BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BENTON SCHOOL DISTRICT

and

BENTON EDUCATION ASSOCIATION

Case 20
No. 64452
MA-12896

Appearances:

Joyce Bos, appearing on behalf of Benton Education Association.

Eileen A. Brownlee, Kramer & Brownlee, LLC, appearing on behalf of the Benton School District.

ARBITRATION AWARD

The Benton School District, hereinafter District or Employer, and Benton Education Association, hereinafter Association, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a Commissioner or member of the Commission staff to hear and decide the instant grievance. Commissioner Susan J.M. Bauman was so appointed. A hearing was held on April 5, 2005, in Benton, Wisconsin. The hearing was transcribed. The record was closed on June 6, 2005, upon receipt of all post-hearing written arguments.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Award.

ISSUE

There are no procedural issues to be decided. The parties stipulated to the following issues:

Did the District violate the contract when it failed to recall Suzanne Marx to teach the Career Guidance class?

Did the District violate the contract when Principal Gary Neis supervised a study hall during the 2004 – 2005 school year?

If so, what is the remedy?

BACKGROUND

Grievant, Suzanne Marx, is an employee of the Benton School District (District). Although she had been employed full-time for a number of years, she was laid-off to 50% time at the end of the 2003-2004 school year. Due to the exercising of her bumping rights under the contract, and re-calculation, Ms. Marx initially received a 75% appointment for the 2004-2005 school year.

During the summer of 2004, Shullsburg, a neighboring school district, inquired as to whether the Benton School District had anyone available to teach two health classes. The District contacted Ms. Marx, who agreed to teach the classes. The two districts entered into a municipal agreement whereby Ms. Marx received a full-time contract for the 2004-2005 school year, although she was teaching two classes for the Shullsburg School District rather than the Benton School District. She was paid by the Benton School District, which was reimbursed by the Shullsburg District.

A short time after the start of the 2004-2005 school year, the Grievant became aware of a new course, Career Guidance, that was being taught by the guidance counselor, Ms. Wildes. Preliminary schedules for the school year show the course was being considered as early as February 2004. Additionally, Grievant became aware that Principal Gary Neis was supervising a one hour study hall each day. This is not evident from a review of any of the tentative class schedules. Ms. Marx is certified to teach the Career Guidance course and filed a grievance in accordance with the provisions of the collective bargaining agreement between the Association and the District to the effect that she should have been re-called to teach Career Guidance and to supervise the study hall.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

Article I: Management Rights

Management retains all rights of possession, care, control and management that it has by law and retains the rights to exercise these functions under the terms of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly and unequivocally restricted by the express terms of this Agreement. These rights include, but are not limited by enumeration to, the following rights:

A. To direct all operations of the school system;
B. To establish and require observance of reasonable work rules and schedules of work;

C. To hire, promote, transfer, schedule and assign employees in positions within the school system;
D. To suspend, discharge and take other disciplinary actions against employees;
E. To relieve employees from their duties because of lack of work;
F. To maintain efficiency of school system operations;
G. To take whatever action is necessary to comply with state or federal law, or to comply with state or federal agency decisions or orders;
H. To introduce new or improved methods or facilities;
I. To hire employees, establish quality standards and evaluate employee performance;
J. To determine the methods, means and personnel by which school system operations are to be conducted;
K. To take whatever action is necessary to carry out the functions of the school system in situations of emergency;
L. To contract out for goods and common labor.

Article XIII: Grievance Procedure

. . .

Step 4: If the grievant is not satisfied with the action taken at Step 3, he or she may, within five (5) days of receipt of the Board's answer, file a written request with the WERC for arbitration. The WERC shall appoint a member of its staff to conduct a hearing on the matter, and the resulting decision of said arbitrator will be final and binding upon the parties.

Article XVI: Staff Reduction

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D. Bumping: Any employee who is selected for reduction may elect in writing, within ten (10) days of receipt of a layoff notice, to assume any supervision assignment or teaching assignment (in the case of a full layoff) or portion of an assignment (in the case of partial layoff) of the employee with the lowest number of points who holds an assignment for which the more senior teacher is certified or able to be certified by the contract date. Any employee who is replaced in this fashion may similarly elect to replace another employee in the District as provided above.

. . .

Article XVII: Length of Service

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C. Recall

1. If the District has a vacant position or a portion of a position available for which a laid off employee is certified or able to be certified by the

contract date, the employee shall be notified of such position and offered employment in that position. Employees on layoff will be contacted and recalled in reverse order of their layoff. Recall rights shall extend to employees on partial layoff.

2. An employee's recall rights period is two (2) years following the employee's most recent layoff. The two-year period ends on the first day of the third school year after layoff.

