

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
NORTHERN EDUCATIONAL SUPPORT TEAM (NEST)

and

SCHOOL DISTRICT OF RIB LAKE

Case 22
No. 64022
MA-12778

Appearances:

Gene Degner, Director, Northern Tier UniServ, 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501-1400, appearing on behalf of Northern Educational Support Team (NEST), referred to below as NEST, or as the Union.

Richard J. Ricci, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the School District of Rib Lake, referred to below as the Employer or as the District.

ARBITRATION AWARD

NEST and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. NEST requested, and the District agreed, that the Wisconsin Employment Relations Commission appoint a member of its staff to serve as Arbitrator to resolve a grievance concerning the layoff of certain teacher aides. The Commission appointed Richard B. McLaughlin. Hearing on the matter was held on December 8, 2004, in Rib Lake, Wisconsin. On January 6, 2005, Amy C. Sieg filed with the Commission a transcript of the hearing. The parties filed briefs and reply briefs by March 4, 2005.

ISSUES

The parties stipulated the following issues for decision:

Did the District violate the Collective Bargaining Agreement, in particular, Article XXI, Reduction in Force, and Article XXIII, Seniority, when it laid off

Aides Kris Zondlo, Mary Ann Rusch, and Susan Freiboth, while retaining Aide Jeanine Bartelt?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II- MANAGEMENT RIGHTS

- A. The Board possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited by enumeration to the following:
1. To direct all operations of the school system . . .
 3. To hire, promote, transfer, schedule and assign employees in positions with the school system, not inconsistent with the terms of this agreement . . .
 5. To relieve employees from their duties because of the lack of work or any other legitimate reason;
 6. To take whatever action is necessary to maintain efficiency of school system operations . . .
 9. To determine the kinds and amounts of service to be performed as pertains to school system operations, and the number and kind of positions and job classifications to perform such services;
 10. To determine the methods, means and personnel by which school system operations are to be conducted . . .

ARTICLE XXI - REDUCTION IN FORCE

- A. Reduction. This procedure shall apply when the District decides to reduce personnel or reduce hours.
- B. Selection: The selection of employees to be laid off or reduced in hours shall be made according to the following guidelines:
1. Normal attrition resulting from employees retiring or resigning shall be relied upon to extent possible.
 2. Voluntary layoff.
 3. Employees serving a probationary period shall be considered next.
 4. If steps 1, 2, and 3 are insufficient to accomplish the desired reduction in staff, the least senior employee in the department shall be reduced or laid off provided the remaining staff are qualified to fill the remaining positions. The “departments” referred to above are:

Custodial
Food Service
Clerical
Teacher Aide

- C. Procedure: Employee(s) and the union shall be notified, in writing, forty-five (45) days in advance of any layoff or reduction in time . . .

ARTICLE XXII – VACANCIES AND REASSIGNMENTS

. . .

- B. If one or more bargaining unit members appear to be equally qualified, the bargaining unit member with the most seniority will be given first chance at the position. . . .

ARTICLE XXIII - SENIORITY

- A. Definition: Seniority shall be defined as the length of continuous service with the employer., and shall be applied on a unit-wide or departmental basis as set forth herein . . .

BACKGROUND

The grievance form, dated May 11, 2004 (references to dates are to 2004, unless otherwise noted), states the grievance thus:

The District has violated the rights of NEST employees by layoffs slated for the end of the 2003-04 school year. By letters dated April 30, 2004, the District failed to notify the Union 45 days in advance and did not layoff the least senior employees within the aides classification.

Further, the District did not attempt to seek volunteers.

Dan Boxx, the District Administrator, sent the April 30 letters to Mary Ann Rusch, Kris Zondlo and Susan Freiboth, the three employees the District had selected for layoff. In a letter to “ALL SUPPORT STAFF” dated June 18, Boxx stated:

As you may be aware, the District, because of serious budget constraints, has decided on reductions of teacher aides positions within the District. In considering this, Article XXI – Reduction in Force requires the District to utilize normal attrition and voluntary layoffs before layoff decisions are finalized.

In this regard, please notify the District Administrator if you are considering retirement or resignation or would be amenable to a voluntary layoff by this fall semester. If so, please advise . . . no later than June 30 . . .

In a letter dated July 12 to Freiboth, Zondlo and Rusch, Boxx noted the absence of any volunteers for layoff, and noted that “the District must regrettably renew its notice to you of layoff effective August 27, 2004.” He also mailed a copy of this letter to Sandra Zimmerman, the Rib Lake representative of NEST.

Boxx recommended the layoffs noted above after conferring with Thomas Kopecky, the High School Principal and Rick Cardey, the Elementary/Middle School Principal. The layoff decision reflected a consensus reached after informal discussions that the District needed a Special Education Aide at the High School. The incumbent in that position was Janine Bartelt. Freiboth occupied the position of Library Aide at the High School; Zondlo occupied the position of Special Education Aide at the Elementary School; and Rusch occupied the position of Special Education Aide at the Middle School. The District’s August layoff eliminated these three positions. The District did not inform these three employees that Bartelt remained as a Special Education Aide at the High School; did not interview any of them prior to the layoff; and did not review their personnel files prior to the layoff. Rather, the District’s administrative team discussed the positions affected by the layoff and determined that Bartelt’s position could not be eliminated and that no other Aide was qualified to fill it. The District did not discuss its selection of employees for layoff with NEST prior to the issuance of the April 30 letters.

The wage appendix to the parties’ 2004-05 labor agreement pays “Classroom Aides” and “Clerical Aides” at the same wage level. The District’s job description for the position of “Special Education Paraprofessional” reads thus:

QUALIFICATIONS:

This individual shall hold a license as a special education program aide or a valid teaching license. Reference must indicate successful experiences with children, and preferably children with disabilities.

Also required, initiative and enthusiasm for task; good organizational skill; creativity; and flexibility in working with children.

JOB GOALS:

The Special Education paraprofessional is an individual whose services are required to serve alongside a special education or regular teacher in order that students with disabilities may receive an appropriate education. They are often required when students might otherwise be difficult to manage, educate, control, transport safely or assist with physical needs.

He/she not only frees the teacher from routine tasks, but also serves as an extension of the teacher, carrying out the programs and plans developed and initially taught by the teacher . . .

PERFORMANCE RESPONSIBILITIES:

1. Assist with supplementary work for students and supervise independent study.
2. Reinforce lesson with small group or individual student.
3. Provide assistance with individualized program materials-both written and oral.
4. Administer classroom assessment instruments (spelling tests, etc); and scoring objective tests; and keeping appropriate records.
5. Assist the teacher with observing, recording, and charting behavior.
6. Assist the teacher in implementing a consistent behavior management program.
7. Assist in the development of classroom materials and clean up.
8. Assist with crisis problems and discipline.
9. Maintain strict confidentiality.
10. Provide assistance to student with disabilities within the regular program as determined by regular and special education staff.
11. Assist with feeding, toileting, and care of children with disabilities.
12. Other duties deemed appropriate by administrative staff.

SPECIFIC RESPONSIBILITIES:

Specific responsibilities must be delivered by the principal, teacher, and director. Paraprofessionals may work with or supervise pupils in the classroom, on the playground, in the hallways, restrooms, therapy areas, gymnasium and other specified areas on campus, or provide emergency transportation.

In some situations, teachers are permitted to leave the paraprofessional responsible for the class, but this shall be for as short a time as possible. The teacher should remain on campus and continue to be the person responsible for the classroom and students. Off-campus activities, such as work-study placements, fi(el)d trips, errands, shopping, and recreation, may be supervised by paraprofessionals with daily teacher contact and supervisory approval.

Generally, the paraprofessional follows the teaching day schedule. Occasionally and in certain situations, unique hours are established because of early arrivals or late departures of students.

The District advertised in a newspaper that it would receive, until August 5, 1996, applications for a “High School Library Aide” and a “Classroom Aide (to work primarily with a special needs student)”. Freiboth and Rusch responded to this ad, and the District hired each of them on August 21, 1996. For one to two years prior to this, Rusch had served the District as a substitute teacher and as a substitute classroom aide mainly in the special education area. The District hired Zondlo on January 6, 1997.

The District first hired Bartelt as a bus/van driver for its summer school swim program. She worked for two pay periods in June of 1996; two pay periods in June of 1997; one pay period in June of 1998; and two pay periods in June of 1999. In March of 2000, she became a Special Education Aide to one student as well as serving as a bus/van driver for three work study students. In the 2000-01 school year, she continued as a Special Education Aide for one student and served as a substitute custodian and food service worker. She continued as a Special Education Aide, following the student into the High School, where she ultimately took over the position of Special Education Aide at the High School. Her duties in that position extend to an entire special education classroom.

The first agreement between NEST and the District covers the 1999-00, 2000-01 and 2001-02 school years. The District submitted to the Commission a list of employees eligible to vote in the election by which NEST became the bargaining representative for District Support Staff. That list did not include Bartelt, who did not vote in the election. The negotiations for the first agreement between NEST and the District resulted in interest arbitration. A District costing spread sheet for those negotiations does not list Bartelt as a unit employee; and states a “Hire Date” for Rusch of “8/21/96”; for Freiboth of “8/21/96”; and for Zondlo of “1/6/96”. A District document summarizing “Support Staff Experience As Of July 1, 2000” and faxed to NEST in May of 2000 lists Bartelt as a “Van Driver” with “1 . . . Yrs. Of Service up to 7-1-00”; and lists “4 . . . Yrs. Of Service up to 7-1-00” for Rusch, Freiboth and Zondlo, each of whom are listed as “Classroom Aide”. District generated costing spread sheets for a base year of 2001-02 list Bartelt as a “Van Driver” and as a “Classroom Aide.” Each entry states Bartelt’s “Hire Date” as “9/19/01” with her schedule placement as “Step 3”. The sheet lists Rusch’s “Hire Date” as “4/25/93”, with her schedule placement as “Step 7”; Freiboth’s “Hire Date” as “8/21/96”, with her schedule placement as “Step 7”; and Zondlo’s “Hire Date” as “1/6/97”, with her schedule placement as “Step 7”.

The balance of the background is best set forth as an overview of witness testimony beyond the points noted above.

Susan Freiboth

Freiboth served as the High School Library Aide from her hire until her layoff. She has a high school degree and has earned credits in Basic Library Management. She worked as a part-time employee for the Ogema Public Library for roughly two years before her hire with the District. She has not participated in coursework dealing with student contact. She has, since 1984, instructed courses for her church covering age groups from toddler to high school, and has managed their library for ten years.

Freiboth oversees the High School Library and supervises the students who use it, including special need students. She has limited supervision from the District's Head Librarian. She is not certified as a Special Education Program Aide, but is qualified to be if the District signs her application to the Wisconsin Department of Public Instruction (DPI). She has no special education training and would not have applied for the Special Education Aide position if she could have remained a Library Aide. She has not received an adverse evaluation or discipline for her work performance.

Kristine Zondlo

For the 2003-04 school year, Zondlo served as a Special Education Aide in the Elementary School. She also assisted in the Early Childhood Program, and supervised a study hall at the High School. Her duties at the start of the year focused on a special education student who moved from the District during the school year. Her study hall supervision involved between twenty-five and thirty students.

When hired by the District in January of 1997, she served as a Classroom Aide for Emotionally Disturbed (ED) and Learning Disabled (LD) students. Initially, the work was to be with ED students, but the class came to include ED and LD students. Zondlo was not DPI certified as a Special Education Program Aide until the District hired her. Her current certification as a Special Education Program Aide is in effect from July 1, 2001 through June 30, 2006. The license is good for Pre-Kindergarten through Grade 12. She worked several years at the High School, since the District's special education program was then located there. Her duties focused on one-on-one instruction of a Middle School student, although she assisted High School students and occasionally had to supervise the special education class in the teacher's absence. Her experience with special education has focused on elementary or middle school students, and she worked primarily at the Middle School and the Elementary School for the two years preceding her layoff. The position she was hired into has evolved into the position currently held by Bartelt. She has not received an adverse evaluation or discipline for her work performance.

Prior to working for the District, she was employed by the Milwaukee Public Schools in a variety of positions from custodial to lunch room supervision. She has a high school degree and has attended a variety of courses covering student behavioral problems. She has taught courses at her church for many years and has three daughters, one of whom is a special education student.

Mary Ann Rusch

In the 2002-03 and 2003-04 school years, Rusch worked with a special education student at the Middle School. She had duties with other students, but focused primarily on one-on-one contact with a single student. She also worked in the Middle School's media center supervising students in Grades 5 through 8. At her point of hire, she worked with a student in Kindergarten. She was not DPI certified as a Special Education Program Aide when hired, and has not received such certification since.

She has served the District in its Early Childhood Program as well as in its Special Education Program from grades K through 2. She has supervised the Middle School's after-school learning center. The Early Childhood Program involved up to ten students. She has not worked at the High School and has not worked for the District as a full-time employee. She has not received an adverse evaluation or discipline for her work performance.

Rusch has a Bachelor of Science degree and has a lifetime DPI license to serve as a Librarian from Pre-Kindergarten through Grade 12. She has, in the past, been licensed by DPI as a Substitute Teacher of English, a Substitute Librarian and a Substitute Audio-Visual Coordinator. She also has received DPI certification to teach English, Science, Library, English and Social Studies.

Prior to her hire at the District she served for three years as a Substitute Librarian and Media Director in the Lansing School District in Michigan. She also worked in a Department of Defense school library for Kindergarten through Grade 8 at a naval base in Japan. She also served as the High School Library Director and K-12 Audio Visual Director at the Waterloo School District in Wisconsin.

Dan Boxx

Boxx has served as District Administrator for eight years, and as Elementary/Middle School Principal for seventeen years prior to that. A sharp decrease in state aid over the past few years forced the District to reduce positions. The District is a small one, and closely-knit. He was not aware of any employees who were considering retirement or had voiced a willingness to volunteer for layoff. As a result, he did not initially formally seek volunteers.

Boxx considered Freiboth a Clerical Aide rather than a Classroom Aide. He does not consider her qualified to be a Special Education Aide. He personally would not sign an application for her to receive a DPI license as a Special Education Program Aide. He believes she has had problems disciplining students and would have difficulty handling a group of High School special education students. He did not believe Bartelt was included on the eligibility list for the representation election because the agreement does not cover summer school.

Barb Anderson

Anderson has served the District for twenty-one years as a High School special education instructor. She has worked with Freiboth and Zondlo, but not Rusch. Zondlo worked primarily with another special education instructor, but Anderson did not have a positive working relationship with Zondlo while she served at the High School. She felt Zondlo voiced disagreements regarding Individual Education Plans in the presence of students. She did not feel Zondlo had the patience or flexibility to work effectively with High School special education students. Freiboth had problems regarding the discipline of Anderson's students while in the Library. Freiboth had dismissed her students from the Library for long periods of time without giving the students an indication of how they could earn their way

back. Anderson considered the punishment excessive and unproductive. Two of her students complained that if Freiboth became their Aide, they would not come into the room.

Bartelt took over for an Aide that Anderson thought highly of. Bartelt over time has proven herself an even better Aide. Bartelt started in her classroom as a one-on-one Aide, and learned from that experience how to handle the entire class. Her performance is exceptional.

Anderson did not participate in the informal discussions by which Boxx determined which positions would be subject to layoff. While the layoffs were being considered, she spoke with Freiboth, who indicated no interest in the position of Special Education Aide. If she was asked, she would not recommend the District sign an application for Freiboth to be licensed as a Special Education Aide. While Zondlo worked at the High School, Anderson voiced her frustration with her to Kopecky. While the layoffs were pending, she did voice to Kopecky her desire to have Bartelt retained as an Aide.

Thomas Kopecky

Kopecky has served as High School Principal for eleven years. He has supervised Freiboth and Zondlo. At the time the layoffs were being discussed, the administrative team discussed the need to retain one Special Education Aide. He did not consider Freiboth during these discussions, because she lacked the necessary certification. She was not, in his view, qualified to become a Special Education Aide. She had too many disciplinary problems with special education students in the Library. Some of those students would not return to the Library. The District maintains a disciplinary policy and she had difficulty complying with it. For example, she insisted on enforcing strict silence in the Library even though District policy permits quiet talk. He had to repeatedly remind her of this. He would not sign an application on her behalf to receive DPI certification as a Special Education Program Aide.

He did not consider Zondlo a viable candidate because she had not had a good experience while at the High School and had twice voiced to him a desire not to return to the High School. She expressed doubt about her ability to keep up with a High School curriculum, particularly with Mathematics.

In his view, the informal discussions preceding the layoff established that “we thought that the most highly qualified for the job . . . was Mrs. Bartelt (Transcript at 134).”

Rick Cardey

Cardey has served as Elementary/Middle School Principal for eight years, and has supervised Zondlo and Rusch. He has taught special education at the elementary level and has taught at the High School. He described the consensus reached regarding the layoffs thus: “The results were based upon the qualifications, the strengths, and what was best for the kids, was that the layoffs would be the three ladies there” (Transcript at 136). Zondlo had informed him many times that she had not enjoyed High School and did not wish to return there. Her

complaints concerned curriculum, teachers and students. She was a good Aide at the elementary level. In his view, she became negative when frustrated, and found the High School experience frustrating.

Rusch was hired as a one-on-one Aide and had performed well, particularly with an autistic child. Cardey believed she needed more structure than a high school program could offer, and he had concerns regarding her ability to cope with the manifold tasks provided by a group of High School students. He believed that she showed frustration in dealing with groups of students in the Middle School learning center. He did not think either Zondlo or Rusch were “highly qualified” and noted “I question their qualifications for that position” (Transcript at 140).

