

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

HORICON EDUCATION ASSOCIATION

and

HORICON SCHOOL DISTRICT

Case 21
No. 58144
MA-10853

(Brian Gutche Grievance)

Appearances:

Mr. Armin Blaufuss, UniServ Director, WinnebagoLand UniServ, on behalf of the Horicon Education Association.

Mr. Barry Forbes, Staff Counsel, Wisconsin Association of School Boards, on behalf of the Horicon School District.

ARBITRATION AWARD

The Horicon Education Association, hereinafter the Association, requested the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the Horicon School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on January 12, 2000, in Horicon, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by January 19, 2000. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues, but were unable to agree upon a statement of the substantive issue.

The Association offers the following statement of the issues:

Has the Horicon School District violated the Negotiations Agreement between it and the Horicon Education Association by failing to assign Brian Gutche to a 7th hour study hall at the High School?

If so, what should the remedy be?

The District would state the issue as follows:

Did the Horicon School District violate the collective bargaining agreement at Article IX.C. of the collective bargaining agreement by not assigning Gutche to a high school study hall to allow him a full time teaching assignment.

The parties have left it to the Arbitrator to frame the issues to be decided. Those issues are as follows:

Did the Horicon School District violate Article IX of the parties' Negotiations Agreement when it did not assign the Grievant, Brian Gutche, to the 7th hour study hall at the High School the second semester of the 1999-2000 school year? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Negotiations Agreement have been cited:

ARTICLE III --- MANAGEMENT RIGHTS CLAUSE

Nothing in this Article shall interfere with the right of the employer, in accordance with applicable law, rules and regulations to:

1. Carry out the statutory mandate and goals assigned to the School District utilizing personnel, methods and means in the most appropriate and efficient manner possible.

2. Manage the employees of the School District: to hire, promote, transfer, assign or retain employees in positions within the School District and in that regard to establish reasonable work rules.
3. Lay off employees in the event of lack of work or funds or under conditions where continuation of such work would be inefficient and non-productive.
4. Subject to provisions and conditions of this agreement.

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ARTICLE IX --- STAFF REDUCTION

- A. The Association recognizes the Board's right as stipulated in Article III, Management Rights. The Board recognizes the Association's responsibility to bargain an orderly layoff and recall procedure. Eliminating of teaching positions and reduction in hours in any position for the forthcoming school year shall be covered by this article.

B. LAYOFF PROCEDURE

Teachers shall be laid off by teaching assignment in inverse order of their initial employment. A list specifying the seniority of each teacher shall be prepared by the Association. A similar updated list shall be supplied annually prior to November 30 for Board verification. The Board shall verify the list in writing no later than December 30.

1. The Seniority List supplied by the Association shall include rank and name of teacher, first day of work (or other date-criteria if necessary), years of seniority, current teaching assignment and eligible bump area.
2. The first day of work will determine seniority. When equal seniority exists, date of administrative commitment, date of Board action or date of candidate inquiry in that order will determine seniority.
3. Partial teaching experience will be pro-rated to full year equivalency for seniority ranking.

4. The annual seniority list presented by the Association will update the rank, name and seniority column. It will also update the eligible bump area column as it pertains to reassigned teachers only.
5. Eligible bump area determination of new staff members will be consistent with the existing bump area columns.
6. Eligible bump areas shall be based on Department of Public Instruction certifications held by teachers as of October 1 annually and the teachers having experience in that certification within the last five (5) years.

C. RECALL PROCEDURE

1. Certified teachers shall be recalled in inverse order within the eligible bump area of their being laid off and all benefits to which recalled teacher was entitled at the time of being laid off including but not limited to incremental steps on the salary schedule and accumulated sick leave shall be restored in full upon re-employment within the recall period.
2. The recall period shall be any time within two years after the beginning of the next school year following a layoff.
3. Laid off teachers may continue group insurance coverages available through the Board, during the recall period by reimbursing the Board for premium costs, if such coverage can be provided by the carrier.
4. As openings develop through the recall period, certified laid off teachers shall be notified by registered mail to their last address on record and be given first preference, provided a written affirmative reply is received by the Superintendent within fifteen (15) days of issuing such notice.
5. A full time teacher whose position is reduced in hours shall be restored to full time if work becomes available within his/her eligible bump area(s).

D. BUMPING PROCEDURE

A teacher affected by layoff shall be eligible to bump a position within the District as stipulated by the seniority list, eligible bump area column. Said teacher shall bump from the bottom of the list within eligible bump area and shall be eligible to bump into the least senior teacher's position for whatever part is necessary in order to maintain full time status.

. . .

BACKGROUND

The parties entered into the following stipulations:

1. There are no procedural issues.
2. The District admits that study halls have been assigned on the basis of schedule availability.
3. Brian Gutche has been assigned teaching responsibilities in grades K-8 for the last 5 years (1994-95 through 1998-99).
4. Brian Gutche has been assigned 7th and 8th hour study halls at grades 9-12 for the last 5 years (1994-95 through 1998-99).
5. A 1st year teacher, Carol Koblitz, is assigned a study hall for the second semester (1999-2000) during 7th hour at the high school.
6. Elementary teachers Kris Duhr (1st grade), Molly Finkler (kindergarten), Lana Wheeler (kindergarten), and Charlene Tessenske have each confirmed that a change in their P.E. schedule (permitting Brian Gutche to assume the 7th hour study hall assignment at the high school for the second semester) would not be disruptive or interfere with their schedule.
7. If Brian Gutche had been assigned to 7th hour study hall at the high school for the second semester and the changes made in number 6 above, Brian would have been at 100% for the second semester of the 1999-2000 school year.

8. Seniority lists are annually prepared by the Association as provided for in the Negotiated Agreement. The seniority lists are given to the District. The seniority lists are used in layoff and recall decisions.

Since the 1994-95 school year the seniority list has listed the following as regards the Grievant's current teaching assignment ("teaching"), areas of certification ("assignment on"), and area(s) the employe may bump into ("eligible bump area"):

TEACHING:	P.E. 1-8, STUDY HALL 9-12
ASSIGNMENT ON:	P.E. 1-12, COACHING
ELIG. BUMP AREA:	PHYSICAL EDUCATION 1-12

The 7th and 8th hour study halls at the high school were from 1:06 p.m. – 2:42 p.m. for the school years 1994-95 through 1998-99. The Grievant is the least senior employe in his "eligible bump area". Due to revenue caps and declining enrollment, the Grievant was reduced to 83.6% FTE for the 1999-00 school year and has three kindergarten physical education (P.E.) classes and a first grade P.E. class from 1:10 to 1:40 (with a prep time during that period on Tuesdays), and prep time from 1:40 p.m. - 2:00 p.m. Monday through Friday, and is not assigned any study halls at the high school. The District Administrator testified that he advised the Grievant in April of 1999 that he was selected to be reduced and that there were enough high school teachers available to cover the high school study halls, so he would not get those assignments. The Grievant testified that at that time he believed more senior teachers would be assigned to the study halls and did not grieve.

After receiving the class schedule for 1999-2000 at the start of the new school year, the instant grievance was filed, asserting that the District had violated the Agreement by assigning a less senior teacher to the 7th hour high school study hall, that it had been the practice to assign study halls to a more senior teacher if that assignment would increase the teacher's percentage of employment, and further, that the Grievant had the right to be recalled to the study hall work. The grievance also stated that the Grievant's schedule could be arranged to permit him to take the 7th hour study hall at the high school and that this was acceptable to the elementary teachers who would be impacted by that change. The grievance alleged violations of Article VI – E and IX – C and requested that the Grievant be assigned the study hall for the second semester. The Grievant first requested that his 1:10 p.m. P.E. class be moved to 2:00 p.m. in order that he be available for the 7th hour (1:08 p.m. – 1:53 p.m.) study hall that was being covered by the less senior teacher. He later amended his request to a 2:05 p.m. start which he felt would permit him sufficient time to return from the high school. The Grievant obtained statements from the kindergarten and 1st grade teachers who would be affected that such a change would not be a problem for them. The request was denied.

The parties attempted to resolve their dispute, but were unsuccessful and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association believes that the District failed to consider the Grievant's seniority rights when it scheduled teacher assignments for the 1999-2000 school year. The District knew that it would continue to have 7th and 8th hour study halls at the high school for the 1999-2000 school year, and knew that it would need coverage for those study halls at the time it reduced the Grievant's contract to 83.6%, as well as when it finalized the schedule for 1999-2000 in late May or early June. It is further undisputed that after finalizing the scheduling needs for that school year, the District hired a first-year teacher and assigned her a 7th hour study hall at the high school for the second semester instead of the Grievant, who was "available" to take the study hall. The District could have scheduled four of the Grievant's elementary P.E. classes from 2:05 to 2:35 p.m., permitting him to assume the second semester 7th hour study hall. The District was put on notice early in the school year that this was an option.

Article IX of the Agreement obligates the District to reduce teacher contracts based on seniority. The approved seniority list acknowledges that the Grievant has a high school study hall assignment as part of his teaching load. The assertion that inclusion of the study hall assignments on the seniority list is irrelevant denies the reality of the assignment, and renders the inclusion of the study hall assignments meaningless. That inclusion is the result of unique circumstances, the Grievant being the only elementary member assigned study halls at the high school and the District's having annually approved the inclusion of the study hall assignment on the seniority list. Study halls provide schedule fillers after academic classes have been assigned and the question that must be answered in this case is who is to be assigned this work. While the District Administrator had no trouble confirming that the Agreement speaks to seniority, when asked whether a more senior high school teacher would be assigned a study hall over a less senior high school teacher, he absolutely avoided giving a definitive answer. The Association requests that an adverse inference be drawn from the District Administrator's response. As to the absence of the study hall in the "eligible bump area" on the seniority list, that area lists specific certification areas, and there is no specific certification for high school study hall. Thus, there is no "study hall 9-12" bump area. The contractual bumping procedure permits senior teachers to bump the "least senior teacher's position for whatever part is necessary in order to maintain full-time status." This applies to the specific certification areas and is not inconsistent with the District's testimony that study halls are assigned based on schedule availability.

Article IX requires layoff in the inverse order of employment, and the District admits that the reduction in staff provisions are based on seniority, yet a less senior teacher at the high school was assigned a second semester 7th hour study hall while the Grievant was reduced in time. The District's actions in denying the Grievant the assignment to the second semester study hall are arbitrary and/or capricious in that the District purposely ignored his seniority rights and his availability when filling the second semester 7th hour study hall. The District Administrator's testimony supports that conclusion. He testified that there were enough high school teachers available to fill the study halls, and yet at the time the Grievant was laid off, that was not true. The new teacher eventually assigned to the study hall was hired after the high school schedules were finalized. While the District Administrator testified that the District would follow the Agreement as far as seniority is concerned, he was unwilling to answer the question of who would get a study hall if there was only one study hall period available and there were two teachers with differing seniority who were available to take the study hall. In this case, there were no teachers less senior to the Grievant assigned to physical education and his teaching contract was therefore reduced. However, a less senior teacher was assigned to the second semester study hall for which the Grievant would have been available. His request that his afternoon schedule be adjusted was denied due to insufficient time to travel between the high school and the elementary school, but those elementary classes could have been moved back to 2:05 p.m. or to 2:10 p.m., rather than 2 p.m., in order to provide sufficient travel time. His request was also denied due to hallway congestion; however, starting classes later would have reduced or eliminated congestion. The District Administrator also testified that his request was denied as a result of the decision not to schedule classes in the school's gymnasium after 2:30 p.m. due to middle school co-curricular activities. Those activities do not begin until 2:45 p.m. or later, and involve between 20 and 45 students. While those activities involve changing in the locker room, the elementary P.E. classes do not. Further, any congestion in the hallways is mitigated by a divided staircase. Also, both last year and this year elementary P.E. is scheduled to end at 2:45 p.m. on Mondays and from 1994-95 through 1997-98 elementary P.E. ended as late as 3:05 p.m. Finally, the Association notes that a Spanish teacher who teaches at the elementary school in the mornings and who has two afternoon Spanish classes at the high school, was assigned a sixth hour study hall at the high school, while her predecessor, who was full-time, had not been assigned any study hall. Thus, the Grievant was treated differently and in an arbitrary and capricious fashion.

The Association concludes that the Grievant was available for second semester 7th hour study hall and, consistent with the District's position, should have been assigned to the study hall. Further, the District concedes that the Agreement speaks to seniority and that it would follow seniority in that regard, yet its actions advantaged a first-year teacher over a more senior teacher, thus violating the Grievant's seniority rights. Finally, the District's explanation for its actions illustrate that they were indeed arbitrary or capricious. The Association requests that the grievance be sustained and the Grievant be assigned to a second semester study hall and made whole for any losses.

District

The District asserts that as this is not a discipline case, the burden of proof rests upon the Association. Therefore, the Association must prove that the District's refusal to assign the Grievant to a second semester 7th hour study hall violates the Agreement. The District concedes that the Grievant has been assigned high school study halls from 1994-95 through 1998-99, and that teachers are to be laid off by seniority and recalled in inverse seniority to teaching positions for which they are qualified and available. The District disputes the assertion that the Agreement and past practice require that laid off employees who have held study hall assignments be allowed to bump into and/or be recalled to the study hall assignments of less senior teachers. It also disputes that the Grievant's unavailability for the second semester 7th hour high school study hall was due to arbitrary and capricious actions by the District in assigning him other duties at that time. The District disagrees that it should be forced to rearrange the elementary physical education schedule to permit the Grievant to take the study hall.

Article III, Management Rights, at paragraph 3, includes the right to: "lay off employees in the event of lack of work or funds or other conditions where continuation of such work would be inefficient and non-productive." That provision permits the District to determine that the assignment of study halls to a K-8 teacher is "inefficient and non-productive" when high school teachers are available. Those management rights are only restricted by the express terms of the Agreement.

Of the Agreement's express terms, only Article IX, Staff Reduction, gives employees any seniority rights. Section B states that, "Teachers shall be laid off by teaching assignment in inverse order of their initial assignment." The Grievant is the least senior physical education teacher. Article IX, Section B, states that, "A teacher affected by layoff shall be eligible to bump a position within the District as stipulated by the seniority list, eligible bump area column." The eligible bump area listed for the Grievant on the 1998-1999 seniority list is "physical education 1-12" and does not include any study halls. Article IX, Section C, 1, states, "Certified teachers shall be recalled in inverse order within the eligible bump area of their being laid off. . ." As the Grievant's eligible bump area does not include study halls, he has no contractual right to be recalled to study halls. The contract language is clear and unambiguous in terms of who gets laid off and where that person has bumping and recall rights.

As to past practice, Association witness Kurcynski testified that the Grievant should get the study hall based on the practice that he was assigned it for the last five years. Both the District Administrator and the high school principal testified that the Grievant was assigned study halls in those years because there were not enough high school teachers available to cover study halls. There is no evidence of a practice of assigning study halls on the basis of

seniority when a teacher is facing a layoff or a reduction in hours. Neither Kurcynski nor the Grievant testified to such a practice. While the Association asked both the District Administrator and the principal if such a practice existed, both testified that high school study hall assignments are made on the basis of who is available for the hour in question, and that seniority is not an issue. While the Association asks that the arbitrator make an adverse inference based on the District Administrator's reluctance in answering that question, that is not sufficient to meet the burden of proof. The only evidence as to layoff was the Grievant's layoff in 1993-94 and the District Administrator testified without contradiction that the Grievant was not permitted to bump into a study hall of a less senior teacher in that layoff. Thus, the Association has failed to prove that study halls are assigned by seniority to avoid layoffs or a reduction in hours.

Even assuming *arguendo* that the Association had proved that the Grievant had a right to demand that he be assigned to a study hall of a less senior teacher, he still would have no right to the second semester 7th hour high school study hall as he was not available. The Grievant has kindergarten and first grade P.E. classes four days a week during that time period. While the Association asserts that the District's assignment of the Grievant to those classes during that time was arbitrary and capricious, the evidence is to the contrary. He was assigned those classes because classes had to be scheduled at some time during the day, scheduling the classes at either 1:10 p.m. or 2:00 p.m. worked equally well for the kindergarten and the first grade teachers, if the Grievant were assigned a study hall at the high school from 1:08 through 1:53 p.m. and the P.E. classes at his K-8 school at 2:00 p.m., he would not have enough time to travel between schools, and if the Grievant were assigned a P.E. class from 2:00 to 2:30 p.m., first grade and kindergarten students would be moving in the hallway back to their classes at the same time that the second and fourth grade students were moving in those same halls and the middle school students were being dismissed, creating heavy traffic. The Grievant could not be assigned a P.E. class starting later than 2:30 p.m., because the gym was reserved for middle school activities beginning at that time. Thus, the District had a reasonable basis for its decision to schedule the Grievant's kindergarten and first grade P.E. classes from 1:10 to 1:40 p.m. Accordingly, the Grievant was unavailable for the second semester 7th hour study hall. While the Association would argue that the kindergarten and first grade P.E. classes could have been moved to 2:05 p.m. to 2:35 p.m., alleviating the hallway traffic concerns, and that the middle school students do not need the gym until 2:35 p.m., that does not change the fact that the District had a reasonable basis for the schedule it adopted.

The District concludes that the Association has failed to prove that the Grievant had a right to demand that study halls be assigned by seniority, and has not proved that the District's scheduling was arbitrary and capricious. Thus, it requests that the grievance be denied.

DISCUSSION

The Association is asserting that the Grievant had seniority rights to the second semester 7th hour study hall at the high school based upon a practice of assigning study halls to the more senior teacher if the teacher is available and if it is necessary in order to make that teacher full time, and based upon the unique situation of having the study halls listed as part of the Grievant's teaching assignment on the seniority list. The Association asserts that the District could have arranged the Grievant's class assignment and schedule such that he would have been available for the second semester 7th hour high school study halls.

As evidence of the existence of the alleged practice, the Association offers the assignment of the high school study halls to the Grievant the previous five years and the District Administrator's hesitation in answering a hypothetical question on cross-examination. That evidence is not sufficient to establish such a practice exists. As to the past five years, the unrebutted testimony of the High School Principal, David Kotewa, the individual who is responsible for developing the teachers' schedules/assignments, was that seniority has never been a consideration in assigning study halls; rather, it has been based on who is available after all of the academic assignments have been made. He testified that in the prior years, there were no high school teachers available to cover the 7th and 8th period study halls at the high school, and that is why the Grievant was assigned to them. Both District Administrator Ballwahn and Kotewa testified that for several reasons there were sufficient high school teachers available to cover all of the high school study halls for the 1999-2000 school year. Ballwahn also testified that although the individual assignments had not yet been made, it was known by April of 1999 from the schedule of classes that there would be high school teachers available and that the Grievant was advised of this along with his reduction in hours. Ballwahn further testified that teachers have never been permitted to bump into study halls.

Even if this Arbitrator would be willing to draw an adverse inference based solely upon a witnesses' hesitation in answering, which he is not, (there being too many possible explanations for the hesitancy) the unrebutted testimony of Ballwahn and Kotewa would overcome such an inference and also sufficiently explains what occurred the past five years with regard to the Grievant.

The listing of the study halls on the seniority list as part of the Grievant's teaching assignment is also not sufficient to establish that he has seniority rights to the study hall. Admittedly, the Grievant is unique in that he was the only elementary teacher assigned to a high school study hall and the only teacher in the District that had a study hall listed as part of his teaching assignment on the seniority list. The fact that study halls are not listed for other teachers, however, would indicate that study halls are generally not considered part of a teacher's teaching assignment or eligible bump area for layoff and recall purposes. The Association created the seniority list and the District apparently approved it, but no one

explained who made the decision to list the study halls as part of the Grievant's assignment or whether any discussions were had in that regard and/or as to the significance to be given it. Further, the parties' Agreement, Article IX, B, 1, provides that "Teachers shall be laid off by teaching assignment in inverse order of their initial employment. . ." Article IX, D, Bumping Procedure, expressly limits a teacher's bumping rights to "a position within the District as stipulated by the seniority list, eligible bump area column." Similarly, Article IX, C, Recall Procedure, Section 1, states, "Certified teachers shall be recalled in inverse order within the eligible bump area of their being laid off. . ." Section 5 of that provision similarly states, "A full time teacher whose position is reduced in hours shall be restored to full time if work becomes available within his/her eligible bump area(s)." The foregoing makes clear that it is assumed the teaching assignment listed and the eligible bump area listed for the teacher line up, i.e., the teaching assignment listed falls within the eligible bump area listed, and for everyone except the Grievant, that is the case. Thus, it is not clear why the study halls were listed on the seniority list for the Grievant or what that means, especially since study halls are not listed under his "eligible bump area".

Given the lack of any explanation as to why the study halls were listed as part of the Grievant's teaching assignment on the seniority list, the omission of study halls under the Grievant's eligible bump area, as well as the conclusion that study halls are not generally considered to be included in either, there is not sufficient basis for concluding that the parties intended to confer unique seniority rights upon the Grievant with regard to the high school study halls.

As to whether the District could have arranged or rearranged the Grievant's teaching schedule to make him available for the second semester 7th hour high school study hall, since it is concluded that the Grievant did not have seniority rights to exercise with regard to the study halls, the District was not required to arrange the Grievant's schedule so as to make him available for the study hall, even if it were possible to reasonably do so. It is noted, however, that the District presented a reasonable basis for scheduling the Grievant as it did, even though the schedule requested by the Grievant might also have been reasonable.

Thus, it is concluded that the District did not violate the Grievant's rights under Article IX of the parties' Negotiations Agreement when it did not assign him to the 7th hour high school study hall for the second semester of the 1999-2000 school year.

Based on the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 10th day of March, 2000.

David E. Shaw /s/

David E. Shaw, Arbitrator

