

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
NORTH CRAWFORD EDUCATION ASSOCIATION

and

NORTH CRAWFORD SCHOOL DISTRICT

Case 16
No. 62470
MA-12303

(Dennis Brown Layoff Grievance)

Appearances:

Joyce Bos, Executive Director, South West Education Association, on behalf of the North Crawford Education Association.

Eileen A. Brownlee, Kramer & Brownlee, LLC, Attorneys at Law, on behalf of the North Crawford School District.

ARBITRATION AWARD

The North Crawford Education Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission provide a panel of staff arbitrators from which the Association and the North Crawford School District, hereinafter the District, could select a staff arbitrator to hear and decide the instant dispute between the Association and the District in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ Thereafter, the undersigned, David E. Shaw, of the Commission's staff, was selected and was designated to arbitrate in the dispute. A hearing was held before the undersigned on August 11, 2003 in Soldiers Grove, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by September 26, 2003.

1/ *The parties agreed at hearing to waive the 30-day time limit in the agreement for the issuance of an award.*

Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues and agreed the Arbitrator would frame the issues.

The Association offered the following statement of the issues:

Did the District violate the negotiated agreement when it chose Dennis Brown for layoff? If so, what is the resolution?

The District would state the issues as follows:

Did the Board abuse its discretion in selecting Dennis Brown for layoff? If so, what is the remedy?

The Arbitrator finds the Association's statement sufficiently sets forth the issues to be decided in this case.

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited, in relevant part:

ARTICLE II. RIGHTS OF THE SCHOOL BOARD

The School Board possesses the sole right to operate the school system and all management rights reposing, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

- A. To direct all operations of the school system;
- B. To establish work rules and schedules of work;
- C. To hire, promote, transfer, schedule and assign employees in positions with the school system;
- D. To suspend, demote, discharge and take other disciplinary action against employees;
- E. To maintain the efficiency of school system operations;
- F. To take whatever action is necessary to comply with State or Federal Law;
- G. To introduce new or improved methods or facilities;

- H. To change existing methods or facilities;
- I. To determine the kinds and amounts of services to be performed and the number and kind of classifications to perform such services as they relate to school operations;
- J. To contract out for goods and services;
- K. To determine the means, methods, and personnel by which School System operations are to be conducted;
- L. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

The exercise of these rights is not subject to the grievance procedure.

...

ARTICLE IV. GRIEVANCE PROCEDURE

...

Step 5. Arbitration:

...

- E. It is understood that the function of the Arbitrator shall be to provide a decision as to the interpretation and/or application of terms of this Agreement, and he/she shall have no authority to make recommendations that would require the modification of this Agreement in any way.

...

ARTICLE VIII. SALARY SCHEDULE

Section 1. The salary schedule in Appendix A attached hereto shall be applicable during the term of this Agreement. The School Board reserves the right to hold a teacher on the same step if that teacher has not done an acceptable job, as determined by the evaluation reports or has not met the requirements of this Agreement.

...

ARTICLE XIV. LAYOFF PROCEDURE

When, in the judgment of the North Crawford School Board, a layoff of personnel should occur, the North Crawford School Board agrees to notify the effected employee by June 1 for the following school year. When the layoff occurs, however, the parties agree that the North Crawford Education Association will be informed of the layoff with the North Crawford School Board before it takes place.

Factors, which shall be considered by the North Crawford School Board, in determining which teachers are to be laid off shall be the following, taking into account both on an individual basis and in comparison with other teachers: academic training and certification, length of service in the district, ability and performance as a teacher in the district as previously and currently evaluated by appropriate supervisory personnel, past and potential contribution to the educational program of the district, and over-all teaching experience. In the event all other factors are equal, length of service in the district shall prevail.

...

ARTICLE XVIII. JUST CAUSE

Section 1. No teacher shall be discharged, disciplined, suspended, reduced in rank or compensation without just cause.

Section 2. After two years of probationary employment with the District, no teacher shall be non-renewed without just cause.