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES’ POSITIONS

NEST’s Brief

Article XXI, Section B.,4., establishes the order of layoff, and demands that the employee selected for layoff be “the least senior” provided the remaining staff are qualified. This language does not equate seniority with qualifications, but sets seniority as the dominate criterion with “a safety valve” concerning qualifications. This exception, however, “must be based on minimum qualifications only”.

Bartelt is the least senior Teacher Aide. The District’s seniority list improperly treats her summer experience in 1996, 1997 and 1998 as “continuous” service under Section XIII, Section A. This ignores that the summer experience did not qualify for unemployment compensation; did not qualify her to participate in the representation election; did not make her part of employee lists used during collective bargaining; and did not result from the hiring process used for regular employees. Her summer experience does not qualify her for the accumulation of seniority under the labor agreement because she is a casual employee. Because she is the least senior employee, she should have been laid off.

Each of the employees covered by the grievance is qualified to fill the position occupied by Bartelt. Article XXI does not define qualified, but Article XXII refers to “equally qualified”, so the reference in Article XXI must connote something other than “equally qualified.” Rusch and Zondlo satisfy the educational qualifications listed in the governing job description. Freiboth does not have a teaching or Special Education Program Aide license, but she meets DPI criteria to become licensed. In any event, each of the grieving employees is as qualified for the position as Bartelt, whether “qualified” is read as a matter of common law or common usage in employment relations. The District has no formal evaluation process, but none of the Aides has a history of discipline or performance problems. That the District did not review personnel files or conduct an interview establishes that it had no qualms regarding the qualifications of any of the employees at issue.

In fact, the District used a “minimal qualifications” standard in hiring Bartelt. Each of the grieving employees meets or exceeds such a standard. The Union concludes that the District has no justification for not laying off Bartelt, and requests that the “most senior aide” be made “whole with reinstatement.”

The District’s Brief

The District contends that it did not violate the labor agreement by the layoff of the three employees covered by the grievance. Article XXI makes seniority a prevailing factor “only if the senior employees are qualified to fill the remaining positions.” Bartelt was the Special Education Aide at the High School prior to the layoff.

Bartelt was, however, not the least senior Aide when the District decided to eliminate three Teacher Aide positions. She was first hired by the District in June of 1996 to drive bus during summer hours. In March of 2000 she became a Special Education Aide to a single student and drove bus. She has continued in a variety of positions, including Special Education Aide, since then. That a District costing sheet lists her date of hire as September of 2001 “is an obvious error.” Using costing data in any event is unreliable, and states an error regarding Rusch’s date of hire. Because Bartelt has worked for the District longer than any of the laid-off Aides, she was not subject to selection for layoff.

Even if Bartelt is the least senior of the Aides, none of the three laid-off Aides were qualified to be a Special Education Aide at the High School. Arbitral precedent establishes that an employer’s discretion regarding the determination of qualifications is granted great deference. An analysis of the evidence will not support the Union’s assertion that the District acted arbitrarily or capriciously. No formal process is contractually required, and Boxx used a consensus process turning on input from the supervisors of the affected employees. Those “three administrators discussed the language of the collective bargaining agreement and the fact that they had to look at the layoff in terms of seniority and qualifications.” An examination of the work performance of the laid-off Aides establishes that none “possess the necessary qualifications to be a special education aide at the high school.”

The facts are straight forward. The District laid off “what it believes to have been the least senior aides.” Even if the District erred on this point, it did not commit a contract violation since “the three aides laid off did not meet the qualifications required under the job description for the special aide position at the high school.” It follows that the grievance must be denied.

NEST’S Reply Brief

The District’s assertion that Bartelt is not the least senior Aide was not voiced during the processing of the grievance. Beyond this, the District mistakenly takes Article XXI to state a “relative ability” rather than a “sufficient ability” seniority clause. These types of clauses, identified in Elkouri & Elkouri, *How Arbitration Works* (Fifth Edition, BNA, 1997) have been

recognized by many arbitrators, and once appropriately identified, demand that Article XXI be read as a “sufficient ability” seniority clause. Thus, the District improperly applied a standard beyond “minimum qualifications.”

The District’s brief improperly imposes levels of qualifications beyond those noted in the job description. It should not be permitted to add “additional qualifications in a cloud of secrecy unbeknown to the employee and Union.” An examination of the authority cited by the Employer establishes that it lacks in arbitral precedent the authority it asserts under the agreement. The record establishes that the “District made the decision to deal with qualifications only as a second factor if they did not prevail in arbitration with regards to the seniority date for Bartelt.”

The District’s Reply Brief

NEST mischaracterizes the District’s view of the grievance by asserting that Bartelt’s seniority date is its “major emphasis”. Qualifications are an additional emphasis for the District. NEST is incorrect in its assertion that the Aides were hired under the same job description. A more detailed examination of the record establishes that only Zondlo has filled Bartelt’s position “and in that case she asked to be removed from the position.” Beyond this, it is not necessary to dispute NEST’s view of the term “qualifications” to note that personality and attitude must play a role in its determination. Here, District administrators applied the appropriate standards to determine that none of the Aides subject to the grievance are qualified to fill Bartelt’s position. It follows that the grievance must be denied.

DISCUSSION

The stipulated issue focuses on Articles XXI and XXIII, but the sections of Article XXI are the focus of the interpretive issue. Section A establishes the applicability of Article XXI, since the District decided “to reduce personnel” by laying off Freiboth, Rusch and Zondlo. Section B establishes the specific applicability of its subsections by setting forth how the “selection of employees to be laid off . . . shall be made”. The background set forth above establishes that the parties did have a dispute regarding the applicability of Section C and of the subsections of Section B other than Subsection 4. Those disputes are not posed for determination here. The District, after the filing of the grievance, formally sought volunteers and did supply NEST with forty-five days notice of the layoffs. The parties do not argue those points here, and thus the interpretive issue focuses on Subsection 4 of Section B of Article XXI.

More specifically, the parties dispute whether the “least senior employee in the department” was selected for layoff. The testimony indicated that Boxx may not view Freiboth as a member of the “Teacher Aide” department, but that potential dispute does not figure in the parties’ post-hearing arguments and is, in any event, irrelevant to the application of Subsection 4 to the grievance. Subsection 4 demands that the least senior employee be selected for layoff “provided the remaining staff are qualified”. Thus, the interpretive dispute is

whether Bartelt is senior to the three laid off employees, and, if not, whether any of those employees are qualified to fill the position of High School Special Education Aide.

The issue of seniority is threshold to the issue of qualifications because there is no dispute Bartelt is qualified for the position she occupies. If she is senior to the other claimants, there is no need to address their qualifications.

The evidence will not support the assertion that Bartelt can be considered senior to the other claimants. This issue points to Article XXIII, Section A, which defines “Seniority” as “the length of continuous service with the employer.” The factual basis of the parties’ dispute on this issue can be summarized thus:

Employee	Start Date District View	Start Date NEST View
Jeanine Bartelt	June 17, 1996	September 19, 2001
Mary Ann Rusch	August 21, 1996	August 21, 1996
Susan Freiboth	August 21, 1996	August 21, 1996
Kristine Zondlo	January 6, 1997	January 6, 1997

The parties agree on the date of continuous service for each employee but Bartelt. The issue is thus whether Bartelt’s service as a summer school bus driver can be considered the start of her “continuous” service with the District under Article XXIII, Section A.

Each party offers a plausible view of “continuous”, which is sufficiently broad to connote either service in a unit position specifically or service in the District generally. The interpretive issue is to determine the parties’ shared intent, and although the evidence is not clear enough to establish a precise start date for Bartelt, the evidence will not support the District’s view that she can claim a start date senior to any of the other claimants.

While the District can plausibly assert that pre-unit work in the District can be considered “continuous”, there is no persuasive evidence that it communicated this view to NEST. The evidence establishes that Bartelt did not vote in the representation election and did not appear as a unit member until the successor to the parties’ first contract. The District did not at any negotiation session prior to the current agreement assert that pre-unit experience played a role in the determination of seniority. That the District did not communicate this view during the processing of the grievance or supply a seniority list stating the start date noted above until after the grievance’s filing establishes that it did not communicate during bargaining the view it asserts here.

More significantly, costing documents used by the parties during bargaining state a start date subsequent to Bartelt's summer school work. Costing sheets referred to by the parties in their bargaining for a first contract set a start date for Freiboth and Rusch coincident with their assumption of a unit position. Bartelt's initial appearance on a costing sheet lists the hire date asserted by NEST. Whether the hire date is accurate or not, it cannot be read to give her credit for the summer bus driving work of 1996, 1997 and 1998. The reference to her placement at Step 3 may indicate that she received credit for her service from the time she became an Aide in March of 2000, but cannot be read to indicate credit for service prior to that. The District asserts this entry is an error, because the same cost sheet indicates a hire date for Rusch of 1993. It can also be noted that the initial costing sheet states an error in Zondlo's date of hire. The assertion of error is plausible, but ignores a seniority sheet provided to NEST in May of 2000, which indicates Bartelt, listed as a "Van Driver" had one year of service up to July 1, 2000. This is consistent with the earlier costing sheet, establishing consistency on giving Bartelt credit for experience commencing when she became an Aide in addition to her driving duties. Even if this stretches the point, the fact remains that the District never communicated to NEST that Bartelt should be given seniority credit for time worked in a non-unit position.

This fact is significant because the parties agree on Rusch's start date, which does not give her credit for time spent substituting prior to her assumption of a unit position. This manifests shared intent, and if Rusch's pre-unit experience can not constitute "continuous" service with the District, neither can Bartelt's. Conversely, if Bartelt's is to be counted, so must Rusch's. It is evident that the District never considered counting pre-unit experience, including the discussions leading to the selection of Rusch for layoff. If NEST did so, there is no evidence it communicated this to the District. Thus, there is no evidence of mutual intent to include pre-unit experience. The parties' agreement on Rusch's start date does supply evidence of mutual intent not to include such experience. In sum, the record does not clearly establish when Bartelt assumed a unit position that accrued seniority. It does, however, establish that her hire date, for the purposes of calculating seniority, cannot precede that of the three other claimants.

The issue thus becomes which, if any, of the three claimants are qualified to be a High School Special Education Aide. Resolution of that issue turns first on Rusch and Freiboth, turning to Zondlo if they are not qualified. This reflects that Rusch and Freiboth share a hire date preceding Zondlo's.

The issue on qualifications poses a significant interpretive issue only regarding Rusch. NEST persuasively argues that Bartelt was not certified at the time of her hire as a High School Aide and that the District assisted her in acquiring the certification. This does not, however, establish that the District can be compelled to support Freiboth's application to DPI. The job description for Special Education Paraprofessional establishes DPI certification as a requirement of the job. Boxx, Kopecky and Anderson agreed that her problems dealing with

special education students in the library made it impossible for them to support her application for such certification. It is not necessary to determine whether DPI regulations make Freiboth certifiable as a Special Education Program Aide. Rather, the issue is contractual. Article II, read with Article XXI, Section B., 4., grants the District the authority to determine if Freiboth is qualified to be a High School Aide. She lacks the certification necessary to the position, and there is no evidence to undercut the reasonableness of the District's view of Freiboth's work performance. Thus, there is no contractual basis to compel District officials to support the DPI application of an employee they reasonably deemed unqualified for a special education position.

Rusch does not pose the same issue. She is a certified teacher and meets District requirements to be a Special Education Aide whether or not District officials choose to support her application for DPI certification as a Special Education Program Aide. Review of the District's determination of her qualifications is, then, the central interpretive issue.

The evidence will not support the District's assertion that its selection of Rusch for layoff complies with Article XXI, Section B. The parties agree that this section demands an assessment of employee qualifications and seniority. They differ on the discretion the language permits the District to determine qualifications. NEST asserts that typing the provision as a "relative" or "sufficient" ability provision is determinative. Resort to these types may be of some use, but should not obscure that contract language, supplemented where necessary by the parties' past practices and bargaining history, is the ultimate focus of contract interpretation.

At the broadest level, NEST persuasively argues that the District exaggerates the scope of the discretion granted it under Article XXI, Section B. Subsection 4 focuses first on seniority, demanding that the least senior employee in the department be laid off provided the remaining employees are qualified. This underscores that consideration of seniority is a significant point. Beyond this, the classification of Teacher Aide is treated as a department for layoff purposes. This highlights that the distinction drawn by Boxx and his administrative team between High School and Middle/Elementary School experience lacks specific contractual support, other than as a factor within "qualified". That District Aides earn the same pay underscores the lack of specific contractual authorization to distinguish by grade level among Aides. Subsection 4 does not distinguish between full and part-time Aides. This makes that consideration an implicit factor within "qualified".

More specifically, the evidence does not show that the District afforded Rusch a contractually meaningful review of her qualifications. The evidence establishes Boxx, Kopecky and Cardey reached consensus that Bartlet was the best qualified employee to fill the position of High School Special Education Aide, and that her position needed to be retained more than those occupied by Rusch, Freiboth and Zondlo. Kopecky's and Cardey's testimony candidly acknowledge this point. This determination has a solid basis in the evidence and is not improper under Article XXI, Section B. The difficulty in the record is that Rusch was due an independent examination of her qualifications. The evidence breaks down on that point.

