BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN FEDERATION OF TEACHERS, LOCAL 395
AFL-CIO

and

WISCONSIN INDIANHEAD TECHNICAL COLLEGE

Case 64
No. 58083
MA-10837

(Terri Klimek Grievance)

Appearances:

Mr. William Kalin, Staff Representative, Wisconsin Federation of Teachers, AFL-CIO, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Stephen L. Weld,** appearing on behalf of the College.

ARBITRATION AWARD

The Wisconsin Federation of Teachers, Local 395 (herein the Union) and the Wisconsin Indianhead Technical College (herein WITC or the Employer) were parties to a collective bargaining agreement, dated February 20, 1997, covering the period from July 1, 1996, through June 30, 1998, and providing for binding arbitration of certain disputes between the parties. On October 18, 1999, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration as the result of the layoff of Terri Klimek from her position as a counselor at WITC's Superior campus and requested the appointment of a member of the WERC staff to arbitrate the issue. At the time of the layoff the parties were in a hiatus period between contracts, but the Employer did not dispute the arbitrability of the matter. The undersigned was designated to hear the dispute and a hearing was conducted on February 10, 2000. The proceedings were transcribed and briefs were filed on April 17, 2000.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties were unable to stipulate to an issue. The Union would frame the issue as follows:

> Did the Employer violate either Article IV, Section T, Staff Reduction or Article IV, Section A, Discipline and Discharge, when it issued the layoff notice to the Grievant and the Employer's subsequent action forcing the Grievant to transfer from her counseling position?
>
> If so, the Grievant is to be offered the first available counseling position at the WITC – Superior campus.

The Employer would frame the issue as follows:

> Did the Employer violate Article IV, Section T of the collective bargaining agreement when it reduced a counseling position, issued a layoff notice to the Grievant and allowed her to bump into an instructional position?
>
> If so, what is the appropriate remedy?

The arbitrator adopts the issue as framed by the Employer as most accurately addressing the circumstances of the case.

PERTINENT CONTRACT PROVISIONS

ARTICLE IV – WORKING CONDITIONS

Section S. Management Rights

. . .

2. Board Functions: The Board possesses the sole right and responsibility to operate the school system and all management rights repose in it, subject to the express provisions of this agreement. These rights include, but are not limited to the following:

. . .

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

h. The right to relieve employees from duty for lack of work.

i. 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 employment performance.

3. Exercise of Management Rights: The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board; the adoption of policies, rules, 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.

Section T. Staff Reduction

1. Whenever it becomes necessary to decrease the number of employed teachers who have completed a probationary period by reason of a decrease in pupil population within a specific campus, or any other reason, employees shall be laid off in the inverse order of seniority by program (i.e., machine shop, accounting, etc.), or major instructional area, and by campus. Notice of such layoff shall be sent prior to the July 1 preceding the school year in question by registered mail, return receipt requested, to the last known address of the employee.

A teacher who has the least seniority in the program or in a major instructional area to be reduced may transfer to another program or major instructional area in which they are certified and there is a less senior employee in that program or instructional area.

Such teachers who have completed the probationary period shall be reinstated in that campus in inverse order of their being laid off, if qualified to fill the vacancies.

The seniority these teachers have accumulated shall be retained, but shall not accrue from time of lay off. Seniority for the purpose of recall from lay off shall be retained for a period not to exceed two (2) years. All laid off teachers have a period of thirty (30) days to accept or reject a recall to work and during this time no new permanent appointment may be made to fill that vacancy.

. . .

BACKGROUND

The Employer is a state-operated technical college, which maintains four campuses in Northwestern Wisconsin, in the cities of Ashland, New Richmond, Rice Lake and Superior. The Grievant, Terri Klimek, is a member of the bargaining unit represented by the Union and, between 1996 and 1999, was employed by WITC as one of two counselors at its Superior campus.

On January 11, 1999, David Hildebrand, President of WITC, notified the Grievant that she would be laid off at the end of the 1998-99 school year due to a drop in enrollment, pursuant to Article IV, Section T of the collective bargaining agreement. (Jt. Ex. 2) 1/ On February 3, 1999, the Grievant was informed by Wayne Sabatke, Vice President of Human Resources, that she had bumping rights in the study skills instructional area and was given until March 5, 1999, to either exercise her bumping rights or accept the layoff, which would allow her to retain recall rights to her former position for two years. (Jt. Ex. 3) The Grievant requested, and received, two extensions of the deadline for her decision, but ultimately decided on April 13 to exercise her bumping rights into a position as a Student Success Center Instructor for the 1999-00 school year, but reserved her recall and bumping rights. (Jt. Ex. 7) Sabatke thereupon informed her that, as a full-time employe, she would not have bumping or recall rights to any future counseling positions, but could apply for any openings. (Jt. Ex. 8)

1/ The layoff notice doesn't specify whether the layoff would be total or partial, however, Jann Brill, the Superior campus Administrator, testified that the reduction was to a half-time position, which was offered to the Grievant. The Grievant ultimately declined in order to retain full-time benefits.

On July 13, 1999, the Union and the Employer entered into an agreement reclassifying three Student Services Specialists as counselors, and adding them to the bargaining unit as follows:

UNIT CLARIFICATION STUDENT SERVICES SPECIALIST AGREEMENT

To resolve the management/faculty issue on work parameters for the Student Services Specialist position, the following resolutions are agreed to:

1. The Student Services Specialists will be assigned to the position of counselor subject to the working parameters described in Article IV/Section H2 of the Faculty Master Contract.

2. Salary placement on the salary schedule will be based upon their experience as full-time counselor and educational preparation. Maximum placement will be step five (5).

3. The seniority date of the persons effected by this agreement will be the February 8, 1999 unit clarification decision date. This date established the start of a 3-year probationary period that ends February 8, 2002.

4. The position of Student Recruiter will be exempt from the faculty bargaining unit. This position will report to the Dean of Student Services and will not perform counseling functions. See attached job description.

5. The effective date of this agreement will be July 1, 1999.

. . .

This agreement was pursuant to a unit clarification decision issued by the Wisconsin Employment Relations Commission [WISCONSIN INDIANHEAD TECHNICAL COLLEGE, DEC. NO. 11380-C (WERC, 2/8/99)], wherein the Commission determined that the position of Student Services Specialist was properly included in the bargaining unit. One of the Student Services Specialists, Gary Gibson, was located at the Superior campus, and remained there as a counselor after the reclassification, which had the effect of increasing the number of counseling positions at the Superior campus from one and one-half to two and one-half. Although Gibson was classified as a counselor, however, he continued in his former duties, which primarily involved recruitment in the high schools located in the geographical service area of the Superior campus.

The Grievant became aware of Gibson's reclassification and, on July 21, 1999, she requested that she be reinstated to her former position, inasmuch as she had greater seniority than Gibson. (Jt. Ex 11) The Employer denied the request, but informed the Grievant that she would be considered for any future counseling openings. (Jt. Ex. 13) The Union grieved the original decision to layoff the Grievant, which the Employer denied. The parties followed the steps of the grievance procedure and the matter moved to arbitration. Additional facts will be referenced in the positions of the parties and the discussion section of the award.

POSITIONS OF THE PARTIES

The Union

The language of Article IV, Section T, Staff Reduction, states that staff reductions will be based upon need and for specific reasons. By agreeing to this language, the Employer accepted limitations upon its ability to layoff staff and the burden of justifying layoffs based upon specific criteria. When the Employer issued the Grievant's layoff notice on January 11, 1999, it specifically referenced declining enrollment as the basis for the decision. It is, therefore, incumbent upon the Employer to establish that enrollment had, in fact, decreased to a great enough degree to justify the Grievant's layoff. It has not done so.

The testimony of Perry Lindberg and Vasant Kumar, and Employer Exhibit 2 establish that the student population on the Superior campus throughout the 1998-99 school year was sufficient to justify two full-time counselors. Furthermore, even if there was a concern about enrollment in the fall 1998 semester, since layoff notices need not be given prior to July 1, the Employer could have waited through the spring 1999 semester, when student numbers were rising, to make the decision on reducing a counseling position for the 1999-2000 school year, at which point it was clear that at least two positions were needed. This can be seen by the fact that in July, 1999, the Employer reclassified Student Services Specialist Gary Gibson as a counselor and assigned him to the Superior campus.

Not only has the Employer failed to carry its burden, but the Union has established, to the contrary, that there was no basis for the Grievant's layoff due to declining enrollment. Rather, the Employer had ulterior motives for eliminating the Grievant's position and forcing her to bump into an instructional position. The Grievant testified that in August, 1998, she met with the Administrator of the Superior Campus, Jann Brill. At that time, Brill told the Grievant that she did not fit her (Brill's) image of a counselor, and strongly urged her to consider returning to being a special needs instructor. Later, in early 1999, but after receiving her layoff notice, the Grievant spoke to Brill again about the possibility of her position being restored at which point Brill told her the reduction was "a done deal" and that the Administrator would be watching her if she made trouble. This clearly displays the Employer's animus toward the Grievant and its desire to remove her from her counseling position.

The testimony of Vasant Kumar, the District Vice President, establishes another motive for the layoff. As a result of the unit clarification decision, the Employer needed to create a position for Gary Gibson within the bargaining unit. By laying off the Grievant, the Employer was able to reclassify Gibson as a counselor and retain him at the Superior campus.

It is clear that declining enrollment was only a pretext, and that the Employer was pursuing a separate agenda in laying off the Grievant. It did not wish to attempt to discharge the Grievant because it could not meet its burden under the just cause standard, so it adopted a specious rationale for its decision to lay her off, instead. This action does violence to the spirit and the letter of the collective bargaining agreement. It circumvents the just cause standard and undermines the Employer's commitment to layoff staff only when necessary. The grievance should be sustained, therefore, and the Grievant should be reinstated to her former position.

The Employer

Under Article IV, Section T, of the collective bargaining agreement, staff reductions may be based upon declining enrollment. Between the 1995-96 school year and the 1998-99 school year the number of Full-Time Enrollments at the Superior campus dropped from 547.38 to 462.53. Under the circumstances the Employer properly determined that staff reductions were necessary and was within its contractual rights in downsizing the counseling staff.

There is no support in the record for the Union's contention that the Employer had some other motivation for eliminating the Grievant's position. The Grievant was not personally targeted for layoff. This is demonstrated by the fact that several layoffs occurred on the Superior campus. Further, Vice President Kumar testified that when the decision to reduce staff was made, the Administration was unaware of which particular staff members would be affected.

The Grievant was informed that her position was being reduced to half-time in January. She was offered the option of accepting the half-time position, or bumping into a full-time instructional position, and asked to make her decision by March 26. That deadline was later extended to April 15. Although the contract doesn't establish a deadline for exercising bumping rights, the entire process must be completed by July 1. It is important to move the process along expeditiously, therefore, because the bumped employes also may have to make bumping decisions, which also are under the July 1 time constraint. Under the circumstances, the Grievant was given a reasonable amount of time to make her decision.

Once the Grievant opted to bump into an instructional position, she gave up the right to bump back into a counseling position. Article IV, Section T, makes no provision for a full-time employe to bump another full-time employe. The Grievant was informed of this by Wayne Sabatke, Vice President of Human Resources, in his April 26 response to her letter announcing her decision. The decision to assign her to any future counseling openings is the Employer's sole prerogative under Article IV, Section S, Subparagraphs 2g, h, i and k.

In the absence of some express contractual limitation, the Employer retains the right to manage its business. The only restrictions on its powers are those imposed by law and those given up through negotiation. ST. LOUIS SYMPHONY SOCIETY, 70 LA 475, 481-82 (ROBERTS, 1978). Management's unrestricted right to assign work to employes, and to assign employes to positions, is provided here in Article IV, Section S.

Article IV, Section S, not only gives management the discretion to reduce staff, but also permits management to transfer employes, allocate and assign work to employes, and assign workloads. When the Grievant was laid off she had the right to bump into an instructor's position, which she did. Once she had done so, it was the Employer's right to determine whether she or Gary Gibson was better suited to work as a high school recruiter at the Superior campus, the position Gibson had previously held. Although Gibson, now classified as a counselor, had less seniority than the Grievant, the Employer determined, based on his prior experience, that he was the appropriate choice for the position, which it was entitled to do. For all the foregoing reasons, therefore, the grievance must be denied.

DISCUSSION

Burden of Proof

The starting point for my analysis is the Union's contention that, under Article IV, Section T, of the collective bargaining agreement, the Employer has the burden of proof to

establish a reasonable basis for its layoff of the Grievant. Typically, it is a recognized management prerogative to determine the size of the workforce and to expand or reduce the workforce as it sees fit. In fact, those specific rights are set forth in Article IV, Section S, paragraph 2, subparagraphs g, h and i. However, Section S, paragraph 3, also restricts these rights to the extent they are specifically limited elsewhere in the agreement. This, then, draws attention to the language in Article IV, Section T, paragraph 1, which states, in pertinent part, "Whenever it becomes necessary to decrease the number of employed teachers who have completed a probationary period by reason of a decrease in student population within a specific campus, or any other reason, employees shall be laid off in the inverse order of seniority by program (i.e., machine shop, accounting, etc.), or major instructional area, and by campus." (Emphasis added.) The Union maintains that this language has the effect of requiring the Employer to justify reductions in the workforce by meeting some external standard.

I agree that the provision does have a limiting effect on the Employer's ability to layoff staff. In interpreting a contract, one should choose an interpretation which gives effect to all provisions over one which renders certain provisions meaningless. The phrase, "Whenever it becomes necessary . . . ," therefore, must imply some basis for establishing necessity otherwise it would be mere surplusage. Having established that point, however, the contract does not create any objective standard by which necessity is to be measured. Indeed, it is difficult to see how it could, as there might be any number of causes meriting staff reductions and the parties could not presume to cover them all, hence the catchall phrase, "or any other reason." I take this to mean that the parties intended that staff reductions must have a rational basis, but that management has broad latitude in determining when reductions are necessary.

Put another way, if management determines that staff reductions are necessary, it has the burden of "going forward" insofar as it must articulate to the employes and the Union a rational basis for the layoffs. Having done so, however, if the Union wishes to challenge the decision it has the burden of persuasion on the issue of whether management's rationale is justified by the facts. In light of the management rights previously set forth, management will be accorded substantial deference in its decision making regarding the size of the workforce. The onus is on the Union to bring forth evidence establishing that management's decision is unreasonable, either because it is unsupported by the facts or because it is based on some other improper motive.

The Merits

In this case, the Employer based its decision to layoff the Grievant from her position as a counselor on "decreasing enrollment at the Superior campus." (Jt. Ex. 2) The Union contends that this explanation is specious, that enrollment numbers did not support the layoff and that the Employer had ulterior motives for laying the Grievant off. I will address these arguments in turn.

Union Exhibits 1 and 2 purport to supply raw data regarding enrollments at the Superior campus over the past decade. Exhibit 1, showing total enrollment figures over that period, reveals that enrollment at the Superior campus reached its high water mark in fiscal year 1992, when it had 788 full-time students and 1765 part-time students, for a total of 2553 students. 2/ By January, 1999, Superior's total enrollment had dropped to 622 full-time students and 1518 part-time students, for a total of 2140 students, the lowest total enrollment of the decade to that point. These figures certainly reveal a significant downward trend, reflecting a drop in total enrollment of over 16%, and would, standing alone, support the Employer's determination that cutbacks were necessary.

2/ The Employer's fiscal year begins on July 1 and ends on June 30. Thus, fiscal year 1992, for instance, would encompass the 1991-92 school year.

The Union argues, however, that these figures are misleading. It points to the fact that by the spring 1999 term, enrollment was again rising, reflected by Union Exhibit 2, which shows full-time enrollments increasing steadily from a low of 280 in fall 1999 to a high of 382 in spring 2000. This is true. However, reference to Union Exhibit 1 shows a corresponding drop in part-time students, such that in actuality total enrollment in fiscal year 2000 dropped still further to 2053. Although these figures were only updated through February 7, and were not final, they do not rebut the Employer's initial contention that enrollments at the Superior campus were in overall decline. I note also, in this regard, that there is apparently not a significant distinction between full-time and part-time students when it comes to the need for counseling services. Perry Lindberg, a student services counselor at the Superior campus since 1974, testified that the counselors spend nearly as much time with part-time students as with full-time students. (Tr. 24) Thus, an increase in full-time students with a corresponding decrease in part-time students does not necessarily mean an overall increase in the counseling workload merely by virtue of the fact that the students are taking more credits.

Nevertheless, the Union asserts that the overall numbers were still high enough to justify retaining the Grievant's position. In support of this contention, the Union cites the testimony of the District Vice President, Vasant Kumar, to the effect that there is a rule of thumb that each counselor can serve approximately 800-900 students. (Tr. 103) Even using the 1999 census of 2140, therefore, the Union contends that there was no rational basis for reducing the Grievant's position, since there were only two counselors assigned to the Superior campus at the time. The total enrollment figures, however, are aggregate numbers comprised of the combined enrollment for both semesters of the school year. Thus, there were 622 total full-time students in fiscal year 1999 (U. Ex. 1), but there were only 280 and 342 full-time students, respectively, in the individual semesters. (U. Ex. 2) Therefore, at any one time there were only about half the number of students on campus as the total enrollment figures reflect, because in most cases the same students will attend in both semesters and, thus, be counted twice. As a result, the number of students per counselor at any one time has likely

been significantly less than 800 for several years. On the whole, therefore, I cannot find that the Employer's purported rationale for laying off the Grievant, that of declining enrollment, had no rational basis in fact. 3/

3/ I take notice of a WITC Basic Education Report, dated May 3, 1999, which evaluates the programs of the various campuses, and which was submitted by the Union subsequent to the hearing. The report recommends, for a variety of reasons, the retention of the second counseling position at the Superior campus. This recommendation, however, was based on perceived needs to attain certain defined goals and the report does not indicate whether it took into account financial or enrollment considerations. The decision whether or not to act on the recommendation lay ultimately with the Administration.

This does not end the analysis, however. The Union has additionally alleged that the Employer's stated rationale of declining enrollment, whether or not supportable, was a pretext and that the Employer's actual purpose was to remove the Grievant from her counselor position. Two theories have been advanced as to the Employer's motivation, one or both of which are alleged to have prompted the Employer's action. First, the Union contends that the Administration did not feel the Grievant was suited to her position and wanted her to return to being a special needs instructor. Because the Grievant did not wish to do this, the Employer contrived to lay her off, because it could not transfer her as there were no available vacancies for which she was qualified, and it did not have a basis for a just cause termination. The second contention is that the Employer laid off the Grievant in anticipation of the reclassification of the Student Services Specialists as counselors. One of the Specialists, Gary Gibson, was located at Superior and the Employer wished to retain him there. Because he had less seniority than the Grievant, however, he, rather than the Grievant, would have been laid off unless she were laid off and bumped into another position prior to the reclassification. Either scenario, if established, would arguably constitute an impermissible use of the Layoff procedure.

Concerning the first allegation, the Union's argument is based primarily on conversations which took place between the Grievant and the campus Administrator, Jann Brill. In August 1998, shortly after Brill's appointment as Administrator, she met with the Grievant to discuss the status of the student services department. The Grievant testified that Brill told her that she did not fit the image of a counselor and would be better suited to teaching special needs students. (Tr. 54) Brill testified that she discussed the status of student services with the Grievant, as well as various options, which she did with all the student services personnel, because declining numbers might require a reorganization. She denied any negative comment regarding the Grievant's abilities or image. (Tr. 69-71) The second meeting took place in April 1999, subsequent to the Grievant receiving her layoff notice, but just prior to her decision to bump into an instructional position. The Grievant testified that she asked about the possibility of reinstatement and that Brill told her that the reduction was "a done deal" and that she would be watching her if she tried to fight it. (Tr. 55) Brill testified

that she asked the Grievant whether she was interested in the half-time counseling position and the Grievant said no unless there were also a half-time teaching position so that she would qualify as a full-time employe. She did tell the Grievant that the decision to reduce the counseling department to one and one-half positions was set. (Tr. 72-74)

I do not find in these exchanges evidence of an underlying desire to remove the Grievant from her position. The decision to reduce the Grievant's position was not made by Brill, and, in fact, Brill sought to keep the full position. (Tr. 78) The August meeting was one of several with the individual employes in student services to explore options in the event that there would be staff reductions. It would be natural for the Grievant to feel vulnerable in that situation, but it doesn't automatically follow that the Employer had an impermissible objective of removing her from her position without just cause. Likewise, in the April meeting, the Administrator may have told the Grievant that the reduction decision would not be reversed, but that, in and of itself, doesn't establish animus on the part of the Employer. As to the Grievant's recollection of what could be construed as a veiled threat, I would only note that the Grievant did challenge the decision and there is no evidence in the record of any acts of retaliation.

I am also not persuaded that the Employer's decision to layoff the Grievant was in anyway influenced by the reclassification of the Student Services Specialists as counselors. One problem with this contention has to do with timing. The unit clarification hearing was held on October 13, 1998, but it is clear from the conversation between the Grievant and Jann Brill that at least by early August the Employer was considering the possibility of reducing the counseling staff due to low enrollment. 4/ Further, the Employer issued the notice of layoff to the Grievant on January 11, 1999, but the Commission did not issue its decision on unit clarification until February 8. It is hard to see, therefore, how the Employer could have known that the Student Service Specialists were going to be added to the bargaining unit at the time it determined to layoff the Grievant.

4/ I also note for the record that the petition for unit clarification was filed by the Union, seeking to have the position of Student Service Specialist included in the bargaining unit.

Another difficulty concerns the process by which the Student Service Specialists became classified as counselors. The Commission's decision merely orders the inclusion of the position of Student Service Specialist into the bargaining unit. It says nothing about classifying them as counselors. Thus, when the decision was issued on February 8, all that was known was that the employes would be added to the bargaining unit. The Student Service Specialists did not become classified as counselors until July 13, 1999, when the Employer and the Union entered into an agreement implementing the Commission's decision. (Jt. Ex. 9) 5/ Further, it appears that the designation "counselor" is used in the agreement to establish the working parameters of the position, as set forth in Article IV, Section H2 of the contract,

which covers such things as hours of work, vacations and holidays, but says nothing about specific job duties. Thus, the process was a collaborative effort between the Union and the Employer, which was not completed until fully three months after the Grievant had elected to bump into an instructional position.

5/ On April 13, the Grievant put the Employer on notice that she considered that she retained her bumping and recall rights for a counseling position, notwithstanding her decision to accept an instructional position. (Jt. Ex. 7) On April 26, the Employer responded and stated its position that, as a full-time employe, she had no such rights. (Jt. Ex. 8) The record is silent, however, as to what, if any, discussion the parties had during their negotiations over the impact the agreement would have on the Grievant's status.

Finally, it should be noted that the unit clarification decision did not have the effect of adding a counseling position to the Superior campus. The reclassified Specialist, Gary Gibson, was already placed at Superior and, according to Vice President Kumar, had the decision been in the Employer's favor, he would have remained there as a Student Service Specialist. (Tr. 110) As it is, despite the reclassification Gibson continues to perform his former duties, which are primarily recruitment in area high schools. (Tr. 112) He does not perform counseling functions, nor did the Grievant perform recruitment functions prior to her layoff. For all the foregoing reasons, therefore, I do not find that the Employer had any impermissible objective in its layoff of the Grievant.

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

AWARD

The Employer did not violate Article IV, Section T, of the collective bargaining agreement when it laid off the Grievant and permitted her to bump into an instructional position. The grievance is, therefore, denied.

Dated at Eau Claire, Wisconsin this 7th day of July, 2000.

John R. Emery /s/
John R. Emery, Arbitrator

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