

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**DODGEVILLE EDUCATION ASSOCIATION**

and

**DODGEVILLE SCHOOL DISTRICT**

Case 23  
No. 63855  
MA-12731

*(Doyle Layoff Grievance)*

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**Appearances:**

**Thomas Fineran**, Negotiations Consultant, Southwest Education Association, on behalf of the Dodgeville Education Association.

Lathrop & Clark, LLP, Attorneys at Law, by **Michael J. Julka** and **Richard F. Verstegen**, on behalf of the Dodgeville School District.

**ARBITRATION AWARD**

The Dodgeville Education Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission provide a panel of Commission/staff arbitrators from which the parties could select an arbitrator to hear and decide the instant dispute. Thereafter the Association and the Dodgeville School District, hereinafter the District, selected the undersigned, David E. Shaw, to arbitrate in the dispute. Hearing was held before the undersigned on December 14, 2004, in Dodgeville, Wisconsin.<sup>1</sup> A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs by March 16, 2005.

Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

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<sup>1</sup> The parties agreed at hearing to waive the thirty (30) day time limit for issuing an award.

## ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issues:

Did the District violate Article VII contained in the Collective Bargaining Agreement when it laid off the Grievant? If so, what is the appropriate remedy? <sup>2</sup>

## CONTRACT PROVISIONS

The following provisions of the Agreement are cited:

### **ARTICLE V – MANAGEMENT RIGHTS**

The Board, on its own behalf and on behalf of the electors of the District, hereby retains and reserves unto itself, except as modified by the terms of this agreement, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin, and of the United States, including but without limiting the generality of said laws and Constitution. The Management Rights are as follows:

- A. To the executive management and administration of the school system, its properties and facilities, and the activities of its employees, insofar as they affect the educational process and the school-related activities of its employees;
- B. To hire, promote, transfer, schedule, discharge, demote, non-renew, and assign employees in the school system.
- C. To establish curriculum, courses of instruction, special programs, athletic activities, extra curricular activities, and other programs deemed necessary for a good education program.
- D. To determine the means and methods of instruction, the process for selection of textbooks and other teaching materials, and the use of learning aids after input from the department or grade level involved.
- E. To determine class schedules, hours of instruction and duties, and responsibilities and assignments of teachers to administrative and non-teaching activities.

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<sup>2</sup> The parties also stipulated the Association is not challenging the Board's decision to eliminate the Learning Lab or the timeliness of any notices of reduction provided to the Grievant.

- F. To take whatever action is necessary to carry out the functions of the school system in situations determined to be an emergency.

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## **ARTICLE VII – STAFF REDUCTION**

- A. In the event the Board determines to reduce the number of employee positions (full layoff) or the number of hours in any position (partial layoff) for the forthcoming school year, because of a decrease in student enrollment, a decline in course registration, educational program changes, financial or budgetary reasons, or any other legitimate reason as determined by the School Board, they may layoff teachers as necessary.

The school district administration will recommend to the School Board when teacher or teachers should be laid off or reduced in time in accordance with the following criteria.

- B. The criteria to be used are “qualification,” “length of service in the district” and “length of departmental service.”
  - 1. The following standards shall be applied by the administration in making the comparative evaluation of “qualification”:
    - a) Teaching performance in the district as previously and currently evaluated by the appropriate supervisor.
    - b) Appropriateness of training, experience and certification with respect to the remaining teaching assignments which must be filled.
  - 2. In the event two or more teachers are found to be relatively equally qualified upon application of the above standards, then length of departmental service shall prevail, and if equal, length of service in the district shall prevail.
  - 3. Departments shall mean the subject area, assignment or grade levels as enumerated below.

All members of the staff being considered for potential layoff because of the position reduction are identified through application of the subject/departments.

a) Subject Certification 7 -12

English	Social Studies
Science	Math
Spanish	Business Education
Technology Education	Agriculture
FACE	Health
Driver Education	

b) K-12 Special Area Certification and Special Certification

Physical Education	Art
Music	Library/Media
Learning Disabilities	Speech/Language
Cognitive Disabilities	Occupational Therapy
Emotional Disturbance	Counselor
Reading Specialist	Early Childhood
	Hearing Impaired

c) Elementary Certification

Preschool, Kindergarten through grade 6

4. Any teacher who is to be reduced or is reduced through the application of the above process will be transferred to any vacant position for which the teacher holds certification if that teacher has an average or better performance evaluation in his/her present teaching

position, and will agree to a reasonable professional development plan designed by the administration, in cooperation with the teacher that is designed to make the teacher competent in teaching in that subject area.

...

- D. When a teaching position is made available and a laid off teacher or teachers have recall rights and the desired minimum qualifications established for the position, then if more than one qualified laid off teacher has recall rights, the administration shall, after applying the standard for comparing individual “qualifications” set forth in paragraph 2, recommend to the Board the teacher to be recalled. If two or more teachers subject to recall are found to have relatively equal “qualifications”, then the laid off teacher having the greatest length of previous service, if any, in the district shall be first recalled; and, if district service is equal, then the teacher having the greatest length of previous service in the department shall be recalled.<sup>3</sup>

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### **BACKGROUND**

The Grievant, Laretta Doyle, was hired by the District in 1994 to develop the District’s Learning Lab. The concept of the Learning Lab is to assist students who are “at risk” and are having problems in academic areas. When she was hired, the Grievant was certified in Geography, Grades 6-12. Specific certification is not required to teach the Learning Lab, only that the person is certified to teach in Wisconsin. When the Grievant first started, the emphasis was on teaching Math and the District had two Math teachers running the Learning Lab. After two years, the Grievant had learned enough Math to be able to assist students in that area and the Math teachers were no longer used in the Learning Lab. In 1996, the Grievant also obtained a license in Alternative Education. According to the Grievant, the Learning Lab focused on areas in which students were having the most problems and worked on skills in those areas, especially in the areas of grammar, spelling and writing. During her tenure with the District, the Grievant also team taught Physical Education for a semester and Math. In 2001, the Grievant obtained licenses in Broad Field Social Studies and History, as well as in Geography and Alternative Education. In the 2003-2004 school year, the Grievant taught two courses of Government each semester, in addition to the Learning Lab.

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<sup>3</sup> The Association also cites Article VIII – Freeze Clause and Article IX – Fair Dismissal, but makes no arguments based upon those provisions.

Due to financial/budgetary reasons, the District's Board of Education found it necessary to implement staff reductions for the 2003-2004 school year. During the 2002-2003 school year, the District's administrative team, consisting of the District Administrator, Diane Messer, the High School Principal, the Middle School Principal, the two Elementary School Principals, and the Pupil Services Director, made recommendations to the Board regarding teaching positions to be reduced or eliminated for the 2003-2004 school year. In applying the criteria for staff reductions in the parties' collective bargaining agreement, the administrative team compiled a seniority list of the District's teachers by district seniority and departmental seniority. This seniority list was given to the Association's leadership to review and they, in turn, made the list available in the teachers' lounges and also gave the list to the Association's Building Representatives. The Grievant acknowledged that she saw the 2002-2003 seniority list the administrative team had compiled. That seniority list did not list the Grievant in one of the departments listed in Article VII, B, 3, but listed her position as "Learning Lab" with a departmental seniority ranking as "1 of 1". German teacher Candace Pitts was also not listed in a department and was similarly listed as "German" with a departmental seniority ranking as "1 of 1". No objection was raised by the Grievant or the Association regarding the Grievant's listing on this seniority list. The Learning Lab had initially been one of the areas considered for reduction, but ultimately was not an area identified to be reduced for the 2003-2004 school year.

