

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.

SUPPLEMENTAL ARBITRATION AWARD

On May 13 2005, I issued a decision in this matter. It addressed the following issues, which had been stipulated by the parties:

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?

The **AWARD** section of the decision addressed the issues thus:

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.

On June 6, 2005 (references to dates are to 2005, unless otherwise noted), the District filed a request for a formal review of the issue of remedy. NEST responded in a letter filed with the Commission on June 8. On June 22, I conducted a teleconference with the parties to determine the remedial issues to be addressed.

BACKGROUND AND DISCUSSION

The District's June 6 letter stated the remedial issue thus:

The issue that has arisen is relative to the make whole portion of the award. The question is whether Mary Ann Rusch should receive back pay and benefits based on the position from which she was laid off, i.e., the part-time middle school position, or on the basis of the full-time Bartelt high school position.

Asserting that the labor agreement did not allow Rusch to "obtain more time than she already had" through a layoff, the District concluded that it could have, for the 2004-05 school year, assigned Rusch to her part-time position or to part of Bartelt's position. To measure the remedy based on a full-time position thus "would be unfair and a windfall for Ms. Rusch." The District concluded its request by asserting that the measure of the make-whole should be Rusch's part-time position, not the full-time position the grievance sought for her.

NEST responded that "Rusch is entitled to a make whole award of the hours worked by Jeanine Bartelt because that is the position she would have held but for the employer's violation of the collective bargaining agreement." The grievance did not question Rusch's position, but whether the District had followed "the correct order of layoff." That the Award reinstated her to the High School Aide position confirms that the measure of the make whole should be Bartelt's 2004-05 school year hours, not the hours Rusch would have worked if she had retained her part-time position or had been offered part of Bartelt's position. NEST concluded that a determination of whether the make-whole should turn on "the full time position of Bartelt or the part time hours" would resolve the remedial dispute, since "the parties agree that the contract then takes over and determines what the fringe benefit level would have been."

The conference call revealed that the parties' dispute had changed from that addressed in the correspondence summarized above. More specifically, the District had a potential part-time opening available to Rusch. If that opening proved acceptable to Rusch, the issue turned to what rights, if any, Freiboth and Zondlo had to part or all of Bartelt's position. The District asserted that the following portion of original decision implied they had no rights to assert:

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. MA-12778 AT 16.

NEST did not agree that the cited language necessarily leads to the District's conclusion. I noted that the language was dicta, included in the decision to highlight the decisional process denied Rusch. Because Rusch was the most senior applicant, the finding of a violation did not require addressing the specific issue of Freiboth's or Zondlo's rights against Bartelt.

The parties agreed that the factual record had been fully developed at the first hearing, and that further hearing or another grievance would pose unnecessary costs and delay. Thus, even though the specific issue of Freiboth's and Zondlo's rights to Bartelt's position was not posed at the time of the initial award, they are posed now.

I stated to the parties during the teleconference, and confirm with this Supplemental Award, that the original decision determined that Rusch never had her qualifications independently assessed by District administrators and that their decision on her qualifications lacked an objective basis in fact. This was not the case with Freiboth and Zondlo. For each of those applicants, the District administrators considered the issue of their qualifications sufficiently to warrant an arbitrator's deference to their conclusion that neither was qualified, within the meaning of Article XXI, Section B, 4, to fill the High School Special Education Aide position occupied by Bartelt.

In sum, even though Freiboth and Zondlo have more seniority than Bartelt, neither is qualified to take the position of High School Special Education Aide. Thus, unlike Rusch, they lack the ability to challenge their layoff under Article XXI, Section B. The Award entered below states these conclusions and closes MA-12778.

AWARD

The measure of make whole relief for Rusch for the 2004-05 school year is the full-time position of High School Special Education Aide occupied by Bartelt. Neither Freiboth nor Zondlo can assert rights under Article XXI, Reduction in Force, or Article XXIII, Seniority to challenge the District's retention of Bartelt in the position of High School Special Education Aide.

Dated at Madison, Wisconsin, this 29th day of June, 2005.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

