "teacher" or "teachers" as a reference to a living person, not an abstract position. For example, each of the three references in Section A of Article VI to "teacher" or "teachers" following the reference to "a reduction in the number of teachers" is to a specific teacher, not to a position. The section's consistent use of the same term makes it unpersuasive to read the first reference to "teachers" as "teaching positions", and the remaining references as "teachers." The first reference in Article VI which points to

positions, not persons, occurs in Subsection B 4, which refers to "the desired reduction in staff." 3/ This reference, however, follows repeated use of the terms "teacher" and "teachers." That Section A does not refer to a "reduction in staff" undercuts the significance of the reference in Subsection B 4.

As noted above, however, Article VI does not address this point clearly and unambiguously. The most persuasive 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, there is no past practice evidence. The Association's assertion that the absence of such evidence undercuts the Board's position cannot be accepted. The source of the binding force of past practice is the agreement manifested by the parties' conduct. The absence of past practice evidence reflects only the absence of agreement. Since a practice must be mutually known, it cannot persuasively be contended that absence of evidence on the point favors one party over another.

Evidence of bargaining history is, in this case, decisive. The Association points out that the Board, in the 1980-81 bargaining, unsuccessfully attempted to limit Article VI, by title, to full-time positions. This does undercut the Board's position, but not to the degree the Association asserts. Phair could not recall what, if any, discussions preceded the Board's dropping of "Full Time Positions Only." He could, however, recall the discussions preceding the creation of Article VI, Section B 5. This minimizes the significance of the Board's dropping of the reference. Beyond this, the Association's proposal for Article VI did not incorporate a reduction in hours into the layoff process. Their proposal refers to "the teaching position or positions to be eliminated." The use of "eliminated" would seem to connote a complete severance of employment, but an earlier reference to "the professional staff" may not. In any event, the Association's proposal does not distinguish between total or partial elimination of a position. Each party's proposal cites "Full-time teachers" in the Recall section. In sum, the bargaining for a 1980-81 agreement reflects, at most, the same ambiguity concerning a reduction in hours posed here.

Against this background, the Association, in collective bargaining for the 1981-82, 1982-83, 1983-84, and 1985-86 labor agreements, proposed language specifically extending Article VI to a full or a partial layoff. Each proposal extended Article VI to a reduction in hours and stated bumping rights by which a teacher whose hours had been reduced could "retain a position" which was "substantially equivalent" in "hours and compensation" to the position the teacher held prior to receiving notice of layoff. It is arguable that these proposals sought to clarify what the Association believed Article VI already granted. The repeated attempts to secure these rights, however, undercuts this argument. Beyond this, Phair noted the various proposals sought to "shore up" existing language. 4/ Against this background, the proposals must be viewed as

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3/ Cf. Evansville Community School District, (Hutchison, 4/92).

4/ Transcript at 102.

an attempt to extend Article VI beyond its original scope. In sum, the interpretation of Article VI advanced by the Association in this grievance seeks, through arbitration, a result not secured in collective bargaining.

Article VI, Section A, does not extend to the reduction in hours questioned by the grievance. The Board, by reducing the Grievant's hours, did not reduce the number of teachers in the Tech Ed Department. It follows that the Board has not violated Article VI by refusing to grant the Grievant a full-time teaching schedule by gleaning duties from less senior Tech Ed teachers.

Before closing, it is necessary to more specifically tailor the conclusions stated above to the parties' arguments. The Association has raised a series of troublesome points.

The Association reads the grievance responses and the Board's conduct in issuing the preliminary notice of layoff as an acknowledgement that Article VI applies to a reduction in hours. The force of this argument cannot be dismissed lightly. The inference the Association makes is, however, no more probable than inferring that the Board acted to protect itself against an adverse ruling on the applicability of Article VI. In any event, it is preferable that a teacher facing a reduction be notified as soon as possible, whether the contract requires it or not. Concluding the Board's conduct waived its contention that Article VI does not apply to a reduction in hours encourages the withholding of an important notice. In the absence of evidence specifically making the Association's inference more probable than the Board's, the more persuasive conclusion is to address the applicability of Article VI on its merits.