The District continued to experience budget problems in the 2003-2004 school year and the District's administrative team again made recommendations for staff reductions to the Board. That team again compiled a seniority list of the 2003-2004 staff for the purpose of applying the criteria for layoff for the 2004-2005 school year. On this seniority list the Grievant was listed under both Social Studies and Learning Lab, with one year of departmental seniority in Social Studies based upon her teaching the classes in Government during the 2003-2004 school year and ranked as "7 of 7". She was ranked as "1 of 1" in the Learning Lab.

Among the reductions recommended by the administrative team for the 2004-2005 school year, was essentially the elimination of the Learning Lab by reducing it by 1.0 FTE. The Association objected to the Grievant's placement on the seniority list, claiming she should be listed under Social Studies with credit for her years in the Learning Lab. The Association also claimed that district seniority should be applied as the second criterion for selecting teachers for layoff.

The parties had engaged in consensus bargaining for their 1994-1995 agreement. Then-District Administrator David Westhoff, summarized the tentative agreements reached by the parties as of December 4, 1994, which summary included the following, in relevant part:

**Revision of ARTICLE VII – STAFF REDUCTION**

Paragraph 2 is revised as follows

Lines 11-12: The criteria to be used are 1) “qualification,” 2) length of service in the district” and 3) “length of departmental service”.

Line 18: Supervisor(s)

Lines 24-26: then length of service in the district shall prevail, and if equal, length of departmental service shall prevail. <sup>4</sup>

Westhoff’s summary indicated the parties would be submitting the tentative agreements to their respective bodies “for the consideration of ratification. . .”

Board minutes for the meetings of December 19, 1994 and January 9, 1995 indicate that the item of ratification of the consensus bargaining agreement for 1994-95 was tabled “for further clarification.” At the latter meeting, the Board recommended that Board member Steve Hilgenberg enter into a conversation with Barbara Thompson (of the Association) “inviting the DEA to appoint one or two people to meet with one or two people representing the Board to see if the proposals that have been amended can be reconciled.” Ratification of the “consensus bargaining proposals” was again tabled at the January 23 and January 30, 1995 meetings. At the latter meeting, the ratification was tabled “until review by the DEA of amendments sent by the Board.”

The minutes of the Board’s February 13, 1995 meeting indicate the following:

Hilgenberg moved, seconded by Johnson-Loy, a motion to ratify the 1994-95 teacher contract with the DEA with the QEO dated 02-01-95 and the language amendments

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<sup>4</sup> The parties’ 1993-1994 agreement contained the following regarding Article VII, in relevant part:

ARTICLE VII – STAFF REDUCTION

1. In the event the Board determines to reduce the number of employee positions (full layoff) or the number of hours in any position. . .

. . .

The school district administration will recommend to the School Board which teacher or teachers should be laid off or reduced in time in accordance with the following criteria.

2. The criteria to be used are “qualification,” “length of departmental service” and “length of service in the district.”

. . .

- (b) In the event two or more teachers are found to be relatively equally qualified upon application of the above standards, then length of departmental service shall prevail, and if equal, length of service in the district shall prevail.

dated 01-31-95 and the elimination of the reference to line 72 in Article 12 dated 02-03-95. Roll call vote. All voted aye. Motion carried.

By memorandum of February 16, 1995, Westhoff advised Thompson of the changes in the agreement the Board had ratified. Attached to the memorandum were the pages of the agreement with the changes indicated, including the following regarding Article VII, in relevant part:

Board which teacher or teachers should be laid off or reduced in time in accordance with the following criteria.

2. The criteria to be used are “qualification,” “length of service in the district” and “length of departmental service.”

- (a) The following standards shall be applied by the administration in making the comparative evaluation of “qualification”:

...

- (b) In the event two or more teachers are found to be relatively equally qualified upon application of the above standards, then length of departmental service shall prevail, and if equal, length of service in the district shall prevail.

These changes were incorporated into the parties’ 1994-1995 agreement. There were no changes in Article VII, B, 2, b.

Michael Knoedler, the Association’s chief negotiator at the time, testified that the Association did raise a concern in those negotiations regarding considering departmental seniority ahead of district seniority, and that it has raised this concern in the parties’ negotiations for successor agreements since that time. However, the wording of Article VII, B, 2, b, has not changed during that time.

The Association continued to raise that concern in the parties’ discussions during the pendency of the Grievant’s layoff. According to Messer, she twice reviewed the District’s records in an attempt to verify whether the Association’s claim that the parties had intended to change the order of applying the layoff criteria to place district seniority ahead of department seniority was accurate. Messer ultimately concluded from her review that while there had apparently been a tentative agreement reached in that regard, further negotiations had subsequently taken place and that change had not been part of the final agreement. Westhoff testified he could not recall specifically what had occurred, but opined that if the parties had intended that change to be in their final agreement, its omission would have been discovered in the parties’ review and it would have been included in their agreement.



On April 12, 2004, the Board issued the Grievant a preliminary notice of layoff. On April 30, 2004, the Board issued the Grievant a final notice of layoff.

The Grievant filed a grievance regarding her selection for layoff. The parties, being unable to resolve their dispute, proceeded to arbitration before the undersigned.

### **POSITIONS OF THE PARTIES**

#### **Association**

The Association asserts that the Grievant was laid off because the District misinterpreted, inequitably applied and/or violated the contract. While the language of Article VII seems to be contradictory, the testimony clarifies that the intent of the language is to mean that the criteria are listed in the order they are to be applied. It would then be logical for subsection B, 2, to provide: "In the event two or more teachers are found to be relatively equally qualified upon application of the above standards, then length of service in the district shall prevail, and if equal, length of departmental service shall prevail." Unfortunately, due to the way subsection B, 2, is worded, the entire meaning of Article VII is reversed. The Association asserts the change should have been made so that the language in Article VII flows to a logical conclusion which would end with subsection B, 2, which explains how departmental service should prevail if district service were equal.

To more closely examine the issue in this case, four factors must be considered. First, Article VII, subsection B, 1, sets forth the criteria to be used in measuring "qualifications." There are four measurements listed under "qualifications". Regarding evaluations, District Administrator Messer stated that she had not read either the Grievant's or the other two teachers' involved evaluations. Additionally, she stated that the Grievant's performance was "adequate" and that she is a "good teacher". Messer later testified that the Grievant was laid off "purely because the Learning Lab was eliminated. . ." Regarding the appropriateness of training, the Grievant added two new certifications in Social Studies during her tenure (Broad Field Social Studies and History) to complement her Geography certification, and additionally added the Alternative Education certification. Compared to the other teachers in question, she has done much more in terms of ongoing training. Regarding appropriateness of experience, the Grievant's overall appropriateness of experience is demonstrated by her past evaluations and by successfully teaching Government during the 2003-2004 school year. Regarding appropriateness of certification, while the District seems to try to build a case that the Grievant had the least useful licenses of the three Social Studies teachers in question, it does not mention that the Grievant shared the same certification as Filardo and Kulcinski, and that these two certifications allow all of these teachers to teach almost all of the courses under consideration for the 2004-2005 school year. Thus, the Grievant has just as much "certification right" as the other two teachers and also has a Geography certification that neither of the other two have. Messer testified that they looked at qualifications with respect to other assignments available and at performance. The Association asserts that "performance" entails all four pieces of the qualification issue.

The second factor to be considered in interpreting Article VII is the significant change that was bargained into the parties' 1994-1995 agreement. The preceding agreement stated in Article VII, subsection 2, that the criteria to be used are: "qualification", "length of departmental service", and "length of service in the district," in that order. In the 1994-1995 agreement, subsection 2 was revised to read that the criteria to be used are "qualification", "length of service in the district," and "length of departmental service."<sup>5</sup> Dr. Westhoff and Mike Knoedler testified as to what occurred in 1994-1995. Westhoff was clear in his testimony that he wrote the memorandums in question, describing the December, 1994 document (Joint Exhibit 35) as a "summary of the tentative understanding agreements between the Board. . .and DEA as a result of consensus bargaining. . ." He was very clear that no mistakes were made in the process. Knoedler testified that a large number of people on the bargaining team made a collective decision and indicated their intent, which led directly to Westhoff's December, 1994 memorandum. This changed the District's philosophy of departmental versus district seniority. What occurred between December and final ratification in February of 1995 is both relevant and irrelevant. While the Board wanted Hilgenberg to talk to Thompson, we do not know the details of the intended conversation or if it took place, as there is no record of those conversations. We do have the Board's ratification and acceptance of the significant changes in lines 11 and 12 of Article VII. Westhoff could not say why this change was made in the absence of the other suggested tentative changes, other than it was made and was not a mistake. If the District did not intend to allow district seniority to replace departmental seniority as the second criteria after qualifications, they would not have allowed the changes in lines 11 and 12. The Association asserts that an arbitrator may reform the contract to reflect the true intent of the parties. LOS ANGELES COUNTY SOCIAL SERVICES UNION, 89-1 ARB. 81-89 at 3923 (Knowlton, 1988). Here, the true intent of the parties is to allow district seniority to replace departmental seniority as the second criterion after qualifications.

The third factor to be considered is the recall provision in the agreement, which provides that if two teachers subject to recall are found to have relatively equal qualifications, the laid off teacher having the greatest length of previous service in the district shall be first recalled and that if district service is equal, then the teacher having the greatest length of previous service in the department shall be recalled. It would be illogical for the District to lay off with a different order of criteria than those used to recall the same teachers.

The fourth factor is that layoff is to be by subject/department. Article VII, subsection B, 3, states: "All members of the staff being considered for potential layoff because of the position reduction are identified through application of the subject/departments." Learning Lab has never been listed as a subject/department. The District failed to assign the Grievant to a subject/department which would have protected her from layoff during the 2004-2005 school year.

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<sup>5</sup> It appears that the Association is actually referring to Article VII, B, rather than, subsection 2 of that provision.

The Association disputes the claim that because Ms. Pitts was reduced in German during the 1992-93 school year, and German is not a subject listed in the Agreement as a department, and if the Association did not object to Pitts' reduction, then a past practice has been established. There is a key difference between a reduction in time, the case in the Pitts' reduction, and a complete layoff, as in this case.

The District also argues that the seniority lists are a key piece of the layoff, however, the seniority lists did not exist prior to Messer's tenure, and the Association did not contribute to the creation of these lists. The District asserts that because the Association did not dispute the Grievant's departmental status in 2002-2003 when she was not laid off, the Association by de facto accepted her department status as accurate on the 2002-2003 list. However, not every teacher looked at this list in 2002-2003 and it was not given out as a District-wide document to all teachers for the purposes of making corrections. Further, the Association had no reason to contest the Grievant's status in that list, since she was not receiving a layoff in 2003-2004. The Association's purpose in the spring of 2003 regarding the seniority list was not to correct all errors on the list, but to clarify the department status for the group of elementary teachers who were being considered for layoff. Messer admitted that the first time she asked the full Association to consider the accuracy of her seniority list was in the fall of 2004, after the Grievant's layoff. The Association did not receive this version of the 2004-2005 seniority list until the day of the hearing and it is obviously not an agreed-upon or necessarily accurate document.

The District argues that although the Grievant was hired with only a Geography certification, she was always intended to only be a teacher in the Learning Lab until the 2003-2004 school year, when she taught in Social Studies part-time in addition to the Learning Lab. Since the Grievant was hired with only a Social Studies certification in 1994, she could only have been considered to be in the Social Studies department, as that was the only teaching certificate she had available. For the Grievant to be in any other certification area, the District would need to get emergency certification from DPI. There were no other teachers at the time who had a teaching certificate in one department, but whose departmental seniority was measured in another. The Association asks that the Grievant's time in the Social Studies department be accurately accounted for. The earliest the District could measure the Grievant's departmental seniority for the Learning Lab would be in 1996-97, when she actually had the necessary certification to match the department. At that time, she would have had two years in the Social Studies department, and those two years, paired with the one year in 2003-2004, would give her three years of Social Studies experience, i.e., one more year of seniority than Kulcinski and the same number of years as Filardo. As a tie-breaker, according to the District's interpretation, district seniority would then become the precedent for breaking the tie, with the Grievant being the most senior in that regard compared to these two employees.

As relief, the Association asks that the Grievant be reinstated to her previous 100% FTE position and made whole by paying her the salary equal to that she would have received in the 2004-2005 school year had she been employed at 100% FTE, and payment of such other benefits as required by law.

## **District**

The District asserts that the Board correctly applied and interpreted Article VII of the 2001-2003 agreement in laying off the Grievant, consistent with its previous application and interpretation of this provision.

During the 2003-2004 school year, the Board decided to reduce positions for the 2004-2005 school year, one of which was reducing the position in the Learning Lab. Article VII, B, 1 and 2, set forth the criteria to be used in determining which teachers are to be laid off. Before the administration applies those criteria, it first identifies teachers who are within the pool of teachers subject to layoff based on the position or program being reduced. In this case, based on the Board's decision to reduce a position in the Learning Lab, the administrative team looked to those teachers currently teaching in the Learning Lab, as the administration considered the Learning Lab to be a separate program. The Grievant was hired for the sole purpose of serving as the Learning Lab Coordinator, and has been the only teacher serving specifically in the Learning Lab for the last ten years. Her evaluations reflect the Learning Lab was a separate and developing program in the District to provide support for regular students with special needs. During her tenure, the Grievant solely represented such students during meetings with other teachers who focused on educating students with special needs.

The Learning Lab was also identified by the District as a separate position in both the 2002-2003 and 2003-2004 seniority lists, copies of which either the Grievant, or the Association, or both received. Neither objected to the content of the Grievant's entry, nor her placement on the seniority lists. Thus, the District reasonably looked to the Learning Lab and the teachers serving there, to develop the pool of employees subject to layoff, a pool limited solely to the Grievant. Once this was determined, the administrative team proceeded to apply the criteria under Article VII. The language of that provision requires the District to make recommendations by applying the criteria in a clearly-established order. First, qualifications are considered. However, as the Grievant was the only teacher subject to layoff in the Learning Lab, there were no other teachers with which to compare qualifications. Therefore, the District appropriately ended its analysis and identified the Grievant as subject to layoff based on the reduction in the Learning Lab.

The District asserts it must be noted that the Grievant has never argued that if she was part of the Learning Lab program, other employees outside the Learning Lab should have been included in the pool of employees subject to layoff. To do so would have the effect of turning the evaluation process into a bumping clause, which is not permitted under the current agreement.

Thus, the Board acted reasonably in identifying the Grievant for layoff based upon the reduction in the Learning Lab program, and applied the same process it applied the previous year in identifying the pool of employees subject to layoff and applying the criteria contained in Article VII. As the Grievant was the only employee in the Learning Lab, applying the criteria under Article VII, without anyone else to compare to, resulted in the selection of the Grievant for layoff.

The District asserts that it acted appropriately in recognizing the Learning Lab as a separate department or subject under Article VII. The Grievant argued in her grievance that the Board incorrectly identified her as being in Learning Lab, when she should have been identified in Social Studies, and that had it done so, she would not have been subject to layoff. However, an appropriate interpretation of the agreement leads to the conclusion that Learning Lab should be identified as a separate department or subject area. While Article VII, B, subsection 3, defines “departments”, but does not list Learning Lab as a separate department or subject area, it is not clear, based on the contract language, whether “departments” are limited only to those listed under subsection 3. The agreement defines “departments” broadly as “subject areas, assignments and grade levels”, but then includes a list based on specific certifications, which list fails to include many certifications in the District, including Psychology, German, Geography, and Alternative Education, creating an uncertainty as to whether other certifications may be added to the list. Conceivably, the list may be interpreted to be a list of broad categories intended to encompass all teachers teaching in a certain area, but that is not clear.

Pursuant to Article V, the Board has the right to establish curriculum and programs in the District and in that regard, created the Learning Lab in 1994; however, there is not a separate subject area for Learning Lab. The ambiguity may be created in a contract by inconsistent language in the contract or by the failure to foresee a problem that arises from the application of a term to an unexpected situation. Citing, Elkouri and Elkouri, *How Arbitration Works*, (6<sup>th</sup> Edition, 2004, p. 441). Here, if the District creates a program under Article V, it is unclear whether this program is an addition to the list in Article VII.

Also, usage relevant to interpretation is treated as part of the context of an agreement in determining whether there is an ambiguity. Restatement (Second) Contracts, Section 220, Comment D, page 149 (1981). In practice, the parties have recognized, through seniority lists which were shared and not grieved by the Association, certain departments and identified additional positions that have their own department or subject area, e.g., Learning Lab and German. This is similar to the situation in STOUGHTON AREA SCHOOL DISTRICT, MA-5126 (Levitan, 10/89) where the arbitrator first concluded it was unclear under the parties’ agreement whether the departments listed under the contract were an exclusive list, and then looked at other evidence to determine the intent of the parties as to whether an alternative learning program was a separate department. The arbitrator noted that under the agreement, the district had the right to create departments within the district, and that the district had provided the association with seniority lists identifying departments, including the alternative learning program, and that the association had not challenged these lists through the grievance procedure. The arbitrator concluded that even though the agreement did not specifically identify this program as a distinct department, in considering the alternative learning program as a distinct grouping, the district had applied the contractual criteria in an appropriate manner. Given the ambiguity in this agreement, as in STOUGHTON, the Arbitrator should look to other evidence and applied rules of contract interpretation. As in STOUGHTON, the Arbitrator should look to the actions and conduct by the parties to discern their intent as to whether they intended to recognize the Learning Lab as a separate program or department as part of the list under subsection B, 3.

The Grievant was hired for the sole purpose of coordinating and developing the Learning Lab, and her evaluations reflect that the parties considered the Learning Lab as a separate program. Further, in both the 2002-2003 school year and in the 2003-2004 school year, seniority lists were prepared by the administration and provided to the Association. The Association objected to the District's classification of other teachers, but did not object to the classification of the Grievant, nor did the Grievant object to her classification. Thus, through their actions, the parties identified Learning Lab as a separate department from those listed in Article VII. The Association was aware of this designation through the seniority list provided to the Association, and the Association did not grieve this designation. Thus, consistent with the intent of the parties, if subsection 3 applies, Learning Lab should be recognized as a separate department or subject area under that provision.

To now classify the Grievant under a category other than Learning Lab would lead to absurd results, which are to be avoided in contract interpretation. Elkouri and Elkouri, *How Arbitration Works*, at pages 470-471. Placing the Grievant in any other department fails to give her appropriate credit within the Learning Lab and ignores her service in the Learning Lab. Also, any attempt to now classify her in a department other than the Learning Lab would run counter to the past treatment of her as leading a separate program in the District. Classifying the Grievant by certification, rather than by service in the department, is counter to how the District has identified teachers within departments. Finally, if not identified under the Learning Lab, it is unclear which department or subject area the Grievant should be classified under, as she has consistently been attending meetings and working closely with other teachers who serve students with special needs, aligning her more closely with Learning Disabilities than with Social Studies. Thus, a reasonable interpretation of the contract would not limit the list in subsection B, 3 to those programs or departments listed, especially when the Association has not objected to additional departments such as Learning Lab being created or identified.

Finally, the parties have previously conducted layoffs in subject areas other than those listed in Article VII. During the 1992-93 school year, the District laid off an employee in German, even though the relevant contract language did not list German as a separate department. For the purposes of interpreting ambiguous language, relatively few past instances have been required to establish a practice, especially when the incidents giving rise to the issue rarely occur. Elkouri and Elkouri, (at pages 625-626). There was never any dispute in the 1992-93 school year over the reduction of the German teacher, even though her department was not listed in the staff reduction clause of the agreement. This is compelling evidence as to the parties' treatment of a rarely-used provision. The applicable collective bargaining agreement at the time contained a substantially similar provision for staff reduction. As in this case, the administrative team first looked at the pool of employees who were subject to layoff based on a particular reduction in program, the pool of teachers consisting of teachers who were teaching in the department at that time. Thus, when German was reduced, the District focused on staff who were currently teaching German. Once the pool of employees subject to reduction was identified, the District then applied the required criteria for staff reduction in deciding which teachers to reduce and then made its recommendations to the Board.

Thus, the Board reasonably concluded the parties had effectively created a separate department under subsection B, 3, entitled Learning Lab for which the Grievant was the sole employee serving in the department. The past practice of layoffs in the District supports the recognition of departments that are not listed under this subsection. Thus, any argument that Learning Lab was not a separate department or subject area must be dismissed and the grievance denied.

Last, the District asserts that if it is concluded that the Grievant should have been identified within another department, the Arbitrator should retain jurisdiction and remand the case to the Board in order for it to make a determination on whether the Grievant should have been identified for layoff within this department. The District's administrative team, in response to the Association argument that the Grievant should have been designated within the Social Studies department, made a determination based on this alternative analysis that the Grievant would still be subject to layoff under the qualification criteria under Article VII. However, the Board based its conclusion to layoff the Grievant on the determination that the Learning Lab should be designated as a separate department. Only the administrative team, not the Board, made a determination through the alternative analysis that presumed the Grievant was part of the Social Studies department. The administrative team identified the pool of employees in the Social Studies department, which included Kulcinski and Filardo, and then did a comparative evaluation of qualifications of those individuals. Both Kulcinski and Filardo had more experience teaching in the Social Studies department than the Grievant. Unlike the Grievant, Filardo was also certified in Political Science, which the administrative team weighed in favor of Filardo. Also unlike the Grievant, Kulcinski taught in the IMC, which the administrative team believed weighed in favor of him, based on the teaching assignments remaining to be filled in the District. Thus, the administrative team concluded that even if the Grievant had been considered part of the Social Studies department, she would have been correctly identified for layoff based on the comparative evaluation of her qualifications with the qualifications of the other teachers in the department. However, while the Board may have followed this recommendation and reached a similar conclusion, the Board did not make such a determination.

The District also asserts that departmental seniority and district seniority were never issues in this case, because the Board determined that the Grievant was in Learning Lab and was subject to layoff as a result of reduction in this program. Thus, it did not need to look past qualifications in its analysis. While the Grievant may attempt to raise these issues, the Arbitrator must refrain from addressing them, as they were never addressed by the parties in this case. An interpretation of these provisions would not be prefaced by any interpretation by the parties and would be based on speculation that the provisions may be triggered at some point in the future. Thus, the Arbitrator should reserve judgment on such issues until the parties actually are required to address them. In sum, the Board must have an opportunity to make the determination as to whether the Grievant should have been identified for layoff based on the criteria for layoff under Article VII, if it is determined that the Board erred in identifying Learning Lab as a separate department.

### Association Reply

The Association asserts that the District has deliberately ignored the key issue for the Association's position, i.e., department seniority versus district seniority, and instead goes on about the departmental status of the Grievant, trying to make it seem as though that is the entire basis for the grievance. It must be recognized that the issue of the Learning Lab constituting a distinct department is just one of the issues. An equally key issue is the language change in the 1994-95 agreement and the issue of district versus departmental seniority, which the District almost exclusively disregards.

Regarding the District's assertion that the Arbitrator should remand the case to the Board if it is determined that the Learning Lab was not a separate department, this falsely assumes that the Board did not know the full range of the case at the time of the layoff.

The District argues that the seniority lists developed by the administration were a collaborative effort between the District and the Association, but the record makes clear that the seniority list was an administrative initiative and the Association had no hand in it. The assertion that the Association made the seniority list available to members and provided input to district officials to correct some of the information hardly makes the seniority list an agreed-upon document. That the Association did not formally contest the list does not give the list the credence of a fully-accepted legal document. Also, the assertion that the Association did not raise any objection to the District's classification of the Grievant is rebutted by Knoedler's testimony that in 2003-2004 the Association brought up the issue that the list was not accurate as to the placement of the Grievant. Knoedler further testified that the Association did not raise the issue in 2002-2003 because there was no need to, as the Grievant did not receive a layoff in that year.

While the District claims that since there were no grievances filed in 2002-2003, the Association gave implicit approval to the layoff process, the grievances were not filed because everyone receiving layoffs were not only the people with the least departmental seniority, but were also the least senior in the District, and there was no reason to grieve hypothetical layoffs, such as the Grievant's, as she did not receive a layoff. The Association also reasserts that the claim that the Association did not object to identifying Learning Lab as a separate position in either 2002-2003 and 2003-2004, is contrary to Knoedler's testimony that they did object and it is one of the bases for this grievance.

The claim that the purpose of listing departments in the contract is not to include every subset of classes that could be taught in each certification implies that there are many other certifications in the District that are not listed, other than German and Alternative Education. However, if that were the case, those others would have been listed in the non-departmental groupings on the seniority list. However, only German and the Learning Lab are listed.

Finally, the District's comparison of the layoffs in 1992-1993 to the layoffs in 2003-2004 is erroneous for two reasons. First, it would equate a reduction in time to a full layoff,



the latter being quite different. Secondly, during the 1993-95 bargaining cycle, the whole process of layoff was changed. Since the 1994-1995 agreement was signed, the sequence of layoff changed to 1) qualifications; 2) district seniority and 3) department seniority. The District has deliberately ignored the key issue for the Association's position, that of department versus district seniority, and has not shown that it followed the negotiated steps for layoff provided in Article VII.

### **District Reply**

Regarding the contention that the Board cannot layoff the Grievant as a result of the reduction to the Learning Lab merely because the Learning Lab is not listed as a department under subsection B, 3, there is no dispute that even though the Learning Lab is not listed in that subsection, it was an established department in the District. In its only accounting of the Grievant's departmental seniority in the District, the Association itself noted that she earned seniority within the Learning Lab department. Thus, through its own accounting of the Grievant's departmental seniority, the Association identifies Learning Lab as a separate department in the District. This conclusion is consistent with the actions of the parties over the last ten years.

Consistent with that understanding, the administration prepared seniority lists recognizing that Learning Lab did not fit under any of the classifications listed in subsection 3, and was instead a separate and distinct category. Neither the Grievant nor the Association objected to this classification. The Association attempts to refute the importance of the lists and makes several statements that are not based on any evidence in the record or that are contradicted by the record. These assertions should be rejected as without support. First, there is no evidence in the record to support the assertions that not every teacher looked at this seniority list in 2002-2003 or that the list was not given out as a District-wide document to all teachers for the purposes of making corrections at the time. The testimony shows that the Association made these lists available to members by providing them to building representatives and making them available in teacher's lounges. Regardless, the Grievant stated that she in fact received the seniority list and did not object to its content. Second, the Association asserts that it had no reason to contest the Grievant's status on the seniority list, since she was not receiving a layoff in the spring of 2003, and the Association's purpose at that time regarding the seniority list was not to correct all errors on the list, but to clarify the department status for the group of elementary teachers being considered for layoff. In fact, the Association took steps to correct errors of teachers who were outside the group of elementary teachers, including David Fry in the Social Studies department. Further, the Association had reason to contest the Grievant's classification, as Learning Lab was being considered as a potential area for reduction as early as the 2002-2003 school year. Third, there is again no evidence in the record to support the assertion that the Association did not receive the 2004-2005 seniority list until the day of hearing. The testimony shows the Association received the list well before the hearing. Thus, the Association's assertions must be ignored and its claims that the seniority lists are meaningless, disregarded.

The administration's sole purpose in preparing the lists was to provide them to the Association. Having failed to take any steps to assure the accuracy of the list with its members, the Association now attempts to refute any significance to the list. The administration took substantial efforts to ensure the accuracy of the documents due to impending layoffs and worked closely with the Association on various matters, including the seniority lists. The Association was aware of the seriousness of the documents and made some corrections to the errors on the list, but now tries to distance itself from the list calling them "in-house projects" that were works in progress, rather than accurate lists.

The question becomes that if Learning Lab is an established department in the District, whether a teacher can be identified within that department for purposes of staff reduction even though the department is not specifically identified in subsection B, 3. The parties answered this question during the 1992-1993 layoffs when the German teacher was reduced as a result of German being reduced, despite the fact that German was not listed as a separate department under the layoff provision. Contrary to the argument that the reduction in German was different because it did not involve a layoff, there is absolutely no difference between these situations. Under both the 2001-2003 agreement and the agreement in place during the reduction in German, Article VII addressed all reductions in staff, whether in part or in full. Thus, the reduction in German was absolutely no different than the reduction in Learning Lab.

The Association offers several different interpretations of subsection B, 3, all of which are not supported by the language of the provision or which lead to unfair and absurd results. One interpretation argued is that the Board cannot layoff a staff member who is not in a contractually-approved department. Subsection B, 3, does not in any way prohibit the reduction of a staff member, if the department in which he or she serves is not listed, it merely directs the Board to identify the teacher being considered for layoff in one of the subjects/departments at the time of layoff. The fact that Learning Lab is not one of the listed departments does not make the Grievant immune from layoff, and the record is void of any evidence that would support such an argument. Further, the parties never intended such a result, as the language indicates that the staff member can still be reduced, but the Board would have to identify that staff member in a department before proceeding. In other words, the Board would proceed by identifying the Grievant with another department, based on something other than her service in the department.

This is another interpretation offered by the Association, i.e., the Grievant can be laid off, but she must be identified within a department specifically set forth in the Agreement. The Association argues that the Grievant must be identified for part of the time during her tenure in a district in Social Studies, apparently in part based on her certification in Geography. The Association asserts that there were no other teachers at that time who had a teaching certificate in one department, but whose departmental seniority was measured in another, however, there is absolutely no support in the record for such an assertion, as indicated by the Association's failure to cite to the record.

Further, identifying the Grievant as part of Social Studies based on a reduction in Learning Lab creates unfair and absurd results. Such an interpretation would identify the Grievant in Social Studies based solely on her certification, when in fact employees have never been identified within a department on that basis, but instead on the basis of service in the department. As shown by the seniority lists, there are at least 19 teachers in the District with certification to teach in a different department, e.g., Chitwood is certified in both Health and Science, but is identified in the Health department, as he teaches in that department, but not in Science, and also DeLain, who is certified in both Social Studies and Technology Education, but only identified in the latter department because that is the department in which he teaches.

It is also not clear what effect identifying the Grievant in Social Studies would have when it comes time to measure departmental seniority. The confusion that would result from the Association's application of seniority is demonstrated by its calculation of departmental seniority for the Grievant. Apparently it would be based both on service and on certification, the Association arguing that the earliest the District could begin measuring the Grievant's departmental seniority for Learning Lab would be in 1996-1997, when she obtained the Alternative Education certification, at which point she would have had two years in the Social Studies department based upon her certification in Geography. Thus, by its own argument, the Association recognizes that service in the department is the criteria for placing a person in the department and concedes that the Grievant was not in the Social Studies department from 1996 to 2003, even though she remained certified in Social Studies. This shows the absurd result that occurs by not identifying the Grievant within the Learning Lab.

Further, placing the Grievant in the Social Studies department fails to give her appropriate credit within the Learning Lab and ignores her service in that department. When the Grievant was hired for Learning Lab, the District did not require certification in any specific area, nor does the Department of Public Instruction require certification in a specific area, but only at a specific level. Wis. Adm. Code, PI 34.33(2)(b)1. Her service in the position, not her certification, provided her with seniority in this area. Under the Association's interpretation, every certified teacher at that level in the District, based solely on their certification, would be earning seniority in the Learning Lab because they are certified to teach in the program. Neither party intended this result under the current agreement. Thus, the Arbitrator should conclude that the correct, as well as the more reasonable and fair, interpretation of the agreement is that Learning Lab should be identified as a separate department under subsection B, 3, and that the Board appropriately identified the Grievant for reduction based on the reduction in the Learning Lab.

The District reiterates its assertion that if it is determined that the Grievant should have been identified through a different department based on the reduction in Learning Lab, the matter should be remanded to the Board. The administration conducted a full analysis of the criteria under the staff reduction clause, comparing the qualifications of the Grievant to other employees in the Social Studies department, based on an interpretation of the contract offered by the Association at the time the administration was considering staff reductions for the 2004-2005 school year. Based on its analysis, the administration concluded that the Grievant would

still be subject to layoff because her qualifications were not equal to the other teachers in the Social Studies department. Hence, there was no need to go beyond the qualifications criterion. Messer noted that while she had not read the evaluations, she had consulted with the principals to identify whether there were any performance problems of note, and that no differences in performance were noted. Similarly, Messer did not note any difference between the employees regarding training. However, with regard to experience, the administration noted that the Grievant had only taught one class in Government within the Social Studies department for one year, while Filardo had three years teaching experience in Social Studies and Kulcinski had taught for two years in the department. Thus, they had more teaching experience in Social Studies than the Grievant. Regarding certification, both Filardo and Kulcinski had additional certification which made their retention in the District more desirable. The administration wanted to preserve Political Science in the District, and Filardo was the only one in the department with that certification. Kulcinski also was certified as a Library Media Specialist and the District was concerned with staffing in the Library and therefore sought to retain him.

The Association has not met its burden of presenting sufficient evidence to prove that management violated a provision of the Agreement. The Association could not even pinpoint which employee, Filardo or Kulcinski, should have been laid off instead of the Grievant, and instead argues that one of them should have been without identifying which one. Further, the Association injected factual assertions in its analysis of the qualifications between these employees that are not part of the record. There is no evidence to support the assertions that Filardo and Kulcinski had fewer years of good evaluations, fewer documented past contributions to the educational program, and less overall teaching experience than the Grievant, while the latter had many more years of successful teaching experience, and had done much more in terms of ongoing training. The Association's evaluation of experience fails to compare the Grievant's relevant experience with other employees. It also asserts that her certification in History and Broad Field Social Studies would allow her to teach almost all the courses under consideration for the 2004-2005 school year, when in fact she could not teach many upper level courses and there is no support for the assertion in the record. The Grievant also had a Geography certification; however, that area was already covered by another teacher. The administration conducted a full and appropriate comparative analysis of the Grievant with respect to other employees in the Social Studies department, and based on that analysis, the Arbitrator could conclude that the Board would have adopted this interpretation, had the Grievant been identified within Social Studies. In the alternative, the Arbitrator could conclude that a remand to the Board to conduct its own analysis must occur.

The District notes that the Association requests that the Grievant be reinstated to her previous 100% FTE position, indicating that it is also contesting her reduction in Social Studies that resulted from the reduction of 2.0 credits in the Social Studies program for the 2004-2005 school year. Based on this reduction, the appropriate pool of employees were those serving in Social Studies during the 2003-2004 school year, particularly Filardo, Kulcinski and the Grievant. As noted, the administrative team conducted a comparative analysis and concluded, based solely on their qualifications, that the Grievant was subject to layoff. On that basis, the Board acted to reduce the Grievant's position in Social Studies.

However, even if it is concluded that the employees were relatively equally qualified, the Arbitrator must conclude that the Grievant was appropriately identified based on the fact she had fewer years of departmental seniority in Social Studies than the other employees. Employees within the district have always earned seniority in the department based on service in the department, not on certification. As the Grievant only taught for one year in the Social Studies department, she had less departmental seniority than either Filardo or Kulcinski. Thus, she was properly identified by the Board for layoff based on the reduction in the Social Studies program.

This differs from the action to reduce the Grievant in Learning Lab, as the Grievant was the only employee in the department and there was no need to conduct a comparative evaluation of other employees in the department, and thus, the Board did not do so. If the Arbitrator finds the Board should have conducted such a comparative evaluation with the Grievant and with employees in another department based on a reduction in the Learning Lab, the matter should be remanded to the Board for its final determination on that issue. However, the reduction in the Grievant based on a reduction in Social Studies was based on a conclusion that the Grievant was less qualified than the other employees in Social Studies. Thus, the Board would be likely to reach a similar result if the Arbitrator concludes that the Grievant should have been regarded as within Social Studies based on a reduction in Learning Lab. In that case, a remand may be futile and the Arbitrator could simply conclude that the Board would have reduced the Grievant based on her qualifications.

Finally, the District asserts that the Association has been unable to produce any evidence to show that the order of the criteria under Article VII, B, 2, should be different than as it is stated in the Agreement. While the Association asserts that the order in subsection B, 2 should reflect the order under Section B, the two provisions can be interpreted as written without any inconsistency. Section B simply provides a list of the criteria to be considered, while subsection B, 2 provides the order by which the criteria are to be applied. The contract is not rendered meaningless or absurd by the current language. The Association has not met its significant burden to show that the contract must be reformed, based on the parties having intended a different result.

It must be noted that despite the significant efforts the administration undertook to verify the validity of the Association's claim, the Association either never attempted or failed to produce any evidence to support its claim. The Association first brought the issue to the District's attention during the 2002-2003 school year. Following an exhaustive search of District records and no response from the Association to provide evidentiary support for its position, the District administration concluded there was no evidence to support the assertion that the order of subsection B, 2 should be different. It was a year later that the Association produced the document dated December 4, 1994 (Joint Exhibit 35) containing alleged tentative agreements reached by the parties as a result of consensus bargaining on that date. The Association presented the documents to Messer as though they were final agreements which were approved and entered into the parties' agreement. However, after reviewing Board minutes from that time, Messer concluded that the minutes showed there were ongoing

negotiations, such that the December 4, 1994 tentative agreements were not the final agreements reached by the parties. Dr. Westhoff's testimony confirmed Messer's conclusions. While Westhoff identified the December 4, 1994 document as a summary of the tentative agreements reached by the parties, he was adamant that the parties could not have mistakenly failed to incorporate any intended change into the agreement. The Association did not provide any more documents to support its assertion that the order of the criteria under Article VII, B, 2, should be different until the hearing in this matter, when it introduced a document (Association Exhibit 1) to support its assertion. Such failure to disclose an important document is tantamount to bad faith bargaining. However, this document does not support the argument that the criteria should be listed in a different order; rather, it directly supports the argument that the parties never intended to change this language. This memorandum identifies an attached document resulting from the ratification of the consensus bargaining proposals by the Board on February 13, 1995, which attached document shows absolutely no change to Article VII, B, 2. As a result, the document shows the clear intent on the part of the Board not to change the existing language with respect to that provision.

While the Association asserts that if the District did not intend to allow District seniority to replace departmental seniority as a second criterion, they would not have allowed the changes in lines 11 and 12, those lines do not determine the order of application of these criteria. The Board's philosophy has remained consistent. Departmental seniority must be examined first because of the importance of ensuring that a reduction to a department results in a reduction to a teacher in the department, rather than a negative impact to other departments and teachers in other departments. The agreement has never included a bumping requirement and there is no evidence that bumping has ever occurred in the past. By including departmental seniority as the second most important criterion, the parties clearly never intended to permit bumping. Further, the vacancy provision under Section B, 4, which allows for transfer of a reduced teacher to a vacant position regardless of the department, shows that the teacher is permitted to move to another department only under specific circumstances. Thus, the argument that the parties at any time intended a different order under subsection B, 2 must be rejected.

The District requests that the grievance be denied.

### **DISCUSSION**

In deciding the primary issue in this case, it is necessary to first make determinations regarding a number of subissues. The Association essentially argues that the Grievant should have been considered part of the Social Studies department, as her only certification was in that area and the Learning Lab was not listed as a "department" in the contract, and that in comparison to teachers Kulcinski and Filardo, the Grievant prevailed under the "qualification" criterion, and even if not, she would prevail based upon district seniority, which would be the next tie-breaker, and under department seniority as well.

As the District asserts, it is first necessary to identify the pool of teachers being considered for layoff in order to apply the comparative criteria set forth in subsections B, 1 and 2. Subsection B, 3, provides that this is to be done “through application of the subject/departments”. Thus, the first question is whether the Learning Lab constituted a separate “department” for purposes of applying Article VII, B, 1 and 2 criteria. For the following reasons, it is concluded that the Learning Lab, despite not being listed under B, 3, a), b) or c), constituted a separate department for purposes of the application of Article VII, Section B.

Article VII, B, 3, provides, in relevant part:

3. Departments shall mean the subject area, assignment or grade levels as enumerated below.

All members of the staff being considered for potential layoff because of the position reduction are identified through application of the subject/departments.

However, as the District notes, it is not clear what the parties intended in this regard when departments or areas were created that do not fit within the listed areas. In this regard, how the parties have treated such unlisted departments in the past provides some guidance.

The parties’ 1991-1994 agreement, Article VII, 2, (c) contained the same wording found in the parties’ 2001-2003 agreement at Article VII, B, 3:

“Departments shall mean the subject area, assignment or grade levels as enumerated below.”

Neither of those agreements listed “German” as a “department”; however, the evidence establishes that in 1993 the Board treated German as a separate department in reducing the District’s only German teacher, Candace Pitts, from .75 FTE to .50 FTE for the 1993-94 school year.<sup>6</sup> Jeffrey Athey, testified that he was the High School Principal in 1993 and had made the recommendation to the Board to reduce Pitts’ position. Athey’s unrebutted testimony was that no grievance was filed regarding the reduction of Pitts to .50 FTE. Contrary to the Association’s claim that a reduction is different from a full layoff, the parties’ agreement at Article VII, A, makes no distinction between them and treats them the same for purposes of applying the Article VII criteria for layoff.

Similarly, in the 2002-03 school year, the Board determined that staff reductions would be necessary in the 2003-04 school year. In deciding which staff would be recommended for layoff, the District’s administrative team created a document listing the teachers in the various

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<sup>6</sup> While the parties refer to 1992-93, the evidence indicates the layoff decision was made in 1993 for the 1993-94 school year.

departments by their current teaching positions and noting their “district seniority” and “dept. seniority.” This document listed German and Learning Lab as separate departments and with regard to departmental seniority, indicated the Grievant was ranked “1 of 1”. In other words, it showed the Grievant as the only teacher in the Learning Lab. The document did not list the Grievant in the Social Studies department, nor did it recognize her as having any departmental seniority in Social Studies. The document was submitted to the Association for review, and while the Association asserts that although it was generally made available to staff, a copy was not distributed to each staff for review, the Grievant testified that she had seen and read the document. Neither the Association’s officers, nor the Grievant, made any objection known to the administration regarding the manner in which the Grievant was listed on the document. There were corrections made in the document with regard to other teachers. As the Association and the teaching staff were given the opportunity to review the document and to provide input as to where they felt corrections should be made, the document is relevant evidence of the Association’s acceptance of how the Learning Lab and Grievant were listed, notwithstanding the Association’s claim to the contrary.

Similarly unpersuasive is the claim that there was no need to raise any objection as to how the Grievant was listed on the document, since she was not being identified for layoff at the time. Messer testified that Joint Exhibit 36 is a document the District created for the purpose of informing the public of the areas that were under consideration for elimination or reduction for the 2003-04 school year. According to Messer, the document was displayed on a screen at public meetings in order to elicit input from the public regarding the areas under consideration. The document listed Learning Lab as an area being considered for potential elimination. While ultimately Learning Lab was not included in the areas to be reduced or eliminated for 2003-2004, seemingly, that it was even under consideration would be sufficient to generate concern on the Grievant’s part, as well as the Association’s, that her position in the Learning Lab be listed appropriately on the document. By not at least questioning the listing of Learning Lab on the document as a separate department for purposes of layoff, and the Grievant’s placement in that department, the Association gave tacit approval to the manner in which Learning Lab was listed, as well as the Grievant’s placement in that department.

Generally, more than one or two instances are necessary in order to establish the existence of a “practice”; however, where, as here, occasion for the application of the contract provision in question has only rarely occurred, one or two instances may be sufficient. This is especially the case where these are the only instances of the provision having been applied in the past. The only evidence in the record of Article VII having been applied prior to the 2004-05 school year is with regard to the reductions and layoffs that occurred in the 1993-94 and 2003-04 school years; in the former, German was treated as a “department” even though it was not listed as such in the agreement, and in the latter, both German and Learning Lab were treated as “departments”, albeit no reductions or layoffs occurred in either. Thus, based upon their past practice, the parties have recognized areas beyond those listed in B, 3, as “departments” for purposes of layoff.



As to the Grievant's placement in Learning Lab, in addition to the tacit approval of her placement noted above, the record establishes that the Grievant was hired in 1994 solely to develop, and teach in, the Learning Lab. Other than team teaching Physical Education and Math for a semester, until the 2003-04 school year, the Learning Lab constituted the Grievant's sole teaching assignment. The Grievant testified that when she started, the primary emphasis in the Learning Lab was on Math. Her evaluations from her first few years indicate this as well, as the Learning Lab and Math lab were located in the same room. According to the Grievant, in more recent years the primary emphasis had been on grammar and spelling in the English area.

The Association claims that the Grievant at least had to have been properly considered to be in the Social Studies area from the time she was hired in 1994, based upon her only having Geography certification at the time, until she obtained her certification in Alternative Education in 1996, when she was only then properly certified to teach in the Learning Lab. However, this claim is not supported by the evidence, which indicates to the contrary that no particular certification is required to teach in the Learning Lab. Further, despite the Grievant's possessing a Geography certification when she was hired and her subsequently obtaining certification in Broad Field Social Studies and History in 2001, there was no Social Studies component to her teaching assignment until the 2003-04 school year, when she taught two classes of Government in each semester. Thus, that would be the only period in which she would have earned department seniority in that area. The claim that the Grievant earned departmental seniority in Social Studies based upon her certification, rather than her teaching assignments, is contrary to the evidence. The Association's chief negotiator, Michael Knoedler, testified that the Association's concern with giving departmental seniority more weight than district seniority was based upon the impact a change in teaching assignments from one department to another would have on a teacher's departmental seniority, i.e., that a teacher would be starting over as to departmental seniority in the new assignment. (Tr. 45-46). Further, placement in a department on the basis of certification, rather than teaching assignment, would essentially render departmental seniority meaningless and result in simply applying district seniority among the teachers in the affected certifications or basing it on the number of years that a teacher has held a certification, regardless of whether they ever taught in the area. Again, the evidence is that neither of these results were intended by the parties.

Thus, it is concluded that the District properly treated Learning Lab as a "department" for purposes of applying Article VII, and further, that the Grievant was properly considered to be in Learning Lab and her departmental seniority was confined to the Learning Lab, except for one year of departmental seniority she earned in Social Studies during the 2003-04 school year.

However, this does not end the analysis in this case. While Messer testified that the Grievant was laid off due to the Board's decision to eliminate the Learning Lab, the District has acknowledged that part of the Grievant's position at the time of her layoff was teaching the Government class, which is part of the Social Studies department. The record indicates that at the time the Board voted to fully layoff the Grievant, it also voted to reduce the Social Studies

area by 2.0 credits, ostensibly reflecting the elimination of the Social Studies component of her position. Hence, it is further necessary to determine if Article VII was applied appropriately in this regard. The District asserts that among the least senior teachers<sup>7</sup> in Social Studies, the Grievant was appropriately selected based upon a comparison under the “qualification” criterion,<sup>8</sup> which claim the Association disputes.

Article VII, B, 1, provides:

1. The following standards shall be applied by the administration in making the comparative evaluation of “qualification”:
  - a) Teaching performance in the district as previously and currently evaluated by the appropriate supervisor.
  - b) Appropriateness of training, experience and certification with respect to the remaining teaching assignments which must be filled.

Contrary to the Association’s assertion, “performance” does not entail evaluations, training, experience and certification; rather, it is limited under B, 1, a) to being measured by prior and current evaluations. Messer testified that while she did not read the evaluations of each of the three teachers being compared – the Grievant, Filardo and Kulcinski – she discussed with their respective principals whether there were any performance issues of note and concluded there was no basis for distinguishing among them in that regard; rather, that it was the criteria under B, 1, b) upon which the determination was made that the Grievant was the least qualified of the three.

The three criteria under B, 1, b) – training, experience and certification, are to be considered in light of their appropriateness “with respect to the remaining teaching assignments. . .” Messer’s testimony was that of the three criteria, the determination was made on the bases of experience and certification, no real mention being made of training. In this latter regard, the Association cites no training the Grievant has received beyond taking courses necessary to obtain her certifications in Geography, History and Broad Field Social Studies, which would be covered in applying the certification criterion, and which training Filardo and Kulcinski presumably also possess based upon their respective certifications.

Regarding experience, Messer noted that Filardo and Kulcinski had been teaching in the Social Studies department in the District three years and two years, respectively, compared to the Grievant’s having taught one year in that area. Regarding certification, the comparison is

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<sup>7</sup> The Association has asserted that either Kulcinski or Filardo should have been laid off ahead of the Grievant.

<sup>8</sup> The District actually asserts this comparison was done only in order to determine whether the Grievant would still be the one selected for layoff under the Association’s view of how Article VII is to be applied.

again to be based upon appropriateness of their certifications “with respect to the remaining teaching assignments which must be filled.” While all three of the teachers have certifications in Broad Field Social Studies and History, according to Messer, the distinctions were made on the basis of Filardo’s having a Political Science certification and Kulcinski’s having the Library certification, neither of which the Grievant possessed. Messer’s un rebutted testimony was that the District wished to maintain Political Science and Filardo is the only teacher in the department with that certification. The record indicates that Kulcinski is also assigned as a Librarian in addition to teaching Social Studies. While the Grievant possessed certification in Geography, which neither Filardo nor Kulcinski have, Messer noted that another, more senior teacher, Charles Tank, also possesses that certification.

Again, the comparison of the criteria under subsection B, 1, b) is to be made on the basis of appropriateness with respect to the remaining teaching assignments that must be filled. On that basis, it is concluded that the District could have reasonably concluded that the Grievant was the least qualified of the three teachers.<sup>9</sup> Therefore, based on the above, it is concluded that the District did not violate Article VII of the parties’ Agreement when it laid off the Grievant.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

**AWARD**

The grievance is denied.

Dated at Madison, Wisconsin, this 21st day of October, 2005.

David E. Shaw /s/

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David E. Shaw, Arbitrator

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<sup>9</sup> Having reached these conclusions, it is not necessary or appropriate to address the issue of the order of applying the remaining criteria for selection for layoff.

