

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

RANDOM LAKE EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF RANDOM LAKE

Case 28
No. 53455
MA-9363

Jeffrey Voeks Bumping Grievance

Appearances:

Cedar Lakes United Educators, 411 North River Road, West Bend, Wisconsin 53095, by Ms. Debra Schwoch-Swoboda, Executive Director, and Mr. Jim Carlson, Local Association President, appearing on behalf of the Random Lake Education Association.

Davis & Kuelthau, S.C., 605 North Eighth Street, Suite 610, Post Office Box 1287, Sheboygan, Wisconsin 53082-1287, by Mr. Paul C. Hemmer, appearing on behalf of the Random Lake School District.

ARBITRATION AWARD

The Random Lake Education Association (hereinafter referred to as the Association) and the Random Lake School District (hereinafter referred to as the District) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a grievance concerning the partial layoff and bumping rights of teacher Jeffrey Voeks.

The Commission designated Arbitrator Nielsen. A hearing was held at the District offices in Random Lake on March 12, 1996, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. No transcript was made of the hearing. The matter was held in abeyance for a time after the hearing to allow for settlement discussions. The parties submitted briefs and reply briefs, the last of which was received on July 29, 1996, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties and the record as a whole, the Arbitrator makes the following Award.

I. Issue

The parties agreed that the following issue should be determined herein:

"Did the School District violate the collective bargaining agreement when it failed to increase the 1995-96 teaching contract of Jeffrey Voeks from 75% to 100% by allowing Jeffrey Voeks to bump into or be recalled to the at-risk or gifted and talented programs?"

II. Relevant Contract Provisions

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ARTICLE III - BOARD FUNCTIONS

A. It is recognized that the Board has and will continue to retain the rights and responsibilities to operate and manage the school system and its programs, facilities, properties, and activities of its employees, except as expressly limited by the expressed terms of this Agreement.

B. Without limiting the generality of the foregoing (paragraph A), it is expressly recognized that the Board's operational and managerial responsibility includes:

. . .

7. The direction and arrangement of all the working forces in the system, including the right to hire, suspend, discharge or discipline, or transfer employees.

8. The right to relieve employees from duty for poor or unacceptable work or for other legitimate reasons.

9. The creation, combination, modification, or elimination of any teaching position deemed advisable by the Board.

10. The determination of the size of the working force, the allocation and assignment of work to employees, the

determination of policies affecting the selection of employees, and the establishment of quality standards and judgment of employee performance.

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C. The foregoing enumerations of the functions of the Board shall not be considered to exclude other functions of the Board not specifically set forth, the Board retaining all functions and rights to act not specifically nullified by this Agreement.

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ARTICLE IX - STAFF REDUCTION

Reduction. If the Board decides to reduce or eliminate a teaching position, the Board shall have the sole right to determine the positions to be reduced or eliminated. The reduction in number of hours in a particular position shall constitute a partial layoff. The elimination of a position shall constitute a full layoff. Whether the layoff is partial or full, the following procedure shall be followed:

A. Timelines. Layoff for an ensuing contract year may be effected at any time on or before the preceding June 1, provided that the preliminary notice of such layoff is given no later than the preceding May 1.

B. Layoff Criteria. Layoff shall be applied District-wide by inverse order of seniority provided the remaining teachers are DPI certified to perform the remaining work and, provided further, that a teacher may avoid layoff by displacing another teacher who is the least senior teacher in the District holding a position for which the first teacher is DPI certified, and in which the first teacher has taught in the District for at least one school year.

C. Bumping. A teacher with three or more years of District service who is unable to avoid layoff in the manner described in paragraph B of this Article, may do so by displacing a less senior

teacher who is the least senior teacher in the District holding a position for which the first teacher is DPI certified.

D. Seniority. Attached as Appendix E is the seniority order of employees whose seniority precedes the 1983-84 work year. For employees hired for the 1983-84 school year and thereafter seniority shall be applied District-wide and shall be based on the number of consecutive years worked for the District. A limited term employee (as defined in Board Policy EI#-A) shall accrue seniority, if any, as provided in that policy. Seniority shall begin with the first day of employment under the teacher's initial contract. If two or more teachers hired for the 83-84 school year and thereafter have the same seniority the Board shall determine, in its sole discretion, which teacher(s) shall be laid off.

Seniority and the employment relationship shall be broken and terminated if the teacher (a) resigns or quits; (b) fails to report to work within fourteen (14) days after having accepted a position upon being recalled from layoff, unless unable to do so for medical reasons; (c) is retired; (d) or is on layoff for more than the appropriate recall period provided in paragraph H of the Article. If the District, in its sole discretion, lays off an employee with identical seniority to another employee then also eligible for layoff, the District shall have continuing discretion to choose which of such employees is laid off if the first employee is recalled from layoff and there is a subsequent layoff of one of them.

F. Recall. Teachers on layoff will be recalled in inverse order of layoff, provided the recalled teacher(s) is (are) DPI certified to perform the duties of the vacant position.

G. Partial Recall. If a teacher fails to accept within ten (10) calendar days of receipt of an offer of recall which satisfies the requirements of the following schedule, such teacher's recall rights shall be forfeited:

<u>Contract % for School Year Prior to the School Year in Which Full or Partial Layoff Takes Effect</u>	<u>Minimum Contract % of Recall Offer</u>
100%	80%
80%	60%
60%	50%
50% or less	Equal to % of Prior Position.

H. Recall Limitation. Recall rights for teachers with two (2) years of service or less with the District shall be limited to two (2) years. Recall rights for all other teachers shall be limited to three (3) years. The recall period shall commence on the date of layoff and run through (sic) the close of business on September 14 of either the second or third year, as appropriate.

I. Recall Notice. It shall be the responsibility of each laid off employee to keep the District office informed of an up-to-date mailing address and phone number. Recall notices will be mailed by certified letter, return receipt requested, only to the last known address of the teacher. The teacher shall have ten (10) calendar days from the date of receipt to respond and accept or reject the recall offer.

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K. Seniority Lists. No later than January 15 of each school year, the District shall distribute a seniority list which shall rank all employees, including both active employees, full and part-time, and employees on full or partial layoff, according to their length of service in the District. The list shall also state the teaching assignment(s), if any presently held by such employees and the areas in which such employees are certified by the DPI.

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ARTICLE XV - DISCIPLINE PROCEDURE

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C. Just Cause and Arbitrary and Capricious Standards. No teacher shall be discharged, suspended, disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause. In the case of teacher non-renewal, however, the following standards shall apply: 1) less than one full year of employment with the District -- applicable law; 2) for teachers employed during the 1994/95 school year and issued a contract for 1995-96; more than one full year and less than two full years of employment with the District -- arbitrary and capricious. For teachers hired after the 1994-95 school year; more than one full

year and less than three full years of employment with the District -- arbitrary and capricious; 3) for 1995/96, more than two full years of employment with the District - just cause. For teachers hired after the 1994/95 school year, more than three full years of employment with the District - just cause.

Any such action, including adverse evaluation reports of teacher performance asserted by the Board or a representative thereof, which is intended to be included in the teacher's personnel file, shall be subject to the grievance procedure outlined in Article V. All information forming the basis for disciplinary action will be made available to the teacher and the Association.

ARTICLE XVI - NOTICE OF VACANCY

A. Posting. When a vacancy occurs in any position, the District will post a notice of vacancy in each entry area of each school building. In addition, a copy of the notice of vacancy will be placed in the mailbox of the Association's President. The notice of any vacancy occurring during the summer will be mailed to the President of the Association in addition to being posted.

B. Description. The notice of vacancy shall contain the date of posting, a description of the position, the qualifications sought by the District, the name of the person to which an application for the vacancy should be returned, and the date by which the application is to be returned.

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III. Background Facts

The District provides general educational services to the citizens of Random Lake in southeastern Wisconsin. The Association is the exclusive bargaining representative for the District's teachers. The grievant, Jeffrey Voeks, is an instrumental music teacher for grades 6 through 12, a position he has held since 1980. He ranks 37th on the District's seniority list. Until the 1995-96 school year, he was employed full-time teaching band. In 1995-96, he was reduced to 75% FTE, leading to the instant grievance.

The District operates an At-Risk program for students who are judged to be in danger of dropping out of school but who are not classified as special education students. The At-Risk teachers cooperate with the classroom teachers in providing extra assistance and tutoring to these students and coordinating services for them. The Department of Public Instruction does not

require any particular certification for teachers of At-Risk children, but it does require that persons seeking teacher certification after August 31, 1992 all have course work in issues relating to children at-risk, and in identifying and providing services to gifted and talented children.

The history of employment in the District's At-Risk program is:

School Year	Staff Member (Seniority)	Teaching Assignment(s)	Dept. Public Instruction Teaching Certification(s)
91-92	Senstad	6-12 At-Risk	Physical Ed. 6-12
92-93	Radtke	9-12 At-Risk and English	English 7-12
92-93	Senstad	6-8 At-Risk and 9th Grade Health	Physical Ed. 6-12
92-93	Blumenberg	1-5 At-Risk	Elementary School 1-6
93-94	Radtke	9-12 At-Risk	English 7-12
93-94	Ahrens	6th At-Risk	Elementary School 1-8
93-94	Aubert	7-8th At-Risk and K-6 Art	Art K-12, Math (expired)
93-94	Blumenberg	1-5 At-Risk and Elementary Reading	Elementary School 1-6
94-95	Radtke	9-12 At-Risk	English 7-12
94-95	Aubert	6th & 8th At-Risk and K-6 Art	Art K-12, Math 6-9
94-95	J Hanson	7th At-Risk and Middle School	Math 6-9
94-95	Blumenberg	1-5 At-Risk and Elementary Reading	Elementary School K-8
94-95	Blumenberg	1-5 At-Risk and Elementary Reading	Elementary School 1-6
95-96	Radtke (45)	9-12 At-Risk	English 7-12
95-96	Blumenberg (68)	1-5 At-Risk	Elementary School 1-6
95-96	Hein (new)	6th At-Risk and Guidance	Guidance K-12, ED 6-12
95-96	Stroika (new)	7th-8th At-Risk, Math and Science	Soc. Stud. 6-12, Soc. 6-12
95-96	Stroika (new)	7th-8th At-Risk, Math and Science	Elementary School 1-8
95-96	Stroika (new)	7th-8th At-Risk, Math and Science	Bio/Life Science 6-12

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In April of 1995, the District for the first time adopted a job description for the teachers in the At-Risk program, detailing the qualifications and duties expected of those teachers:

AT-RISK TEACHER

QUALIFICATIONS

The At-Risk Teacher shall possess a valid Wisconsin teaching license, and shall meet or exceed all the standards set by Wisconsin State statutes and the Wisconsin Department of Public Instruction. Preference will be given to teachers who possess a license in language arts, mathematics, learning disabilities, cognitive disabilities or in the area of emotional disturbance. Previous teaching experience is required.

The At-Risk Teacher shall also have demonstrated the ability to positively motivate students, to work effectively with at-risk students and their parents, and to work successfully and cooperatively with other teachers.

PRIMARY FUNCTION

The At-Risk Teacher is directly responsible for the development and provision of appropriate educational programming for the at-risk students assigned to him/her. He/she reports directly to the principal of the building to which he/she is assigned and is jointly supervised and evaluated by the principal and the Director of Student Services.

PRIMARY TASKS

The primary tasks of the At-Risk Teacher include, but are not limited to those listed in this section. Additional tasks can be assigned to the Teacher at the discretion of the administration.

1. Assist in the evaluation and identification of at-risk students, including attending file review meetings, staffings, and parent conferences.
2. Assist in the development of individually designed educational program plans for all at-risk students assigned to him/her.

3. Serve as the case manager for all at-risk students assigned to him/her.
4. Provide direct instruction to at-risk students in accordance with the students' identified needs.
5. Provide direct assistance to at-risk students in completing their required assignments and otherwise meeting their responsibilities in all of their courses.
6. Communicate regularly with all of the at-risk students' teachers regarding their performance and needs.
7. Monitor the at-risk students' progress and grades in all courses.
8. Communicate regularly with the parents of the at-risk students regarding matters pertaining to school performance.
9. Serve as a liaison with the various community agencies working with the at-risk students.
10. Provide consultation and suggestions to the at-risk students' teachers regarding classroom approaches, modifications, etc. that are appropriate to the needs of the student.
11. Compile all needed data and assist in the completion of all reports related to the at-risk program.
12. Fulfill all responsibilities listed in the School District of Random Lake's job description for a Teacher.

The District also employs a coordinator for its gifted and talented program. As with At-Risk teaching, the GAT program does not require a specific DPI certification beyond certification as a teacher. The School Board adopted a job description for the GAT coordinator at the same time it adopted the job description for the At-Risk teacher:

GIFTED AND TALENTED TEACHER CONSULTANT

QUALIFICATIONS

The Gifted and Talented Teacher Consultant shall possess a valid Wisconsin teaching license, and shall meet or exceed all the standards set by Wisconsin state Statutes and the Wisconsin Department of Public Instruction. Preference will be given to experienced teachers and those who possess broad academic training and licensure.

The Teacher shall have demonstrated the ability to positively motivate students, and to effectively design and implement instructional activities which provoke individual inquiry and higher

level thinking and problem-solving skills. He/She shall also have demonstrated the ability to work effectively with parents and to work cooperatively and successfully with other teachers.

Preference shall be given to teachers who have knowledge and successful experience in designing and implementing instruction based upon cognitive theory, learning styles, and individual needs.

PRIMARY FUNCTION

The Teacher is directly responsible for the planning, development, implementation, and evaluation of the K-12 R.E.A.C.H. Program. He/She reports directly to the Director of Instruction, and is jointly supervised and evaluated by the Director of Instruction and the building principals.

PRIMARY TASKS

The primary tasks of the Teacher Consultant shall include, but are not limited to those enumerated in this section. Additional tasks can be assigned to the Teacher Consultant at the discretion of the administration and in accordance with the collective bargaining agreement and state laws.

1. Provide leadership in developing and implementing a district-wide plan to serve the gifted and talented students (K-12).
2. Assist in the evaluation and identification of gifted and talented students, including the development and implementation of screening procedures, the administration of standardized tests and participation in staffings.
3. Assist the teachers assigned as case managers for gifted and talented students.
4. Communicate with the gifted and talented students' teachers regarding matters related to their school performance.
5. Provide consultation to teachers regarding meeting the need of gifted and talented students within their classroom.
6. Assist teachers in designing and implementing instructional activities within their classrooms, including demonstration and team teaching when appropriate.
7. Communicate with the parents of gifted and talented students regarding their school performance.

8. Provide direct instruction to gifted and talented students as determined through the staffing process.
9. Provide leadership for a district wide gifted and talented committee.
10. Recommend a district budget for all aspects of the gifted and talented program, including materials, staff development, curriculum work, etc.

11. Become informed on legal and programmatic matters related to serving gifted and talented students.
12. Provide staff development opportunities on gifted and talented issues for all staff and administration.
13. Compile all needed data and assist in the completion of all reports related to the gifted and talented program.
14. Fulfill all responsibilities listed in the School District of Random Lake's job description for a Teacher.

In late April of 1995, the grievant received a preliminary notice of layoff from the District. When he got his 1995-96 contract, it showed a reduction from full-time to half-time. He requested a meeting with representatives of the District and the Association to discuss the layoff, and to explore the possibility of increasing his percentage of full-time equivalence. At the June 7th meeting, he told District Administrator Francis Murphy and the other District representatives that he should be given the right to bump into positions held by less senior employees in the Gifted and Talented (GAT) or At-Risk programs. As the parties were still discussing settlement possibilities, they agreed that he could reserve his right to formally seek to claim a GAT or At-Risk position. The District agreed without conceding that he had the right to such a position.

No satisfactory settlement was reached on the reduction in FTE status, and the grievant submitted a letter on July 25th, formally seeking to bump into a GAT or Elementary At-Risk teaching job. The incumbent GAT coordinator had asked to return to classroom teaching, and the District was interviewing possible replacements. The grievant was given interviews for the vacant GAT coordinator position, and existing At-Risk positions. He had neither teaching experience nor academic coursework in teaching At-Risk students or in a Gifted and Talented program. He had, however, worked in one on one tutoring as part of his band duties, and had some band members he regarded as gifted. The District deemed him unqualified to either claim the vacant GAT job or bump a less senior employee in At-Risk. However, his percentage of FTE was increased to 75% in order to cover anticipated demand for band instruction.

Joyce Atkins, an outside applicant from Ohio, was hired to be the District's Gifted and Talented Coordinator, as well as to do some counseling work. Two new teachers, Hein and Stroika, were hired to teach in the At-Risk program, joining incumbents Mindy Blumenberg and Kristen Radtke.

The instant grievance was filed on August 25th, contending that neither At-Risk nor GAT positions required DPI certification, and that the grievant was therefore qualified to claim these jobs. The grievance was not resolved in the lower steps of the grievance procedure and was referred to arbitration. At the hearing on March 12th, in addition to the facts outlined above, the following testimony was offered:

Jeffrey Voeks

Jeffrey Voeks testified that he did not have a preference between GAT or At-Risk teaching, so long as he was able to secure an additional 25% on his teaching contract. He agreed to interview for GAT and At-Risk positions, even though he told Murphy that he should have been able to claim one on the basis of seniority alone, because he wanted to help the administration find the best placement for him.

Robert Aubert

Robert Aubert testified that he had been an art teacher in the District for 30 years. Since July of 1993, he has also been certified as a math teacher. In the spring of 1993, he received a preliminary notice of partial layoff. He contacted the Department of Public Instruction to find out if he could teach in either an At-Risk or GAT program, and was told that his K-12 Art certification was legally sufficient for both jobs. He then contacted Murphy and asked if he could be assigned to one of the programs to avoid the reduction in his contract. In the 1993-94 school year he was recalled from the partial layoff to teach K-5 Art and 7-8 At-Risk. He also taught in the At-Risk program in the 1994-95 school year. Aubert testified that his experience in the At-Risk program was primarily as a tutor and a mentor, and did not involve direct classroom instruction in academic subjects. His tutoring included academic areas such as mathematics, English, social studies and science, and primarily reinforced the substantive instruction offered by the students' regular classroom teachers.

On cross-examination, Aubert testified that he had taken courses in academic instruction in college and had minored in mathematics. He had previously held DPI certification in mathematics, which he was able to renew with the submission of an application and a fee. He could not recall whether he told Murphy he could be certified in mathematics, but acknowledged that Murphy would have known this from his personnel file.

James Carlson

James Carlson testified that he is the President of the Random Lake Education Association and had been involved in negotiations for the 1993-95 and 1995-97 collective bargaining agreements. He represented the grievant in his meetings with the District. Carlson testified that the grievant at all times reserved his right to exercise his bumping rights, even while proceeding with settlement discussions, and that the District acknowledged this. The District consistently maintained throughout settlement discussions and the grievance procedure that the grievant would not be allowed to bump into GAT or At-Risk because he was not qualified, while the Association took the position that his Art certification should allow him to claim those jobs.

According to Carlson, most of the At-Risk positions in 1995-96 were partial assignments, and two of them were vacancies. Neither of the vacant At-Risk jobs were posted as required by

the contract, and both were filled by newly hired teachers. He testified that he had spoken with most of the people assigned to the At-Risk program for 1995-96, and all said they were tutoring and mentoring students in subjects outside of their academic certifications. Among the At-Risk teachers, only Mindy Blumenberg provided direct instruction to At-Risk students.

Francis Murphy

Francis Murphy testified that he had been the District Administrator for six years, and had previously been an administrator, coordinator and principal at the elementary school for 26 years.

He acknowledged that Ann Senstad was hired to teach At-Risk students even though she did not have DPI certification in an academic area. According to Murphy, Senstad was hired to work in the At-Risk program in 1991-92 because of her involvement in the District's AODA program when she worked in the prior year as a long term substitute. The program was quite successful with Senstad, so it was expanded in the 1992-93 school year, by adding Radtke and Mindy Blumenberg. Both displayed great skill in dealing with At-Risk children, prodding them to greater performance while maintaining popularity. In 1993-94 Christine Ahrens and Robert Aubert were assigned to the At-Risk program in part as a result of reductions in their regular assignments. Ahrens was an excellent teacher, very well organized and demanding, but very popular with the students. Aubert was selected for the program because he was an experienced teacher who had a history of going out of his way to help students. Murphy also knew that Aubert had an expired certification in mathematics, and told him to renew it when they discussed his possible assignment to the At-Risk program. In 1994-95, Jackie Hanson, a 7th Grade teacher was assigned to take over Ahrens' At-Risk students from the year before. Hanson was certified to teach Elementary K-8.

Murphy testified that he was familiar with the grievant and did not believe that he had the background or the qualities necessary to teach in the At-Risk program. His observations led him to believe that the grievant was not a magnet for students, or a teacher with a history of actively encouraging and pushing underachievers or reaching out beyond his own classes. Murphy noted that the School Board had adopted job descriptions for At-Risk teachers and the Gifted and Talented Coordinator in April of 1995, including a specification of qualifications for both jobs, and that the grievant did not meet the qualifications established for either job.

On cross-examination, Murphy agreed that the grievant's layoff was due to declining enrollments in his band program, and was not connected to any problems with his performance evaluations. Murphy said he was aware that the grievant had taken his bands to Florida for a national competition in May of 1995, and that the concert band and the marching band had placed first and second respectively. He conceded that he had no actual knowledge of Hein or Stroika's ability to interact with or motivate students before he hired them to teach in the At-Risk program.

Murphy testified that the contract provided for both full and partial recalls from layoff, in inverse order of seniority for those with DPI certification to perform the duties of available jobs.

He acknowledged that the grievant was senior to every At-Risk teacher employed in 1995-96, as well as the teacher hired as the Gifted and Talented Consultant. He also agreed

that there was no DPI certification required for teaching in the At-Risk or Gifted and Talented programs. While no teacher had ever bumped into the At-Risk program, some teachers had been recalled into the program, but Murphy asserted that those teachers were recalled only because he believed that they were qualified to teach in that program.

Joseph Gassert

Joseph Gassert testified that he is the Director of Instruction for the District, and is responsible for curriculum development and assisting in recruiting, selecting, supervising and evaluating the teaching staff. He took the lead in developing the job descriptions for the At-Risk and GAT programs. The descriptions indicate a preference for specific DPI certifications. The administration had sought to require these certifications, but the Board of Education wanted to retain the flexibility to employ exceptional candidates who did not have the certifications. Gassert testified that the degree of direct instruction provided in the At-Risk program varied, with Mindy Blumenberg providing a great deal of direct instruction, Radtke providing some and Hein primarily tutoring students. He noted that direct instruction may not be provided by someone, such as the grievant, who lacks certification in the area and that DPI had issued a memorandum to that effect in 1989.

Gassert stated that the grievant was not qualified to perform the primary functions and tasks of either job. His work history and academic background show nothing that indicates familiarity with the concepts, techniques or substantive content of either program. Gassert interviewed the grievant for these jobs, and found his answers very vague and simplistic. When asked several specialized questions, the grievant had no idea of the correct answers. The grievant's only motive for interviewing for GAT and At-Risk appeared to be raising his FTE to 100%.

None of the At-Risk jobs for 1995-96 was posted. Blumenberg was in a continuing assignment. Ahrens had gone on a leave of absence and was due to return. Gassert scheduled Ahrens to teach a combined At-Risk, Mathematics and Science position. He then discovered that Ahrens would not be returning to the District, and hired Stroika as an LTE to replace Ahrens, solely for the 1995-96 school year. Hein was hired as a counselor, but was assigned some At-Risk duties because the District knew she had some background with emotionally disabled children. Thus neither of these positions was actually a vacancy that had to be posted.

The incumbent Gifted and Talented Coordinator asked to go back into the classroom, and he approved the transfer subject to finding an acceptable replacement. Atkins was superbly qualified, and was hired into a combined position, 20% in counseling and 80% in GAT. Thus

this was not actually anything more than a contingent vacancy, and the grievant was not qualified to do the counseling portion of the position's duties. Moreover, the GAT Consultant's job could not, as a practical matter, be broken into segments to allow the grievant to do it 25% of the time and Atkins to do it the remainder of the time.

Gassert testified that, in constructing the class schedules, band and choir were the first things scheduled. Given this, it would have been very difficult to rearrange the grievant's band schedule to make him available to At-Risk students. Gassert acknowledged, however, that the grievant's 75% schedule had him ending his work day early several days per week.

Additional facts, as necessary, will be set forth below.

IV. Arguments of the Parties

A. The Association

The Association takes the position that the contract is clear and unambiguous. The parties have negotiated very specific language controlling layoff, bumping and recall. The only limitation on a teacher's right to bump into a position occupied by a less senior teacher is that, if the DPI requires certification for the job, the senior teacher must hold that certification and have taught in the subject area for at least one year. At-Risk and Gifted and Talented do not have any specific certification required by DPI, and the grievant must be conclusively presumed to be qualified under the contract. While he had never taught in At-Risk or Gifted and Talented, it is clear from the record that the District did not know that and did not attempt to determine that before laying him off. The failure to even inquire about a teacher's qualifications is a violation of the bumping provisions of the contract.

The contract allows teachers with more than three years of seniority to bump, even if they have never taught in a subject area, so long as they hold the required DPI certification. As noted, the At-Risk and GAT positions do not require any DPI certification -- any teacher may lawfully teach in these programs. Thus the grievant had the right under the contract to bump into these jobs. Instead, the District retained at least five junior employees while reducing the grievant.

The District's refusal to allow the grievant's bumping rights is compounded by its subsequent refusal to honor his recall rights. After the grievant was laid-off, the District hired new employees to fill At-Risk and GAT jobs, without giving the grievant the opportunity to claim these positions. This is a clear violation of the contract. The District also violated the Association's rights by failing to post these vacancies via mail to the Association President.

The District's claim that it had the reserved right to determine qualifications which serve to limit the negotiated bumping and recall rights must be rejected. Management has reserved only

the rights which are not modified or limited by the specific terms of the contract. This contract had specifically defined the qualifications required before a teacher may bump or be recalled, and the District may not change those provisions by purporting to read in training, experience or narrower certification requirements. The arbitrator should also dismiss the claim that it could refuse to recall the grievant, or allow him to bump, to a partial position. The contract's layoff and recall provisions clearly apply to full and partial layoffs, and the District cannot frustrate these provisions. Moreover, the history of employment in the District shows that At-Risk and GAT positions are customarily filled on a part-time basis. The District never even reviewed the existing class schedules to determine whether a partial At-Risk or GAT position was feasible, and it should not now be allowed to raise this specious argument simply as a device to evade its clear obligations.

The Association asks that the arbitrator direct the District to make the grievant whole for his losses, as if he had been assigned a full-time position for the 1995-96 school year, and retain jurisdiction so as to protect him from retaliation in his 1996-97 contract.

B. The District

The District takes the position that the grievant was not qualified for any position aside from his instrumental music job, and had no contractual entitlement to bump or be recalled into either GAT or At-Risk positions. At the outset, the District notes that the grievant is seeking a partial position to supplement his 75% FTE contract as a band instructor for 1995-96. The contract allows teachers to avoid layoff by claiming positions. There is no 25% position in the At-Risk or GAT programs. These are full-time positions. Nothing in the contract allows a teacher to claim part of a position, nor does arbitral case law support such an effort. Severing portions of the At-Risk and GAT programs in order to accommodate the grievant would interfere with the District's ability to provide coherent and effective services in these areas. Thus the remedy sought by the grievant is foreign to the contract, contrary to sound educational policy and beyond the authority of the arbitrator.

Even if there was a general right to a partial recall, the evidence shows that implementing that option in this case would require changing the GAT program from two and a half full days per week to five half days per week. This would violate the District's right to establish class schedules which are in the best interests of its students. The two and a half day schedule allows greater flexibility for the provision of services to students than does the five half day schedule sought by the grievant.

The Association's entire theory of this case ignores the basic right of an employer to determine the minimum qualifications required for any job in its labor force. General labor law, arbitral precedent and the management rights clause of the contract reserve to the District the right to set qualifications. While the parties have agreed that DPI certification in a given area is

presumptive evidence that a teacher has the requisite academic background and experience needed for a job, no such certification exists for At-Risk or GAT. Thus there is no presumption of qualifications in those areas, and a teacher seeking to claim one of those jobs must demonstrate that he or she is actually qualified. The standard for qualifications in that case would be those set by the District under its reserved rights, guided by the DPI requirements for teachers in such positions who were first licensed on or after August 31, 1992. The District has set just such appropriate qualifications. The grievant could not meet them.

As of May, 1995, the District has exercised its management rights by deciding that At-Risk teachers should have academic certification in language arts, mathematics, learning disabilities, cognitive disabilities, or emotional disturbance. In addition, those teachers must have prior teaching experience, the ability to assess at-risk students, experience in developing individual program plans, and the capacity to consult with other classroom teachers to meet the needs of At-Risk students. The Association did not provide any evidence that the grievant met these requirements, and the record shows that he does not. Moreover, the grievant does not possess the intangible qualities of empathy and aggressive interest in student welfare that experience shows are critical to success in the At-Risk program.

The grievant was likewise unqualified to work in the Gifted and Talented program. This position envisions a candidate with experience teaching in a GAT program and broad certification in academic areas. The grievant has neither. Nor does he have the necessary experience in instructional activities "which provoke individual inquiry and higher level thinking and problem solving." He is not qualified to assess and identify gifted and talented students, nor to consult with other teachers to meet the students' needs or assist in their instruction. In his interview, it was apparent to the District's personnel that the grievant had little knowledge or understanding of program design or development in the area of GAT programs, and little interest in the area other than as a means of retaining a full-time job. The grievant is clearly not capable of providing direct or indirect services to gifted children or their teachers, and could not provide leadership to the District's program. He possesses none of the required qualifications for the job, and thus has no right to claim it under the bumping or recall provisions of the contract.

The Association's claims that the District somehow violated the posting provisions of the contract are disingenuous. The grievant admitted that he interviewed for a vacant GAT position. There was no vacancy in the At-Risk program. There were several reassignments in the At-Risk program, due to transfer requests, but no vacant position. The District notes that the right to be recalled under the contract is limited to vacant positions, and thus the grievant could not have claimed the At-Risk jobs under that provision.

For all of the foregoing reasons, the District asks that the grievance be denied.

V. Discussion

The issues in this case are whether the grievant had the right to bump or be recalled to either the At-Risk or Gifted and Talented programs and, if so, whether there were positions available to him in those programs.

A. Is the Grievant Eligible to Bump or be Recalled?

The grievant was reduced in hours for the 1995-96 school year. This constitutes a partial layoff under Article IX of the collective bargaining agreement. According to the contract, partial layoffs are subject to the same procedures as total layoffs. Any teacher wishing to avoid layoff may claim a position for which he is certified and in which he has previously taught for at least one year. The grievant has never taught in either the At-Risk or GAT programs, and that provision is therefore not directly in issue. However, a non-probationary teacher has additional bumping rights under Article IX:

C. Bumping. A teacher with three or more years of District service who is unable to avoid layoff in the manner described in paragraph B of this Article, may do so by displacing a less senior teacher who is the least senior teacher in the District holding a position for which the first teacher is DPI certified.

Teachers also have recall rights to full or partial positions:

F. Recall. Teachers on layoff will be recalled in inverse order of layoff, provided the recalled teacher(s) is (are) DPI certified to perform the duties of the vacant position.

G. Partial Recall. If a teacher fails to accept within ten (10) calendar days of receipt of an offer of recall which satisfies the requirements of the following schedule, such teacher's recall rights shall be forfeited:

<u>Contract % for School Year Prior to the School Year in Which Full or Partial Layoff Takes Effect</u>	<u>Minimum Contract % of Recall Offer</u>
100%	80%
80%	60%
60%	50%
50% or less	Equal to % of Prior Position.

The Association reads the contract language as meaning that a teacher may claim any position in which the Department of Public Instruction will unconditionally allow him to teach. Thus, because DPI allows any certified teacher to work in At-Risk or GAT, the grievant is "DPI

certified". The District reads the language as articulating the parties' agreement on what constitutes proof of minimum qualifications, thus applying only to jobs for which there is a specific DPI certification. Since there is no specific DPI certification of competency for At-Risk or GAT, the District argues that there can be no presumption of qualifications, and that it may exercise its management right to judge whether the teacher is qualified to claim the job.

While neither party's interpretation is foreclosed by the language of the contract, Article IX provides greater support for the Association's position than for the District's. The general purpose of a bumping provision is to allow a senior employee to avoid layoff by displacing a less senior employee. Almost inevitably, the senior employee is somewhat less qualified for the job he is bumping into than is the person performing the job. The degree of disparity between the two employees' qualifications is customarily limited by language requiring that the senior employee must possess at least the minimum requirements for the job. This contract sets two different thresholds for minimum qualifications. For probationary teachers, there must be both DPI certification and actual experience teaching in the subject area. For non-probationary teachers such as the grievant, the threshold is DPI certification. The DPI certification for both At-Risk and GAT is certification as a teacher.

The parties elected to define minimum qualifications by making reference to those dictated by the Department of Public Instruction, specifically whatever certification is required to teach in a particular position. It may be that they did not contemplate the areas of At-Risk and GAT when they made this election, but the language was carried forward in the contract after these positions were created, and the arbitrator is not free to create a different bargain under the guise of interpretation. While the District's argument that the parties intended the DPI certification standard to apply only to specific areas of certification is ingenious, there is no evidence that this alleged intent was ever articulated in bargaining. DPI requires certification for these jobs, and the grievant possesses that certification. Thus, under the plain language of the contract, the grievant was entitled to claim either an At-Risk or GAT position through the bumping and recall provisions. 1/

The arbitrator notes that, even under the District's view, the grievant would be able to qualify for these positions. The job descriptions for these positions require certification as a teacher, and demonstrated ability to work with students, parents and other staff. The descriptions express a preference for teachers with prior experience and broad academic exposure, but those

1/ If the District's position is accepted, the anomalous result would be that new teachers would have greater bumping and recall rights than senior teachers. Given the DPI's requirement that teachers licensed after August 31, 1992 have academic training in At-Risk and GAT, those teachers would presumably have the minimum requirements for these jobs by virtue of their certification as teachers, even though they are no more "DPI certified" for At-Risk and GAT than are senior teachers.

are preferences, not requirements. 2/ The District did not have any actual knowledge of Hein or Stroika's ability to work effectively with students, teachers and parents before they were hired for the 1995-96 school year, and the superintendent's opinion that the grievant was deficient in these areas was not supported by any specific examples or objective evidence.

B. Were There Positions Available?

The District cites the decisions of arbitrators in Sheboygan Area Schools and Wheatland Center Schools for the proposition that teachers may not claim portions of other positions in order to avoid layoff. I find that the principles enunciated in these Awards are sound, but that those cases are distinguishable from the instant case.

In Sheboygan Area Schools (7/9/84) a teacher sought to avoid a partial layoff by claiming classes from other teachers' schedules. Arbitrator Greco determined that, for bumping purposes, a "position" within the meaning of the contract encompassed all of the duties of a particular employee, and that the contract did not allow employees to seize portions of other jobs. I have no disagreement with this general principle, and have made similar rulings in the past:

A "position" is a bundle of duties (in the case of teachers, a bundle of classes and/or supervisions) tied together into a job, created by management to accomplish the educational and administrative goals of the District. Balkanizing positions into separate class and supervision components for bumping purposes suggests that teachers in a layoff setting may design their own jobs. If a "position" is the same as a "class", why could not a full-time teacher facing layoff take individual classes from a number of junior teachers to create a job, leaving those teachers to cherry-pick the classes they desired from other less senior teachers, and so on throughout the District? Given that the parties here agree that upward bumping is permissible, from a part-time into a full-time position, it would also be possible for the grievant to claim sufficient classes from junior teachers, full or part-time, to craft a job with a greater FTE than the one she had before the reduction ordered by the School Board. These are absurd results, but they are entirely permissible under the interpretation urged by the grievant. Certainly the parties could negotiate for these results, or could construct an orderly system to regulate bumping based on classes, but

2/ This renders Arbitrator Honeyman's decision in Antigo School District distinguishable, since the job description for At-Risk teachers there required certification in one of four specific academic areas. The contract in Antigo also called for recalling teachers to positions "...in their area of certification", a narrower and more specific class of positions than is called for in this contract.

there is nothing in their contract or past history to suggest that they have done so. (Lake Geneva Schools, 9/22/94)

Unlike the contract in Sheboygan, the contract in this case specifically contemplates partial layoffs and partial recalls. It also calls for the bumping procedure to be followed whether the layoff is total or partial. While this cannot be read to allow a teacher to bump in such a manner to as to cherry pick individual classes from other teachers' assignments, if the language allowing bumping in partial layoff situations is to have any meaning, it must be read to allow bumping where an entire, discrete portion of a less senior teacher's assignment could be claimed without disrupting the District's educational program. Having said this, it does not appear from the record that such a bump was possible, since there was no discrete set of duties amounting to .25 FTE or less available among the existing assignments in either At-Risk or GAT. However, when vacancies developed in the At-Risk and GAT programs, the right to a partial recall became relevant.

The District concedes that there was a vacancy in GAT, but denies that any At-Risk jobs were vacant. This assertion is almost impossible to credit. Two new hires were teaching in the program as of 1995. The notion that Stroika's LTE status somehow means that the 7th and 8th grade At-Risk job wasn't vacant is simply an assertion. The District may not have wished to fill that job with Stroika permanently, but its reservations about her status cannot exempt the position from the recall provisions of the contract. Likewise, the fact that Hein was hired primarily as a counselor does not mean that the 6th grade At-Risk position was not vacant. The 6th, 7th and 8th grade At-Risk jobs were all filled the year before, and are all continuing parts of the program. The incumbent teachers for these portions of the program both left the positions and were replaced with new hires. Clearly, these positions were vacant after the notice of layoff to the grievant and prior to the start of the 1994-95 school year.

The fact that the At-Risk jobs were vacant does not automatically mean that the grievant had the right to claim them. The District has the right to structure positions so as to advance its educational programs. If the District can prove that it has a compelling reason for assigning At-Risk classes in combination with some other specialty in its curriculum, or that combining the grievant's schedule with an At-Risk schedule compromises its ability to deliver services, harmonizing the management rights clause with the seniority clause may result in denial of the grievant's attempt to be recalled. There is no such evidence in this case.

The history of the At-Risk program shows that there have generally been full-time At-Risk assignments and part-time At-Risk assignments. The part-time At-Risk assignments have included teachers whose other tasks have been teaching 9th grade Health, English, K-6 Art, Elementary Reading, Middle School, and, in the 1995-96 school year, Guidance, Math and Science. The responsibility for grades 1-5 and grades 9-12 have historically been discrete assignments. At-Risk services for grades 6, 7 and 8 have been assigned in various combinations. Of the four At-Risk teaching positions in school years 1993-94 through 1995-96, only one, Blumenberg, relied primarily on direct instruction as a teaching method. The others approached the job primarily as tutors and mentors, working directly with the students' other instructors. The structure of the program in this District does not demonstrate that the grievant's teaching background would somehow interfere with his ability to provide services in the At-Risk program, at least with respect to grades 6, 7 and 8.

The structure of the GAT consultant's position, on the other hand, does not appear to lend itself to a partial recall. Unlike the At-Risk jobs, all of the GAT duties for the District have historically been concentrated in one position. Unless the District chooses to somehow divide GAT by classes or in some other fashion, there is nothing in the program that can be said to be a discrete assignment into which the grievant could have been recalled.

The practicalities of scheduling can also defeat an effort to claim a partial position. In Wheatland Center (5/24/88), Arbitrator Gratz determined that the District's right to structure the

positions within the teaching force was subject only to the implied covenant of good faith and

fair dealing, and that the District's decision could not be set aside unless it was shown to have been arbitrary, capricious or in bad faith. Reviewing the evidence, he concluded that the decision not to allow the grievant to claim a portion of the Gifted and Talented program was based on a careful review of the negative impact this would have on the District's ability to most effectively deliver services to Gifted and Talented children. Specifically, the District in that case showed that combining the grievant's morning kindergarten classes with an afternoon GAT schedule would have required a change in the long established two full and one half day schedule for GAT, and that the established schedule was based on considerations of educational policy. In this case, there is not a history of specific schedules for At-Risk. Those schedules have been built around the teachers' other assignments. Moreover, Gassert's testimony was that it would be difficult to construct an At-Risk component into the grievant's band schedule was general in the extreme, and focused on the slotting of the grievant's band classes, not the impact on At-Risk. It is not at all clear in this case that an At-Risk assignment to the grievant would have reduced the District's ability to effectively offer that program, but it is clear that the District made no particular effort to construct a schedule incorporating At-Risk and band assignments, even though the decision to partially lay the grievant off was made before the schedules for the coming school year were constructed. 3/

The District has the right to determine which positions are necessary in its work force in order to effectuate its educational program. The contract gives teachers who are partially laid-off the right to be recalled to discrete, partial positions. Absent evidence that it is necessary to the educational program, the District may not bundle At-Risk assignments with other, unrelated teaching duties in such a fashion as to frustrate the grievant's recall rights. The grievant was qualified under the contract to teach in the At-Risk program, and the record evidence does not show that making the 6th, 7th and 8th grade At-Risk assignments for the 1995-96 school year unavailable for recall was necessary for the District's educational program. Thus I conclude that the District violated the contract by refusing to allow the grievant to exercise his recall rights to claim one of these assignments. Given that the 1995-96 school year has been completed, the appropriate remedy is to pay the grievant an amount equal to the difference between his 75% FTE

3/ In connection with this, I note that there must have been some possibility of melding these assignments, since the District asserts that it interviewed the grievant and considered adding GAT and/or At-Risk duties to his contract, but rejected him because it believed him to be unqualified.

assignment for that school year, and what he would have earned had he been recalled to that discrete portion(s) of the At-Risk program in grades 6, 7 and/or 8 which would have enabled him to most closely approximate a 100% FTE assignment for the school year. The District is further directed to treat the grievant for bumping, recall and other contractual purposes as if he had held such an assignment in the 1995-96 school year.

The arbitrator will retain jurisdiction over the grievance for a period thirty days from the date of this Award for the sole purpose of clarifying the remedy ordered herein, if requested. 4/

AWARD

The School District violated the collective bargaining agreement when it failed to increase the 1995-96 teaching contract of Jeffrey Voeks by allowing Jeffrey Voeks to be recalled to the At-Risk or program. The appropriate remedy is to make the grievant whole for his losses by virtue of the failure to increase his contract, and to treat him for all contractual purposes as if his contract had been increased through a recall to the At-Risk program.

The arbitrator will retain jurisdiction over the grievance for a period of thirty days from the date of this Award, for the sole purpose of clarifying the remedy ordered herein.

Dated at Racine, Wisconsin this 25th day of November, 1996.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

4/ The Association has requested that the Arbitrator retain jurisdiction in order to address anticipated retaliation against the grievant in his assignment for the 1996-97 school year. The arbitrator has enunciated certain principles which may bear on the grievant's rights in 1996-97 and thereafter, and the remedy ordered herein may bear on his assignments after 1995-96. However, the substance of any dispute over assignments beyond 1995-96 is not before the arbitrator, and the arbitrator cannot retain jurisdiction which he does not possess in the first place. The Association's request for a sweeping retention of jurisdiction is therefore denied.