3. Recall notice shall be sent by registered mail. . . .

4. An employee on layoff status may refuse recall offers less than their previously held position without loss of rights to the next available position. . . .

5. No new appointments may be made by the district while there are employees who have been laid off or reduced in hours who are available and certified to fill the vacancies.

POSITIONS OF THE PARTIES

The Association contends that the collective bargaining agreement states in clear and concise language that no new appointments may be offered while there are employees who have been laid off or reduced in hours and they are available and certified to fill the vacancy. Grievant, Suzanne Marx, was available and certified to teach the Career Guidance class. Although Ms. Marx was given a 100 percent full-time contract, it requires that she travel to another school district to teach part of the day. She should have been recalled to the Benton School District to teach the Career Guidance class and supervise a study hall, rather than the District's decision to hire an unlicensed employee to teach the new class and to have a non-bargaining unit employee supervise a study hall.

The Association asserts that, when reading the contract between the parties as a whole, study hall supervision is bargaining unit work that should have been assigned to Ms. Marx. As a remedy for its breach of the collective bargaining agreement and failure to assign the Career Guidance class and the study hall supervision to Ms. Marx, the District should pay the sum of $1,500 to cover her travel expenses between Benton and Shullsburg for the 2004-2005 school year. In addition, the Association asks that the District assign the Career Guidance class to Ms. Marx for the 2005-2006 school year, and that the District only assign bargaining unit work to bargaining unit members in 2005-2006 and beyond. Finally, the Association seeks remuneration equal to half of the salary the grievant would have received from the Benton School District had she remained in the Benton School District to teach her entire day, rather than travel between districts.

The District asserts that the union ignores the fact that the recall language of the collective bargaining agreement states specifically that if the District has a vacant position or portion of a position available, and a laid-off employee is certified or able to be certified and available, the employee shall be offered employment in that position. In the instant case, there was no vacant position, nor was there a vacant part of a position as those terms are used in the collective bargaining agreement. The rights of an employee to bump into any supervision assignment or teaching assignment at the time of lay off are different than the rights of an employee upon recall. According to the Employer, the Union is attempting to equate the rights of an employee in these two different situations. There was no vacant position or part of a position available to which the Grievant was entitled.

In addition, the District contends that there is no authority in the collective bargaining agreement for the arbitrator to provide the remedy sought by the Grievant. The Grievant suffered no loss as a result of her assignment to teach in Shullsburg. The grievance should be denied.

DISCUSSION

At the core of what is to be decided is whether the Grievant's recall rights extend to teaching the newly created Career Guidance course (assigned during the 2004-2005 school year to guidance counselor Wildes) and to supervising the fifth hour study hall (assigned during the 2004-2005 school year to Principal Neis). Although a significant portion of the record is concerned with the question of whether Ms. Wildes holds, or is eligible to hold, the appropriate certification[1] to teach Career Guidance, the only relevant licensure consideration is the established fact that the Grievant holds an appropriate license to teach the course.

When Ms. Marx was initially reduced from a full time teacher to a 50% contract at the end of the 2003-2004 school year, she exercised her rights under the layoff clause of the collective bargaining agreement between the Association and the District to bump up to a 75% contract.[2] The layoff clause of the contract, at Article XVI D: Staff Reduction, provides:

> Bumping: Any employee who is selected for reduction may elect in writing, within ten (10) days of receipt of a layoff notice, to assume any supervision assignment or teaching assignment (in the case of a full layoff) or portion of an assignment (in the case of partial layoff) of the employee with the lowest number of points who holds an assignment for which the more senior teacher is

[1] All testimony regarding DPI license requirements was in the nature of hearsay, without objection of either party. The testimony provided by the Grievant directly contradicted that provided by the District, leaving the Arbitrator without a clear picture of whether Ms. Wildes was certified, or able to be certified, to teach the Career Guidance class.

[2] A portion of the increase from 50% to 75% was attributable to bumping and a portion was attributable to recalculation of planning time.

> certified or able to be certified by the contract date. Any employee who is replaced in this fashion may similarly elect to replace another employee in the District as provided above.

This language specifically provides that a member of the bargaining unit facing partial layoff has the right to bump a less senior person for any supervision assignment or portion of a teaching assignment.

The collective bargaining agreement also contains language, at Article XVII C, that specifies the recall rights of a bargaining unit member. These rights extend for a period of two years and require the District to offer a laid off or partially laid off employee work as follows:

> If the District has a vacant position or a portion of a position available for which a laid off employee is certified or able to be certified by the contract date, the employee shall be notified of such position and offered employment in that position. Employees on layoff will be contacted and recalled in reverse order of their layoff. Recall rights shall extend to employees on partial layoff.

The agreement also limits the District's ability to employ new personnel while employees are on layoff:

> No new appointments may be made by the district while there are employees who have been laid off or reduced in hours who are available and certified to fill the vacancies.

A review of this language supports the idea that an employee's rights at the time of layoff are different from the same employee's rights after having been laid off, that is, his/her rights upon recall. From the fact that the parties chose to use different language in these two different contract clauses, the undersigned must infer that the parties meant the clauses to mean different things, to provide different rights to a member of the bargaining unit when transitioning from full time to part time than when that same employee is transitioning from part time[3] to full time (or at least to an increased percentage of full time). At the time of her layoff, Grievant could have bumped into the study hall supervision position if it existed and was assigned to someone with less seniority than Ms. Marx and, perhaps into the Career Guidance teaching assignment, had the course existed and if Ms. Marx were more senior than Ms. Wildes. This is the case because the Career Guidance class would have been a "portion of an assignment" into which a bargaining unit member facing partial layoff could bump.

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[3] These clauses also apply to a complete layoff or recall. Inasmuch as this case concerns partial layoff, the discussion is written in this manner although the concepts extend to both full and partial layoff and recall.

However, we are not faced with what might have occurred at the time of layoff but, rather, with the question of Ms. Marx' rights during the two year period after her partial layoff. Once laid off, Ms. Marx' rights are not to a "supervisory assignment" or "teaching assignment", but, inasmuch as she had experienced a partial layoff, to a "portion of a position." Grievant's reading of this language to mean the same as a supervisory assignment or teaching assignment is not without merit. However, the fact that the parties chose to use different language must be given meaning.

An "assignment", as used in the collective bargaining agreement, is a finite job duty, one of either teaching one class for one hour, or of supervising a study hall for one class period. I agree with Arbitrator Nielsen when he stated in LAKE GENEVA JT. SCHOOL DISTRICT #1, DEC. NO. 50707 (9/22/94) that "A 'position' is a bundle of duties . . . tied together into a job, created by management to accomplish the educational and administrative goals of the District." That is, a position consists of a number of assignments and supervisions that, taken together, form a job. By extrapolation, a "portion of a position" means a bundle of duties that tied together create a job that is not a full-time position but, rather, a partial position that is, perhaps, a 50% or 75% appointment, much like Grievant held prior to the beginning of the 2004-2005 school year.

Based on these definitions, it is conceivable that the course claimed by Ms. Marx, Career Guidance, or the supervision of the 5th period study hall, are portions of a position that taken together create a position. However, the District did not assign these two tasks to the same person. Further, although the teaching of Career Guidance was something new and different for the district, it did not create an additional position, or partial position, in order to provide this offering to the students of the District. Rather, it changed Ms. Wildes' position so that instead of being in the guidance office and meeting with students and or staff for eight (8) periods a day[4], she met with a group of students during the 8th period in a class setting, teaching Career Guidance. Assuming that Ms. Wildes' was legally able to teach this course[5], the District did not violate the collective bargaining agreement by failing to recall the Grievant to teach the course.

The District argues that Ms. Wildes was entitled to teach the Career Guidance course since she had developed it in response to an invitation from Principal Neis and the course had been approved by the School Board. The Association contends that this is individual bargaining, contrary to the Municipal Employment Relations Act. The fact that a teacher

[4] There was no testimony as to how Ms. Wildes' spends her days, other than the teaching of the course in question. This description is based on the undersigned's experience with guidance counselors many years ago.

[5] The parties disagreed as to whether Ms. Wildes' was capable of being licensed to teach this position. If she was, and continues to be, there is no contract violation. However, if she does not hold an appropriate certification to teach the course in the 2005-2006 school year, she cannot be allowed to do so. The District then has a choice as to whether to offer the course or to provide Grievant or another teacher the opportunity to teach it.

develops a new course and the Board approves it and that teacher is given the opportunity to teach it does not, in this writer's opinion, constitute individual bargaining, at least as described in this case. It makes sense for the person who develops a new course to have the opportunity to teach it, at least in the first instance provided, of course, that the person in question meets all of the legal obligations to engage in teaching. If Ms. Wildes does not possess the teaching credentials necessary to teach the course, it is up to the District to determine whether it wishes to offer the course at all.

The Association also points to a letter from Richard Lawrence, President, Board of Education, School District of Benton dated November 30, 2004, in support of its argument that the District violated the contract in failing to offer the Career Guidance class to Ms. Marx[6]:

> The Board of Education is all too aware of the fact that there are teachers in the School District of Benton who are either laid off and/or reduced in time for the 2004 -2005 school year. We are equally aware of our contractual obligations as well as our obligation to provide the optimum educational opportunities for all of the students of the School District of Benton. Both of these factors must be considered when building an instructional schedule for a given school year.
>
> In the case of the two situations you identified, Career Guidance and 7th/8th grade Expletory [sic] Spanish, there was no staff member who was either available or certified for the positions, thus no recalls for these positions were offered to teachers who were on layoff or reduced time status.

By the time this letter was written, three months of the school year had passed. The letter was offered through the testimony of Benton Education Association President, Sherri Timmerman, to whom it was addressed. Ms. Timmerman received it on December 9, 2004. Mr. Lawrence did not testify. Accordingly, the letter is hearsay that cannot be relied upon for the truth of the matters asserted. The fact is, however, that at the time the letter was written, Ms. Marx was not on partial layoff[7], and there was no testimony with respect to the other personnel who might have been laid off, or on reduced status at that time.

The Association provides a variation of its argument with respect to the 5th hour study hall supervised by Principal Neis. The Association contends that supervision of the study hall is bargaining unit work and that the District could not assign the study hall to Principal Neis although, apparently, he has supervised a study hall for at least two years. The Association

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[6] There was also testimony with respect to the Exploratory Spanish class that Ms. Marx appears to claim she should have been offered. As this matter was not included in the issues to be decided, it has not been addressed.

[7] Ms. Marx accepted the Shullsburg assignment at the start of the school year. Accordingly, she was not in partial lay off status at the time the letter to which Mr. Lawrence responded was written, September 22, 2004.

points to the layoff clause of the agreement with the District in support of its claim that such supervision is bargaining unit work, since a more senior teacher who is laid off or partially laid off may bump a less senior bargaining unit member from such a supervision assignment.

There is no question that supervision of study halls is bargaining unit work. However, the collective bargaining agreement does not reserve this work exclusively to bargaining unit members. The Management Rights clause of the Agreement allows the District to "schedule and assign employees" and "to determine the methods, means and personnel by which school system operations are to be conducted." In many school districts, the supervision of study halls is handled by teachers, support staff, and administrators.[8] The fact that the Association did not grieve the fact that Principal Neis supervised a study hall during the 2003-2004 school year has no bearing on whether Ms. Marx should have been recalled to supervise the 5th hour study hall in 2004-2005. In the absence of contract language making supervision exclusively bargaining unit work, I cannot find that the District violated the recall provisions of the bargaining unit by failing to recall Ms. Marx to supervise the 5th hour study hall.

The District argues that Ms. Marx was employed by the Benton School District as a full-time teacher during the 2004-2005 school year, and that she has agreed to the same for the 2005-2006 school year. Ms. Marx argues that, in reality, she has a 75% contract with the Benton School District, and a 25% contract with the Shullsburg District. That is, she argues that the 100% with Benton is only on paper, making her eligible for recall to the assignments she seeks: teaching Career Guidance and supervising the study hall. Although Ms. Marx might feel that she is working only 75% in Benton and 25% in Shullsburg, the evidence demonstrates that she is employed 100% by Benton School District, with a teaching location in Shullsburg as well as in Benton. Accordingly, she is not eligible, or available to teach the class that she seeks. The Shullsburg assignment does appear to have developed at a later time than the Career Education class. Accordingly, I read Ms. Marx' argument to be that she should have been offered the Career Education class (and the study hall) at a point in time before she was recalled to teach the health classes in Shullsburg.

Inasmuch as I find that Ms. Marx does not have a contractual right to teach the Career Education class or to supervise the study hall in question, I need not reach the question of Ms. Wildes' certification to teach the Career Education course, or the question of remedy. However, since the 2005-2006 school year has not begun, and because Ms. Marx has expressed a desire to teach the Career Education course rather than the health classes in Shullsburg, if Ms. Wildes is determined to not have the credentials necessary to teach Career Education, and if the District determines to offer the course not withstanding the fact that Ms. Wildes is not available to teach it, then the opportunity to teach the course should be offered to Ms. Marx, provided that there is no bargaining unit member currently laid off, or partially laid off, who is more senior to Ms. Marx and who has the necessary certification to teach the course.

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[8] There was no testimony to indicate that support staff supervises study halls in the Benton School District.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The District did not violate the collective bargaining agreement when it failed to offer the Career Guidance class or the fifth hour study hall to Ms. Marx. The grievance is denied.

Dated at Madison, Wisconsin, this 8th day of July, 2005.

Susan J.M. Bauman /s/
Susan J.M. Bauman, Arbitrator

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