BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WATERFORD TEACHERS EDUCATION ASSOCIATION	Case 21 No. 50004 MA-8122
and	
WATERFORD UNION HIGH SCHOOL DISTRICT	

Appearances:

Ms. Esther Thronson, Executive Director, Southern Lakes United Educators, 124 South Dodge Street, Burlington, WI 53105, appearing on behalf of the Association.

Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-6613, by Mr. Mark L. Olson, appearing on behalf of the District.

ARBITRATION AWARD

Waterford Teachers Education Association, hereafter the Association, and Waterford Union High School District, hereafter District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. Hearing was held on April 21, 1994, in Waterford, Wisconsin. The hearing was transcribed and the record was closed on July 26, 1994, upon receipt of written argument.

ISSUE:

The District frames the issue as follows:

1. Is the grievance arbitrable?

2. If the grievance is arbitrable, has the District violated Article III, Section C, of the 1991-93 collective bargaining agreement and the procedure to be used to reduce teacher hours for five teachers for the 1993-94 school year?

The Association frames the issue as follows:

Has the District violated Article III, Section A, of the 1991-93 collective bargaining agreement in the procedure used to reduce teacher hours for teachers for the 1993-94 school year?

The Arbitrator frames the issues as follows:

1. Is the grievance arbitrable?

2. Did the District violate Article III, Section A or Section C, of the 1991-93 collective bargaining agreement when it reduced teacher hours of five teachers for the 1993-94 school year?

RELEVANT CONTRACT PROVISIONS:

II. GRIEVANCE PROCEDURE

A. Definitions:

1. For the purpose of this agreement, a grievance is defined as a complaint or disagreement regarding the interpretation of application of a specific provision of this agreement by and between Waterford Union High School District and the Association, or a member thereof. The grievant shall be defined as an individual or the Association.

2. The grievance may be present at every step of the procedure and shall be present at the request of the Association, Principal or Superin- tendent, as the case may be.

If two or more teachers have the same grievance, a joint grievance may be presented and processed as a single grievance.

An employee shall have the right to select a representative of his/her choice to accompany and assist him/her in the presentation of his/her cause of dissatisfaction.

3. The term "days" when used in this article shall be calendar days. Time limits as directed at each stage shall be observed, unless a written request for an extension is made and accepted by mutual agreement.

B. Purpose:

The purpose of this procedure is to secure at the lowest possible level equitable solutions to problems which may from time to time arise affecting the wages, hours or working conditions of teachers.

C. Initiation and Processing:

1. Level One:

Every effort shall be made to satisfy the grievance through informal discussion between the grievant and his/her immediate superior, within a 21 day period of time the grievance became known or should have become known. In the event of a grievance, the employee shall perform his assigned work task and grieve his complaint later.

2. Level Two:

a) If the grievance is not satisfied in the informal conference, the grievant may within ten (10) days present a formal written grievance to the immediate supervisor or principal. 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, how these specific sections were violated and the relief sought.

b) Within ten (10) days of receipt of the written grievance, the immediate superior of the grievant shall render a written decision to the grievant.

3. Level Three:

a) If the grievant is not satisfied with the disposition of the grievance at Level Two, or if no decision has been rendered, the grievant may within ten (10) days refer the grievant to the Superintendent.

b) Within ten (10) days of receipt of the grievance, the Superintendent will meet with the grievant in an effort to resolve the grievance. The Superintendent shall render written decision within ten (10) days of the conference or ten (10) days of the receipt of the grievance, whichever is sooner.

4. Level Four:

a) If the grievant is not satisfied with the disposition of the grievance at Level Three or if no decision has been rendered by the Superintendent, the grievant may within ten (10) days refer the grievance to the Board.

b) The Board shall meet with the grievant at a mutually agreed upon date, no later than the next regularly scheduled board meeting. The Board shall render a written decision within ten (10) days following a second regularly scheduled board meeting. If necessary, the Board shall provide a list of arbitrators at the time of the written decision.

5. Level Five:

If the grievant is not satisfied with the disposition of the grievance, the Association may proceed to arbitration. If, after fifteen (15) days from receipt of the Board's written decision, the parties cannot agree on an Arbitrator, the Associ- ation may request the WERC to appoint an Arbitrator. The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area(s) where alleged breach occurred. If a grievance is not appealed to the next step in the grievance procedure within twenty-five (25) days of the Board's decision at Level Five, then the grievance is deemed to have been dropped by the grievant and/or Association.

D. Representation:

It is understood that the grievant in any or all cases is entitled to representation at all levels of the grievance procedure and that the Association shall be a part in interest at all levels of the grievance procedure.