There is no evidence that the District considered the seniority of any of the applicants. The dispute regarding Bartelt's date of hire establishes this. There is no evidence of a consistent District position regarding Bartelt's date of hire prior to the April 30 layoff notices. The District did not, prior to a document created in May of 2004, communicate to NEST that Bartelt's pre-unit experience counted toward her seniority. Even if it had done so, there is no evidence that the District considered Rusch's pre-Aide experience, even after doing so regarding Bartelt's. Whatever is said of this, it shows no consideration of one of the two governing criteria under Article XXI, Section B, Subsection 4.

The evidence does indicate the administrators independently considered Freiboth's and Zondlo's qualifications, and had an objective basis in fact to ground a conclusion that the employees lacked necessary qualifications. Freiboth lacked necessary certification. Zondlo experienced difficulty with Anderson and voiced a desire not to return to High School.

To the extent the evidence indicates the administrators independently considered Rusch's qualifications, it does not establish a contractually meaningful review of them. Cardey was concerned that she might have difficulty with groups of High School special education students. This opinion is not improper or contractually insignificant. However, to give it binding force standing alone obscures that the contract does not expressly distinguish between grade levels regarding selection for layoff. More to the point, it obscures the extensive qualifications Rusch possesses, including direct experience with a severely disabled student. It also obscures that none of the administrators considered her personnel file, or took any other action to determine if Cardey's concern had an objective basis. The evidence manifests no more than that the administrators considered Bartelt a superior employee in the position.

This conclusion cannot be given binding force under Article XXI, Section B. Under that view, Bartelt would not be qualified to assume the position she currently occupies. Anderson's testimony highlights how Bartelt grew into the position, steadily improving over time. At the time of her hire, Bartelt had no experience beyond serving as an Aide for a single student or bussing small groups of students. If, as the District acknowledges, this establishes a level of experience that qualifies an employee to be a High School Special Education Aide, then there is no demonstrated basis for labeling Rusch unqualified. Like Bartelt, Rusch performed well handling a severely disabled student and has had limited experience in the District dealing with groups of students. There is no evidence the administrators considered Rusch's considerable work experience outside the District.

In fact, there is no evidence the administrative team reviewed Rusch's qualifications under the governing contractual criteria. Rather, they reviewed her against Bartelt after Bartelt had acquired experience as the High School Special Education Aide. This is essentially the recognition of Bartelt's seniority in the position. Under the labor agreement, however, department-wide seniority is the governing criterion. The absence of a deliberate review of Rusch's qualifications means that there is no evidence that the administrators applied the governing contractual criteria in their determination to retain Bartelt. Thus, the selection of Rusch for layoff violates the provisions of Article XXI, Section B, Subsection 4.

The parties did not pose any specific arguments regarding remedy. This poses some difficulty, since the school year is coming to a close. Rusch's immediate reinstatement may pose unnecessary complications regarding the District's delivery of special education services during this school year and may pose unnecessary complications for Rusch's assumption of duties. The Award thus states a general make-whole remedy coupled with a direction to offer the position to Rusch. This is to permit the parties some latitude in determining when to place Rusch in the position of High School Special Education Aide. The offer, if accepted by Rusch, could be for placement after the current school year. I have not tried to specify the point, because I believe the parties are in the best position to determine how best to handle Rusch's reinstatement. I have retained jurisdiction in the event the issue cannot be handled otherwise.

Before closing, it is appropriate to state what the Award does not. The administrators took no pleasure in the layoff decision. There is no clear winner in a situation such as this. Anderson's and the administration's high opinion of Bartelt's performance as a High School Special Education Aide stands without rebuttal because there is no rebuttal. The Award displaces her not because of her performance but because Article XXI, Section B, Subsection 4, demands that a more senior, qualified Teacher Aide not be selected for layoff when a less senior Aide is available. It is not necessary or appropriate to question Bartelt's performance to note that Rusch was denied the benefit of that provision.

AWARD

The District did violate the Collective Bargaining Agreement, in particular, Article XXI, Reduction in Force, and Article XXIII, Seniority, when it laid off Mary Ann Rusch, while retaining Aide Jeanine Bartelt.

As the remedy appropriate to this violation, the District shall offer the position of High School Special Education Aide to Mary Ann Rusch, and place her in that position if she accepts. The District shall also make her whole for the wages and benefits she would have earned but for the District's wrongful selection of her for layoff.

To permit the parties the opportunity to discuss the details of Rusch's reinstatement, including its timing, and to address any issue that might result from those discussions, I will retain jurisdiction over this matter for not less than forty-five days from the date of this Award.

Dated at Madison, Wisconsin, this 13th day of May, 2005.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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