BACKGROUND

Dennis Brown has been employed by the District as a science teacher since 1972. Brown has a life certification in Biology/Life Science grades 7-12, and taught Biology I and II and Conservation at the grades 9-12 level. Brown has a BA degree + 12 credits. In addition to Brown, there are two other science teachers employed by the District: Lauren King and Lucas Zitzner. At the end of the 2002-03 school year, King had seven years of service in the District and Zitzner had two years. 2/ King has five-year licenses in Physics, Chemistry, Biology/Life Science and Broad Field Science (grades 7-12 for all). Zitzner has a five-year

2/ Zitzner actually had 1½ years of service in the District, but it was agreed that teachers receive credit for a full year, even if they are part-time, or work less than a full year.

license in Biology/Life Science and had one year provisional licenses in Chemistry and Physical Sciences for the 2002-03 school year, which the District applied for again for Zitzner for the 2003-04 school year. At the time of hearing, Zitzner was taking courses to obtain certification in Chemistry and Physical Sciences and upon completion of those courses and a nine-week student teaching course, was expected to be certified in those areas by the end of the first nine weeks of the 2003-04 school year.

King previously taught Chemistry in the District, but not since the 1999-00 school year, and in the past school year taught grades 7-8 Earth Science and Life Science and Physics. Zitzner taught Physical Science and Chemistry I and II in the 2002-03 school year.

All three science teachers have received good evaluations.

In early 2003, then-Superintendent Dr. Brad Gillaspie recommended reductions in the staff of a number of departments, including the Science Department. In late January or early February, Gillaspie met with the three science teachers to clarify licensures and seniority, and to discuss concerns. On March 20, 2003, the District's Board of Education announced reductions in the staff of a number of departments, including reducing the Science Department by .5 FTE, but had not yet determined which teachers would be laid off. Gillaspie subsequently met with the individual science teachers to discuss the pending reduction.

On March 26, 2003, Gillaspie and High School Principal Daniel Davies, met with Brown to discuss the pending layoff. At that meeting, Brown suggested the possibility of reducing King's and his positions by .25 each. Gillaspie testified that Brown was asked if he would be interested in obtaining certification in Chemistry, to which Brown responded that he would not, unless he had to. Davies testified that Brown responded to the effect that by the time he would achieve certification, he would be retired. Brown testified that he did not recall being asked, although he later testified that they did not state it was necessary he do so to retain full-time employment. Gillaspie also testified that he subsequently discussed Brown's suggestion with King, who indicated she opposed the idea. Both Gillaspie and Davies indicated that when they discussed the pending layoff with Zitzner and asked about obtaining certification in chemistry, Zitzner indicated he had been taking courses to obtain additional certification and licensure and that he would obtain the additional certification within the year.

Gillaspie and Davies testified that they went through the five criteria for layoff in the parties' Agreement and concluded that Brown should be the science teacher reduced to half-time. Gillaspie testified he reviewed his considerations of the criteria for layoff with the Board in making his recommendations. The Board President, Mary Kuhn, testified that the Board also considered the criteria in their deliberations, and gave equal weight to all of the criteria. Gillaspie testified that one factor is not to be given more weight than others, but also testified the decision was based upon "certification". Davies testified that if all the factors are equal,

only length of service is given unequal weight, and that “potential contributions” can have more weight than the other factors in some situations. Kuhn testified the Board went through the factors and gave equal weight to all, however, she also testified the Board discussed “potential contributions” at great length and made its decision on the basis that Zitzner was going to be certified in Chemistry.

The Board ultimately decided that Brown would be reduced to half-time for the 2003-04 school year and he was given notice of this in April of 2003. The Association subsequently filed a grievance on behalf of Brown, which stated in relevant part:

III. STATEMENT OF THE GRIEVANCE:

The Board and/or its agents have violated, misinterpreted, and inequitably applied the provisions of the negotiated agreement found in the above-referenced Articles. Said violations, misinterpretations, and inequitable applications occurred when the District laid off the incorrect employee. An employee who had taught for the District for thirty-one years was laid off before a less senior employee with equal certification.

The District claims the less senior employee had more certification because he was given an emergency provisional license by the DPI for the duration of the 2002-2003 contract year. The DPI would have given the emergency license to anyone in the District had the District asked the DPI, including the grievant. Therefore, that provisional license does not add any more weight for the District to consider when determining seniority. It is the Association’s and DPI’s position that all provisional licensed employees should be non-renewed to allow for the search of a current certified employee.

The grievance was processed through the steps of the contractual procedure to the Board level. A hearing was held before the Board with the administration and the Association presenting arguments to the Board. The Board thereafter issued their decision denying the grievance, which stated, in part:

Dr. Gillaspie said that the Administration had considered Mr. Zitzner’s academic training toward additional certification as a factor to be considered. He said that neither teacher had negative evaluations and that the recommendation was not based on performance or ability. Insofar as overall teaching experience is concerned, Dr. Gillaspie stated that this might mean length of service, areas of certification or other factors.

The Administration concluded that Mr. Zitzner has greater potential for the District. He noted that there had been one other previous case in which a more experienced teacher was laid off rather than a less experienced teacher despite multiple certifications.

Mr. Zitzner has a 5-year #605 license and a one-year chemistry license. Mr. Brown has a life #605 license. Mrs. King has #601, 605, 610 and 625 licenses.

The Board then discussed the grievance. There was much discussion on certification and the need for teachers with breadth of certification. The overriding factor here (sic) Mr. Zitzner's potential contribution in light of the fact that he is actively seeking chemistry certification.

...

Brown is employed half-time by the District for the 2003-04 school year, while King and Zitzner are employed full-time. There is one less science section offered in 2003-04 than was offered in 2002-03, with King and Zitzner each picking up a section of Biology I that Brown had taught in 2002-03. Brown will be teaching one section each of Forestry/Conservation, Biology I and II. King will be teaching two sections each of Earth Science and Life Science and one section each of Physics and Biology I. Zitzner will be teaching one section each of Chemistry, Chemistry I and II and Biology I and two sections of Physical Science.

The parties, being unable to resolve their dispute, proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association takes the position that the District failed to consider the required criteria for layoff set forth in the Agreement and blatantly disregarded those criteria in choosing an employee to remain on staff with less academic training and certification, significantly fewer years of service with the District, an almost non-existent record of evaluations, no past contributions to the District, an unknown potential contribution to the District, and a total of one and a half actual years of teaching experience.

To compare between the employee retained full-time, Zitzner, and Dennis Brown, each factor the Board was obligated to consider in choosing an employee for layoff must be considered. With regard to academic training and certification, Brown holds a license in Biology/Life Science, and has earned twelve credits beyond BA certification (BA + 12). During his tenure with the District, Brown has earned a three-year license in Biology/Life Science, a two-year license in Physical Education, a five-year license in Physical Education, and a life license in Biology/Life Science. Brown testified that he also has taken workshops to further his academic training, but did not feel it was necessary to notify the District of same. Conversely, Zitzner holds the certification and academic training level of BA + 0, and a five-year license in Biology/Life Science. While the District obtained an emergency license from DPI for Zitzner to teach Chemistry, it is a leap of faith for the District to assume that Zitzner will complete his coursework and become certified in Chemistry. The Chemistry license Zitzner was working on was not completed when the layoff decision was made, nor at the time of hearing. It was inappropriate for the District to base the decision on what could happen, and not what has happened. Further, an emergency license can be applied for in any name the District chooses, and they could just as easily have requested an emergency license for Brown. Brown testified that he could teach a Chemistry class if the District had done so. Regarding the Chemistry assignment, the District could have exercised its contractual management rights and assigned King, who is certified to teach Chemistry and has done so. Further, when Brown suggested the solution of reducing himself and Mrs. King by 25%, the District asserts they did not follow that suggestion because King “was not in favor of that.”

As to length of service, Brown has over 30 years in the District, while Zitzner has been an employee for one and a half years. When Board President, Mary Kuhn, was asked if the Board was made aware of the difference in the length of service, she stated the Board did not really consider it a factor.

Regarding ability and performance as a teacher in the District, while both employees have good evaluations, Brown has 30 years of good evaluations, while Zitzner has one and a half years. While the Board President was told that none of the three science teachers had poor evaluations, the Board did not make the effort to look at the evaluations. Thus, the Board could not have considered that factor in depth. Further, the District had in at least one instance previously used the evaluations to distinguish one employee from another in considering layoff, and laid off the more senior person who was less desirable due to poor evaluations. In that case, the single consideration of evaluations clearly played a significant role in determining who to lay off.

Regarding past and potential contributions to the educational program of the District, Zitzner has not contributed to the past educational programs at all, whereas Brown has made considerable contributions to the past educational program of the District as evidenced by the exhibits produced at hearing. As to potential contributions of the two employees, the best

predictor of future behavior is past behavior, and Brown has 30 years of successful, highly effective teaching to offer students. Conversely, Zitzner has not completed his two-year probationary period. The Association questions whether age discrimination is involved, as Dr. Gillaspie responded in the affirmative when asked if he would like the young, successful employee to continue teaching in the District. One cannot predict the potential of this inexperienced teacher, nor whether he will choose to remain in the District beyond the present school year. Further, if the District prevails in this case, it would dramatically demonstrate to an inexperienced employee that many years of successful teaching in the District is not valued.

Regarding overall teaching experience, Zitzner has no teaching experience beyond his one and a half years in the District, while Brown has 30 years experience with the District. Within those 30 years experience are many contributions, experiences with students and course development and life experiences of a loyal 30-year employee.

The Association asserts that the District could not have possibly considered the five factors it was required to consider in choosing an employee for layoff. If in fact the District did do so, it chose to ignore the results in the comparison of the two teachers as to each factor. The factors are not equal. In the past, having an unequal factor in just one area has been enough for the District to decide which employee was to be laid off. In this case, Brown ranks higher in all of the factors, yet he was chosen for layoff. Further, Gillaspie and Davies differed on their interpretation of the layoff language. Gillaspie stated there were differences between the science teachers in terms of certification, overall teaching experience and years of service. Gillaspie felt there was a distinction between the certification of Brown and Zitzner although both held identical current certifications.

It became clear to the Association that Gillaspie felt the emergency license counted as a qualifying factor in certification. The Association asserts that in a conversation between Gillaspie and UniServ Director Bos, Gillaspie told the latter that the reason he chose Brown over Zitzner for layoff was because Zitzner had a temporary license. However, DPI does not recognize an emergency license as a true license. The emergency license did not add any weight to the comparison of certifications between Zitzner and Brown. When the District was made aware of this, they changed their reason for retaining Zitzner from having greater certification to having greater potential, demonstrating that the District had made up its mind who they wanted to retain and that they would use any excuse to back up their decision.

The District's witnesses implied that having a multiply-certified employee was an asset to the District, however, this would only be the case if the District chooses to utilize the multiple certifications. This cannot be the case, as the District had a certified Chemistry teacher on staff in King, and chose not to assign her to teach Chemistry. The claim that King was the only person certified to teach Physics, somehow made her unable to teach Chemistry, is belied by the fact that King has only one hour of Physics to teach in the 2003-04 school

year. Thus, King could have been assigned to teach Chemistry and Zitzner and Brown could have been assigned to teach the Life Science classes at the junior high level.

Gillaspie stated that all five of the criteria were given equal weight in deciding on the employee to be laid off, although he also stated the decision to layoff Brown was based on certification. Davies stated that he felt all five factors were equal except for length of service, but when asked if potential contribution to the program has more weight than any of the other factors, he stated that "It may in some situations." The Board President stated that it was her understanding that the Board was to give equal weight to all five criteria. However, the Board did not do so, and did not really give any consideration to the relative lengths of service of the three teachers. They were only told about the evaluations instead of looking at them for themselves. From Kuhn's testimony, it was clear that the Board looked hardest at potential contributions of the teachers, and that they based their decision to retain Zitzner based on the fact that he was going to become certified in Chemistry. Thus, though the Board understood they were to give equal weight to all of the criteria, it is evident that they did not.

Next, the Association asserts that Article XVIII – Just Cause, provides that no teacher shall be ". . .reduced in rank or compensation without just cause." The Association cites the "Daugherty standards" set forth in ENTERPRISE WIRE CO., 46 LA 359 (1966). It then asserts that Brown was reduced in compensation and not forewarned of the consequences of his decision when he stated that he did not want to take further coursework "unless he had to." Brown was not told that he would be reduced to half-time if he did not obtain credits toward certification in Chemistry. Brown testified that had the District made it clear that his position depended on him taking the coursework, he would have "attempted to do what was necessary."

The Association also asserts that the bargaining history does not indicate that there is any other interpretation of the layoff language in the contract than the plain meaning of the language. The language has remained relatively the same since it was placed in the Agreement in the 1978-80 contract.

Last, the Association notes that as to the other layoffs that occurred this year other than in the Science Department, the least senior person in their category was laid off.

In its reply brief, the Association first asserts that the District's argument that it was forced to look outside the existing staff for a Chemistry teacher for the 2002-03 school year and intimation that when Zitzner was hired the District needed a Chemistry teacher, is belied by the facts. The District had a current employee on staff licensed to teach Chemistry, and who had successfully taught Chemistry in the District, i.e., King. While the District emphasized that a multi-certified employee is a much celebrated phenomenon, when it came time to utilize the many licenses of King, the District instead hired an unknown employee and

applied for a temporary license from DPI to have him teach a subject he had never taught before, and was not licensed to teach.

The Association also asserts that the District relied in its brief on testimony that was not offered at hearing to support its case. The District references the Association's positions at the Board level hearing and accuses the Association of basing its decision to file a grievance in this case on two narrow issues of strict seniority and the question of whether or not the order in which the factors were listed had significance. There was no testimony to support that argument, and even if the Association had made those claims at the Board level, this arbitration is a *de novo* hearing, and the Association is free to make any argument it wishes to make.

The Association concludes that the crux of the problem is exactly what the District stated in its initial brief, i.e., that the administration determined that because Zitzner's academic training and certification "were assumed to be" broader than Brown's, and because this offered greater potential for contribution to the District's academic program, the appropriate teacher to layoff was Brown. The contract language in this Agreement applies to employees who are currently under the contract and the District is to look at each employee as they stand in the current contract. To base decisions pertaining to layoff on a license that might be obtained in a future contract is clearly wrong. When the layoff decision was made, Brown and Zitzner held an identical license and Brown had completed twelve credits beyond his Bachelor's.

The Association does not argue that all factors to consider for layoff were equal and that only seniority should be considered; to the contrary, it has proved that Brown ranked higher in every factor listed under the contract. Therefore, the Association requests the grievance be sustained and the District ordered to reinstate Brown to 100% full-time employment and compensate him for his lost salary and any other lost benefit that would make him whole.

District

The District asserts that it did not abuse its discretion when it reduced Brown's teaching contract for the 2003-04 school year to half-time. The issue presented here being one of contract interpretation and application, the Association bears the burden of proof. In that regard, the Association's grievance alleges that the District either "misinterpreted" or "inequitably applied" the layoff provisions of the Agreement. If it is the Association's argument that the Agreement was "misinterpreted", it must "establish a contractual provision intended by the parties to govern the grievance, and an interpretation of that provision which is more persuasive than the District's." FENNIMORE COMMUNITY SCHOOL DISTRICT, DEC. NO. 26036-A (McLaughlin, 8/89). If the Association argues that the Agreement was "inequitably applied", the burden is the same. Under the Management Rights clause of the

Agreement, the Board has the authority to “determine the means, methods and personnel by which the School System operations are to be conducted.” Under the layoff clause, the Board must consider certain factors in determining which employee to lay off. As long as those factors are considered, the Board retains the discretion to determine which employee to lay off.

The District asserts it did not misinterpret the layoff clause of the Agreement. That provision includes a number of factors the Board is required to consider in determining which teachers are to be laid off both as to the individual teachers being considered and in comparison with other teachers. Only in the event that all of those other factors are equal, does length of service become the deciding factor.

At the Board level hearing, the Association argued that length of service should be given greater weight than the other criteria and also argued that the criteria for layoff were listed in the order of their importance. In doing so, the Association implied the Board had misinterpreted the Agreement by failing to give greater weight to Brown’s length of service than to the other criteria. However, the Association conceded at the Board hearing that there was no evidence in either bargaining history or past practice to support the claim that the criteria were listed in order of importance. Further, it is important to note that neither of these grounds alleging misinterpretation was pursued at arbitration. At hearing, the Association did not claim that the Board failed to correctly consider the contractual criteria. Before proceeding to identify any teachers to be considered for layoff or make any recommendations, Gillaspie and Davies met with the Association leadership to clarify any ambiguities that might exist in applying the contractual layoff criteria. Once that was done, Gillaspie and Davies proceeded to consider how the criteria applied to each of the three science teachers in the District.

Application of the first of the contractual criteria, academic training and certification, shows that King is the only science teacher certified to teach Physics and holds a broad range of licenses in the science area. She has also acquired 24 credits beyond a bachelor’s degree. Zitzner is currently acquiring credits beyond the bachelor’s degree and will be eligible, before the end of the first quarter of the 2003-04 school year, to hold Chemistry, Physical Science and Broad Field Science certification. Brown has acquired a single certification and obtained 12 credits beyond the bachelor’s degree, the last of which were earned in 1986, and he has expressed little interest in obtaining additional credits or additional certification. The District offers classes that require certified teachers in each of the areas in which the three science teachers hold certification.

As to length of service, Brown has clearly been in the District the longest of the three teachers.

As to evaluations, there is no evidence that the performance of the three teachers is anything less than satisfactory, or that the evaluations were anything other than equal.

As to past and potential contributions, Brown has acted as a coach and advisor in a number of extra-curricular activities, but has not done so since 1995, and did not testify that he had any interest in engaging in the activity in the future. King has done some nominal extra-curricular work, but has taught at a variety of levels. Zitzner has not engaged in extra-curricular work, but has concentrated on obtaining additional certifications that will enhance his versatility in the future. Regarding potential contributions, Dr. Gillaspie testified that it is very important to small school districts to have teachers who hold multiple certifications, as it enhances the flexibility of the District in scheduling classes when staff reductions occur. Brown himself testified that it is the expectation of the students in the District that the courses currently being offered continue to be offered. There is no evidence that the District has found it difficult to locate or employ individuals to coach or mentor extra-curricular activities, however, the District has struggled to find qualified science teachers and because of his limited licensure, in comparison to King and Zitzner, Brown has little potential to offer.

With regard to overall teaching experience, Brown has taught pretty much the same classes during his entire career, although he taught some junior high classes a decade ago. Zitzner has taught a variety of science classes under both a regular and a temporary certification. King has taught at the junior high school and high school levels, and has a breadth of experience in teaching all facets of science. Thus, even though King and Zitzner have fewer years of teaching experience than Brown, the range of their overall teaching experience is, and will continue to be, wider than his.

Thus, it was not unreasonable, arbitrary, capricious or discriminatory for the Board to determine that both King's and Zitzner's academic credentials and certification, potential contributions and overall teaching experience outweighed Brown's length of service and past service. The District cites a number of arbitration awards for the principle that the arbitrator is not to substitute his judgment for that of the employer in judging qualifications. In this case, the Agreement requires the District to consider specific criteria in determining which employee will be laid off, but does not specify the weight that must be given to each criterion. However, there is no dispute that in this case the Board gave each criterion relatively equal weight. It is only when employees being considered for layoff are deemed equal under the criteria other than seniority that seniority controls. The Board evaluated each science teacher in light of these criteria, both as applied to each teacher individually and in relation to each other, and made a decision to partially lay off Brown. The Association has presented no evidence, much less met its burden of proving, that the Board's decision was arbitrary, capricious, discriminatory or unreasonable. The Association is essentially asking the Arbitrator to substitute his judgment for that of the Board.

The Association has not challenged other layoff determinations made by the Board over a period of years, including this year and, as the Association points out, the contract language relating to layoffs has not been modified for over 20 years. The Association does not attempt

to explain how the Board could have so consistently interpreted the contract correctly in all cases but this one. The District concludes that the invitation to substitute arbitral judgment for that of the employer's should and must be declined. Similarly, to the extent the Association requests that the Agreement be rewritten to create a relative seniority clause, the request should be denied.

As to the appropriate remedy, if the Board has been deemed to have abused its discretion or acted capriciously in partially laying off Brown, Brown is entitled to be reinstated to a full-time position and made whole for lost salary or other benefits, less any unemployment compensation or other income he may have received due to or during the layoff.

In its reply brief, the District asserts that the Association states that the District had the authority to lay off King in part and Brown in part in order to reduce the department by one-half of a teaching position. The District has not read the contract to allow for plucking portions of the teacher's positions away from them without using the contractual layoff criteria. More to the point, the Association appears to argue that the District could have re-assigned teachers in the Science Department so as to enable Brown to retain his full-time position. The argument misses the mark, as the question the District was required to answer was which of the three science teachers, using the contractual layoff criteria, should be laid off. Once that was determined, the District could and did reassign teachers based on their respective certifications.

The Association further argues the District could have obtained emergency certification on behalf of any teacher. While that is the case when initially requesting such a license, it is not so in the case of renewals of such a license. In order for emergency certification to be renewed, the teacher must be prepared to obtain a minimum of six credits in an approved program toward obtaining a regular license in the area or subject matter for which the emergency license was granted. Wis. Adm. Code, Sec. PI 3.03(6). Here, the District obtained emergency certification for the teacher who was actively enrolled in an approved program leading to full licensure in Chemistry and Physical Science, as opposed to one who has not been enrolled in any approved program of any kind for 17 years. It was not an abuse of discretion for the District to count this emergency licensure and program enrollment in reviewing the qualifications of Science Department faculty in determining the layoff.

The Association also seems to believe that the layoff criteria should be treated as a point system with each criterion worth one point. There is nothing in the Agreement requiring the District to do anything other than consider the factors enumerated. The weight to be given each of the factors rests with the Board. As the Association itself points out, "in the past, having an unequal factor in just one area was enough for the District to decide which employee was laid off." The Association fails to explain why this has been an acceptable practice in the past, but would not be so now.

Finally, the Association makes much of the just cause provision in the Agreement, however, the grievance does not in any manner reference or allege a violation of Article XVIII. Like the Association's belated attempt at hearing to challenge the layoff itself, the Association is making a desperate effort to divert attention from the fact that the District considered all of the layoff criteria, made a decision based on those criteria, and determined Brown was the teacher to be laid off. The Association has not met its burden to show that, based on the facts, the Board acted discriminatorily, arbitrarily, unreasonably or capriciously in determining to partially lay off Brown.

DISCUSSION

Article XIV, LAYOFF PROCEDURE, sets forth five criteria that Board is to take into account, "both on an individual basis and in comparison with other teachers." The parties appear to be in agreement that this requires the Board to look at each factor with regard to each of the teachers in the area in which the layoff is to occur and then make comparisons among those teachers on the basis of each factor.

The District asserts the Board considered those factors and that unless the Association demonstrates that the Board acted discriminatorily, arbitrarily, unreasonably or capriciously in reaching its decision to layoff Brown, its decision must stand. The Association essentially asserts that the Board did not consider all of the factors in reaching its decision, but instead relied only on Zitzner's having emergency licensure to teach Chemistry and his taking coursework to become certified in that area, and that this violates Article XIV.

Beginning with a consideration of the factors themselves, the Arbitrator is mindful that his role is not to substitute his judgment for that of the Board however, the Board's determinations must have a reasonable basis in fact.

Academic Training and Certification

At the time the Board made its decision, King held five-year licenses in Physics, Chemistry, Biology/Life Science and Broad Field Science; Brown had a life license in Biology/Life Science; and Zitzner held a five-year license in Biology/Life Science and one-year special licenses for the 2002-03 school year in Chemistry and Physical Science and was enrolled in courses that would lead to certification in those areas by the first semester of the 2003-04 school year, as well as enable him to again receive emergency licensure in those areas to start that school year. In comparing the academic training, King has a BA degree plus 24 credits, Brown has a BA degree plus 12 credits and Zitzner has a BA degree with no additional credits yet earned.

The Association asserts the Board could not appropriately consider Zitzner's emergency licensure or his potential certification in Chemistry and Physical Science. However, the parties' agreement simply lists "academic training and certification" as a factor to consider and does not define or limit those terms. Absent such limitations, the Board is not precluded from taking Zitzner's emergency licenses into account under this factor and finding that Zitzner prevailed over Brown in this regard. As to his pursuit of regular licensure in the additional areas, that is more appropriately considered in the factor of past and future contributions.

Length of Service in the District

It is obvious that Brown prevails as to this factor with his 31 years of service compared to King's 7 and Zitzner's 2 years of service. Board President Kuhn testified that while the Board was aware of the teachers' relative lengths of service, it did not really consider it a factor. This is troubling, however, it appears from Kuhn's additional testimony that the Board looked at all of the criteria, that what she meant was that the Board did not consider it to be a determinative factor, rather than not considering it at all.

Ability and Performance As a Teacher in the District As Previously and Currently Evaluated By Appropriate Supervisory Personnel

While all three teachers have received good evaluations during their tenures with the District, the wording of Article XIV requires not only a consideration of the factor on an individual basis, but also in comparison with the other teachers. In addition, this factor references previous evaluations, as well as current evaluations. Contrary to the Board's conclusion, the fact that Brown had 31 years of good performance evaluations, versus King's seven years and Zitzner's one good evaluation must also be considered. On that basis, Brown prevails as to this factor.

Past and Potential Contribution to the Educational Program of the District

It is clear the Board gave more weight to Zitzner's potential contributions in pursuing certifications in Chemistry and Physical Science, than Brown's past contributions, which included developing and teaching the Biology II and Conservation/Ecology courses, chaperoning and advising students and coaching from 1972 to 1995. While one might disagree with the Board's valuing potential contributions over past contributions, it was the Board's decision to make, and it was not without a basis in fact. As to the assertion that the Board could not appropriately consider something that had not yet happened, the term "potential" refers to something that is possible, but has not yet happened.

While the Association asserts that the District does not need another teacher certified in Chemistry, since the Board could assign King to teach Chemistry under the Agreement, that is again the Board's decision to make. The Board's valuing teachers with multiple certifications and the flexibility that would give the District in making assignments in the future is not unreasonable. Further, Zitzner's willingness to obtain the additional certifications, as opposed to Brown's reluctance, is also appropriate to consider in this regard. Thus, it was not unreasonable for the Board to conclude that Zitzner prevailed as to this factor.

Over-All Teaching Experience

The District claims that both King and Zitzner have broader teaching experience than Brown based on the variety of science classes they have taught, and that this outweighed the length of Brown's experience in teaching. The term "teaching experience" is broad enough to include both the breadth and the length of a teaching experience; however, it is not apparent from the record that Zitzner's experience is broader than Brown's. He taught Physical Science and Chemistry and Brown taught Conservation and Biology. Based upon the facts in the record, it was not reasonable to conclude that Zitzner's having taught Physical Science and Chemistry for the 2002-03 school year with 1½ years of teaching outweighs Brown's 31 years of teaching Biology and Conservation.

Thus, it is concluded that the Board had a reasonable basis for deciding that King and Zitzner prevailed over Brown as to "academic training and certification" and "past and potential contributions to the educational program of the District", but that this was not the case as to "ability and performance in the District as previously and currently evaluated. . ." and "overall teaching experience." This leaves Brown prevailing in those areas, as well as "length of service in the district," leading to the question of what this means under the wording of Article XIV.

As the District points out in its reply brief, the wording of Article XIV does not specify what weight is to be given to each factor. Both Dr. Gillaspie and Board President Kuhn testified that they felt all of the factors have equal weight; however, it is apparent from their testimony that is not how they applied the language of Article XIV. Both testified that, in effect, academic training and certification and potential contributions, (based on Zitzner's having the emergency licensure in Physical Science and Chemistry and his pursuit of regular certifications in those areas) carried the most weight in their consideration of the factors. However, even if it is assumed the factors carry equal weight, the language of Article XIV does not provide that a teacher who prevails in three out of the five factors prevails overall. Further, both the Association and the District have pointed out that on at least one occasion in the past the Board made its determination to layoff a more senior teacher on the basis of a single factor – "ability and performance as a teacher. . .as previously and currently evaluated. . .", and that determination apparently was not challenged.

Although Brown prevails as to “length of service in the district”, that factor only carries the day if “all other factors are equal.” (Emphasis added) Giving those words their plain meaning, that precondition does not require a balancing of the results under each factor against each other such that Brown’s having prevailed in two areas (other than length of service) versus Zitzner’s having prevailed in two areas, would mean Brown’s length of service prevails. Thus, for Brown’s length of service to prevail, it was necessary for him to at least equal King and Zitzner as to all of the other factors. As Zitzner prevailed as to two of the factors, that was not the case.

In sum, the Board could reasonably conclude that Zitzner prevailed over Brown as to two of the factors to be considered, and therefore Brown could not prevail on the basis of length of service. As the wording of Article XIV in effect permits the Board to give one factor controlling weight in its final determination as to who is to be laid off, the Board did not violate Article XIV in determining to layoff Brown, rather than Zitzner.

The Association also argues that the District violated Article XVIII, Just Cause, of the Agreement, by reducing Brown in “rank or compensation” without just cause. In support of its argument, the Association asserts Brown was not forewarned of the consequences of telling Gillaspie and Davies he was not interested in obtaining certification in Chemistry unless he had to. Assuming *arguendo* that this provision applies, the question of whether he would be interested in obtaining the additional certification in Chemistry was put to Brown by Gillaspie and Davies during the course of their discussion with him regarding the pending layoff in the Science Department based upon the Board’s decision to eliminate one-half of a position in that department. In the context of that conversation and the pending layoff, Brown would have had to been aware that the question was not asked out of idle curiosity and that his answer would be taken into account when it came time for the layoff decision to be made.

Based upon the foregoing, it is concluded that the District did not violate the parties’ Agreement when it laid off Dennis Brown.

On the basis of 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 13th day of January, 2004.

David E. Shaw /s/

David E. Shaw, Arbitrator