BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHERN EDUCATIONAL SUPPORT TEAM

and

MERCER SCHOOL DISTRICT

Case 31
No. 65167
MA-13143

(Lynn Schlueter Grievance)

Appearances:

Gene Degner, Director, Northern Tier UniServ, on behalf of the Northern Educational Support Team.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Kathryn J. Prenn**, and **Andrea M. Voelker**, on behalf of the Mercer School District.

ARBITRATION AWARD

The Northern Educational Support Team, hereinafter the Union, 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 between the Union and the Mercer School District, hereinafter the District. Thereafter, the parties selected the undersigned, David E. Shaw, to arbitrate in the dispute. A hearing was held before the undersigned on January 19, 2006, in Mercer, Wisconsin. There was a stenographic transcript made of the hearing and the parties completed the submission of post-hearing briefs by April 24, 2006.

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

ISSUES

The parties were unable to agree on a statement of the issues and agreed the Arbitrator will frame the issues to be decided.

The Union offers the following statement of the issues:

Did the Mercer School District violate the rights of Lynn Schlueter when it laid her off from a full-time position as Secretary and rehired her as a part-time Administrative Assistant? If so, what is the appropriate remedy?

The District would state the issues as follows:

1) Was the grievance timely filed?

2) If so, did the District violate the Collective Bargaining Agreement when it awarded the full-time Administrative Assistant position to an employee, Chris Ranallo, who is less senior than the Grievant, Lynn Schlueter?

3) If so, what is the appropriate remedy?

For the reasons discussed herein, the Arbitrator adopts the District's statement of the issues.

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited, in relevant part:

ARTICLE II – MANAGEMENT RIGHTS

The Board, on its own behalf and on behalf of the School District of Mercer, hereby retains and reserves unto itself all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the constitution of the State of Wisconsin and of the United States, except as modified by the specific terms and provisions of this agreement.

Such rights include, but are not limited to, the following rights:

A. To direct all operations of the School District.

B. To hire, promote, transfer, schedule and assign employes in positions within the School District not inconsistent with the terms of this agreement;

C. To establish and require observance of reasonable work rules and schedules of work;

D. To relieve employes from their duties because of lack of work;

E. To maintain efficiency of School District operations;

F. To take whatever action is necessary to comply with state or federal law, or to comply with state or federal agency decisions or orders;

G. To introduce new and improved methods or facilities;

H. To change existing methods or facilities;

I. To select employes, establish quality standards, and evaluate employe performance;

J. To determine the kinds and amounts of services to be performed as pertains to School District operations and to determine the number and kind of classifications to perform such services insofar as it is not inconsistent with the terms of this agreement;

K. To determine the methods, means, and personnel by which School District operations are to be conducted;

L. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

M. To suspend, demote, discharge, and take all other disciplinary action against employes not inconsistent with the terms of this agreement.

. . .

ARTICLE VI – GRIEVANCE PROCEDURE

A. DEFINITION: The purpose of this procedure is to provide an orderly method of resolving differences arising during the term of this agreement. A "grievance" shall be defined as a complaint by an employe in the bargaining unit regarding the interpretation or application of a specific provision of the collective bargaining agreement. "Days" are defined as district business days.

B. Grievances shall be processed in accordance with the following procedures:

1. Step 1:

a. An earnest effort shall first be made to settle the matter informally between the employe and his/her administrator;

b. If the matter is not resolved, the grievance shall be presented in writing by the employe to the District Administrator within ten (10) days after the facts upon which the grievance is based first occurred. The District Administrator shall respond in writing within ten (10) days of the time the grievance was presented in writing.

. . .

ARTICLE XIV – REDUCTION IN FORCE

A. If there is a substantial reduction in work, the Board may consider layoff or reduction in hours of the necessary employe(s), but only in the inverse order of appointment. The reduction shall be accomplished as follows:

1. The District shall first consider voluntary layoffs, reductions, and retirements.

2. Should the reduction not be accomplished voluntarily, the Board shall then layoff or reduce the least senior employe in the classification (food service, custodians, aides, secretaries) selected.

B. Notification of reduction or layoff shall be made fourteen (14) days prior to the effective date.

C. Employes laid off shall be recalled in inverse order of layoff in their classification. They shall retain recall rights **for the remainder of the school year in which the layoff took effect, plus the following school year, i.e., July 1-June 30.**

ARTICLE XV – VACANCIES AND REASSIGNMENTS

A. All vacant or new positions shall be posted in a conspicuous place internally for three (3) days prior to being posted externally. During the summer months, notices of vacancies or new positions will be sent to all bargaining unit employees who do not work during the summer months and who have left a self-addressed stamped envelope(s) requesting that such postings be sent to them.

B. All present bargaining unit employes shall be given first consideration to transfer to any new or vacant position provided they are qualified.

. . .

ARTICLE XVI – DISCIPLINE PROCEDURE

A. All new employes shall serve a one (1) year probationary period.

B. After serving a one (1) year probationary period, no employe shall be discharged, suspended, disciplined, or reprimanded, or reduced in rank or compensation without just cause. All information forming the basis for disciplinary action shall be made available to the employe.

While the Union also cites Article I – Recognition and Article IV – Negotiations Procedures in the grievance, no further reference is made to those provisions in the Union's case.

