BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

OOSTBURG EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF OOSTBURG

Case 10
No. 52161
MA-8859

Appearances:

Cedar Lake United Educators Council, by Mr. John Weigelt, UniServ Director, appearing for the Association.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Paul C. Hemmer, appearing for the District.

ARBITRATION AWARD

The Oostburg Education Association, herein the Association, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. The School District of Oostburg, herein the District, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Oostburg, Wisconsin, on April 12, 1995. There was no transcript made of the hearing. The parties completed the filing of post-hearing arguments on June 20, 1995.

ISSUES:

The parties were unable to stipulate to a statement of the issue and agreed that the arbitrator would frame the issue in his award.

The Association presented the following statement of the issue:

> Whether the District violated the collective bargaining agreement by failing to employ Laura Lemmerman at 100% FTE during the 1993-94 and 1994-95 school years? If so, what is the appropriate remedy?

The District presented the following statement of the issue:

> Did the School District of Oostburg violate the terms of the collective bargaining agreement through the partial layoff of Ms. Laura Lemmerman during the 1994-95 school year? If so, what is the appropriate remedy?

The undersigned believes the following to be an accurate representation of the issue:

> Did the District violate Article XVII of the collective bargaining agreement when it provided the grievant with a less than 100% teaching contract during the 1994-95 school year? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

> **ARTICLE II: BOARD FUNCTIONS**
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> A. The Board's right to operate and manage the school system is recognized including the determination and direction of the teaching force, the right to plan, direct and control school activities; to schedule classes and assign work loads; to determine teaching methods and subject to be taught; to maintain the effectiveness of the school system; to determine teacher complement; to create, revise and eliminate positions; to establish and require observance of reasonable rules and regulations; to select and terminate teachers. The Board agrees that no employee except those with probationary contracts may be deprived of benefits, reduced in pay, suspended, discharged, or non-renewed except for just cause.
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> . . .
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> **ARTICLE VII: PLACEMENT**
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> A. The Board retains the right to make grade, subject and activity assignments and to make transfers between schools as necessary in the best interest of the district.

B. Insofar as practical, assignments and transfers will take into consideration employee professional training, experience, specific achievements, and service in the district.

C. In making voluntary assignments and transfers, the convenience and wishes of the individual teacher will be honored to the extent they do not conflict with the instructional requirements and best interests of the school system and the pupils. Permanent assignments or transfers will not be made without prior discussion with the teachers.

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ARTICLE XVII: LAYOFF PROCEDURE

The Board of Education agrees to the following seniority layoff procedure:

1. The Oostburg Educational Association will be notified and will be given the reason(s) why the Board of Education is reducing, in whole or in part, a bargaining unit position(s). Both parties recognize that timely notice prior to the layoff is beneficial to both parties. Teachers shall receive preliminary notice of layoff on or before May 1st preceding the school year during which such layoff is to be effective. Prior to May 15, if requested, the Board shall meet with the teacher receiving such preliminary notice, or his/her representative, to review the reason(s) for the proposed layoff. On or before May 15th, teachers shall be given final notice of layoff for the ensuing school year.

2. Seniority shall be determined by continuous years of service, pro-rated on percent of full time contract (i.e., 191 days at 100%).

. . .

b. An employee with less than a 100% contract will be laid off first.

. . .

3. Seniority will be within the teaching area in which the teacher is certified by the Wisconsin Department of Public Instruction.

. . .

> 7. Any employee to be laid off under this provision may elect to bump a less senior employee in an area in which he/she is currently certified to teach. It is agreed that the less senior employee bumped will be deemed to have received notice of layoff as of the same date as the employee exercising this bumping clause.

. . .

BACKGROUND:

The District operates a kindergarten through twelfth grade public school system. The grievant, Laura Lemmerman, has been an employe of the District since May of 1976. She is a regular classroom teacher certified in Home Economics, grades seven through twelve. She has taught the subjects of Individual Living, Parenting, Food Choice and Interior Design.

In the 1992-93 school year the grievant was employed by the District as a 100%, i.e., full-time, teacher. During the 1993-94 school year, the grievant was employed on a contract equivalent to 75% of a full-time position.

During the 1994-95 school year, the grievant was employed at approximately 91.65% of a full-time contract. The grievant was employed at 100% for the first semester and at 83.3% for the second semester.

During both the 1993-94 and 1994-95 school years, another employe, Mary Leonhard, taught courses for which the grievant was certified to teach. Leonhard began her employment with the District in August of 1993.

A letter dated September 14, 1993, from the Association to the District contained the following:

> I am writing to verify the contents of the conversation held in your office yesterday regarding the employment rights of Laura Lemmerman, a teacher in the Oostburg School District. As you are aware, Laura has been partially reduced in time for the 1993-94 school year.
>
> It is the position of the Oostburg Education Association that the reduction of Laura Letterman was in violation of the collective bargaining agreement in that there is currently an employee with less seniority teaching in the Oostburg School District in an area for

which Laura Letterman is currently certified. Any reduction in Laura's time would normally allow her to bump that employee in order to restore herself to a full time position.

Both Laura and the Oostburg Education Association waive their right to press a grievance forward in regard to Laura's employment status. We have agreed in our conversation with you that Laura will remain at her current level of employment for the remainder of the 1993-94 school year. The District has assured us that it will make an effort to re-employ Laura at a 100% position for the 1994-95 school year.

In the event that Laura is not employed at a 100% position for 1994-95, the Association, with your agreement, retains its right to grieve her reduction at that time in the event that such reduction results in a violation of the layoff clause of the collective bargaining agreement.

We further agreed that Laura will receive a full year of seniority for the 1993-94 school year. It was your suggestion that she suffer no proration of her seniority as a result of this layoff. John Moriarity and I agreed with this position subject to the approval of the Oostburg Education Association.

In a letter to the District dated August 19, 1994, a grievance was filed, which grievance alleged that the District had violated the contract by failing to employ the grievant on a full-time, or, 100%, basis for the 1994-95 school year. Said grievance became the basis of the instant proceeding.

In a letter to the grievant dated August 26, 1994, the District stated the following:

I reviewed your schedule and the impact any change would have on student schedules and their ability to get those courses which they requested. The result of that review is:

a. Moving Food Choices second semester to the periods on your schedule in which no class is scheduled: Period 1, 8, or 9 creates a conflict for 78.5% of the students enrolled in the course.

b. The computer placed each of your courses onto the schedule in the optimum period for each specific course to

keep student schedule conflicts with other courses to a minimum.

c. Foods Choices class is scheduled during period 4, which is the same time during which the Middle School course is scheduled into which you wish to be scheduled.

d. If I were to move Food Choices, it would result in an enrollment of only 2 students in the course. That number enrolled would cause us to not offer the course which would not resolve the grievance by providing you with a 100% instructional load second semester. The end result would be the same percentage you now have for 1994-95.

In my review of the contract lay off procedure, I can find no mention of a guarantee of a 100% contract to employees.

This past spring, when we discovered that it was possible to schedule the Middle School course during the first semester into your instructional load, we immediately responded and placed the course on your schedule. That provided you with the equivalent of a 100% course load for the first semester. However, we were not able to make the same schedule change for the second semester based on the conflicts it would create for students. Their course selections must dictate course placement on the schedule.

In reading the letter from Mr. Weigelt to Mr. Hopland dated March 31, 1994, Mr. Weigelt writes in paragraph two: "As you are aware, the School District of Oostburg agreed to provide 100% employment for Laura for the 1994-95 school year, if possible".

We have made an effort to provide you with a schedule which provides you with a 100% instructional position during the first semester, and an 83.3% instructional position during the second semester.

In regard to your grievance based on the contract - lay off procedure, effort has been made to adjust your schedule assignment and the conflicts for students which would be created by moving food choices class - causing the course to be dropped.

POSITION OF THE ASSOCIATION:

The Association contends that the District violated Article XVII, the layoff procedure, of

the contract when it issued a notice of layoff to the grievant on March 12, 1993, and subsequently employed a less senior teacher for classes for which the grievant was certified and able to teach in both the 1993-94 and the 1994-95 school years. At the time of layoff, there was no other employe with certification in the same area as the grievant who either had less seniority or was a part-time employe. However, when Leonhard was hired to teach part-time in areas for which the grievant was certified, then the grievant had the right to be recalled to a full-time status. The District's failure to recall the grievant was a violation of the clear and unambiguous language of the contract.

The District failed to show that it had tried alternative schedule mechanisms in order to fit the grievant into the schedule. The high school principal, Mike Donnelly, simply stated that there was no room in the schedule to assign to the grievant those classes being taught by Leonhard. Donnelly did not explain what course of action he had taken to modify the schedule to help the grievant, such as rescheduling any classes, or assigning a study hall to the grievant. Further, the contract does not make an allowance for scheduling difficulties.

Recognizing the problems which the District has in scheduling, the Association and the grievant agreed to a waiver of the grievance procedure in order to give the district an entire year to correct scheduling difficulties. The District failed to show how it attempted, during that year, to ensure that such difficulties would not happen for the 1994-95 school year. In fact, the District not only was unable to remedy the situation, but made it worse by hiring a less senior teacher and giving that teacher all of the Middle School classes formerly taught by the grievant. The grievant waived her right to grieve her partial layoff for the 1993-94 school year only in a good faith effort to allow the District to remedy its scheduling problems. Neither the grievant nor the Association intended to waive the right to grieve in the event the grievant's 1994-95 contract was not at full employment.

The management rights provision of the contract is limited by the other provisions of the contract. Thus, the layoff provision takes precedent over the management rights clause.

The grievance should be sustained.

POSITION OF THE DISTRICT:

In a letter to the District dated September 14, 1993, the Association specifically waived the right to file a grievance with respect to the grievant's employment status for the 1993-94 school year. Said letter contained no reference to the grievance time limits being waived until decisions were made with respect to the grievant's employment contract for the 1994-95 school year. That letter concludes by thanking the District for a quick and amicable resolution to the situation.

The grievant did not want a full-time contract for the 1993-94 school year. Initially the grievant elected to remain at a 75% contract, when offered additional classes previously taught

by a teacher who had resigned. Because the grievant wanted to complete her Practicum and to have time for child care, a 75% contract was well suited to her circumstances during the 1993-94 school year.

The collective bargaining agreement recognizes the authority of the District, under Article II, to assign the grievant to a less than 100% contract, while at the same time employing a part-time teacher to provide all of the instruction required by the students. During the 1994-95 school year, the grievant was employed at a 92.6% level, while Mary Leonhard was also employed at a 30% level. This action was taken pursuant to the reserved right of the District to determine the classes to be taught, to schedule classes, to assign work loads, and to determine teaching methods and teacher complement. The contract assigned to the grievant was, in part, the result of a policy that the schedule of a teacher not be revised if it means that one or more students are unable to enroll in courses which they require or have requested. Further, the percentage of employment assigned to the grievant for the 1994-95 school year is also in part the result of the District's decision concerning teaching methods which directed that high school teachers be assigned courses at the high school level, the level of instruction for which they are best qualified. The construction of the contract advanced by the Association would render meaningless most of Article II. The layoff clause of the contract should not be allowed to nullify essential District functions, when application of the layoff clause is of no benefit or advantage to the senior employe and the students are disadvantaged through the absence of a teacher, as was the case herein.

The process of scheduling assignments for the teachers is student driven in that the schedules of teachers are built around students. If any student will be adversely affected with respect to enrollment in required or elective courses as the result of a schedule change requested by a teacher, the change will not be approved. If a student may still take a course by being assigned to a different section at another time, a change in the teacher's schedule will be approved. The usual scheduling procedure was followed in developing a teaching schedule for the grievant during the 1994-95 school year. Her initial schedule provided for less than 100% of full-time employment during the first semester. The grievant identified an opening within her first semester schedule which corresponded to a Middle School "high interest" section in child care. The course subsequently was assigned to the grievant, thereby increasing her percentage of full-time employment during the first semester to 100%.

The District attempted to match the first semester teaching schedule of the grievant in the second semester of the 1994-95 school year. If the course entitled "Food Choices" had been moved to one of the open periods in the grievant's schedule, thereby allowing the grievant to teach a course at the middle school, then only two students would have been available for enroll-ment, which number would have resulted in cancellation of the course. The District attempted to restructure the second semester schedule of the grievant in a variety of ways, none of which were successful in increasing the percentage of her employment contract. There was no large study hall requiring additional supervision during the eighth or ninth periods of the day. Although the grievant was not assigned to 100% employment during the second semester, she was assigned all

work available within the limits of her certification, student class schedules and her teaching schedule. If it had been possible, the District would have given the grievant a 100% assignment for the second semester and would have reduced the percentage of full-time employment assigned to Leonhard, as had been done in the first semester.

The District requests that the grievance be dismissed.

DISCUSSION:

The threshold issue concerns whether the grievant's less than 100% teaching contract for the 1993-94 school year is also appropriately included as part of the subject grievance. The undersigned's review of the evidence persuades him that it is not. Most persuasive to reaching that conclusion is the September 14, 1993 letter from Weigelt to Hopland. While the letter states the Association believed that the grievant's less than 100% teaching contract was issued in violation of the collective bargaining agreement, the letter goes on to state "Both Laura and the Oostburg Education Association waive their right to press a grievance forward in regard to Laura's employment status." The letter then proceeds to set forth the consideration received in return for not "pressing" the grievance, i.e., she would stay at her then-current level of employment for the remainder of the 1993-94 school year, she was to receive full seniority for the 1993-94 school year, and the District would make an effort to reemploy her at 100% for the 1994-95 school year. I am satisfied that it was the intent of the grievant and Association, as evidenced by that September 14, 1993 letter, to give up any claim that her 1993-94 individual teaching contract was in violation of the collective bargaining agreement. Therefore, the undersigned framed the issue herein such that the sole question is whether the grievant's less than 100% 1994-95 teaching contract violated the collective bargaining agreement.

While the introductory language of Article XVII: Layoff Procedure, refers to both partial reductions and full layoffs, the language setting forth the actual procedure to be followed regarding partial reductions, like occurred to the grievant herein, is either ambiguous or nonexistent. For example, Article XVII 2. b. states that "An employee with less than a 100% contract will be laid off first." Obviously that cannot be meant in an absolute sense, for what if there were no full-time (100%) teachers certified to teach the courses taught by the less than full-time (100%) teacher. It also does not deal with the issues presented when there are two employes teaching less than full time, and the more senior believes that he/she should be given some of the teaching load of the less senior teacher to increase his/her contract to 100%. Finally, no provision is made for how student class schedules, minimum class enrollment, teaching methods, etc., are to be harmonized with the layoff procedure. In such a situation, where the contract provides no guidance, the undersigned believes the only sensible approach is to apply a standard of reasonableness in examining the decisions made and actions taken by the Employer that give rise to the claim of breach of contract. That is the standard that will be applied herein to determine if the District's actions that resulted in the grievant's less than 100% contract for the 1994-95 school year violated

the collective bargaining agreement.

The Association contends that the District failed to make every effort to avoid a layoff of the grievant. The grievant taught less than full time during the 1993-94 school year, and as a consequence of discussions with the District did not grieve, in part, based upon a representation by the District that it would "make an effort to re-employ Laura at a 100% position for the 1994-95 school year." The District's High School Principal, Michael Donnelly, testified in detail with respect to the procedure which is followed in developing teacher assignments and schedules for each school year. Donnelly further stated that he looked at several options in an attempt to provide the grievant with a full-time schedule for the second semester of the 1994-95 school year, including such options as: moving the course entitled "Food Choices" to one of the grievant's open periods, but then only two students would have been available to enroll in the class; assigning to the grievant those middle school courses assigned to Leonhard and then building the remainder of the grievant's schedule, but then the high school students would not have been able to take the courses which they required; and, moving classes around to match the grievant's schedule, but students who might have taken home economics courses taught by the grievant were enrolled in other classes during her open periods. Furthermore, there is no evidence that the district was incorrect in concluding that courses in other academic areas could not be assigned to the grievant because of her limited certification. Also, when the District was advised of an opening in the grievant's first semester schedule, which opening corresponded to a middle school course, said course was assigned to the grievant. This action resulted in an assignment of 100% for the grievant, and a reduction in the percentage of Leonhard's contract for that semester. Nothing was presented at the hearing to establish that the District failed to make a reasonable effort to arrange a schedule for the grievant which would result in full-time employment for her.

Clearly, the District did make a reasonable effort to provide the grievant with a 100% contract for the 1994-95 school year, and did provide the grievant with a 100% contract for the first semester. As to the second semester, the District did examine ways by which to give the grievant a 100% teaching load. Its conclusion, that it could not do so within the constraints of her schedule, the available classes, and student schedules was confirmed by the evidence. The undersigned is persuaded that the District's conduct was reasonable in that regard, and therefore did not violate Article XVII: Layoff Procedure, when it provided the grievant a less than 100% teaching contract during the 1994-95 school year.

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

AWARD

The District did not violate the collective bargaining agreement when it provided the grievant a less than 100% teaching contract during the 1994-95 school year. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 26th day of February, 1996.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator