

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**MARKESAN DISTRICT EDUCATION ASSOCIATION**  
and  
**MARKESAN SCHOOL DISTRICT**

Case 7  
No. 60165  
MA-11544

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Appearances:

**Mr. John D. Horn**, UniServ Director, Three Rivers United Educators, 104 West Cook Street, Suite 103, P.O. Box 79, Portage, Wisconsin 53901-0079, appeared on behalf of the Association.

**Mr. Douglas E. Witte**, Attorney at Law, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, P.O. Box 1664, Madison, Wisconsin 53703-1664, appeared on behalf of the District.

**ARBITRATION AWARD**

On July 25, 2001, Markesan School District and Markesan District Education Association filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide the captioned matter. A hearing was conducted on October 16, 2001, in Markesan, Wisconsin. A transcript of the proceedings was made, and distributed on November 2, 2001. Post hearing briefs, and reply briefs were filed and exchanged by January 25, 2002.

This Award addresses a layoff in the Family and Consumer Education Staff.

## **BACKGROUND AND FACTS**

The parties to this proceeding have been signatories to a series of collective bargaining agreements, which address reductions in the work force. The current Layoff Clause, set forth below, has evolved over the years. It features a committee to analyze layoffs. In 1995, the Association representative on the Committee was afforded participant (as opposed to observer) status. The layoff which is the subject of this proceeding is the first experienced by these parties.

In recent years the Markesan School District has experienced declining enrollment. Coupled with State imposed revenue limits this has caused significant budget problems. Sue Alexander, who began as District Administrator in the Fall of 2000, was confronted with the need to cut approximately \$250,000 from the budget. A number of measures were reviewed and certain budget cutting steps were implemented. It became necessary to look to a reduction in teaching faculty to complete the budget cuts. The Administration targeted four positions for elimination or reduction.

On March 7, 2001 Ms. Alexander convened a meeting involving herself, Louis Mullen, the High School Principal, Jerry Chisnell, the Association president, and Connie Hynnek, the Association Negotiations Chairperson. The purpose of the meeting was to review the measures deemed necessary to satisfy the budget. There were no materials provided prior to the meeting. Ms. Alexander laid out her plan to address reductions in force, proceeding Department by Department. Ms. Alexander indicated that reductions in the High School English Department would be accomplished by laying off a first year teacher who was junior. A needed reduction in the Technical Education Department was to be accomplished by reducing the load of a relatively junior teacher, who lacked required certifications. A Social Studies reduction was to be accomplished by laying off a junior, probationary teacher. There was consensus as to the propriety of these moves.

The last proposed reductions, coming in the Family and Consumer Education Department, caused the Association representatives concern. The Family and Consumer Education Department consists of two employees, Rosemary Kiehne, who has been with District for approximately 14 years, and Vivian Buchholz, who has been with the District for approximately 10 years. Ms. Kiehne taught in the area of foods and clothing. Ms. Buchholz taught in the area of family living and parenting. During the 2000 - 01 school year Ms. Kiehne taught 10 sections of subject matter, and had 2 supervisions. Ms. Buchholz had 11 sections of subject matter and 1 supervision. A full time load is 12 classes. Ms. Alexander proposed reducing Ms. Kiehne to a .5 FTE, and Ms. Buchholz to a .83 FTE. Chisnell and Hynnek balked at giving the more senior teacher a greater reduction.

Students register to take courses for the coming year. The District tallies the registrations and determines the courses and sections needed to accommodate the student preferences. Registration for Family and Consumer Education courses was down. Student registration indicated that courses taught by Ms. Buchholz would decline from 11 to 8. Student registration indicated that courses taught by Ms. Kiehne would decline from 10 to 6. These numbers form the basis for Ms. Alexander's reductions. In the Fall of 2000 the District contracted with a consultant, Judy McFarlane, to review the District's Vocational course offerings. Ms. McFarlane made a series of recommendations including measures which would strengthen links to Vocational Colleges. This area is of particular concern to the administration in that approximately 72% of the District's graduates either attend Vocational school or do not pursue further education. McFarlane's conclusion that the Vocational program could be improved and expanded was shared by Ms. Alexander.

Alexander concluded that the contracts of Kiehne and Buchholz should be reduced to reflect the relative decline in enrollment each of their programs had experienced. She believed that Kiehne and Buchholz brought different strengths to the program, and that it would be easier to grow the program with the two working toward that goal. She also felt that Buchholz is among the District's strongest teachers, and should be rewarded for holding her attendance in the face of decline. Finally, she allowed each teacher to continue to teach the classes previously taught. It was her testimony that had student registration produced the reverse result, the reduced contracts would have followed student enrollment. Alexander never considered consolidating class loads in a single teacher, and laying the other off.

When Ms. Alexander indicated her decision relative to Kiehne and Buchholz, the two Association participants expressed reservations about having the less senior teacher end up with a larger contract. It was at this point in the meeting that Ms. Hynnek suggested that the parties review the layoff clause. The four then walked through the layoff clause, analyzing Kiehne and Buchholz against the various point allocations. The participants did not have the documents necessary to do a precise assessment, and so they used estimates or made calculated guesses as to the precise number of points to assign. By the conclusion of the session, Ms. Buchholz appeared to have 3-4 more points. However, the totals were close, lacked precision, and the Association representatives were not satisfied that the performance evaluations were sufficiently analytical to justify the proposed result. The Association representatives felt undermined by the fact that the Superintendent had initiated the meeting with a conclusion in mind, and believed that a purpose of the meeting should have been to allocate the division of work.

Chisnell and Hynnek left the session requesting more information so that decisions could be made. It was their view that the session was not concluded. They believed that the Committee was to work on a consensus basis, and that no consensus had been achieved. Ms. Alexander left the meeting with the understanding that the Committee had voted 2 - 1 in

support of her allocation of time. She and Mullen agreed. The Association dissented. As a part of the concluding discussion, Alexander pointed out the fact that the District was free to deviate from the point system at step four, where circumstances compel such a result.

On, or about March 14, the School Board was presented the “recommendations” of the Committee, as Ms. Alexander understood them. The reductions were approved. The Association asked for a further meeting, which was held on March 20 –21.

On March 20, continuing on the 21<sup>st</sup>, Alexander, Mullen, Chisnell, and Hynnek met again, and did a full review of the application of the point system to Kiehne and Buchholz. They had evaluations, and actual information on length of service and other point criteria. Under the Administrations point allocation, Ms. Kiehne and Ms. Buchholz had an equal number of points. The Association members regarded the points allocated to the Performance Qualification category to be subjective and not “...developed and synchronized with the district’s evaluation system...” This session ended in the same disagreement as did the March 7 meeting.

The results of this session were taken back to the School Board for another review. The Board was provided with the results of the Committee meetings and again endorsed the Administrations proposed reductions. The Association filed a grievance, and pursued the matter to this Arbitration.

### ISSUE

The parties stipulated the following issue;

Did the District violate Section 5.5 of the collective bargaining agreement when it partially laid off Rose Kiehne for the 2001 – 2002 school year?

If so, what is the appropriate remedy?

### RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

#### Section 5.5 Layoff Clause

- a. Standard. After the Board determines to eliminate a teaching position or program, the Board will meet with the MDEA to discuss the reasons for the layoff. After seeking the MDEA’s input, the Board or its representative will determine in comparison with other teachers and on an individual basis, which teachers are to be laid off in accordance with the criteria and procedures set forth in the succeeding paragraphs.

- b. Criteria for Selection. In the implementation of necessary staff reductions under this Article, individual teachers shall be selected for full or partial layoff in accordance with the following steps:

Step One – Attrition Normal attrition resulting from employees retiring or resigning will be relied upon to the extent it is administratively feasible in implementing necessary layoffs. Pursuant to Article VI, teachers in an affected area may be transferred to a different area within the district if they are certified for that area.

Step Two – Committee A layoff review committee (District Administrator, one principal, one MDEA representative appointed by the MDEA) will formulate recommendation(s) as to which teacher(s) is to be laid off. The committee will project the district’s faculty needs, determine the pool of teachers subject to layoff, and then utilize the point system in Step Three in its deliberations (maximum 100 points). The committee will make its recommendation to the Board based upon the foregoing procedures unless it recommends a deviation therefrom in accordance with Step Four. The number of points awarded under part six, miscellaneous, will be indicated and the Board may modify such assessment at its sole discretion.

Step Three – Point System

1. Years of Service **35 Points**

**1 – 0, 2 – 3, 3 – 6, 4 – 7.5, 5 – 9, 6 – 10.5, 7 – 12, 8 – 13.5, 9 – 15, 10 – 16.5, 11 – 18, 12 – 19.5, 13 – 21, 14 – 22.5, 15 – 24, 16 – 25, 17 – 26, 18 – 27, 19 – 28, 20 – 29, 21 – 30, 22 – 31, 23 – 31.5, 24 – 32, 25 – 32.5, 26 – 33, 27 – 33.5, 28 – 34, 29 – 34.5, 30 – 35.**

Weighted – within department 100%, within district 80%, outside district 50%

2. Performance Qualifications **30 Points**

General Performance

Outstanding - 17-21

Strong - 12-16

Acceptable - 7-11

Questionable - 5 and below

Management & Control

- Strong - 8 – 9
- Acceptable - 4 –7
- Questionable - 2 and below

To be developed and synchronized with the district's evaluation system.

3. Areas of Certification Eligibility **10 Points**

- One major area of preparation – 7
- One major area and one minor area – 8
- One major area and two minor areas OR two major areas – 9
- Two major areas AND one or more minor areas - 10

4. Formal Preparation and Advancement **10 Points**

- BS Degree – 7
- BS Degree + 12-35 credits – 8
- MS Degree OR BS + 36 or more – 9
- MS Degree or 12 or more credits – 10

5. Continuing Education and Development **10 Points**

- Within 0-2 Years – 10
- Within 3-5 Years – 7
- Within 6-10 Years – 5
- Within 11-15 Years – 2

Based on three credits or equivalent district developed CEU's.

6. Miscellaneous Special Circumstances **5 Points**

Extracurricular activities (see Appendix B – Maximum Value 2) public and community services, special recommended circumstances, separation of five points or less on above.

Board of Education evaluation and determination after receiving recommendation from Board committee, administration, MDEA, other interested parties.

Step Four Deviation from the results of the application of the point system Under Step Three will be permitted where the Board determines, on recommendation of the Review Committee, that the educational program needs or circumstances of the District compel such deviation.

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h. Grievances Any layoff pursuant to this article shall not be subject to the grievance procedure except that an allegation that the Board acted in Bad faith in utilizing and applying the procedures in this article is grievable.

### **POSITIONS OF THE PARTIES**

The Association contends that a clear contract violation is bad faith, within the meaning of Section 5.5 h, of the collective bargaining agreement. It is the claim of the Association that the District attempted to ignore the requirement that the point system be substantiated by the District's evaluation system. The Association notes that Ms. Kiehne was never denied salary schedule movement or characterized as unsatisfactory, nor was Ms. Buchholz ever granted an extra increment. Yet, at the point of layoff Ms. Kiehne was characterized as unsatisfactory. The Association contends that none of her evaluations suggest an unsatisfactory level of performance. The contract requires that the point system be synchronized with the evaluation system. The Association argues that did not occur. Had the two employees point totals been more reflective of their respective evaluations, Ms. Kiehne would have graded out higher. The Association points out that if you throw the flawed evaluations out altogether, Ms. Kiehne grades out higher.

The Association contends that the District has manipulated the evaluation system to achieve its desired outcome. This is alleged to be the bad faith required by par. h. The Association cites an Arbitration Award by Arbitrator Kerkman for the proposition that a clear contract violation is inherently an exercise in bad faith (see School District of Wausau, no citation).

The Association contends that the contract requires a recommendation of the review Committee. No such recommendation was ever forthcoming, since Association representatives never concurred. The Association argues that the Committee operates on a consensual basis. Absent a consensus, there can be no recommendation. Additionally, the step 4 deviation can only arise where circumstances compel a deviation. There is no element of compulsion present here. It is the view of the Association that what occurred is that the Administration came up with a plan. When there was Association resistance to the plan it became necessary to "cook

the books”, skip step 3, and move immediately to step 4. This alone is alleged to violate the contractual standard of bad faith.

The Association traces the bargaining history of Section 5.5. The historic role of the Association has evolved from total employer discretion, to a point system, to the creation of a Committee, with an Association observer, to apply the point system, to the current language which makes the Association member a full participant.

The Association contends that the lack of notice and opportunity to prepare for the layoff discussion is further evidence of bad faith. No documentation was provided before either meeting. Documents provided at the second meeting were not provided in advance. By the time Association participants were aware that the meetings involved layoffs, and the persons to be laid off, the Board had already acted. The lack of information resulted in the inability of the Association to represent its members.

In summary, the Association believes the District acted unilaterally, and then went through the contractual motions. All of the foregoing is alleged to be in bad faith.

The District argues that the collective bargaining agreement specifically authorizes the District’s layoff decision. According to the District, Section 5.5 (a) makes it clear that while the Association is to be consulted and kept informed, the layoff decision remains with the Board. Step 4 of the process provides as much. The Board’s actions were an affirmation of the Committee’s recommendation.

The Board acknowledges that the suggestion to split the layoffs occurred before the points were analyzed. However, once the Association objected, the parties turned to the point system, and reviewed it a second time. The Board contends that the Committee structure is established by the contract, and that nowhere in the agreement is there a requirement of unanimity to proceed.

The Board argues that there is no evidence of bad faith in the record. Ms. Alexander testified that her decision was the product of her concern for the students and the program. It was buttressed by the use of an outside consultant, and the Association was involved in the process. The fact that Ms. Alexander arrived at the first meeting with a plan should reflect the fact that she and Principal Mullen put in a good deal of work in preparation for the meeting.

A substantial dispute between the parties is the point total to be derived from the Performance Qualifications section of the article. The District notes that even if the point system favors Ms. Kiehne by a large margin, the District is still free to make a different decision based on educational program need or other circumstance. The Association does not challenge Ms. Alexander’s rationale for the decision.



## DISCUSSION

In order to prevail, the Association must demonstrate that a contract provision has been violated. To have standing to make that claim, the Association must establish that the Board has acted in bad faith.

The Association is correct in its assertion that the District initially ignored the point system. At the March 7 meeting the discussion relative to the first three positions impacted ignored the point system. It was the testimony of all witnesses that the first three decisions were regarded as logical, and, under the circumstances, agreeable. There was little, if any, disagreement and no alternatives advanced. It appears that in preparation for the meeting the Administration did not apply the point system. However, all witnesses testified that this was a new experience in the District, and none were quite sure how to proceed. Ms. Alexander had only been District Administrator for a few months, and was not familiar with the elaborate contractual point system. Initially the Association did not think to subject the decisional process to contractual analysis. It was only when the parties disagreed that the Association turned the discussion toward an analysis of the contract.

I find no evidence of bad faith in the initial lack of attention to the contractual point system. This was a new experience for all participants. There was no impetus toward the contract until the discussion was well under way, and a disagreement arose. The initial absence of data was a by – product of the universal lack of familiarity of operating under the layoff clause.

The Association contends that there was no synchronization of the evaluation and point systems. Again, I think the Association is correct. The evaluations had been performed prior to the initiation of the layoff process. It does not appear that there was any attempt to assign points to the respective evaluations prior to the initiation of the layoff discussions. It appears that it was the March 7 meeting that led to the realization that such an application would be necessary. The parties began to assemble points at the March 7 meeting, but were hampered by the lack of necessary information. On all items to which the parties could stipulate, Ms. Kiehne had 49 points, and Ms. Buchholz had 31. The parties left the meeting with a belief that there was about a three point spread in points, but uncertain as to their numbers.

Ms. Kiehne was subsequently given 7 points in the General Performance category, and 4 points in the Management and Control category. These are the minimum possible scores that would accompany an “acceptable” performance appraisal. Ms. Kiehne was evaluated as “acceptable”. Ms. Buchholz was given 20 points in the General Performance category, and 9 points in the Management and Control category. These constitute one point less than the highest possible scores. Ms. Buchholz was given very good performance ratings. When the newly determined point totals were added to the stipulated point totals, the two women fell into a tie in the point system.

The assignment of points fell within the range applicable to the evaluations received by Kiehne and Buchholz. However, those points were assigned after the parties disagreed over the layoff plan. Under the circumstances surrounding the layoff discussions I find it suspect that the allocation of points would result in a tie. It suggests that the points were assigned as a counterweight to the factors over which there was no dispute. Principal Mullen testified as to the assignment of points. His testimony was general and conclusory. He explained that Ms. Buchholz was a much better classroom manager. Beyond that he was unable to provide an analytical explanation of how the allocation of points were drawn from the evaluations. The point totals appear to have been achieved to support the decision already made. As such, I believe the tally of points was done in bad faith. This bad faith is sufficient to allow the Association to grieve the matter.

The Association contends that there was no committee recommendation, for lack of a consensus. Section 5.5, b. Step Two – Committee, is silent as to the procedure to be used to come to a recommendation. These parties have no history of decision making in this area, in that the layoff clause has never been administered. The Association introduced the history of the clause, which showed that the Associations involvement has grown from observer status to full participant. While this is so, it does not comment upon the decisional process to be used by the Committee. The Association would have a consensus model inferred into the contract. The result of this inference is that the Association would have gone from observer status to having its sole representative participate with the authority to block any recommendation, and potentially frustrate the process. I am reluctant to imply such a role into the Agreement.

Section 5.5 reserves to the School Board the final decision. That decision is to follow the recommendation of the Committee. Nothing in the contract precludes a recommendation with a dissent. Such a result would give each Committee member a meaningful role. It appears that the purpose of the recommendation is to inform and guide the School Board. The Committee is to analyze the various factors, apply the point system, and recommend to the Board that it proceed under the point system or recommend a deviation from that system. The existence of a dissent would serve to put the School Board on notice that there is a difference of opinion on how to proceed. The Board would benefit from the competing perspectives, provided each was laid out and explained. The Board decision should be enhanced.

The Association claims that nothing “compels” a deviation from the point system. This contention requires me to review the Family and Consumer Education Department, the faculty, the District needs, and the Layoff process to determine if a deviation is “compelled”. Such an analysis is inherently value laden and subjective. Step 4 of the Section allows for such deviation “...where the Board determines...circumstances...compel such deviation”. This preservation of authority is consistent with, and reinforced by the Step 2 provision that the “...the Board may modify such assessment at its sole discretion.” I believe the contract unambiguously reserves to the School Board the review of the Committee recommendation and determination of the circumstances which compel a deviation.

The Association complains that the lack of advance notice and documentation hindered it in the representation of its members. This is certainly true, particularly with respect to the March 7 meeting. However, the Association was subsequently provided with all relevant materials, including evaluations, that went into the analysis. I do not believe the lack of information ultimately so compromised the Association as to influence this Award.

Ms. Alexander advocated for, and ultimately recommended that both positions be reduced, and both teachers retained, to promote the Department. The reductions were done to reflect student course selection. The rationale was that the two employees brought different skills to the Department, and the Department would be stronger with both of them than with either. Each teacher was to retain her historic teaching assignment. The decision is logical and rational. It reflects Ms. Alexander's view as to what best serves the District. The point total was applied in a bootstrap manner, to support the desired decision. However, Ms. Buchholz performance evaluations are significantly better than are Ms. Kiehne's. Under the entirety of the circumstances I do not believe the decision was exercised in bad faith. Neither do I believe that the District violated the collective bargaining agreement.

**AWARD**

The grievance is denied.

Dated at Madison, Wisconsin, this 2<sup>nd</sup> day of May, 2002.

William C. Houlihan /s/

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William C. Houlihan, Arbitrator

