

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SCHOOL DISTRICT OF DRUMMOND
EMPLOYEE'S ASSOCIATION

and

DRUMMOND AREA SCHOOL DISTRICT

Case 46
No. 52895
MA-9143

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, appearing on behalf of the Association.

Spears, Carlson, Lindsey & Anderson, Attorneys at Law, by Mr. Jack A. Carlson, appearing on behalf of the District.

ARBITRATION AWARD

School District of Drummond Employee's Association, hereinafter referred to as the Association, and the Drummond Area School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Association made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held on October 13, 1995, in Drummond, Wisconsin. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on December 27, 1995.

BACKGROUND:

Prior to the 1993-94 school year, the District had study halls which were assigned to teachers, i.e. certified staff. In 1993-94, the District had nine study hall periods and all were assigned to aides including the grievant who was assigned four study hall periods per day. In the 1994-95 school year, the grievant was assigned all the study halls except for one which was assigned to a teacher. For the 1995-96 school year, the District laid off four (4) teacher aides including the grievant. The District did not lay off any teachers. The District had four study skills periods which were assigned to certified staff. The Association thereupon filed a grievance asserting that the District violated the parties' agreement by laying off aides who were performing study hall duties and assigning these duties to certified staff. The grievance was processed through the grievance procedure and appealed to the instant arbitration.

ISSUE:

The parties were unable to agree on a statement of the issue. The Association stated the issue as:

Did the District violate the collective bargaining agreement when it laid off an aide that had study hall duties and assigned teachers to new duties call study skills?

If so, what is the appropriate remedy?

The District stated the issue as:

Did the District violate the collective bargaining agreement by laying off aides and assigning members of the certified staff to teach study skills classes commencing with the 1995-96 school year?

If so, what is the appropriate remedy?

The undersigned adopts the issue as stated by the Association.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE I - RECOGNITION

The Board acting for said District recognizes the Association as the exclusive and sole bargaining representative for all non-certified staff regularly employed by the School District of Drummond, as certified by the WERC, excluding managerial, supervisory and confidential employees.

ARTICLE II - ASSOCIATION RIGHTS AND BOARD RIGHTS

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E. Board Functions

Management retains all rights of possession, care, control, and management that it has by law, and retains the right to

exercise these functions during the term of the collective bargaining agreement except to the precise extent such functions and rights are restricted by the express terms of this agreement. These rights include, but are not limited by enumeration to, the following rights:

1. To direct all operations of the school system;
2. To establish and require observance of reasonable work rules and schedules of work;
3. To hire, promote, transfer, schedule and assign employees in positions with the school system;
4. To suspend, discharge and take other disciplinary action towards employees;
5. To maintain efficiency of school system operations;
6. To take whatever action is necessary to comply with State or Federal laws or to comply with the State or Federal agency decisions or orders;
7. To introduce new or improved methods or facilities;
8. To select employees, establish quality standards and evaluate employee performance;
9. To determine the methods, means and personnel by which school system operations are to be conducted;
10. To take whatever action is necessary to carry out the functions of the school system in situations of emergency provided such action does not affect the safety and welfare of bargaining unit members;

11. To determine the educational policies of the school district;
12. To determine the means and methods of instruction, the selection of textbooks and other teaching material, and the use of teaching aids, class schedules, hours of instruction, length of school year and terms and conditions of employment.

The parties to this agreement agree to bargain the impact when the Board exercises any of the above rights which effectuates a change in wages, hours or working conditions.

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ARTICLE IX - REDUCTION IN FORCE

If necessary to decrease the number of employees (in whole or in part) in a department (cooks, clerical, bus drivers, custodians, mechanics and aides) the Board may lay off the necessary number, but only in inverse order of the appointment in each department. Such employees shall be reinstated in inverse order of their being laid off when vacancies occur. Such reinstatement shall not result in loss of credit for previous years of service. No new or substitute appointments may be made while those who were laid off are available to fill the vacancies. Laid off employees have reinstatement rights for one (1) year and three (3) months, this time starts the first day the employee is unemployed.

ASSOCIATION'S POSITION:

The Association contends that the study skills period assignments are not teacher bargaining unit work and cannot be assigned to teacher bargaining unit members. It refers to the recognition clauses of the respective teacher and support staff contracts which provide that only certified teachers are in one unit and only non-certified staff are in the other. It notes that certification is not required for study skills assignments and it claims that it is clear that the provisions of the non-certified collective bargaining agreement apply to employees assigned the study skills periods. The Association argues that there is no real difference between the study halls and study skills assignments.

The Association insists that acceptance of the District's arguments could lead to misuse of the recognition clauses asserting that a teacher could replace a custodian simply by the addition of duties requiring the teacher to give points for student hallway behavior. It claims such a result is absurd. The Association refers to Article XIII, Sections A and C of the teachers' contract as pointing to the fact that study skills are not teacher bargaining unit work. The Association also relies on Article XXVIII, Sections A and B of the teachers' contract as establishing that the transfer and filling of vacancies language does not apply to study skills as certification and subject matter are inapplicable. It maintains that study skills do not fit within the teacher bargaining unit contract.

The Association cites a number of arbitration decisions which support the argument that the contractual order of layoff for teachers does not apply to duties where certification is not required as support for its argument that study skill duties are not covered by the teacher's contract and non-certified positions do not belong in a unit of certified teaching personnel.

The Association contends that the District's appointment of teachers to study skills duties violates the non-certified collective bargaining agreement. It refers to Article IX, the first sentence and asserts it was not necessary to decrease the number of aides because one aide should have been retained for study skills duties. It also refers to the second to last sentence and insists that as one aide was qualified for study skills, no new or substitute appointments could be made, so no teacher could be assigned to study skills. It asserts that one laid off aide, Lorraine LaBeree, is qualified for study skills duty as she was qualified to do the tutoring part of study skills as she did this in the past when assigned study hall, tutored in the District's tutoring program outside the regular school year as well as LaBeree's ten years' experience as a teacher in the Hurley School District. The Association submits that mid-term progress reports were done by LaBeree in the two years prior to establishment of the study skills class and there were no differences in the reports. In addition, it notes that LaBeree did more with failing students than the present teachers assigned to study skills periods, and she sent students to regular teachers in areas she was not knowledgeable just like the present study skills teachers. The Association recognizes that students are given a grade for study skills but it is either satisfactory or unsatisfactory and depends on attendance, tardiness, work during the period, bringing materials and whether the student is a discipline problem. It insists that monitoring these areas does not require a professional teacher and LaBeree is qualified to give such grades. It concludes that LaBeree's background as a teacher and an aide make her as qualified for study skills duty as any assigned teacher. The Association requests a finding that the study skills is a position in the non-certified unit and the District violated Article IX by laying off more aides than necessary and making new appointments when laid off aides were available. It seeks reinstatement of an aide and a make-whole order.

DISTRICT'S POSITION:

The District contends that it did not violate the parties' collective bargaining agreement by laying off four (4) aides and replacing traditional study halls with study skills classes assigned to certified staff. It relies on the management rights clause which reserves to it the right to determine the methods, means and personnel by which school system operations are to be conducted as well as the ability to determine educational policies. It asserts that the District was attempting to better utilize staff by assigning teachers to study skills classes to tutor students. It maintains that teachers command more respect in the classroom and the decision to replace study halls with study skills and to utilize teachers comes within the express terms of the management rights clause set forth in Article II, E.

The District denies that it violated any provision of the collective bargaining agreement. It submits that the Association's argument that Article IX was violated must be rejected. It claims that it had several reasons to eliminate four (4) aide positions including budgetary considerations, curriculum changes, implementation of a new disciplinary policy and better use of certified staff. It points out that the contract does not delineate what constitutes "necessary" and there may be several reasons why it is necessary to take certain action as long as the reasons are sound and rational and fall within the parameters of Article II, E. All the reason set forth above are sound, and according to the District, Article IX does not limit the District in determining when it is necessary to decrease the number of employees. It maintains that lack of work is not the only reason for decreasing the number of employees but in this case it was necessary for the reasons set out above.

The District denies any violation of the fourth sentence of Article IX. It argues that no vacancies have taken place and no new or substitute appointments have been made to fill any vacancies. It notes that study halls were eliminated and study skills classes are handled differently than study halls even when the study halls were monitored by teachers. It claims that the Association's argument ignores the fact that reinstatement rights and the limitation of new or substitute appointments apply only to vacancies. It maintains that no vacancy has occurred in this case and no violation of Article IX has taken place.

The District argues that if the Association were to prevail in this case, it would be dictating to the District its curriculum and what staff and qualifications are needed to fill positions. It submits that Article IX was not intended to limit the District from changing curriculum or improving education to students. It contends that Article IX applies only to vacancies and as none have occurred, no violation exists. The District insists that all its actions were in accordance with Article II, E and it did not violate the collective bargaining agreement, so it seeks dismissal of the grievance in its entirety.

ASSOCIATION'S REPLY:

The Association contends that the study skills duties do not require DPI certification and

does not require a certified teacher so the position must be considered a non-certified position and is in the non-certified unit per its recognition clause. It insists that the absence of a certification requirement permits the laid off aides the first right of refusal according to the reduction in force language of the contract and the District improperly assigned teachers to the study skills position. The Association asserts that there were no curriculum changes because there is no curriculum for study skills periods. It claims there was no actual curriculum change between the old "study halls" and the new "study skills" periods. The Association maintains that the District's argument that there are no traditional study halls is nothing but fluff and feathers as all the District did was change the title without any substantive change in duties. It reiterates that the duties are the same except for a grade which does not require a certified teacher and at least one laid- off aide is qualified to give such grades.

The Association points out that the management rights clause allows the District to take action "except to the precise extent such functions and rights are restricted by the express terms of this Agreement." It claims that the reduction in force language restricts the District from hiring teachers instead of laid off aides for study skills. It asserts that aides were qualified for study halls and are qualified for study skills and LaBeree is qualified beyond her status as an aide for the study skills position. The Association asserts that there was a vacant position because from the time the District created the study skills periods until it assigned teachers to them, the positions were vacant. To transfer a teacher from one position to another, according to the Association, a vacant position has to be available for the teacher to be transferred. It claims that the language that no new or substitute appointments may be made while those who were laid off are available to fill the vacancies was violated. The Association submits that the reasons for eliminating study halls are not relevant because the study skills periods do not require a certified teacher and have not substantively changed from study halls which were in the charge of the aides. The Association also observes that contrary to the District's assertion, only one teacher was assigned one study hall for the 1994-95 school year.

DISTRICT'S REPLY:

The District contends that it is not obligated to assign study skills duties to non-certified bargaining unit members. It alleges that there is no evidence to establish that it has ever created a separate and distinct study hall or study skills position, rather these duties have been historically assigned by the District to an individual or individuals depending upon student curriculum needs and the District's needs at any given time. The District argues that the Association's claim that study skills cannot be assigned to teacher bargaining unit members is erroneous for several reasons. The District observes that there is a recognized past practice that the duties of study hall monitors have routinely been performed by teachers though no certification is required. It submits that the arbitration decisions cited by the Association do not preclude the use of certified staff to teach study skills or to utilize certified staff to perform duties which could be performed by non-certified staff or from establishing the qualifications to teach study skills classes.

The District contends that merely because the teacher's recognition clause refers to certified teaching personnel does not preclude it from using teachers to perform duties which could be performed by non-certified staff. It claims that acceptance of the Association's premise would preclude the assignment of any duties or tasks to a teacher which do not require certification. It observes that in Drummond, as elsewhere, teachers act as hallway monitors, and are assigned playground duty and study hall. The District cites Flambeau School District, Case 24, No. 42094, MA-5551 (Burns, 4/90) as supporting its position on past practice. It maintains that past practice supports its position that it may assign study hall duties to teachers or aides in its sole discretion.

The District disagrees with the Association's arguments that LaBeree is as qualified or more qualified than the teachers assigned to study skills classes, and it notes that recall is based on seniority, not qualification, and LaBeree is not the most senior aide. The District insists that the evidence establishes that there are definite differences between the duties of study hall monitors and study skills teachers. It notes that students receive a grade, receive daily points based on performance and receive progress reports. It alleges that the study skills classes have been designed so the teacher can tutor students in other classes taught by the teacher. The District asserts that this is a clear difference, and it has the right to determine to assign certified staff to the study skills classes.

The District reiterates its argument that if the Union were to prevail, it would dictate to the District the curriculum and what staff and qualifications would be required. The District observes that nothing in the contract precludes the District from determining the qualifications required of those teaching study skills classes, and the mere fact that there is no DPI certification required does not prevent the District from establishing such a qualification. It states that past practice supports this position. It concludes that it has not violated the contract and asks that the grievance be dismissed.

DISCUSSION:

Generally, arbitrators have held that, in the absence of an express contractual limitation, an employer has the right to change the job content of a negotiated classification or to transfer some or all of the duties to a different classification or to assign work outside a bargaining unit. 1/ The Association has argued that because study skills classes do not require certification, they are non-certified bargaining unit work. There is no provision of the non-certified collective bargaining agreement which affirmatively requires supervisory assignments to be assigned to non-certified

1/ Abbott Northwestern Hospital, 75 LA 1238 (Heneman, 1980); Central Soya Co., 68 LA 864 (Cox, 1977); Elkouri & Elkouri, How Arbitration Works, (4th Ed. 1985) at 497, et seq.

staff. The recognition clause does not contain any such requirement but merely recognizes the Association as the exclusive and sole bargaining representative of non-certified staff. The contract is silent on the assignment of supervisory duties and nothing in the contract addresses or defines a supervisory period or assignment. The arbitration cases cited by the Association support the conclusion that study hall supervision does not require certification; however, each of these cases involved a laid off teacher attempting to bump into the supervisory duty assigned to a less senior teacher or non-certified employee. The undersigned can find no case where a supervisory assignment could not be assigned to a certified teacher if the District chose to do so. In Stanley-Boyd School District, Case 50, No. 46727, MA-7054 (Buffett, 8/92), the arbitrator held that the District's contractual obligation to provide all teachers with a thirty (30) minute duty-free lunch and to provide non-professional personnel to supervise students during the hot lunch period did not preclude the District from also assigning supervisory duties to teachers. In addition, the evidence failed to demonstrate a long-standing past practice of assigning study hall supervision to non-certified staff exclusively. Prior to the 1993-94 school year, this assignment was given to certified staff. In the 1994-95 school year, a certified staff was assigned to at least one study hall which indicates that the non-certified staff did not have exclusive jurisdiction over such assignments. Without such exclusive jurisdiction, the District may assign such supervisory duties to any employees as long as they are the kind of duties ordinarily performed by such employees. Clearly, teachers are ordinarily assigned supervisory duties as are aides, so the District may assign such duties to either certified or non-certified staff in its sole discretion. If there were language in the contract which stated "only non-certified staff shall be assigned supervisory duties requiring no certification," then the result may be different. Here, there is no language and no past practice, so the District was free to assign certified teachers to supervisory duties.

The Association has asserted a violation of Article IX, Reduction in Force, in that it wasn't "necessary" to lay off one aide because the study skills classes could be assigned to that aide. As discussed above, the District was free to assign the study skills to certified staff; thus, there was no work for one aide and it follows that the required necessity was there to lay off the aide. The Association also refers to the language that no new or substitute appointments may be made while a laid off employee is available. This language is limited to work which would be performed by a new or substitute employee. In Flambeau School District, Case 24, No. 42064, MA-5551 (Burns, 4/90), the arbitrator stated as follows:

. . . Given this language, the undersigned is persuaded that the "vacancies" which are the subject of the reinstatement right involves work which has not been assigned to other bargaining unit members. In other words, there is no "reinstatement" right to "bump" into the work assignment of another bargaining unit employee.

The same result is reached when work is assigned to employees of a different bargaining unit, i.e. certified staff. Thus, there is no violation of Article IX.

Although arguments were made as to LaBeree's qualifications and whether study hall duties and study skills classes were essentially the same, it makes no difference because the District was free to assign such duties to certified staff rather than aides and LaBeree was an aide and not certified staff, so the assignment to certified staff did not violate the agreement.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The District did not violate the collective bargaining agreement when it laid off an aide that had study hall duties and assigned teachers to new duties called study skills, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 29th day of January, 1996.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator