BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CRANDON TEACHERS' ASSOCIATION

and

CRANDON SCHOOL DISTRICT

Case 30
No. 63029
MA-12478

(Janet Schmidt Grievance)

Appearances:

Ted Lewis, Director, Northern Tier UniServ, appearing on behalf of the Association.

Steven Garbowicz, O'Brien, Anderson, Burgy, Garbowicz & Brown, Attorneys at Law, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the District or Employer, respectively, were signatories to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was transcribed, was held on March 25, 2004, in Crandon, Wisconsin. Afterwards, the parties filed briefs and reply briefs which were received by June 23, 2004. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties stipulated to the following issues:

1. Was the Union grievance timely?

2. Did the District violate either Article 16 or Article 31 of the master contract? If so, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2001-2003 collective bargaining agreement contained the following pertinent provisions:

ARTICLE XV

GRIEVANCE PROCEDURE

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B. Steps

1. A grievance may be submitted, in writing, first to the principal for adjustment within 20 days of the event giving rise to the grievance. If the grievant is not satisfied with the adjustment offered by the principal, the grievant shall submit the grievance in writing to the Superintendent. The Superintendent shall then set a mutually agreeable time for discussion with the principal, grievant and representative. Such discussion shall be held within ten (10) working days of the receipts of the above.

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ARTICLE XVI

VACANCIES, TRANSFERS AND REASSIGNMENTS

A. Notices of teacher vacancies shall be given to the president of the Crandon Teachers' Association.

B. Such notices shall contain a description of the vacancy and the date by which it must be returned. Those interested must respond within a period of fourteen (14) calendar days. In the event that a position becomes vacant within thirty (30) calendar days of the start of school, the waiting period can be shortened to five (5) calendar days after notification of the Crandon Teachers' Association.

C. Teachers who desire a change in grade and/or subject assignment or who desire to transfer to another position may file a written statement of such desire with the superintendent no later than April 30th.

D. The Board may, by mutual agreement with the teacher, transfer from one position to another at any time after the last teaching day in May or before the third week in August provided the teacher is notified during that period of time.

E. Bumping can only occur in a layoff situation and then seniority prevails.

F. Any vacancies, transfers, and reassignments would be done using the seniority list, and if more than one person has the same seniority, qualifications will be used. Qualifications shall be defined as teaching experience at a particular level (i.e., Elementary, Middle or High School) and/or subject area; additional college credits in area; number of pertinent workshops and seminars attended; and job performance as determined by pervious evaluations. Not withstanding the above, the Board shall have the right to deviate from the above criteria once each contract year for good and sufficient cause if the Board desires to hire another qualified employee for the position, provided this deviation is not arbitrary or capricious.

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ARTICLE XXXI

LAYOFF PROVISIONS

A. If necessary to decrease the number of teachers (either partially or in whole) by reason of substantial decrease of pupil population or termination of a federal or state program, the Board may layoff pursuant to 118.22 Wisconsin Statutes, the necessary number of teachers taking into account and protecting the seniority of all teachers who are certified or certifiable for retention. No teacher may be prevented from securing other employment during the period he/she is laid off under this article. Such teachers shall be reinstated in inverse order of their being laid off if certified for and makes application for the vacancies. Such reinstatement shall not result in a loss of credit for previous years of service. No new or substitute appointments may be made while there are laid off teachers available who are certified or certifiable to fill the vacancies and who apply for the position.

B. If any lay-offs are being contemplated, the Association shall be informed by the administrator with as much information as is available.

C. No decision to reorganize or change curriculum shall precede a lay-off nor shall any change or reorganization of curriculum occur while there are teachers on lay-off status. The purpose of this provision is not to prevent the necessary continuous on-going curriculum procedures.

D. Teachers affected by a staff reduction will be notified of vacant positions within the District and area of certification and department from which they were laid off when they occur. To be recalled, a teacher must be eligible for the open position with regard to certification. Recalled teachers will be re-employed only if they accept the offer of employment within five (5) days after receiving the offer, or within thirty (30) working days if the offer is made for employment for the beginning, of a school term. The notice shall be sent to the last known address of the employee on file in the District records.

E. The Board shall have the right to delay notices of layoff caused by substantial decreases in enrollment, the reduction/termination of a state or federally funded program, or budget shortages as a result of established caps or revenue limits until April 15th or each school year.

FACTS

The District operates a public school system in Crandon, Wisconsin. The Association is the exclusive collective bargaining representative for those teachers employed by the District. The Recognition Clause in the parties' collective bargaining agreement specifically provides that "this agreement shall be applicable to all regular. . .teaching personnel employed by the Board of Education of the School District of Crandon. . ."

While most teachers who teach in the District are employed by the District, not all are. Some teachers who teach in the District are employed by the local Cooperative Educational Service Agency (CESA). The District routinely contracts with CESA to supply teachers to the District for certain areas. CESA teachers work side-by-side with District teachers, but are not technically District employees. The CESA teachers' employer is CESA. Since the CESA teachers are not District employees, they (the CESA teachers) are not covered by the collective bargaining agreement between the District and the Association.

Two teachers are involved in this case: Janet Schmidt and Michelle Gunderson. Schmidt is a District employee and thus is a member of the teacher bargaining unit.

Gunderson is a CESA employee who has been assigned by the CESA to teach in the Crandon School District. Gunderson is not a member of the teacher bargaining unit in the Crandon School District.

Schmidt is an elementary multicategorical teacher in the District. She teaches elementary students with learning disabilities (hereinafter LD) and cognitive disabilities (hereinafter CD). She normally works with LD students. The position she fills requires LD and CD certification, which Schmidt possesses. She has two Master's Degrees, one of which is in cognitive disabilities. She has been employed by the District as a multicategorical teacher since 2001. Until the end of the 2002-03 school year, she worked full-time.

Gunderson is an elementary CD teacher in the District (but, as noted above, is a CESA employee). She works with both mild and severe CD students.

The following facts pertain to the elementary CD position that Gunderson currently has. The District's last elementary CD teacher left sometime during the 2000-2001 school year. Afterwards, the elementary CD position was staffed by a long-term substitute. The following school year, special education enrollment dropped sharply, and the District's small number of CD students were served by a nearby District. In early 2002, the District decided to again create and fill an elementary CD position to meet the needs of its CD students. Before that position was posted, it was orally offered to Janet Schmidt because District officials knew she was certified for such a position. This oral offer was made to Schmidt on January 31, 2002. On that date, the District's Director of Special Education, David Kwiatkowski, spoke with Schmidt at a District in-service meeting. He told Schmidt about the new elementary CD position which the District decided to create for severe CD students, and asked her if she was interested in filling it. Schmidt replied emphatically that she was not interested in working with severe CD students and thus was not interested in the (new) position. This conversation between Kwiatkowski and Schmidt was very brief – just a couple of minutes. During the conversation, Kwiatkowski did not tell Schmidt that by not applying for the position she was jeopardizing her position or would suffer negative consequences.

The District subsequently created a new elementary CD position. The vacancy was posted internally in April, 2002. No District employee, including Schmidt, applied for the position.

Schmidt testified that the reason she did not apply for the posted elementary CD position was this: she was happy with her existing teaching position with the District, and when she asked the District Superintendent whether it (i.e. her existing teaching position) was secure, he (i.e. the Superintendent) told her not to be concerned.

The District then posted the vacancy externally. There were no applicants.

After no one expressed interest in the posted position, the District's Superintendent decided to contract with the local CESA to fill it (i.e. the new elementary CD position). In June, 2002, the District and CESA signed a contract wherein CESA agreed to provide an elementary CD teacher to the District.

In August, 2002, CESA hired Michelle Gunderson to teach elementary CD in the Crandon School District. Gunderson is a licensed special education teacher who holds a #808 Early Childhood Special Education certification, but was not licensed in elementary CD. After Gunderson was hired, CESA officials took the necessary administrative steps for Gunderson to obtain a provisional license from the Wisconsin Department of Public Instruction (DPI). As a result, Gunderson obtained a provisional license from DPI to teach elementary CD. According to DPI, someone with a provisional license is qualified to teach.

Gunderson taught full-time in the District throughout the entire 2002-03 school year. One of her fellow teachers was Janet Schmidt.

On April 8, 2003, the School Board approved a contract with CESA for the (upcoming) 2003-04 school year. The part of the contract pertinent here deals with the CD program. Therein, the parties agreed that the teacher who provided CD instruction to the District in the 2002-03 school year, Michelle Gunderson, would continue to provide CD instruction in the District in the 2003-04 school year on a full-time basis.

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The following facts pertain to the District's decision to reduce its special education teaching staff. In early 2003, the District evaluated its teaching needs in the special education area for the upcoming 2003-04 school year. After doing so, it decided that due to declining enrollment and reduced state and federal funding, it would reduce its teaching staff in the special education area. It further decided that Schmidt was to be the teacher who would be laid off. Schmidt was the least senior special education teacher in the bargaining unit. In February, 2003, Schmidt was notified in writing that her last day of employment in the District would be June 9, 2003 (i.e. the end of the 2002-03 school year). Schmidt signed the layoff notice on February 27, 2003.

While the layoff notice just referenced envisioned that Schmidt would be completely laid off, that did not happen. Instead, the District's staffing needs changed, and the District decided to employ Schmidt for the upcoming school year on a half-time basis. In May, 2003, the District offered Schmidt a half-time teaching contract for the 2003-04 school year. She accepted the offer and signed a half-time teaching contract on May 15, 2003.

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In late May, 2003, the District had an opening for an LD teacher at the High School. That position required a certification in LD, grades 9-12. Although she does not have that certification, Schmidt applied for the position. The District Superintendent, Dr. Michael Peters, advised her that he was going to "advertise outside the District for the 9-12 teaching position since you are not certified in LD 9-12."

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The 2003-04 school year started with Schmidt working half-time and Gunderson working full-time. Schmidt testified without contradiction that she first learned that Gunderson was working full-time at a meeting on September 2, 2003. Schmidt thought she should be the teacher who stayed at full-time status, not Gunderson, because she (Schmidt) was more senior and experienced than Gunderson and already possessed elementary CD certification.

The Association filed a grievance on September 19, 2003. In that grievance, the Association averred that: "For the 2003-04 school year, the. . .District. . .arbitrarily reduced her full-time position to half-time." The grievance further averred that: "When the 2003-04 school year began, the . . .District. . . hired an uncertified person for Janet Schmidt's previous full-time position." The Association alleged that by these acts, the District violated the Layoff provision and the Vacancies, Transfers and Reassignment provision. The grievance was then processed through the contractual grievance procedure. As it was being processed, the Employer contended that the grievance was untimely. The grievance was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association initially argues that the District's timeliness contention is without merit. First, as the Association sees it, none of the dates cited by the District should be used to determine timeliness herein. The Association specifically addresses two events cited by the District, namely Schmidt's layoff and the subcontracting of the Elementary CD position to CESA. With regard to the former (i.e. Schmidt's layoff), the Association acknowledges that it did not file a grievance when Schmidt was laid off. However, the Association submits that in and of itself, a layoff is not a grievable event, and the Association emphasizes that it is not the act complained of herein. The Association argues that it was only later (when the District kept a less senior, less experienced and less certified teacher at full-time while Schmidt worked half-time), that a grievable event occurred. With regard to the latter (i.e. the subcontracting), the Association also acknowledges that it did not file a grievance when the

District subcontracted the Elementary CD position to CESA. However, once again, the Association submits that in and of itself, such subcontracting is not a grievable event, and the Association emphasizes it is not the act complained of herein. The Association again argues that it was only later (when the District kept a less senior, less experienced and less certified CESA teacher at full-time while Schmidt worked half-time) that a grievable event occurred. Second, building on the foregoing, the Association emphasizes that the grievable event complained of herein was when Schmidt learned on September 2, 2003 that the District kept Gunderson at full-time while she (Schmidt) worked half-time. The Association asserts that it did not know that crucial fact before then because the District did not notify either Schmidt or the Association that it had signed a contract with CESA to keep the Elementary CD teacher at full-time, nor did it notify either Schmidt or the Association that Gunderson had signed a full-time contract. It cites Elkouri for the principle that the procedural clock starts to run after a party finds out the facts that could give rise to a grievance. Once again, the Association avers that the date that Schmidt discovered that the District had maintained Gunderson at full-time was September 2, 2003. It notes that the grievance was filed 17 days later. It therefore contends that the grievance was timely filed within the timeline contained in the grievance procedure and thus is properly before the Arbitrator for a decision on the merits.

With regard to the merits, it is the Association's position that the District violated the collective bargaining agreement when it maintained Gunderson at full-time while Schmidt was at half-time. It makes the following arguments to support this contention.

First, the Association notes at the outset that using objective standards and criteria, Schmidt is more senior, more experienced and more certified than Gunderson is, but Gunderson was the teacher who the District retained at full-time. The Association argues that this violated the collective bargaining agreement.

Here's why. The Association sees this case as being a seniority case governed by a portion of the Layoff Provision. It notes that that provision says, in pertinent part, that when the District lays off teachers, it must "tak[e] into account and protect" "the seniority of all teachers who are certified or certifiable for retention." According to the Association, this language obligates the District to take the seniority of all teachers into account, including Gunderson. The Association maintains that while Gunderson is a CESA employee, she is nonetheless a teacher as defined by Wisconsin Statutes. The Association contends that when the seniority of Schmidt and Gunderson are compared, the District should have "taken into account and protected" Schmidt, since she was the more senior of the two. The Association avers that did not happen, so the District evaded the seniority protection contained in the Layoff Provision.

Second, the Association also argues that the District acted unreasonably and in bad faith when it retained Gunderson at full-time while Schmidt was at part-time. As the

Association sees it, the District offered no reasonable rationale why it gave priority to Gunderson, a non-bargaining unit employee, when she is less senior, less experienced and less qualified than Schmidt. The Association argues in the alternative that if it was CESA, rather than the District that decided to retain Gunderson at full-time while Schmidt was at half-time, the District acted unreasonably and in bad faith in allowing CESA to make that call.

Third, the Association argues that the District's actions here contravened the District's prior practice on subcontracting teaching work to CESA. The Association avers that previously when the District subcontracted teaching work to CESA, bargaining unit teachers were not on layoff status. Here, though, Schmidt was partially laid off at the start of the 2003-04 school year (because she was only working half-time). The Association contends that when the District kept Gunderson at full-time while Schmidt was at half-time, the District essentially gave priority to the subcontracted position over a bargaining unit position.

Next, the Association argues that the District violated what it characterizes as DPI policy by its actions herein.

Finally, the Association contends that what Schmidt told Kwiatkowski in January, 2002 about the new Elementary CD position should not be used to justify the District's actions herein. First, the Association maintains that while the District alleged that Schmidt told Kwiatkowski she would not work with severe CD students, she did not say that. The Association notes in that regard that Schmidt is Elementary CD certified and has worked with CD students for many years. The Association asserts that Schmidt did not tell Kwiatkowski that she would not work with CD students, but instead merely explained her preference to not work with severe CD students because she was happy with her incumbent position working with the students she had. Second, the Association calls attention to the fact that when Kwiatkowski spoke to Schmidt about the new CD position, he did not tell her that what she told him about her preference would jeopardize her job in the future or preclude her from working with severe CD students in the future. Third, the Association contends that even if Schmidt had refused to work with CD students (which was not the case), the District could have nonetheless exercised its management right and reassigned Schmidt to the Elementary CD position, and then subcontracted Schmidt's former half-time multicategorical position to CESA. The Association notes in this regard that at no time did District officials ever tell Schmidt that she could stay at full-time if she worked with severe CD students. According to the Association, Schmidt would have welcomed the opportunity to work exclusively with severe CD students if this would have preserved her at full-time.

The Association therefore asks that the grievance be sustained. As a remedy, the Association asks that Schmidt be made whole for her lost salary and benefits that she lost as a result of being half-time since the start of the 2003-04 school year.

District

The District initially argues that it is unnecessary for the Arbitrator to address the merits of the grievance because it was not initiated within the prescribed time limits which are set forth in the contractual grievance procedure for filing grievances. Hence, the District avers that the grievance was untimely filed. According to the District, no grievable event occurred in September, 2003 (when the grievance was filed) which made this grievance timely. Instead, the District contends that if any grievable "event" occurred, it was one of the following: 1) when the District posted the elementary CD position internally in April, 2002; or 2) when the District contracted with CESA in the summer of 2002 to have CESA supply an elementary CD teacher to the District for the 2002-03 school year; or 3) when CESA hired Michelle Gunderson in the summer of 2002 to teach elementary CD in the Crandon School District; or 4) when the District decided in February, 2003 to completely lay Schmidt off at the end of the 2002-03 school year; or 5) when the District essentially rescinded Schmidt's complete layoff at the end of the 2002-03 school year and offered her half-time employment with the District for the 2003-04 school year; or 6) when the District contracted with CESA in the summer of 2003 to have CESA continue to supply an Elementary CD teacher to the District for the 2003-04 school year. The District essentially contends that the Arbitrator can pick any of the foregoing dates as the "event giving rise to the grievance", because all occurred more than 20 days prior to the date the grievance was filed (i.e. September 19, 2003), thus making the instant grievance untimely.

Next, the District does not attempt to rebut Schmidt's testimony that she did not know until September 2, 2003 that Gunderson was working full-time while she was working half-time. Instead, the District makes the following arguments which it believes should cause the Arbitrator to not use that date (i.e. September 2, 2003) to determine the timeliness of the grievance. First, the District acknowledges that it did not inform Schmidt that it was going to keep Gunderson at full-time while she (Schmidt) worked half-time, but it contends that the District does not have to review its staffing levels and plans with each District employee before they are implemented. Second, the District argues that Schmidt and the Association failed to adequately and timely investigate the District's plans relative to its Special Education CD program for the 2003-04 school year. The District avers that had Schmidt and the Association done so, they would have learned well before September 2, 2003 that Gunderson was not being laid off by CESA, but rather was going to continue as a full-time CD teacher in the District for the 2003-04 school year. The District submits that it did not try to hide or conceal that information. According to the District, that information was readily available and apparent to anyone who looked at the District's contract with CESA for the 2003-04 school year. The District argues that the Association's negligence and/or lack of interest in ascertaining the facts herein should not be rewarded by allowing an untimely grievance to proceed. The District therefore contends that since the grievance was untimely, it should be dismissed on that basis alone. It cites the arbitration award in ROME CABLE CORPORATION to support its position that an untimely grievance should be dismissed.

If the Arbitrator finds otherwise, and addresses the substantive issue in dispute, it is the District's position that it did not violate either Article 31 (the Layoff Provision) or Article 16 (Vacancies, Transfers, and Reassignments) of the collective bargaining agreement by its actions herein. It elaborates as follows.

First, the District avers at the outset that the reason Schmidt does not have a full-time position with the District anymore is because of declining enrollment in her teaching area – special education. The District characterizes that as unfortunate, but one of the known side effects of teaching.

Second, the District responds to the Association's contention that it acted unreasonably and in bad faith by retaining Gunderson at full-time while Schmidt was at half-time. The District disputes that assertion. It contends that while Schmidt now wants the Elementary CD teaching position that Gunderson holds (because it is a full-time position), Schmidt was, in fact, previously offered that position. The District asserts that had she accepted it when it was offered to her in January, 2002, she would now have a full-time position rather than a half-time position. The District emphasizes that she chose not to take it. According to the District, it is illogical for the Association to say that the District acted unreasonably here when it ultimately filled the Elementary CD position after Schmidt had rejected it. The District argues that it should not beheld responsible for the later consequences of Schmidt's failure to accept the position when it was offered to her.

Finally, the District responds to the Association's contention that it subcontracted a position to the ultimate detriment of its regular employee (Schmidt). The District disputes that assertion. First, it notes that it is not Gunderson's employer – instead, her employer is CESA. Second, the District asserts that the collective bargaining agreement with the Association does not cover CESA employees, so therefore Gunderson is not a bargaining unit employee. Third, the District avers that it has historically subcontracted out positions to CESA when they cannot be filled internally, and it further maintains that is what happened here after no one applied for the posted position. The District sees this grievance as an attempt to change that practice, and it asks the Arbitrator to reject that attempt.

In sum, the District believes that its actions herein comported with the collective bargaining agreement. Conversely, the District maintains that the Association did not prove that the District's actions herein violated the collective bargaining agreement. It therefore asks that the grievance be denied.

DISCUSSION

Timeliness

Since the District contends the grievance was untimely filed, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance was timely filed.

I find that it was timely filed. My rationale follows.

Like most grievance procedures, the instant grievance procedure contains a timeline for filing grievances. In this contract, the timeline for filing a grievance is found in Step 1 of Article XV. That section specifies that a grievance may be submitted "within 20 days of the event giving rise to the grievance." That means that the 20 day clock starts to run on the date of the event giving rise to the grievance.

In this case, the parties disagree about what "event" gave rise to the grievance. The reason the parties are fighting over this is because it affects whether the grievance is timely or untimely.

In some cases, there is no question about when the "event giving rise to the grievance" occurred. Take, for example, a grievance which challenges employee discipline. In such a situation, the "event giving rise to the grievance" is commonly considered to be the date that the employer disciplined the employee.

In other cases, it is harder to determine when the "event giving rise to the grievance" occurred than it is in the discipline example just given. In my view, that is the case here. The following discussion shows this.

I begin my discussion on this point by looking at the various "events" cited by the District. The District contends that if a grievable event occurred, it was one of the following: 1) when the District posted the elementary CD position in April, 2002; or 2) when the District first signed a contract with CESA in June, 2002 for CESA to provide an elementary CD teacher to the District for the 2002-03 school year; or 3) when CESA hired Michelle Gunderson and assigned her to the Crandon School District in August, 2002; or 4) when the District decided in February, 2003 to lay Schmidt off at the end of the 2002-03 school year; or 5) when the District decided to not lay Schmidt off at the end of the 2002-03 school year but instead offered her half-time employment for the 2003-04 school year which she accepted; or 6) when the District signed a contract with CESA in April, 2003 for CESA to provide an elementary CD teacher to the District for the 2003-04 school year. After naming all of the foregoing dates as possible "event[s] giving rise to the grievance", the District asks me to pick

one of the foregoing dates without specifying which one I should pick. The reason the District is not more specific than that is quite simple: if I pick any of the foregoing dates as the "event giving rise to the grievance", the grievance was untimely because all those dates occurred more than 20 days prior to the date the grievance was filed on September 19, 2003.

For the purpose of discussion, it is assumed that all the events just referenced were grievable events. According to the District, it automatically follows from that that the grievance was untimely since it was filed in mid-September, 2003. I disagree. Here's why. The District's timeliness contention is based on the premise that no grievable event occurred after those which it referenced, and specifically that nothing occurred in September, 2003. I do not accept that premise. Notwithstanding the District's contention to the contrary, I find that a grievable event did occur in September, 2003. The following discussion identifies what it was.

When the 2003-04 school year started, Gunderson was working full-time and Schmidt was working half-time. At the hearing, the Association made it clear that it considered that to be the grievable event that it was challenging (i.e. that when the school year started, Gunderson was working full-time while Schmidt was working half-time). Since I previously found that all the events which the District relied on were grievable events, I find, for purposes of consistency, that the event just referenced was also a grievable event.

Having so found, the focus now turns to the question of when Schmidt learned of that grievable event (i.e. that Gunderson was going to be working full-time during the 2003-04 school year while she (Schmidt) was working half-time).

Schmidt testified without contradiction that she first learned of this fact at a meeting on September 2, 2003.

The District did not attempt to rebut her testimony about that date. Instead, it made the following arguments which, in its view, should cause the Arbitrator to not use that date (i.e. September 2, 2003) to determine the timeliness of the grievance.

First, the District asserts that even if the District did not inform Schmidt that it intended to keep CESA employee Gunderson at full-time while Schmidt worked half-time, it (the District) does not have to review its staffing levels and plans with each employee before they are implemented. That's true. There is nothing in the collective bargaining agreement that explicitly requires the District to do so. That said, I believe this argument misses the mark because the question herein is not whether the District is contractually obligated to review staffing levels and plans with employees before they are implemented. Instead, for the purpose of determining timeliness, the crucial question is simply when the grievant learned of that decision. That's it.

Second, the District avers that had Schmidt and the Association investigated the District's special education plans for the 2003-04 school year, they would have learned prior to September 2, 2003 that Gunderson was not being laid off by CESA, but rather was going to continue as a CD teacher in the District for the 2003-04 school year on a full-time basis. However, in my view, the question herein is not whether the Association could have ascertained that information earlier than it did. Instead, it is whether the grievance will be found untimely because the Association failed to unearth the information about Gunderson's full-time status sooner than September 2, 2003. I answer that question in the negative, meaning that I decline to find the grievance untimely on the grounds that the Association and/or Schmidt should have unearthed the information about Gunderson's full-time status earlier than September 2, 2003. Here's why. In the preceding paragraph, I noted that the District is not contractually obligated to review its staffing levels and plans with employees before they are implemented. Put more bluntly, the District can withhold that information and keep employees in the dark about those matters if it so chooses. That is what the District did here. When the District reduced Schmidt from full-time to half-time, it did not tell her or the Association that Gunderson was going to stay at full-time. Once again, the District had the right to withhold that information. However, since it did not share that information with Schmidt or the Association, it is hard pressed to turn around and persuasively argue here that Schmidt and the Association should essentially be punished for not discovering that grievable event earlier. Had the District informed Schmidt and/or the Association at the end of the 2002-03 school year that Gunderson was going to stay at full-time, and then Schmidt had not grieved until mid-September, 2003, obviously the District would have a strong timeliness defense. However, that is not what happened here. Instead, as previously noted, Schmidt testified without contradiction that she first learned that Gunderson was working full-time on September 2, 2003. Thus, she did not know that Gunderson was working full-time until that date. I find that this grievable event started the 20-day clock running. Since the instant grievance was filed less than 20 days later, it was timely.

Even if I am wrong about using the date of September 2, 2003 to start the 20-day timeline, there is another good reason for not dismissing this grievance on timeliness grounds. It is this: Many labor agreements specifically say that a grievance that is not filed or processed within the time limits contained in the grievance procedure is waived. By this language, the parties themselves impose a penalty for late filing or processing of grievances. When that type of clause exists, that is what arbitrators hang their hat on, so to speak, when they dismiss a grievance on timeliness grounds. To illustrate this point, one need look no further than the arbitration award which the District cited and attached to their brief, namely the ROME CABLE CORPORATION decision. The contract language being interpreted therein said that "to be considered beyond Step 1" the grievance must be timely processed. Thus, that contract language imposed a penalty for late processing of grievances. Here, though, this contract language does not contain such a provision. That means that when the parties wrote their own grievance procedure, they did not impose a penalty for late filing or processing of grievances.

Thus, assuming for the sake of discussion that the instant grievance was untimely, if I dismissed the grievance on that basis alone, I would be imposing a penalty that the parties themselves chose not to impose in their grievance procedure.

In light of the above, it is held that the grievance was timely filed.

Merits

I have decided to begin my discussion on the merits by first addressing the scope of the grievance and thus the scope of this decision. While the following information about the District's use of CESA employees was previously mentioned in the **FACTS**, it is repeated again because it gives context to the discussion about the scope of the grievance. Some teachers who teach in the District are employed by the local CESA as opposed to being employed by the District. The record indicates that each year, the District contracts with CESA to supply teachers to the District for various areas. This arrangement has existed for many years. In their briefs, both sides characterize the District's use of CESA employees as subcontracting teaching work. The District reads this grievance as attempting, at least in part, to end, change, or put limits on the District's subcontracting of teaching work to CESA employees. That is not how I read the grievance. In my view, the grievance does not implicitly or explicitly reference the subcontracting of teaching work to CESA employees. However, lest there be any question about the scope of the grievance, I have decided to state up front that this decision will not resolve that issue (i.e. the subcontracting of teaching work to CESA employees). Here's why. At the hearing, the parties stipulated to an issue which does not reference the subcontracting of teaching work to CESA employees. As I see it, the stipulated issue can be answered without my opining about the subcontracting of teaching work to CESA employees. That being so, that matter will not be opined on herein.

Having just identified what issue will not be addressed herein, the focus turns to the issue that will be addressed. At the hearing, the parties stipulated to the following issue: Did the District violate either Article 16 or 31 (by its actions herein)? The Association answers that question in the affirmative, while the District answers it in the negative. Based on the rationale which follows, I find that the District violated Article 31 by its actions herein.

My analysis begins with a look at Article 31. That article, which is entitled "Layoff Provisions", contains five separate paragraphs. In the context of this case, the only part of that article applicable here is the first sentence of Paragraph A. The first part of that sentence provides that when the Board finds it necessary to decrease the number of teachers because of declining enrollment or reduced state and federal aid, it can lay teachers off. The District can lay teachers off either completely or partially. The remainder of this sentence then contains a caveat. The caveat is this: when the Board decides to lay teachers off, it must "tak[e] into account and protect the seniority of all teachers who are certified or certifiable for retention."

This means that when the District decides to lay teachers off, it has to take into account and protect the seniority of those teachers who are certified or certifiable.

There is no question that the language just referenced gives the Board the right to lay teachers off because of declining enrollment or reduced state and federal aid. The record indicates that is what happened in the District in the special education area in the Spring of 2003. That being so, the Board was authorized by the language just referenced to lay off a special education teacher. As has already been noted, Schmidt was the special education teacher selected for layoff. While the Board originally decided to lay her off completely, it later decided that her layoff would not be a complete layoff but instead would be a partial layoff (specifically, a reduction to half time). Once again, the Board was authorized to do that by the contract language just referenced.

As the Association sees it, the District's actions referenced so far complied with the Layoff Provision. However, something else happened that caused Schmidt and the Association to grieve.

Here's what it was. When Schmidt started the 2003-04 school year working half-time, she learned that CESA employee Gunderson was still working full-time teaching elementary CD students. This was problematic because Schmidt knew she was more senior and experienced than Gunderson, and Schmidt also knew she was certified in the area that Gunderson was teaching in (i.e. elementary CD), whereas Gunderson only had a provisional license in that area.

The basic question here is whether the District violated the Layoff Provision when it retained CESA employee Gunderson at full-time while Schmidt was at half-time. I find that it did. Here's why. As has already been noted, once the District decided it was going to reduce a full-time special education teacher to half-time, it was required by the last part of the first sentence of Paragraph A to "tak[e] into account and protect the seniority of all teachers who are certified or certifiable for retention." This language is dispositive in determining whether it was Schmidt or Gunderson who was reduced from full-time to half-time. When the District retained Gunderson at full-time while Schmidt was at half-time, the District failed to "take into account and protect" Schmidt's seniority. While Schmidt is a junior employee in the District, she has more seniority than Gunderson does because Gunderson, as a non-bargaining unit employee, technically has no district seniority at all under the parties' collective bargaining agreement. Additionally, Schmidt is certified in the area that Gunderson was teaching in (i.e. elementary CD). Thus, Schmidt was "certified" (within the meaning of the first sentence of Paragraph A) to perform the teaching work that Gunderson was performing (i.e. teaching elementary CD students). Had the District complied with that contract provision and protected Schmidt's seniority, it would have given preference to Schmidt and kept her at full-time. That did not happen. Instead, the District gave preference to Gunderson and kept her at full-time.

The focus now turns to the District's stated reasons why it retained Gunderson rather than Schmidt at full-time.

First, the District notes that it had a contract with CESA for CESA to supply it with a full-time elementary CD teacher for the 2003-04 school year. The District contends that if it had reduced Gunderson to half-time for that school year, that would have breached its contract with CESA. That argument would certainly be persuasive if my task herein was to enforce the District's contract with CESA. However, that's not my job. My task herein is simply to interpret and enforce the parties' collective bargaining agreement. In this particular case, it may be that enforcing the collective bargaining agreement results in a breach of the District's contract with CESA. So be it.

Second, the District contends it did not have to offer Schmidt that work (i.e. the elementary CD work) because it previously offered her that work in January, 2002, and she turned it down. I find that what Schmidt told Kwiatkowski in January, 2002 about the new elementary CD position cannot be used as a basis to justify the District's actions herein. My rationale for so finding can be simply put: things change. When Schmidt told Kwiatkowski in January, 2002 that she was happy in her then-existing position working with the students she had and was not interested in the new elementary CD position, she had a full-time position with the District. However, a year and a half later, things had changed. Specifically, by that time, she had been reduced from full-time to half-time. A reduced paycheck can change one's perspective. Schmidt essentially said so at the hearing when she testified that she would now welcome the opportunity to work with severe CD students because with that work comes full-time employment. Based on the change in Schmidt's employment status since January, 2002 (i.e. that she had subsequently been reduced from full-time to half-time), and the fact that she is certified to teach in the teaching area where the District had a full-time teaching position available (i.e. elementary CD), I find that the District should have offered her that teaching work again prior to the start of the 2003-04 school year. The District's failure to do so was to its detriment.

Having thus reviewed the District's stated reasons why it retained Gunderson rather than Schmidt at full-time and found them to be unpersuasive, it is held that the District violated the first sentence of Paragraph A of Article 31 (the Layoff Provision) when it retained Gunderson rather than Schmidt at full-time for the 2003-04 school year.

Given that finding, I believe it is unnecessary to examine the other contract provision which was referenced in the stipulated issue, namely Article 16. As a result, that contract provision will not be reviewed herein.

Since a contract violation has been found, a remedy is warranted. The remedy which I am ordering is this: the District shall pay Schmidt the difference in pay and benefits between

what she actually received as a half-time employee for the 2003-04 school year, and what she would have received as a full-time employee for that same school year. As I see it, the remedy just ordered is a traditional make-whole remedy. In crafting that remedy, I expressly limited it to the 2003-04 school year. I considered and rejected the idea of extending the make-whole remedy into the 2004-05 school year.

In light of the above, it is my

AWARD

1. That the Union grievance was timely filed; and

2. That the District violated Article 31 of the master contract by its actions herein. In order to remedy that contractual breach, the District is directed to pay Schmidt the difference in pay and benefits between what she actually received as a half-time employee for the 2003-04 school year, and what she would have received as a full-time employee for that same school year.

Dated at Madison, Wisconsin this 11th day of November, 2004.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

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