The Association has questioned, with considerable persuasive force, whether the Board's actions gut seniority provisions. The force of this argument is manifested by the contention that the Board could avoid the seniority rights of a full-time teacher by first making the teacher part-time, and by then laying off the now part-time employe. This would effect, as a two step process, a layoff which the contract might preclude if undertaken as a single step. This is a considerable and a troublesome point.

The possible ramifications of this decision cannot overturn the language and bargaining history discussed above. To minimize the reach of those ramifications, however, it is necessary to apply Article VI to the facts in a fashion which does not undermine other agreement provisions. Examination of this point must start with Sections B and C of Article VI. Even assuming Richmond made the statement the Grievant attributes to him concerning the continuation of the Grievant's 299 license, the statement does not manifest an attempt to remove the Grievant from the Tech Ed Department without regard to his Article VI, Section B, seniority rights. The statement would have been accurate at the time, since the license was not necessary to his then current course load. More significantly, the decision to let the license lapse was, as the Grievant acknowledged, his own. Beyond this, Article VI, Section C 3, defines certification as currently certified, not certifiable. That the Grievant noted he and Richmond did not share a smooth working relationship affords less reason to question Richmond's statement than the Grievant's

reliance on it. It is not clear why the Grievant did not consult an Association representative if he had doubts on the wisdom of letting the license lapse. Beyond the advice the Grievant attributed to Richmond, there is no persuasive evidence that the Board sought to avoid the operation of Article VI by reducing his hours. The Grievant's contention that Richmond steered students away from his woodworking classes is unsubstantiated. It cannot be presumed that students are so easily maneuvered.

As alluded to above, Article VI, Subsections C 3, and B 5, underscore the contractual significance of the Grievant's licensure as compared to other Tech Ed teachers. This is not to say these provisions read as the Board contends. Neither provision is directly posed here. Rather, the point posed here is whether the Grievant's reduction operates to subvert the operation of other agreement provisions. However these subsections are read in the future, their existence clarifies that the Board's stated reasons for the reduction are not, standing alone, repugnant to the collective bargaining agreement.

Nor is there persuasive evidence that the Board's conduct has subverted agreement provisions beyond Article VI. The Board has not taken the position the reduction was disciplinary or quasi-disciplinary. The only testimony of job-related concerns came from the Grievant. There is no basis to doubt the Grievant is a devoted and competent professional. The unfortunate fact remains that at the time of his reduction historically low enrollments in the Tech Ed department continued. Beyond this, school funding levels were, at the time of his reduction, in doubt.

The Association's concern with seniority based issues poses the policy issue whether, in the absence of specific authorizing language, seniority based layoff clauses should apply to a reduction in hours. That policy issue is better reserved to bargaining parties than to arbitrators. To apply general policy concerns to contract interpretation risks obscuring the intent of the parties to the agreement at issue, and arrogates unduly broad authority to the arbitrator. Article VIII, Section D 4, cautions against this. In any event, the conflicting authority cited by the parties demonstrates that there is no common understanding on this point that permeates school district bargaining. That the application of a layoff clause to a reduction in hours is a viable policy choice is apparent, but the issue remains whether the parties to this contract have agreed on that choice. The risks the Association points out are considerable. The answer to those risks is not, however, to look beyond the contract language, but to examine the facts to determine if the contract is being applied in a fashion which subverts other agreement provisions. In this case, the reduction of the Grievant's hours does not do so.

The final point concerns the Association's citation of Basic Facts, published by DPI. The publication has played no role in the conclusions stated above. Even if the content of the publication is assumed to be as argued by the Association, that content would not alter the conclusions stated above. What constitutes "the number of teachers" under Article VI, Section A, is a matter of communication between the contracting parties, not between the Board and DPI.

AWARD

The Board's reduction of the hours in the Grievant's teaching position did not violate Article VI of the collective bargaining agreement.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 20th day of May, 1994.

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

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