E. Arbitration Procedures:

The Arbitrator selected or appointed shall meet with the parties at a mutually agree-able date to review the evidence and hear the testimony relating to the grievance. Upon completion of this review and hearing, the Arbitrator shall render a written decision to both the Board and the Association which shall be final and binding upon both parties.

Both parties shall share equally the costs and expenses of the arbitration proceedings, including transcript fees and fees of the Arbitrator. Each party however, shall bear its own costs for witnesses and all other

out-of-pocket expenses including possible attorney's fees. Testimony or other participation of employees shall not be paid by the board.

There shall be a transcript prepared for each arbitration hearing and the parties shall share the costs equally; however, the parties may mutually agree to waive a transcript.

F. Grievance Report Forms: (See Appendix A).

III. LAYOFF PROCEDURES

A. Restrictions:

This procedure shall apply when the District determines to reduce the number of employee positions or hours of any position. The District shall not use this procedure for arbitrary or capricious reasons. After the Board has determined which position(s) shall be eliminated or reduced, the following procedure shall be used.

B. Seniority List:

The District will prepare a seniority list in the bargaining unit as well as those on leave or on layoff and will list teachers by certification information on record in the District office by December 1 of each year.

C. Notification:

1. In the event the Board anticipates that layoffs or reductions in hours will occur the next contract year, the teacher or teachers affected will be notified by certified mail, return receipt requested, to their last known address in the District files, by May 1 of the school year preceding the school year that the layoff or reduction in hours is anticipated to take place and a copy will be sent to the Association. Final notice of layoff or reduction in hours will be submitted to the affected teacher(s) by certified mail, return receipt requested, prior to June 1 of the school year preceding the school year that the layoff or reduction in hours is to take place and a copy will be sent to the Association.

> 2. The only exceptions to the foregoing provision shall apply to (1) replace- ment teachers may be laid off by written notice to the affected person at least ten days prior to the return of the teacher whose position is being filled by a replacement teacher, and (2) circumstances arising after May 1 which are sudden and unforeseen, making layoff necessary in which case thirty (30) calendar days advance notice shall be given.
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> . . .

BACKGROUND:

During the third week of April, 1993, Superintendent Richmond issued the following letter to Fran Smith, Kelly Forthun, Kris Kontney, Ronette Steinke, and Phyllis Drezdon:

> Pursuant to the terms of the Board Negotiated Agreement with the Waterford Teachers Education Association this letter constitutes notice of possible reduction of hours during the 1993-94 school year. The reduction in hours will become effective on your last day of employment for the 1992-93 school year and will continue until further notice. Should conditions change, we will recall your former employment.
>
> Pursuant to terms of the agreement a copy of this letter will be placed in your file. We wish to make it clear that your hours are not being reduced for reasons relating to personal teaching performance. This layoff is necessitated by factors which have nothing to do with your ability.
>
> Should you have any questions regarding this reduction in hours, please stop in.

On May 27, 1993, the Superintendent issued the following letter to Fran Smith, Kelly Forthun, Kris Kontney, Ronette Steinke, and Phyllis Drezdon:

> By letter dated April, 1993, you received preliminary notice of reduction of hours during the 1993-94 school year. This letter constitutes final notice of reduction in hours for the 1993-94 school year. The reduction in hours will become effective on your last day of employment for the 1992-93 school year and will continue until further notice. Should conditions change, we will adjust your employment.
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> As previously indicated, a copy of this letter will be placed in your file. To reiterate, your hours are not being reduced for reasons related to personal teaching performance. This reduction in hours is necessitated

by factors which have nothing to do with your ability.

If you have any questions regarding this reduction in hours, please stop in.

On June 30, 1993, Association Representative Thronson filed the following grievance:

This is a formal written grievance over the notices of layoff to five teachers. The Waterford Teachers Education Association is the grievant. (Article II, A, 1)

Early attempts to follow the grievance procedure have generated the following course of events.

1. We made a telephone call on June 17, 1993 to the Principal, Dr. Peter Hassemer to comply with Level One. We asked for the "informal discussion" to satisfy the grievance and were told to move the grievance on to another level because he (Dr. Hassemer) could not give us a remedy. He waived the opportunity to receive a formal written grievance.

2. A telephone call to Mr. David Richmond results in a request for the formal written grievance.

So we are at Level Three:

1. **Article III Layoff Procedures, A.** reads in part:

"After the Board has determined which position(s) shall be eliminated or reduced, the following procedure shall be used."

The Association contends that no formal action was taken by the Board to eliminate or reduce positions.

2. **Article III Layoff Procedures, C.** reads in part:

"Final notice of layoff or reduction in hours will be submitted to the affected teacher(s) by certified mail, return receipt requested, prior to June 1 of the school year preceding the school year that the layoff or reduction in hours is to take place and a copy will be sent to the Association."

