

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TONI ETTER

and

WEST DE PERE PUBLIC SCHOOLS

Case 37
No. 52957
MA-9169

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, by **Mr. Gordon E. McQuillen**, 20 North Carroll Street, Madison, Wisconsin 53703, appearing at hearing and, on brief, by **Ms. Toni Etter**.

Godfrey & Kahn, S.C., Attorneys at Law, by **Mr. Dennis W. Rader**, 333 Main Street, Suite 600, P. O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of the West DePere School District.

ARBITRATION AWARD

The West DePere Education Association, hereafter Association, and West DePere School District, hereafter District or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association requested, and the District concurred, in the appointment of a Wisconsin Employment Relations Commission staff Arbitrator to hear and decide the instant dispute. The undersigned was so appointed. The hearing was conducted in West DePere, Wisconsin, on January 31, 1996, and February 1, 1996. The hearing was transcribed and the record was closed on May 12, 1997, upon receipt of post-hearing written argument and the transcript.

ISSUE

The Employer's statement of the issue:

Did the District violate the contract by availing itself of its rights under Wisconsin

Statute 115.86 to participate in the Brown County Handicapped Children's Education programs for children with exceptional education needs?

The Grievant frames the issue as follows:

Did the District violate the collective bargaining agreement in the manner in which it availed itself of the opportunities under Section 115.86 to participate in the Brown County Handicapped Children's Education Board programs for children with exceptional needs?

The Arbitrator adopts the following statement of the issue:

Did the District's participation in the Brown County Handicapped Children's Education Board (BCHCEB) program violate the collective bargaining agreement?

RELEVANT CONTRACT LANGUAGE

ARTICLE I - RECOGNITION

A. The Board recognizes the Association as the exclusive bargaining agent on wages, hours, and conditions of employment for all regular full and part time non supervisory certified professional teacher personnel, hereinafter referred to as "teacher(s)".

ARTICLE II - MANAGEMENT RIGHTS

A. The Board retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin and of the United States, including, but without limiting the generality of the foregoing, the right:

1. To executive management and to the administrative control of the school system and its properties and facilities, and the duties and responsibilities of its teachers.

2. To hire all teachers and subject to the provisions of law, to determine their qualifications and conditions for their continued employment, or their dismissal or demotion, and to promote, and transfer all such teachers.

3. To establish or eliminate grades and courses of instruction, including special programs, and to provide for athletic, recreational and social events for students, all as deemed necessary or advisable by the Board.

4. To decide upon the means and methods of instruction, the selection of textbooks and other teaching material, and the use of teaching aids of every kind

and nature.

5. To determine class schedules, the hours of instruction, and the duties, responsibilities, and assignments of teachers with respect thereto, and with respect to administrative and non teaching activities, and the terms of employment.

B. The exercise of the foregoing power, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules and regulations, and practices in furtherance thereof and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes Section 111.70 and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

...

ARTICLE VII - GRIEVANCE PROCEDURES

A. Definition: a grievance shall be defined as a claim by the bargaining unit representative of a teacher or teachers regarding the interpretation or application of hours, wages, and working conditions as stated by any provision of this Agreement.

...

ARTICLE XV - ASSIGNMENTS, TRANSFERS, REASSIGNMENTS, AND STAFF REDUCTION

A. Assignments

...

2. Teaching Conditions

...

e. Of the work day for Middle School teachers in grades 6-8, a team common planning time, a personal planning time (continuous and equivalent to class periods of at least 40 minutes), shall be provided outside of a 45 minute duty-free lunch period. Student contact time shall not exceed 315 minutes daily. Student contact time is defined as instruction, advisor-advisee, guided activity, study halls, or assigned duty such as lunchroom, hall, gym, bus, or playground.

...

ARTICLE XXII - JOB-SHARING

A. Job-sharing shall be defined as two teachers voluntarily filling one full time position. Job-sharing is not to be confused with part time employment.

1. Job-sharing shall be limited to classroom teachers in grades Kindergarten and 4-12.

2. Teachers desiring job-sharing status will so request, in writing, no later than January 15 of the preceding school year. If approved, the position continues for the succeeding year unless both job-sharers mutually agree to discontinue job-sharing. Requests for continuation will be acted upon each year. Approval or disapproval of such requests or continuations rests solely with the Board and will be given by the Board by April 15.

3. Teachers sharing the position will assume all responsibilities of that position including but not limited to duty periods or assignments, co-curricular assignments, in-service days, parent conference days, faculty meetings, and department meetings.

4. Salary, fringe benefits, leaves, and seniority will accrue in direct proportion to the amount of time worked.

5. The teachers requesting and approved for job-sharing must agree to return to full time status for the term if one of the participants in the shared-job is unable to continue and a qualified person cannot be found to assume the job-share position.

6. In the event of lay-off, staff reduction, or denial of a job-share renewal request, job-sharers shall retain the rights governed by Article XV of the Master Agreement.

7. Shared-job holders shall not accept additional outside employment that would affect their ability to fulfill their responsibilities in the job-share position.

BACKGROUND

At all times material hereto, Toni Etter, hereafter the Grievant, has been employed by the District as a full-time teacher. In August of 1993, the Grievant was notified that she would teach LD kindergarten and first grade students at the Lincoln Elementary School in the morning and that she would teach LD sixth grade students at the middle school in the afternoon. During the 1993-94 school term, the Grievant serviced middle school LD students by pulling them out of their regular education classes.

During the 1994-95 school year, the Grievant was assigned to work in an elementary school in the morning and in a middle school in the afternoon. During the morning, the Grievant worked solely with LD students. During the afternoon, the Grievant provided special education services to sixth grade LD, CD, and ED students who were "included" in a regular education classroom at a middle school. During the morning, these sixth grade special education students were serviced by Dennis Persick, an employe of Brown County Handicapped Children's Education Board (BCHCEB).

Under the "inclusion" program, the sixth grade special education students were serviced primarily within the regular education classroom. At all times material hereto, the Grievant has been certified as an LD teacher and Persick has been certified as a CD teacher.

On February 7, 1995, the Grievant filed a grievance which alleged the following:

Statement of grievance (Please be clear and concise in your statement of fact.)

West DePere School has contracted with Brown County Handicapped Schools for CD teachers in the elementary schools. The L.D. and E.C. teachers are hired by W. DePere Schools and represented by the W.DePere Education Association. There has been mutual agreement between the L.D. and C.D. teachers to assist/help each other in the past. Recently, the C.D. teacher has began scheduling conferences and programming for L.D. students without the mutual consent or input of the L.D. teacher. Mr. Persick (C.D.) and Mrs. Etter (L.D.) have no shared time which has created many communication problems. Mrs. Etter's concerns have been ignored and Mr. Persick has been included in decisions previously made by W.DePere hired staff. Clarification of the present positions are necessary since a "job sharing" position is being created without the mutual agreement of the W. DePere Education Association.

The District's Step 1 response indicated that Persick and the Grievant were to reserve 7:45 a.m. to 8:00 a.m. for daily telephone conferences. Thereafter, the grievance was amended by correcting the specific sections of the contract alleged to have been violated. The original and the amended grievance sought the same relief, i.e., "Clarification of positions, bargained with W. DePere Education Association, opportunities for communication." The grievance, as amended, was denied by the District's Board of Education in a letter dated July 18, 1995.

POSITIONS OF THE PARTIES

Position of the Grievant

For many years, the District has contracted with BCHCEB to provide CD and EEC

services to the District. District teachers and BCHCEB teachers have worked together without complaint from the Association.

The Grievant and Persick, together, filled a single full-time sixth grade special education position at the Middle School. By not assigning the Grievant to this sixth grade special education position, the District has violated the job sharing provisions of the collective bargaining agreement. By assigning LD and ED work to Persick, the District has violated Sec. 115.86, Stats.

For the first time during the 1994-95 school year, BCHCEB teachers were assigned, or engaged in, job duties which historically had been performed by District teachers. Additionally, the Grievant and Persick were assigned to perform work for which they were not certified. By this conduct, the District has violated the Recognition clause and the Management Rights clause of the parties' collective bargaining agreement.

The District failed to bargain changes implemented in the inclusion program. By this conduct, the District has violated Sec. 111.70, Stats.

The District has violated the agreement and the grievance should be sustained. The District should return to the previous program or bargain with the Association over changes implemented with the inclusion program.

Position of the District

Article I, Subsection A, of the collective bargaining agreement does not bar the District from participating in the Brown County Handicapped Children's Education Board programs. The controlling provision, Article II, Management Rights, clearly reserves to the District the right to subcontract for services. No provision of the contract specifically states that management is required to offer work to bargaining unit members prior to contracting with BCHCEB to provide the services.

Under Article XXII, two District teachers must volunteer to job share and the District must approve the job sharing. The arrangement between the Grievant and Persick is not job sharing within the meaning of Article XXII.

Neither the Grievant, nor any other teacher, is teaching outside of the teacher's certification. The DPI clearly permits special education teachers to provide special education services to all special education students.

The District has been responsive to the Grievant's concerns. There is no evidence that there was a request to bargain implementation of the new inclusion program. More importantly, there is no duty to bargain since the District's Management Rights clause provides the District with the right to establish an inclusion program. The District asks the arbitrator to dismiss this grievance.

DISCUSSION

The grievance, as filed, is broader than the issue which was presented to the arbitrator at hearing. While many of the Grievant's arguments may be germane to the original grievance, they are not germane to the issue presented to the arbitrator at hearing. The arbitrator has limited her discussion to those arguments which are relevant to the determination of whether or not the District's participation in the BCHCEB program violated the collective bargaining agreement.

Article II, Management Rights, Section A, recognizes that management has the right "to decide upon the means and methods of instruction . . ." The decision to contract with BCHCEB for professional teaching services is a decision on the means and methods of instruction. The District acted in a manner consistent with its Article II, Section A, Management Rights, when it contracted with BCHCEB to have Persick provide special education services to District students.

Article II, Management Rights, Section A, recognizes that management has the right "to determine . . . the duties, responsibilities, and assignments of teachers . . ." The District acted in a manner consistent with its Article II, Section A, Management Rights, when it (1) assigned the Grievant to provide LD services to elementary students in the morning and to provide special education services to sixth grade CD, ED, and LD students in the afternoon and (2) when it assigned Persick to provide special education services to sixth grade CD, ED and LD students in the morning.

Article II, Management Rights, Section B, provides that the management rights enumerated in Section A "shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes Section 111.70 and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States." Relying upon this language, the Grievant argues that the District has violated the collective bargaining agreement by violating Sec. 111.70, Stats.; Sec. 115.86, Stats.; Sec. 121, Stats.; and Chapter PI 8.01 of the Wisconsin Administrative Code.

The Grievant argues that the District violated Sec. 111.70, Stats., because it failed to bargain changes implemented in the inclusion program, including such changes as the assignment of Persick to service LD and ED students. The inclusion program was implemented at the start of the 1994-95 school term, at a time in which the 1994-95 collective bargaining agreement was in effect. Assuming arguendo, that the District was required to bargain over changes implemented in the inclusion program, the District's statutory duty to bargain would be triggered by an Association request to bargain. CITY OF KAUKAUNA (FIRE DEPARTMENT), DEC. NO. 27027-A (NIELSEN, 8/92)

At the time that the Grievant submitted her grievance of February 7, 1995, the Grievant was the President of the West De Pere Education Association (WDPEA). The grievance indicates that the grievance was filed on behalf of the Grievant and the WDPEA. The grievance

does not expressly state that the Association is requesting to bargain over changes implemented in the inclusion program. Nor can such a demand be reasonably implied from the fact that the relief sought is "Clarification of positions, bargained with W. DePere Education Association, opportunities for communication." The Grievant's letter of April 11, 1995, which the Grievant agrees contains her proposal for resolving the grievance, does not contain any Association request to bargain changes in the inclusion program. Nor, contrary to the argument of the Grievant, does the Grievant's testimony establish that there was an Association request to bargain changes implemented in the inclusion program.

In summary, it is not evident that the Association made a request to bargain changes implemented in the inclusion program. Thus, there is no merit to the Grievant's argument that the District has violated Sec. 111.70 by failing to bargain changes implemented in the inclusion program.

The testimony of the District's witnesses, as well as the information contained in DPI Bulletins No. 93.3 (Employer Exhibit #8) and 95.3 (Employer Exhibit #10), demonstrates that the Grievant's LD certification and Persick's CD certification permits each to provide exceptional education teaching services to sixth grade LD, ED, and CD students. There is no reasonable basis to conclude that the provision of exceptional education teaching services does not include "pulling out" and attending to any special education student who is disruptive. By assigning the Grievant and Persick to provide special education services to sixth grade CD, LD and ED students, the District has not violated Sec. 121, Stats., or Chapter PI 8.01 of the Wisconsin Administrative Code.

Section 115.86 (2)(c), Stats., states, inter alia, that "A school district shall be included under such County program only to the extent approved by formal action of the school board." The Grievant argues that the District violated this statute because the District's contract with BCHCEB limits BCHCEB services to mentally retarded students and the support services which are necessary for these students.

The District's contract with BCHCEB is a contract to provide self-contained units to service mentally retarded students and to provide support services to these students. This contract, however, does not contain any language which prohibits BCHCEB from providing other types of educational services to the District.

More importantly, a finding that the District's school board did not take "formal action" to contract with BCHCEB to provide the services which were provided by Persick, would not establish a violation of the collective bargaining agreement. The reason being that Article II, Section B, does not require the District to exercise its Article II, Section A, rights in conformance with Sec. 115.86. The requirement of conformance "with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States" is only applicable to other provisions of the contract when these provisions are relied upon to limit an Article II management right.

Article I, Recognition, Section A, recognizes that the Association is the exclusive bargaining agent on wages, hours and conditions of employment for all regular full and part-time certified professional teacher personnel. While not expressly stated, the referenced "teacher personnel" are employees of the District. To hold otherwise, would be to ignore the fact that the District's collective bargaining obligations do not extend to individuals who are not employees of the District.

By recognizing the Association as the exclusive bargaining agent for certified teachers who are employed by the District, the District has not limited its Article II right to contract with BCHCEB to provide teaching services to the District. Such a conclusion is supported by the fact that, for over twenty years, the District has contracted with BCHCEB to provide a variety of teaching services, e.g., CD, EEC, speech, and language, without complaint from the Association.

Article I recognizes that bargaining unit members will be certified. The term "certified" is included in this provision for the sole purpose of identifying the District employees who are represented by the Association. Article I does not contain any language which precludes the District from requiring a special education teacher who is certified in CD, such as Persick, to provide special educational services to LD or ED students, or from requiring a special education teacher who is certified in LD, such as the Grievant, from providing special educational services to CD or ED students.

Article XXII provides a mechanism by which two District teachers voluntarily fill one full-time position. Article XXII does not require the District to create a full-time position.

The District did not create one full-time sixth grade special education position at the middle school. The Grievant occupied a full-time position comprised of elementary and middle school assignments. The Grievant and Persick were not job sharing within the meaning of Article XXII. The District did not violate Article XXII when it assigned Persick to provide special education services to the sixth grade in the morning and assigned the Grievant to provide special education services to the sixth grade in the afternoon.

The Grievant argues that, at times, she worked without a lunch period, had a partial lunch period, lost prep time, or exceeded the 315 minutes of student contact time required by Article XV, A, 2(e). Neither the Grievant's testimony, nor any other evidence, demonstrates that the District's participation in the BCHCEB program deprived the Grievant of her contractually required lunch or prep period, or caused the Grievant to exceed 315 minutes of student contact time.

Historically, BCHCEB teachers primarily serviced CD and EEC students. The Grievant argues that this "past practice" limits the District's right to contract with BCHCEB. A "past practice" is not a "specific and express" term of the agreement. Accordingly, it does not serve to limit the District's Article II, Section A, rights. The provisions of the contract relied upon by the Grievant do not specifically and expressly limit the District's participation in the BCHCEB program to services historically performed by BCHCEB or to services not previously performed

by bargaining unit employes.

The Grievant's concerns regarding the appropriateness of an individual student's IEP and the appropriateness of the District's implementation of an individual student's IEP must be raised in a forum other than grievance arbitration. The undersigned has neither the expertise, nor the authority, to respond to these concerns.

In conclusion, Article II of the collective bargaining agreement provides the District with authority to contract with BCHCEB to provide educational services to the District. It is not evident that the District has exercised this authority in a manner which violates any "specific and express term" of the agreement or Wisconsin Statutes Section 111.70.

AWARD

1. The District's participation in the Brown County Handicapped Children's Education Board (BCHCEB) program did not violate the collective bargaining agreement.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 27th day of February, 1998.

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

CAB/mb
5638.WP1