BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

HIGHLAND EDUCATION ASSOCIATION

and

HIGHLAND SCHOOL DISTRICT

Case 16
No. 62496
MA-12310

Appearances:

Ms. Joyce Bos, Executive Director, South West Education Association, 960 North Washington Street, P. O. Box 722, Platteville, Wisconsin 53818-0722, appearing on behalf of the Association.

Kramer & Brownlee, LLC, by **Attorney Eileen A. Brownlee**, 1038 Lincoln Avenue, P. O. Box 87, Fennimore, Wisconsin 53809, appearing on behalf of the District.

ARBITRATION AWARD

The Association and the District are parties to a collective bargaining agreement which was in effect at all times material herein and which provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned as Arbitrator to resolve a dispute as set forth below. The Commission appointed me as Arbitrator on July 11, 2003. Hearing on the matter was held on September 18, 2003, in Highland, Wisconsin. The hearing was transcribed, and the parties completed their briefing schedule by November 25, 2003.

After considering the entire record, I issue the following decision and Award.

ISSUES

The parties were not able to stipulate the issues for decision. The Association poses the following issues:

1. Did the District violate the negotiated agreement when it failed to recall the Grievant, Gail Richgels?

2. If so, what is the resolution?

The District suggested the following issues for determination:

1. Did the District violate the collective bargaining agreement when it did not divide the full time junior high/high school art position into 20% of full time and 80% of full time positions?

2. If so, what is the remedy?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Did the District violate the collective bargaining agreement when it failed to recall the Grievant to 20% of the vacant full time 6-12 art position?

2. If so, what is the remedy?

DISCUSSION

Gail F. Richgels, herein "Grievant," is an elementary art teacher for the District. She currently is in her tenth (10^{th}) year of employment with the District.

The Grievant was employed sixty percent (60%) of full time for the District in the contract year 2001-2002. The District reduced her contract to forty percent (40%) of full time in the contract year 2002-2003.

During the 2002-2003 school year, Greg Pavek, the District's full time 6-12 art teacher decided that he was going to retire. The District did not recall the Grievant to the vacant position. Instead, the District decided to fill the position with another full time secondary art teacher.

The Grievant applied for the secondary art position and was granted an interview for the position. She was not, however, hired for the position.

On April 14, 2003, the Grievant filed a grievance stating that the "District failed to recall Gail Richgels when an art position became vacant in the Highland School District." For a remedy, the grievance requested:

> If the District does not offer Mrs. Richgels the 100% FTE position, the District is obligated to recall Mrs. Richgels 20% FTE increasing her 40% FTE position to a 60% FTE position which was the FTE she worked the 2001-2002 contract year. The 20% FTE recall will be taken from the 100% vacant Art position, leaving that position at 80% FTE.

At issue is whether the District violated the collective bargaining agreement when it failed to recall the Grievant 20% FTE increasing her 40% FTE position to her pre-reduction FTE.

The Association argues that the Grievant should have been recalled into 20% of the vacant secondary art position pursuant to Article 22 of the agreement. The District counters that it acted within its authority under the management rights clause, Article 35, when it did not divide the full time junior high/high school art position into 20% of full time and 80% of full time positions in order to accomplish the foregoing.

The resolution of this dispute turns on the conflict posed by two different contractual provisions; Article 22, the layoff and recall clause, and Article 35, the management rights clause. Article 35 states that the Board has the right "to employ and re-employ all personnel and, . . . determine their qualifications and conditions of employment, or their dismissal or demotion, their promotion, and their work assignment, not in conflict with this collective bargaining agreement." Joint Exhibit No. 1, p. 7. The Board also has "the duty to determine means and methods of instruction . . . class schedule, hours of instruction, length of school year, and terms and conditions of employment. *Id*. The Board further has the right "to determine the methods, means, and personnel by which school system operations are to be conducted." *Id*. Finally, the Board has the right of "executive management and administrative control of the school system, its properties and facilities, and professional duties of its employees." *Id*. The aforesaid language supports the District's view that it acted properly herein.

Article 22, on the other hand, restricts the exercise of these rights as follows:

> When a bargaining unit position or program has to be reduced or eliminated (for reasons other than the performance or conduct of the bargaining unit member) the board will make the reduction in the department or area (such as elementary) affected. The criteria to be used are qualifications, length of departmental service, and length of service in the district. Temporary teachers are not covered by this article.

a. Qualifications shall be determined by appropriateness of training, experience, and certification, and co-curricular and extracurricular assignments held or to be filled.

b. In the event two or more bargaining unit members are found to be equally qualified upon application of the above standards, then the length of service in the district shall prevail.

c. The board will notify the bargaining unit member in the notice of layoff of the reasons for layoff and of the bargaining unit members re-employment rights. Said notice shall be issued to the affected bargaining unit members at least 30 calendar days prior to the effective layoff date.

. . .

The question then is whether the District has an obligation to carve out 20% of the vacant secondary art position to complete a 60% FTE position for the Grievant. Article 22 does not expressly provide for such a result. Past practice and bargaining history also do not support this outcome.

Article 22 only makes a general reference to "re-employment rights." It provides no definition or enumeration of what those rights consist of except to state in Article 22, Section d, that "re-employment rights shall extend for a period not to exceed 12 months from date of layoff." It does not "specifically describe circumstances under which an employee is entitled or the district is obligated to recall." Joint Exhibit No. 2, May 6, 2003 letter. It provides no express authority for granting the Grievant's request to be recalled to 20% of the vacant secondary art position.

In contrast, Article 35 specifically states that the Board has "the duty to employ and re-employ all personnel and, . . . determine their qualifications and conditions of employment, . . . and their work assignment, not in conflict with this collective bargaining agreement." The Board also has the right to determine "the methods, means, and personnel by which school system operations are to be conducted." Finally, the Board has "the duty to determine means and methods of instruction, . . . class schedule, hours of instruction, length of school year, and terms and conditions of employment." In exercising these management rights, the District determined that it would continue to maintain the secondary art position as a full time job. In doing so, it simply continued a position that had existed for at least fifteen years. The aforesaid specific contract language provides express authority for the District's actions herein. It takes precedence over the general language of Article 22 referencing "re-employment rights" that is relied upon by the Grievant as the basis for her request for re-employment to her pre-reduction FTE. Elkouri and Elkouri, *How Arbitration Works*, 5th Edition, p. 498 (1997).

Generally, if a person is on layoff and wishes to transfer or be recalled to a vacant position, he or she must be eligible to perform and/or take the entire position. He or she is not permitted, nor is the employer required, to parcel out bits and pieces of the position. LAKE GENEVA JT. SCHOOL DISTRICT, Case 20, No. 50707, MA-8350 (Nielsen, 9/94); *See, also,* SHEBOYGAN AREA SCHOOL DISTRICT, Case 53, No. 32428, MA-3086 (Greco, 7/84).

The Association argues that LAKE GENEVA JT. SCHOOL DISTRICT, *supra*, is not directly applicable to the instant dispute. The Association is correct. The LAKE GENEVA JT. SCHOOL DISTRICT and SHEBOYGAN AREA SCHOOL DISTRICT cases both involved situations where the right to bump into a position was contractually tied to the availability of a "position" in the district the teacher was eligible to bump into. LAKE GENEVA JT. SCHOOL DISTRICT, *supra,* pp. 5-6; SHEBOYGAN AREA SCHOOL DISTRICT, *supra,* p. 3. There are no such contractual restrictions herein. Article 22 expressly states: "when a bargaining unit position or program has to be reduced or eliminated (for reasons other than the performance or conduct of the bargaining unit member) the board will make the reduction in the department or area (such as elementary) affected." (Emphasis added). The contract specifically contemplates partial layoffs and does not prevent partial recalls. (Emphasis added).

In addition, the Association does "not justly claim that the Grievant was entitled to the 100% position, due to her layoff, because the Association did not believe the Grievant could just claim the position." Association Reply Brief, p. 2.

However, even in cases in which teachers have been permitted to "bump" into or be recalled into partial positions, arbitrators have consistently required that the partial position be a discreet, identifiable position or program rather than an hour or two hacked off of another position. SCHOOL DISTRICT OF RANDOM LAKE, Case 28, No. 53455, MA-9363 (Nielsen, 11/96). In SCHOOL DISTRICT OF RANDOM LAKE, *supra,* p. 20, Arbitrator Daniel Nielsen found that the collective bargaining agreement "specifically" contemplated partial layoffs and partial recalls. He concluded that the District violated the collective bargaining agreement when it failed to allow the grievant to be recalled to a discrete, partial position – a part time At-Risk assignment. SCHOOL DISTRICT OF RANDOM LAKE, supra, p. 23. The Association makes no such request herein. It simply asks the District to lop off 20% of a full time vacant secondary art position in order to restore the Grievant to her pre-reduction 60% FTE.

The Association also relies on SOUTHWESTERN WISCONSIN COMMUNITY SCHOOL BOARD, Case No. A/P93-M-301 (Vernon, 6/94) to support its position. In that case, Arbitrator Gil Vernon ruled that a district was required to carve out a vacant part time position when the employee on layoff held the proper certification and the position would be a substantial amount of work (half-time). The Association opines that in this case, the "carving" would bring the grievant to a substantial amount of work or a 60% FTE position. The Arbitrator agrees. However, Arbitrator Vernon found that the district was required to carve

out a discreet, identifiable position – the high school At-Risk position – as a part time position for the grievant. SOUTHWESTERN WISCONSIN COMMUNITY SCHOOL BOARD, *supra,* p. 13. He based this decision in large part on contract language that "contemplated" part time positions. *Id*. Arbitrator Vernon specifically rejected plucking one or two classes from another teacher to assign to the grievant. *Id*. Here, as noted above, the Association has not identified a discreet, identifiable position to assign to the Grievant to restore her to her pre-reduction FTE. Therefore, the Arbitrator finds that the aforesaid case is not applicable to the instant dispute.

The Association also argues that the recall provision must be read in the context of the layoff language since the recall language is ambiguous. The Association notes that the criteria the District considers when choosing an employee for layoff include: "qualifications, length of departmental service, and length of service in the district." In applying these criteria, the Association submits that Grievant was more qualified for the vacant art position than the successful candidate and, therefore, should have been recalled to the 20% position.

The contract is clear that the aforesaid criteria are to be used by the District when a bargaining unit position or program has to be reduced or eliminated pursuant to Article 22. Presumably, if two or more teachers were on layoff that would be the criteria utilized by the District in deciding which teacher on layoff would be recalled. However, that is not the case here. The Grievant has no recall rights, and the 100% vacant secondary art position was filled pursuant to the management rights clause and Article 21 of the agreement which covers "Vacancies, Transfers and New Positions." The agreement, on its face, does not provide for the utilization of the criteria listed in Article 22 for layoff and recall to be applied in cases of filling vacancies. Therefore, the Arbitrator rejects this claim of the Association.

The Association further argues that recall rights take precedent over transfer rights. This may or may not be true. However, since the Grievant had no recall rights in the instant case it is unnecessary to address this issue.

Finally, the Association argues that this case does not involve disciplinary or performance-related issues. The Arbitrator agrees. There is no evidence in the record that indicates the District based its decision for layoff on disciplinary or performance-related reasons.

Based on all of the above, and absent any evidence that the District abused its discretion or acted capriciously in failing to reinstate the Grievant to a 60% of full time position, the Arbitrator finds that the answer to the issue as framed by the Arbitrator is NO, the District did not violate the collective bargaining agreement when it failed to recall the Grievant to a 20% of the vacant full time 6-12 art position.

In light of all of the foregoing, it is my

AWARD

The instant grievance is hereby denied, and the matter is dismissed.

Dated at Madison, Wisconsin, this 12th day of December, 2003.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

DPM/gjc
6610