Five teachers (Phyllis Drezdon, Kelly Forthun, Kris Kontry, Fran Smith, Ronnette Steinke) received letters dated June 2, 1993. We're not sure if they were sent by certified mail or if the Association was copied, but we know June 2 makes them a day late.

The Association asserts that layoff notices to the five teachers referenced above were sent in violation of the terms of the Collective Bargaining Agreement. The remedy we seek is the recanting of any notices that resulted in a cut-back of employment for any of the five teachers.

Article II. Grievance Procedure, C., 3, (b) sets forth the time available for your response to this grievance.

Please do not hesitate to call if there are questions about this issue.

Superintendent Richmond responded in a letter dated July 13, 1993 which states as follows:

This is in reply to your June 30, 1993, letter. At the onset, these were reduction hour letters not layoff letters.
To address the specific elements mentioned in your grievance letter, the portion "after the board had determined....." is only a preface for further procedural specifications. The master contract does not govern board workings. Obviously, all administration decision making power is derived from board authority. The administration does not have power to act unilaterally.

> The second article of which I assume is the grievance has to do with the dates on which letters of layoff/reduction hours were received. The contention of the grievance was that the letters were sent late. Unfortunately I believe you did not receive all of the correspondence.
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> After the decrease in some class enrollment was noted the situation was discussed at all school levels of communication, including the Board. The initial letter of notification was prepared, but prior to sending the letters, Mr. Kelm was informed. The teacher recipients were also informed. The initial letter was both timely and certified.
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> The letter of final notice of reduction of load was sent on May 27 and again certified. Again Mr. Kelm and the teacher recipients were told of the impending letter.
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> After the final notice of reduction of hours was sent, Mr. Kelm expressed to me concerns that the teachers were questioning what their specific assignments would be. As a result of the conversation between Mr. Kelm and myself, a third "courtesy" letter was sent to the teachers clarifying to the extent that we could what the teaching assignment would be.
>
> In that this third courtesy letter was beyond the parameters of the master contract it was sent on June 2 and was not sent certified.
>
> In the event that you were not provided copies of all letters I am enclosing a copy of the three letters sent to one of the teachers. All of the letters are the same with the exception of what the teaching assignment might be.
>
> With all of the actions on the part of the administration to talk to the WTEA and the teachers prior to the timely sending of any letters, it is difficult to understand all the confusion and the grievance.
>
> If there are further questions, please ask.

POSITIONS OF THE PARTIES:

Association

The collective bargaining agreement was violated when layoff notices were given during April and May of 1993. The relevant language, contained in Article III, Section A, is clear and unambiguous. The Board, and not the Administration, has the contractual authority to reduce the number of employe positions or hours of any position. Board policies also indicate that the Board
has not delegated this authority and responsibility to Administration.

The minutes of the relevant Board meetings establish that no formal Board action was taken prior to the issuance of the layoff notices to the five Grievants. Roberta Cook, an Association official, discovered this fact on

June 2, 1993, when she reviewed the Board minutes. Thus, the June 2, 1993 date is the date upon which the grievance "became known." The June 17, 1993, telephone conversation with the Assistant Principal was within the "21 day period" referenced in Article II, Section C(1).

Does not the language of the collective bargaining agreement require the District to take action in open session before employes are cut back? In responding to this question, the Arbitrator should consider that the public has an interest in decisions affecting staffing levels. It is a serious breach of public expectation when a school board neglects to report publicly what it has done behind closed doors. The Association notes that on April 18, 1994, the Board took action during a regular meeting to approve layoffs for the 1994-95 school year. This is the appropriate way to do business. The Arbitrator should grant the grievance and order the appropriate remedy.

District

The grievance is not arbitrable because it was not filed in accordance with the procedures set forth in Article II, Section C, of the collective bargaining agreement. As set forth in Article II, the 21-day period of time within which the Level One grievance is to be filed is 21 calendar days. The express language of Article II requires that the time limits "shall be observed, unless a written request for an extension is made and accepted by mutual agreement." The record is devoid of any evidence that a written request for an extension to the 21 day period for filing the Level One grievance was made or accepted.

The grievable event was the issuance of the preliminary layoff notices by the District on or around April 21-22, 1993. The June 17, 1993 telephone conversation was the first occasion upon which the Association communicated with any District representative regarding a grievance on the reduction in hours for the 1993-94 school year. The grievance is untimely, and therefore, is not arbitrable.

By virtue of the communication between Superintendent Richmond and WTEA President Kelm, the Association was put on constructive notice of the reduction in hours prior to April 21-22, 1993. The issue of the non-arbitrability of the grievance was raised by Superintendent Richmond, in a letter dated September 10, 1993, when the grievance was being processed.

The preliminary notice of the partial layoff was provided to the five Grievants well in advance of May 1, 1993. The final notice of the partial layoff was provided to the five Grievants and the WTEA by letter dated May 27, 1993. WTEA President Kelm, who was apprised of each notice prior to its issuance, raised virtually no objection or challenge, at any time, to either of these notices.

The June 2, 1993 letters were a matter of courtesy to the Grievants and the WTEA. These letters were not intended to be final notice of layoff to such employes.

The testimony of Board member Gary Beck and Superintendent Richmond clearly indicates that, on March 22, 1993, the Board provided Superintendent Richmond with authority to issue the partial layoff notices to the five Grievants. Additionally, the minutes of the March 22, 1993 executive session state: "Staffing and reductions for the 1993-94 school year were also discussed." The Association's unsubstantiated claim that there was no Board action must be dismissed as being without merit.

The language of the collective bargaining agreement does not require the District to take action in open session before employes are cut back. The Association is seeking to impose upon the Board a process to which the Board has never agreed and which is not contained in the collective bargaining agreement.

The Superintendent acted within the authority granted under Wisconsin Statutes and under Procedures/Policies/Guidelines adopted by the Waterford Union High School Board. The District's conduct in this matter is consistent with Article III Layoff Procedures and the District implemented the partial layoffs in a manner consistent with an established past practice. The grievance is without merit and should be dismissed.

DISCUSSION:

Arbitrability

For ease of identification, the five employes affected by the reduction in hours have been referred to as the Grievants. However, as set forth in the written grievance of June 30, 1993, the grievant is the Association.

The Association's argument that the Board did not formally approve the reduction in hours is based upon its review of Board minutes. It is evident that Association Representative Roberta Cook reviewed these minutes on or about June 2, 1993. It is not evident that Cook, or any other representative of the

Association, had access to these minutes prior to June 2, 1993. Accordingly, the undersigned is not persuaded that the Association, or any Association representative, knew or should have known of the grievance prior to June 2, 1993.

The undersigned considers the telephone conversation with Assistant Principal Hassemer, which occurred on June 17, 1993, to be an "effort" to satisfy the grievance through informal discussion between the grievant and his/her immediate superior, as required at Level One of the contractual grievance procedure. This effort was made within a 21 day period of time that the grievance became known or should have become known. Accordingly, the undersigned rejects the District's assertion that the grievance was not timely filed.

Merits

While the written grievance, as filed on June 30, 1993, alleges that the June 2, 1993 letters constituted a "final notice of layoff or reduction in hours" and, thus, the District did not comply with the time limits set forth in Article III, Section C (1), the Association has not pursued this argument at arbitration. As the District argues, at hearing, Association Representative Cook acknowledged (1) that the "final notice of layoff or reduction in hours" was contained in the letters of May 27, 1993, and (2) that the Association is not contending that the District violated the contractual time limits for providing this notice. 1/

The written grievance, as filed on June 30, 1993, also alleges that "no formal action was taken by the Board to eliminate or reduce positions." This allegation constitutes the sole basis for the Association's claim that the District has violated the provisions of Article III.

At hearing, School Board President Gary Beck and Superintendent Richmond each testified that they were present at the Executive Session of the School Board which was held on March 22, 1993. Each of these witnesses further testified that, during this Executive Session, the School Board authorized Superintendent Richmond to take the steps necessary to effectuate the reduction in hours of the five Grievants for the 1993-94 school year. This testimony of Superintendent Richmond and Board President Beck is unrebutted. 2/

It is true that the minutes of the Executive Session of March 22, 1993 do not expressly state that the School Board authorized Superintendent Richmond to take the steps necessary to effectuate the reduction in hours of the five Grievants for the 1993-94 school year. However, these minutes do contain the following statement: "Staffing and reductions for the 1993-94 school year were also discussed." This statement is consistent with the testimony of Board President Beck and Superintendent Richmond. The undersigned is satisfied that

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1/ T. at 27.

2/ Association Representative Cook, the only other witness to testify at hearing, acknowledges that she did not attend the Executive Session on March 22, 1993.

the Board did authorize the reduction in hours of the five Grievants for the 1993-94 school year.

Under the provisions of Article II, Grievance Procedure, the undersigned is "limited to the subject matter of the grievance" and is "restricted solely to interpretation of the contract in the area(s) where alleged breach occurred." Article III, the contract language which sets forth the procedures to be used "when the District determines to reduce the number of employee positions or hours of any position," does not require the District to take formal action in open session before employes are cut back.

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

AWARD

1. The grievance is arbitrable.

2. The District did not violate Article III, Section A or Section C, of the 1991-93 collective bargaining agreement when it reduced teacher hours of five teachers for the 1993-94 school year.

3. The grievance of June 30, 1993 is denied and dismissed.

Dated at Madison, Wisconsin, this 24th day of October, 1994.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator