BEFORE THE ARBITRATOR

WAUZEKA-STEUBEN SCHOOL DISTRICT

and

WAUZEKA TEACHERS' ASSOCIATION

Case 24
No. 64205
MA-12836

(Scheckel Lay Off)

Appearances:

Ms. Melissa A. Cherney, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin, appearing on behalf of Wauzeka Teachers' Association and Mr. Michael Scheckel.

Mr. Kirk D. Strang, Attorney, Davis & Kuelthau, S.C., 10 East Doty Street, Suite 600, P.O. Box 1068, Madison, Wisconsin, appearing on behalf of the Wauzeka-Steuben School District.

ARBITRATION AWARD

Wauzeka Teachers' Association, hereinafter "Association," and Wauzeka-Steuben School District, hereinafter "District," jointly requested that the Wisconsin Employment Relations Commission appoint Lauri A. Millot, to hear and decide the instant dispute between the Association and the District in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the Undersigned on December 2, 2004, in Wauzeka, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on February 4, 2005, at which time the record was closed.

Pursuant to an Expedited Arbitration Agreement and based upon the evidence and arguments of the parties, the Undersigned issued a letter decision on February 19, 2005. The issue of remedy was remanded to the parties to address and devise a mutually agreeable resolution. The parties advised the Undersigned on March 3, 2005, that they were pursuing a resolution and confirmed that a resolution has been reached and implemented on or about March 31, 2005. Based on the evidence and arguments of the parties, the Undersigned makes and issues the following Award.

ISSUES

The parties were unable to stipulate to the issues.

The District frames the issues as:

1. Is the grievance timely under the collective bargaining agreement?

2. Did the District violate the collective bargaining agreement as alleged in the grievance?

The Association frames the issues as:

1. Is the grievance properly before the Arbitrator on the merits?

2. If so, did the Wauzeka-Steuben School District violate the parties collective bargaining agreement and/or Wis. Stats., Sec. 111.70(3)(a) 4 and 5, when it laid off Michael Scheckel on April 20, 2004?

Having considered the evidence and arguments of the parties, the Arbitrator frames the issues as:

1. Is the grievance timely under the collective bargaining agreement?

2. If so, did the Wauzeka-Steuben School District violate the parties collective bargaining agreement when it laid off Michael Scheckel on April 20, 2004?

3. If not, did the Wauzeka-Steuben School District violate the parties Wis. Stats., Sec. 111.70(3)(a) 4 and 5, when it laid off Michael Scheckel on April 20, 2004?

4. What is the appropriate remedy?

EXPEDITED ARBITRATION AGREEMENT

The parties to this agreement, the Wauzeka-Steuben School District (hereinafter, "the District") and the Wauzeka Teachers' Association (hereinafter, "the Association") have reached the following Agreement for

expedited grievance arbitration. The parties have reached this Agreement to resolve the subject grievance as promptly as possible. While providing the parties with a full and fair opportunity to present their respective cases regarding the merits of this matter to an arbitrator. This procedure constitutes a "collective bargaining agreement" within the meaning of s. 111.70, Stats., and takes precedence over any inconsistent provisions of the Master contract Agreement between the parties, and any inconsistencies shall be resolved in favor of this agreement.

1. The subject grievance is attached hereto and made a part hereof as Attachment A. This grievance need not be processed through any remaining steps of the grievance procedure following execution of this Agreement. Thereafter, the parties will submit the grievance to grievance arbitration for final and binding resolution of disputes giving rise to said grievance, subject to Chapter 788, Wis. Stats.

It is recognized that the Association, acting on its and/or Mr. Scheckel's behalf, would, in the absence of this Expedited Arbitration Agreement, seek relief through a Complaint of Prohibited Practices, and that the parties to this Agreement therefore agree, with this Agreement, to submit issues that may be otherwise heard through a Complaint of Prohibited Practices, to arbitration for final and binding determination.

2. The hearing in this matter shall be scheduled for December 2, 2004.

3. If a court reported is selected to transcribe the arbitration proceedings, he/she shall be required to provide a transcript of the proceedings within one (1) calendar week of completion of any arbitration hearing or as soon thereafter as the parties may agree.

4. Briefs submitted to the Arbitrator following the hearing shall be sent via an overnight delivery service, via e-mail, or by other means agreeable to the parties and the Arbitrator. Briefs will be submitted within seven (7) working days of the parties' receipt of the transcript or as soon thereafter as the parties and the Arbitrator agree. The Arbitrator will exchange the parties' briefs simultaneously.

Reply briefs (if any) shall be sent to the Arbitrator by an overnight delivery service, via e-mail, or by other means agreeable to the parties and the Arbitrator. Briefs will be submitted within five (5) working days of receipt of the opposing party's brief or as soon thereafter as the parties and Arbitrator agree. A statement that a reply brief will not be filed may be provided through other means during this time period. The Arbitrator will exchange the parties' briefs simultaneously.

5. The Arbitrator shall issue a decision regarding the grievance as soon as practicable following receipt of the final briefs of the parties. Consistent with the purposes of this Expedited Arbitration Agreement, the Arbitrator shall be authorized by the parties to issue a decision stating only the results of her award is in this matter following the parties' submission of their final briefs, with the full text of her decision and award to be provided thereafter.

WHEREFORE the parties have read the foregoing agreement, fully understand its terms, represent that they have the authority to enter into same on behalf of their respective constituencies, and agree to be forever bound thereto.

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RELEVANT CONTRACT LANGUAGE

ARTICLE XII – GRIEVANCE PROCEDURE

Definition: A "Grievance" is defines as an allegation by an employee that there has been a violation, misinterpretation, or misapplication of a specific provision of this agreement. The grievance must be written and contain the following:

A. Clear, concise facts of the grievance
B. The part of the master contract violated
C. The remedy sought

A grievance may be withdrawn at any step without establishing precedent. Whenever a grievance shall arise, these steps shall be followed.

Step One: The grievant shall have the obligation to informally discuss the grievance directly with his/her Administrative supervisor. The form found in Appendix C shall be completed and signed by the grievant and the administrative supervisor at the time of the informal discussion.

Step Two: If the grievance is not satisfactorily resolved at Step One, the grievant shall submit in writing a grievance directly to the appropriate Administrative superior and submit a copy to the District Administrator within eight (8) work days after the initiation of Step One. The reply shall be in writing within eight (8) work days to the grievant.

Step Three: If the grievance is not satisfactorily resolved in Step Two, the grievant shall forward copies of the grievance to the District Administrator within five (5) work days of receipt of the answer in Step Two. Within five (5) work days of the receipt, the District Administrator shall meet with the grievant to attempt to resolve the grievance. The District Administrator shall give his/her answer to the Grievant within five (5) work days of this meeting.

Step Four: If the District Administrator's answer is not satisfactory, the grievant may, within seven (7) work days, submit the matter in writing to the Clerk of the School Board. The School Board, at its next scheduled Board meeting, shall meet with the grievant for the purpose of resolving the grievance. The Board's written response shall be received by the grievant within ten (10) work days following said meeting.

It is recognized by the parties that the number of days indicated at each level should be considered a maximum and that the parties will expedite the process by utilizing the minimum number of necessary days whenever possible. Unless specified time limits are extended by mutual consent, any grievance by an employee not processed in accordance with the time limits set forth in this Article shall be considered dropped. Any grievance not processed by the District in accordance with the time limits set forth in the Article shall automatically proceed to the next step.

ARTICLE XXV – LAYOFF

If the Board determines to layoff, it will be done in the following manner:

1. Written notice of layoff will be given by May first.

2. The Board will consider the following layoff criteria when layoff is to be used: Seniority. An employee's seniority is the number of contract days, which the employee has serviced the district. A part time employee's seniority is pro-rated according to the fraction of a full time salary he/she is apportioned. (In the situation where two or more employees have the same seniority, the Board will determine whom to lay off on the basis of evaluations of their teaching ability.)

3. If the laid-off employee has more seniority and is licensed for another position on the staff, they will be transferred to that position.

4. Notification of Seniority. Each year the Board will supply a list of the members in the unity with their seniority as of the first day of school and their present certifications. Any challenges to this list must be made in thirty (30) days.

5. Notification of Layoff. The Board shall provide written notification to the teachers it has selected for layoff under this procedure by May 1st of any year. Said layoff to commence with the first day of school for the following year.

6. Partial Layoff. Any employee who is selected for a reduction of hours or partial layoff can choose to be fully laid off and shall be treated like any other laid off employee. If an employee accepts a partial layoff, he/she shall be treated like any other part-time employee under this Agreement.

7. Benefits During Layoff. If an employee is laid off, he/she will be eligible for inclusion in all of the District's group insurance programs, at the employee's expense, as permitted by the carrier.

. . .

10. The Board reserves the right to exclude one (1) employee in each year from the layoff process if that employee is involved in a unique program or activity.

ARTICLE XXIX – VACANCIES AND TRANSFERS

A. A vacancy shall be defines as a newly created position or a current/previous position that is not filled.

B. In the event no employees on layoff status fill the vacancy, the vacancy shall be posted by the District for fifteen (15) work days. The job requirements and the license required shall be a part of such notice of position opening.

C. Employees shall notify the District in writing if they are interested in a vacancy. The filling of vacancies may be on the basis of seniority. In the case of seniority not being used the teacher will be given a written response of the reasons for the administrative decision. The determination of qualifications for a position will be made by the District. If no qualified bargaining unit member makes an application for the position open, the position may be filled by the District from applications outside the bargaining unit.

D. Nothing herein shall prohibit the District from posting vacancies outside the bargaining unit at any time.

BACKGROUND AND FACTS

The Grievant, Michael Scheckel, was hired in 1984 by the District to a professional teaching position. The Grievant taught full time with the District for 20 years until he was laid off effective the first day of the 2004-2005 school year. The Grievant's certification is Secondary Broad Field Social Studies, Geography and History. In the past, the Grievant, the Association and the District have worked together to improve his teaching, although there is no history of the District taking disciplinary action against the Grievant.

The District has experienced declining enrollment for at least three years This, coupled with the revenue caps imposed by the State of Wisconsin, have required the District to reduce its budget which included staffing cuts. The District laid off one professional staff member for the 2002-2003 school year and one for the 2003-2004 school year. The District's decision to layoff of one professional staff member in the social studies department for the 2004-2005 school year was due to economic reasons.

At the April 19, 2004, meeting of the District's Board of Education, the Board entered into closed/executive session pursuant to Wis. Stats., 19.85(1)(g)(f). The Board returned to open session and "moved to give final layoff notice to affected staff." Exhibit 5. The motion carried, 4-0 with Board member Robin Mezera absent due to a prior work commitment.

School Board member Robin Mezera testified at hearing that he was present during the Board of Education meeting in the Spring of 2003 when the Board decided to exclude the less senior science teacher, Wermich, from layoff. Mezera testified that during that meeting, the Board reviewed the Grievant's personnel file, discussed the Grievant's performance, and discussed how the Board would utilize the same article to lay off the Grievant the following year. Mezera stated that the Grievant was talked about regularly by the Board of Education and that he had recommended that the Grievant maintain a record of his activities to protect himself from unjust Board actions. Mezera testified and Board President Susan Jones-Molina confirmed that Jones-Molina had on one occasion censured Board members from speaking about the Grievant during a closed/executive session Board meeting.

On April 20, 2004, the Grievant received written notification from District Administrator Bryce Bird informing him that the "Board has determined that you are to be laid off for the 2004-2005 school year." Exhibit 4 In laying off the Grievant, the District retained a less senior secondary social studies teacher, John Luster.

Luster, a six-year veteran with the District, was employed as a full-time social studies teacher until the 2003-2004 school year. In 2003-2004, Luster was assigned the At-Risk program for one period per day in addition to his social studies classes. In his At-Risk

capacity, Luster created correspondence to parents inquiring if the parents were interested in their child becoming a part of the At-Risk program, sent memorandums to parents at the end of the semester summarizing the child's progress in the At-Risk program, and maintained a journal for all At-Risk students indicating progress or lack thereof. Luster reviewed student grades, monitored student performance and requested grade updates from staff via written memorandum. During December of 2003, Luster began investigating the creation of a program which he eventually entitled Now or Noon. The Now or Noon program targets 5th through 8th grade students who repeatedly do not turn in work or assignments, but included all students. The program provides the students with an environment to complete their work and/or assignment during their lunch period.

The District has provided an At-Risk program for its students for a number of years. Mark Vachavake was the At-Risk program coordinator from 1999 to 2002-2003 when he was laid off. Prior to Vachavake, Mary Hale was responsible for the program until she received a partial layoff in 1999. Prior to Hale, an elementary teacher with special education responsibilities held the position.

The Job Description for the At-Risk Coordinator is as follows:

REPORTS TO: DISTRICT PRINCIPAL
JOB GOAL: To provide leadership in the development, implementation, evaluation, and communication of the district's at-risk program.

PERFORMANCE RESPONSIBILITIES:

1. Assists in implementing board policies and administrative procedures, as well as state laws governing student instruction and welfare.

2. Assists in developing and coordinating district program services directed toward meeting the needs of at-risk students.

3. Initiates and maintains parental contact regarding academic progress of at-risk students.

4. Plans alternative programming options to meet the needs of identified at-risk children.

5. Assists in planning instruction strategies for the at-risk students.

6. Attends workshops, meetings, and visits other public school's at-risk programs to keep current.

7. Performs other duties as assigned.

On April 29, 2004 the Grievant met with Bryce Bird, District Administrator and orally presented a Step One grievance alleging violations of Article I, Article XXV and Article XIX. The grievance sought immediate reinstatement of the Grievant to a full-time position, payment of any lost income, with interest, and any other remedy deemed necessary to make the Grievant whole. The Grievant and Bird met due to the absence of the Grievant's supervisor, Principal George Andrews, from the District on April 29.

In a letter dated May 11, 2004, Andrews denied the grievance and concluded that the Grievant had skipped to Step Two of the process. In relevant part, Andrews' letter stated:

> I am treating this written grievance as your Step Two submission, since Step One calls for us to discuss the grievance orally and since this is the only document that you have filed within eight (8) work days of initiating your grievance at Step One.
>
> This is my response to your grievance at Step Two: The grievance is denied because the District did not violate, misinterpret or misapply the Master Contract Agreement.
>
> Please note that you are required to appeal this decision within five (5) work days of receipt of this answer at Step Two to the District Administrator.

. . .

The Grievant also drafted a letter on May 11, 2005. The Grievant's letter indicated his dissatisfaction with the response to his grievance, sought appeal at Step Three to Bird, and informed the District that he desired union representation for his meeting. Sometime after Bird received the Grievant's appeal, Bird, Leroy Roberts, Southwest Education Association Executive Director, Jodina Dittman, District Secretary and the Grievant met to discuss the grievance. Bird denied the grievance on May 27, 2004, in a letter that he hand-delivered to the Grievant on that day.

The Grievant mailed to the Board of Education Clerk, via regular post, his appeal of Bird's denial of his grievance. The Grievant's letter was dated June 8, 2004, was postage stamped June 10, 2004, and was received by the Board Clerk on June 12, 2004. The Board of Education denied the grievance on June 21, 2004, finding that the grievance was not timely and was without merit.

The last scheduled work day of the 2003-2004 calendar was June 7, 2004, which was an in-service day. The last student day was June 4, 2004.

On June 17, 2004, Bird sent a letter to the Grievant identifying five dates in which the District had questions regarding the Grievant's conduct. The events giving rise to the District's questions ranged from alleged inappropriate comments to failing to allow a student to go to the lavatory. Bird noted in the letter that the events occurred after the Grievant was on layoff and that the District may desire to defer any responsive action until the lay off dispute was resolved. The District requested that the Grievant comment or explain each situation. The Grievant did not respond to the District's request and the District took no further action.

The Grievant sought to substitute teach for the District during the 2004-2005 school year. He completed the necessary paperwork, but was not called in by the District because the substitute teacher scheduler was directed by Bird to not call the Grievant. The District would have financially benefited from scheduling the Grievant to substitute teaching assignments because the monies he would have earned substituting would have reduced his unemployment compensation benefits paid by the District.

During the Spring of 2002, the District determined it was necessary to lay off one science teacher for the 2003-2004 school year. The least senior science teacher was Matt Wermich. The District utilized Section 10 of the Lay Off language, excluded Wermich and laid off Mark Vachavake. The District supported its exclusion of Wermich on the basis that he was responsible for a "unique" solar energy program. Wermich had written grants to fund the installation of a photovoltaic (PV) system in the District. A PV system produces kilowatts that are used for heating, although the PV system was not installed to offset the District electricity bill. Rather, the PV system was installed to teach students about energy use and renewable sources of energy in the future. The Union did not submit a grievance to the District challenging the exclusion of Wermich due to his licensure in multiple science disciplines.

Other facts, as relevant, will be included in the DISCUSSION section below.

ARGUMENTS OF THE PARTIES

The Association

The Association maintains that the grievance is properly before the Arbitrator and should be sustained. The District violated the labor agreement when it targeted the Grievant for layoff due to perceived performance reasons. In addition and absent the improper motive, the District violated the contract when it retained the less senior employee since he was not involved in a unique program or activity.

The grievance is properly before the Arbitrator because only five (5) work days elapsed between when the District Administrator's decision and the Grievant's appeal to the School Board. The District Administrator's decision was dated May 27, 2004. Memorial Day was May 31, 2004. The last day of work for teachers was June 4, 2004. Only five days had elapsed since the meaning of work days is obviously the days in which employees covered by the collective bargaining agreement work. There is arbitral case law that supports the conclusion that work days for teachers are only those days in which the assigned school days. As a result, the grievance is timely.

The District agreed to submit the merits of the matter to the Arbitrator. The Expedited Arbitration Agreement establishes that the parties intended to resolve the grievance as promptly as possible. Even if the District was correct that application of the collective bargaining agreement grievance processing language provided that the grievance was dropped in June, 2004, the Expedited Arbitration Agreement supercedes and the matter is properly before the Arbitrator.

The District targeted the Grievant for lay off and terminated the Grievant's employment for performance reasons. This is not a typical layoff situation. First, the School Board improperly went into executive session to discuss layoffs. Second, during the closed session, the Board considered the Grievant's performance rather than discuss layoffs in the context of program needs. Third, there was testimony offered that supports the conclusion that the Grievant was targeted for layoff. The Grievant's personnel file had been brought to and discussed at Board meetings. The Board had previously discussed laying off the Grievant. Finally, at the meeting where the layoff decision was made, the Board President was compelled to reprimand board members regarding their discussion of the Grievant's "personnel situation." (Tr. 165)

The District's use of Section 10 is inappropriate in this context because Luster is not responsible for a unique program or activity. The District was unable to agree on what program or activity was unique that justified Luster's exemption from lay off. Bird testified that it was primarily the At-Risk program that was considered when the Board decided to retain Luster while Jones-Molini testified that it was the Now or Noon program that served as the reason that Luster was retained in lieu of the Grievant.

For all of the above reasons, the Association requests that the Arbitrator sustain the grievance and order the appropriate remedy.

The District

The District first argues that the grievance is untimely in as much as the clear language of the labor agreement allows for the conclusion that the grievance was "dropped" by the parties since it was not advanced to the School Board within seven (7) days of the District

Administrator's answer to the grievance. The parties have bargained that the time limits set forth in the labor agreement are mandatory. The District Administrator denied the grievance on May 27, 2004. Assuming that day is not counted as a work day, the seventh work day after the Administrator's response was June 9, 2004. This is so because the parties have recognized work day to mean, Monday through Friday, exclusive of Saturdays, Sundays and holidays, including the summer months. The Grievant mailed his appeal to the Clerk of the School Board on June 10, 2004, and it was not received until June 12 and, therefore, the appeal is untimely. It is undisputed that the District has preserved it objection to the grievance throughout the processing of the grievance, and therefore, it should be dismissed.

The District challenges the Association's attempt to submit the matter to WERC jurisdiction since it has not exhausted the parties negotiated arbitration process. The District acknowledges that it agreed at hearing that the Association's claimed of violations of Secs. 111.70(3)(a)4 and 5, Wis. Stats., were not diminished by utilizing the expedited arbitration process, but maintains that a longstanding policy of deferral requires that the Arbitrator address the procedural arbitrability issue which will result in a finding for the District citing BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 29066-C (WERC, 3/97).

As to the merits, the grievance should be denied because the agreed-upon layoff procedure allows the District to retain one less senior employee if the employee is involved in a unique program or activity. Luster maintains a unique program or activity and the District therefore had the right to retain Luster rather than the Grievant. Bargaining history and past practice support the District position. The Association has consistently attempted to remove Section 10 from the bargaining unit because they knew it allowed the District the right to deviate from seniority based layoffs for one individual. Moreover, the District used this language in 2003 when it laid off Vachavake rather than a less senior science teacher, Wermich.

Although unique is not defined by the parties' labor agreement, by applying the usual and ordinary meaning, a program or activity is unique if it is special or unusual. Luster's "At-Risk" and "Now or Noon" programs meet the definition of unique because they are unusual and singular programs in the District's educational process. Both these programs are "the only programs of their kind" in the District and the Now or Noon is a "one of a kind" program to the geographical area. (District brief p. 21 and 24) Further, these programs serve a unique population and are serviced in a unique manner.

For all of the above reasons, the District requests that the grievance be dismissed.

DISCUSSION

Challenge to Timeliness of Grievance

The District challenges the timeliness of the grievance appeal at the Step Four level on the basis that the grievance was received by the Clerk of the Board of Education greater than "seven (7) work days" from when the Grievant received Bird's denial at Step Three. The Association disagrees and asserts that the appeal was timely since "work day" refers to the actual days that teachers work and seven "work days" had not elapsed as of the day the appeal was received. It is, therefore, necessary to determine what meaning should be applied to the term, "work days."

District Administrator Bird's denial was dated May 27, 2004, and Bird's testimony establishes that it was hand-delivered to the Grievant on that date. The Grievant's Step Three appeal letter was dated June 8, post-marked June 10 and received by the Clerk via regular mail on June 12. The last day that teachers were expected to work, consistent with the District academic calendar, was June 7. The next day in which teachers were obligated to work would have been the first day of the 2004-2005 school year.

Article XII, Step Four, states that the Grievant may submit the matter in writing to the Clerk within seven days. The District relies on the date in which the Board Clerk received the letter for purposes of establishing the timeliness of the grievance. This is incorrect. The parties agreement utilizes the date of submission for purposes of determining timeliness. It is therefore immaterial when the Clerk received the Grievant's appeal since the date of significance is when the appeal was submitted.

The Grievant did not testify at hearing as to when his appeal was submitted. Although the evidence establishes that the Grievant was concerned about the filing of his appeal, the record is void of the date in which the appeal was mailed. If it was mailed on June 8 or June 9, then it was timely, regardless of how "work day" is defined. Based on the fact that the letter was postmarked on June 10, I conclude that it was not mailed on June 8 and, therefore, was mailed in excess of seven calendar days from the date in which he received the District Administrator's response. Given this, it is necessary to determine how "work day" is defined because if June 8-10 are not "work days" and the next actual work day is the beginning of the 2004-2005 school year, then the Grievant's appeal was timely.

When interpreting contract language, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. The Common Law of the Workplace, The Views of Arbitrators, National Academy of Arbitrators, Theodore J. St. Antoine, p. 69 (1998). If the meaning cannot be determined from the plain meaning of the word or words, then extrinsic evidence, including bargaining history and past practice may be utilized to clarify the parties' contractual intent. ID at 68. We therefore begin with the language in question.

"Work day" is used throughout Article XII as a measurement of time. The Association asserts that arbitral case law that defines work day as only those days in which teachers are contracted to work is controlling. Alternately, the District asserts that work day was intended to include all days in which the District does business, regardless who is actually doing business. The Recognition clause of the parties' agreement establishes that the terms contained therein apply to "professional employees of the District" and that "administrators, principals, supervisors, per diem substitute teachers, coordinators and CESA" personnel and non-instructional personnel are excluded. Professional employees are teachers and teachers work during the school year. Read alone, these two sections support the Association's position, but it is necessary to consider to the entire labor agreement.

Looking to the remainder of the agreement, "work day" is used in three additional articles of the labor agreement. Article VIII, Section D, Personal Leave, subsection 4, which states "[p]ersonal leave will be granted by the Administration for compelling personal reasons of such nature that they cannot be accomplish or schedule outside the normal teaching work day." This section further states that personal leave not used by the end of the school year shall be added to the employee's sick leave balance. Reading these two sentences together, "work day" in this context is limited to those days in which teachers are contractually scheduled to work or otherwise stated, during the school year as identified on the school calendar.

"Work day" is next found in paragraph two of Article XIV – Calendar wherein it states:

> There shall be five teacher work days. At least one full day shall be designated as a teacher work day during the first two in-service days; this may be in two half-day increments. There shall be a 1:00 p.m. dismissal on the last day of each grading quarter during the school year. There will be a teacher work day from 1:00 p.m. to the end of the school day on the last day of each grading quarter during the school year. On the last student day of the school year, the time from 1:00 p.m. to 3:45 p.m. shall be teacher in-service/teacher work day. The time from 3:45 p.m. to 6:30 p.m. shall be used for the end of the year checkout. (With administrative preapproval, checkout may be the work day following the last student day, from 7:45 a.m. to 3:45 p.m.). The dates of the teacher workdays for the 2001-2002 school year shall be 8/24/01, 10/19/01, 1/11/01, 3/15/01, 5/24/02.

This section utilizes the term "work day" six times. In all cases, the term is limited to those days in which teachers are working during the official school calendar. This section supports the Association's position.

The fourth article in the labor agreement that uses the term "work day" is Article XXIX – Vacancies and Transfers. Section B states:

> In the event no employees on layoff status fill the vacancy, the vacancy shall be posted by the District for fifteen (15) work days. The job requirements and the license required shall be a part of such notice of position opening.

Instructional staff vacancies generally occur between April and August as a result of teachers searching and obtaining employment with another school district for the following school year, although vacancies also occur during a school year. If this language was limited to the definition offered by the Association, that work days are only those contained on the school calendar, then the District would not be able to fill vacancies during the summer months because it would have to wait until the school year began in order to satisfy the 15-day posting requirement.[1] Given that I do not believe the District waits until the school year begins to fill vacancies that arise during the summer months, this section supports the District position.

It is reasonable to conclude that "work days" means days in which teachers work based on the language of the grievance, personal leave and calendar articles. In contrast, the use of "work days" in the vacancy article is more expansive and is not limited to solely events that occur on days in which teachers work. These four sections cannot be read together to give meaning to the term "work days." As a result, it is necessary to look to extrinsic evidence to ascertain the meaning of "work day."

The District submitted bargaining history through the testimony of Wally Bryne, who was previously the bargaining unit president and now performs administrative function on a contract basis to the District. Although Bryne was a credible witness, he offered no assistance in ascertaining the parties intent as to the meaning of "work day."

With regard to the parties' practice, the District points to the process that was followed by the Association when it ratified the 2004-2006 labor contract as evidence that "work day" includes days in which teachers generally do not work (like the summer) pursuant to the District calendar. I am not persuaded for a number of reasons. First, one instance is insufficient to establish a binding past practice. Second, this situation arose during the Summer of 2004 when the Association vice president was advised by Bird that the ratification vote needed to occur within 15 work days as the District defined "work day." Bird's direction to the vice president occurred, after the Grievant's Step 4 appeal and, thus, after the District had solidified its position defining "work days" as all days in which anyone in the District may be working. The fact that the vice president relied on Bird's advice when the Association president was unavailable was prudent, but not revealing in terms of the meaning of "work day." This scenario is not a credible representation of what the parties' intended "work day" to mean.

I next look to the entirety of the grievance processing language and the parties' actions. The parties failed at all steps to comply with the grievance procedure. Step One of the grievance procedure provides as follows:

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[1] The parties did not submit any evidence of how positions are posted and how summer vacancies are addressed.

> The grievant shall have the obligation to informally discuss the grievance directly with his/her Administrative supervisor. The form found in Appendix C shall be completed and signed by the grievant and the administrative supervisor at the time of the informal discussion.

It was therefore necessary for the Grievant to meet with his supervisor, Andrews, to informally discuss the grievance and complete an Appendix C at that time. The Grievant neither met with his supervisor nor was an Appendix C form completed. Rather, the Grievant met with District Administrator Bird on April 29, discussed his grievance and presented a written grievance to Bird. The Appendix C form was erroneously completed sometime after the April 29 meeting and a second Appendix C was completed on May 11. The parties' labor agreement does not specify a timeline within which the grievance was to have been initially filed, thus there was no urgency obligating the Grievant to meet on April 29 in order for his grievance to proceed. Lacking an urgency to meet, Bird could have informed the Grievant that he was expected to meet with his supervisor at a later date. Bird did not do this. Moreover, neither Bird nor the Grievant initiated completion of the Appendix C at their meeting. The parties failed to comply with all components of Step One; there was no informal discussion between the Grievant and his supervisor, an Appendix C was not completed, and a written grievance was received.

Step Two of the procedure provides that:

> . . . the grievant shall submit in writing a grievance directly to the appropriate Administrative superior and submit a copy to the District Administrator within eight (8) work days after the initiation of Step One. The reply shall be in writing within eight (8) work days to the grievant.

Three actions occurred on May 11th; Andrews issued a letter to the Grievant denying the grievance that has been submitted to Bird; Bird and the Grievant completed two separate Appendix C forms documenting the April 29 meeting, and the Grievant appealed Andrews' Step 2 denial. Andrews' response was timely, but the completion of the Appendix C form, which was the responsibility of both Bird and the Grievant, was 13 days tardy.

Step Three states that:

> . . . the grievant shall forward copies of the grievance to the District Administrator within five (5) work days of receipt of the answer in Step Two. Within five (5) work days of the receipt, the District Administrator shall meet with the grievant to attempt to resolve the grievance. The District Administrator shall give his/her answer to the Grievant within five (5) work days of this meeting.

The Grievant and his representative met with Bird met sometime after the Grievant submitted his appeal, although the date of the meeting is absent from the record. Bird responded to the Grievant's Step 3 appeal on May 27. Bird's letter was 12 teacher and administrator work days after the Grievant's appeal was submitted. Given that the parties' agreement includes the provision that the failure of the District to meet the timelines is an automatic denial of the grievance, the date of Bird's letter is insignificant in terms of processing**,** but is relevant in terms of whether there a history of strict compliance to the grievance timelines by the parties. Bird's letter was issued 12 work days following receipt of the appeal and the Step 3 language provides for a meeting and answer within 10 work days, thus Bird exceeded the timeline contained in Step 3.

Step Four of the grievance procedure provides that:

> . . . the grievant may, within seven (7) work days, submit the matter in writing to the Clerk of the School Board. The School Board, at its next scheduled Board meeting, shall meet with the grievant for the purpose of resolving the grievance. The Board's written response shall be received by the grievant within ten (10) work days following said meeting.

The record is void as to when the Grievant submitted the matter to the Clerk although it was postage stamped on June 10 and received on June 12. Although a District letter was submitted into evidence indicating that the Grievant had mailed his appeal on June 11, 2004, that is incredible since the letter was postage stamped the day earlier. There was some testimony regarding the letter being delayed due to no mail service, but this evidence was incomplete. There is no definitive date in the record that the appeal was submitted.

The parties failed at all steps of the grievance procedure to strictly comply with the processing terms and it assuming *arguendo* that work day is defined as the District suggests, it was only at the last step of the process, Step 4, that the Grievant was untimely. Given the lax manner in which the parties adhered to the grievance procedure, and the theory that "doubts should be resolved against forfeiture of the right to process the grievance" Elkouri and Elkouri, How Arbitration Works, 6th Edition, p. 221 (2003), I am unwilling to find that the grievance has been dropped.

In conclusion, the parties have bargained the term "work day," but the term is ambiguous and susceptible to more than one meaning. The record is void of relevant bargaining history and no past practice exists as an interpretive aid. The manner in which the grievance was processed was lax and the alleged procedural defect arose at the last stage in the grievance procedure. Given these facts, coupled with the presumption of arbitrability, I find the grievance arbitrable.[2]

[2] The District asserts that the Arbitrator and/or WERC does not have jurisdiction to issue an award in the pending case because there is case law that requires that a complainant must exhaust the grievance process before filing a prohibited practice complaint. Given my conclusion that the grievance has not been dropped, the District's argument is not addressed.

Was Luster Exempted from Lay-off Consistent with the Labor Agreement

The Association asserts that Luster is not responsible for "unique programs or activities" and, thus, the District's decision to retain Luster violated Section 10 of Article VI. Section 10 provides that:

> The Board reserves the right to exclude one (1) employee in each year from the layoff process if that employee is involved in a unique program or activity.

The District utilized this section to exclude John Luster from lay off. As a result of Luster's exclusion, the Grievant, who was the only other employee in the Secondary Social Studies department, was laid off even though he had substantially more seniority than Luster. If the program or activity that Luster is involved in is "unique," then the District was well within its contractual rights to exclude him from layoff. The question is whether Luster is "involved in a unique program or activity?"

The District is not consistent in its proffered "program or activity" justifying Luster's exclusion. Board President Susan Jones-Molino testified that the reason Luster was excluded was due to his involvement in the "Now or Noon" program whereas Bird testified that it was Luster's involvement in the "At-Risk" program that justified his exclusion. The fact that the decision-makers are not in agreement as to the reason that Luster was excluded is compelling evidence of pretense.[3] But regardless of which program or activity is relied upon by the District, I do not find that either meet the definition of "unique" as contemplated by the labor agreement.

Looking first to the "Now or Noon" program, it was not in existence at the time that the District decided to retain Luster in lieu of the Grievant. Luster had become aware of a similar program during the Fall of 2003, researched that program, and attended a workshop in March, 2004. The minutes from the April, 2004, Board of Education meeting indicate that Luster informed the Board that the "Now or Noon" program would be introduced and would require 7th and 8th grade students to have a working lunch in Luster's room to complete their homework. Section 10, requires that the employee "is involved in" the program or activity and does not contemplate a future program or activity. The Now or Noon program did not exist at the time that the District made its decision to exempt Luster and therefore it was premature for the District to base its decision to exempt Luster on a program that did not exist.

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3 The Association has proffered evidence to establish that the District's action was disciplinary in nature and prompted by inappropriate motives. My conclusion that there is evidence of pretense it is not intended nor should it be read to lend credibility nor discredit the Association's assertions as to the motives of the Board or Administration.

Section 10 allows the District to exclude an individual responsible for a "unique program or activity." The District offers multiple dictionary definitions of unique concluding that a program or activity is unique if it "is a singular program or activity or at least, a special or unusual one." District brief p. 16. Regardless which definition of unique is applied to the At-Risk program, I do not find it to be "unique." The District is not the only one in the state or in CESA 3 that provides an At-Risk program for its students. Eligibility is based on the number of students that have dropped out of high school. Section 118.153 (2), Wis. Stats. The District has provided an At-Risk program to its students for greater than 13 years. Moreover, when faced with layoff decisions during in the past, the District laid off the At-Risk coordinators rather than other teachers.

There is no evidence in the record that the supports the conclusion that the At-Risk program at Wauzeka-Steuben is unique. Rather, the evidence establishes that the manner in which Luster implemented the program is unique in comparison to his predecessors. Bird testified Luster has "implemented many different facets of it [At-Risk program] that were never there before" and concluded that he recommended "to keep this program because of the uniqueness of it and effectiveness of it and that we did not have [it] before." The language of the parties' agreement does not afford the District the contractual right to exclude an individual based on the unique nature in which he is implementing an activity or program of the District.

Next, I look to how the parties defined a "unique program or activity" in the past. The record indicates that although this section of the agreement has been a part of the labor agreement for a long time, it has been used only once prior to the present grievance. This occurred in April of 2003 when a less senior science instructor was excluded from lay off due to his work in the area of solar energy. Wermich had written a grant and installed a photovoltaic heating system in the District. Wermich, the District and the program were featured by the Energy Center of Wisconsin's WisconSUN program on its website. I concur with the parties that such a program or activity is unique. In comparison, I do not find a 13 year program which has been directed by at least three individuals to be similarly unique.

The District reliance on Arbitrator Dennis McGilligan's decision in OSHKOSH PROFESSIONAL POLICE OFFICERS ASSN AND CITY OF OSHKOSH, CASE 265, NO 53823, MA-9466 (MCGILLIGAN, 10/7/96) is misplaced. In that case, the language of the agreement required Arbitrator McGilligan to focus on the characteristics of the officer in determining who would receive overtime. In contrast, the District and the Association have bargained language that focuses not on the qualities of the excluded teacher, but rather on the program or activity. I find the case distinguishable.

Finally, I do not accept that a program or activity is unique if it is a singular program in the District's educational process. This is a small district and as such, there are many teachers who are solely responsible for subject areas. If I were to accept the District's definition, then most, if not all, teachers at the secondary level in a small district would be responsible for unique programs or activities since they are the only ones in charge of particular courses and specific subject matter.

The evidence does not support finding that the At-Risk program or the Now or Noon program are unique, and as such, the District's exclusion of Luster was in violation of the labor agreement. The grievance is sustained.

AWARD

1. The grievance is timely under the collective bargaining agreement.

2. The Wauzeka-Steuben School District violated the terms of parties' collective bargaining agreement when it laid off Michael Scheckel on April 20, 2004.

The issue of remedy was remanded to the parties to address and devise a mutually agreeable resolution.

Dated at Rhinelander, Wisconsin, this 17th day of May, 2005.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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