BACKGROUND

The Union represents the District's support staff employees in the classifications of cooks, custodians, Administrative Assistants and teachers aides. There had been a "secretaries" classification up until the 2005-06 school year, when that classification was eliminated and the "Administrative Assistant" classification was created. The parties agreed in their negotiations for their current 2005-07 Agreement to delete the references to the "secretaries" classification in Article XIV – Reduction in Force and Article XIX – Compensation, and replace it with "Administrative Assistants."

The current District Administrator, Ronald Vaughn, has held that position since August of 2004. The Administrator prior to Vaughn was Jack English.

The Grievant, Lynn Schlueter, has been employed by the District since 1995. In November of 2002, the Grievant was temporarily placed in the position of School Secretary when the long-time incumbent in the position, Carol Hannemann, went on a medical leave and eventually retired. The Board opened up the position for all to apply and in February of 2003, the Grievant was awarded the full-time position of School Secretary on a 120 day probationary basis pursuant to an agreement reached between the District and the Union. This agreement was due to concerns about excessive visiting with people coming into the office. The Grievant held the Secretary position until it was eliminated effective July 1, 2005.

In addition to the Grievant, the employees in the District's office included Chris Ranallo, a full-time Office Aide and Lori Boltz, Bookkeeper and Vaughn's assistant. There were also two other Office Aides, Linda Anderson and Cheryl Gransee in the District.

Shortly after she got the Secretary position, then-District Administrator English sat down with the Grievant and went over the position description for the position, crossing off those duties that no longer applied and adding a number of new duties. English did most of his own typing and Boltz does most of the typing for Vaughn. The Grievant testified that she continued to perform the duties in the position until she was laid off.

Vaughn testified that when he started in August of 2004, the Board had asked him to take a look at ways the District could make some budget cuts, including looking at the structure of the office and making some changes in that regard. According to Vaughn, he asked the Board to give him a year to work with the office staff in their then-current positions and he would then come up with some recommendations in the spring of 2005.

On April 25, 2005, the Board passed a number of motions, including the following that were based upon Vaughn's recommendations:

- "to eliminate the Secretary position due to budget related restraints."

- "to eliminate 3 Aide positions due to budget related restraints."

- "to restructure the Office Aide position and to post the position."

On April 28, 2005, the Grievant received a "Notice of Lay-Off" stating she would be laid off from the Secretary position effective July 1, 2005. According to the Grievant, she discussed the possibility of filing a grievance at the time with the Union's representative in this District and decided it would be premature, as she would still be working through June. Ranallo, Anderson and Gransee were to be laid off as well.

On June 13, 2005, the District posted one full-time and one half-time Administrative Assistant position. There were no position descriptions available for those positions. According to Vaughn, he and Boltz discussed the duties that would be performed in these positions and subsequently developed the position descriptions for the positions.

On June 14, 2005, the following step 1 grievance was filed by UniServ Director Degner on the Union's behalf and which stated, in relevant part:

STATEMENT OF GRIEVANCE:

> The District is in violation of the collective bargaining agreement between the Mercer School District and NEST by laying off two bargaining unit employees (Chris Ranallo, Lynn Schlueter) and re-posting the positions as a full time and half time Administrative Assistant position.

AREAS OF CONTRACT VIOLATED: (Articles/Sections)

> Article I – Recognition, Article IV – Negotiations Procedure, Article XIV – Reduction in Force, and Article XVI – Discipline Procedure.

REMEDY REQUESTED:

> That Chris Ranallo and Lynn Schlueter be reinstated to the positions they previously held and afforded all benefits in accordance with the collective bargaining agreement and made whole, including but not limited to salary, fringe benefits, leave time, and any other benefits they would have accrued under the collective bargaining agreement if not for the violation of their rights.

. . .

Vaughn testified he was on vacation at that time and that he never saw that document prior to the hearing in this matter, but acknowledged it could have been misplaced or lost. The District does not contest that it was filed. This grievance was not responded to by Vaughn and was not processed further by the Union.

Vaughn testified that he discussed the Administrative Assistant positions with UniServ Director Degner after they were posted, that in response to Degner's concerns, he advised Degner the District had no problems with including the positions in the bargaining unit, and that he and Degner discussed and agreed upon the process to be followed to fill the positions and that the applicants would be limited to the four laid off employees in the Secretary and Office Aide positions.

The four applicants were interviewed and rated by Vaughn and Boltz. Both Vaughn and Boltz ranked the applicants as follows: (1) Anderson (2) Ranallo (3) Gransee (4) the Grievant. Anderson was offered the full-time Administrative Assistant position, but turned it down, and it was then offered to Ranallo, who accepted the position. It appears Vaughn and Degner had a discussion about who would be offered the half-time Administrative Assistant position, as Gransee and the Grievant were very close in their rankings. According to Vaughn's testimony, he asked Degner if the Grievant were offered the half-time position, would that be acceptable to the Union and would there be any further challenges or grievances, if that occurred. Vaughn testified that Degner stated it would be acceptable to the Union to do it that way and there would be no further implications to the District, if the Grievant was offered the position. However, by the following letter of July 22, 2005, Degner notified Vaughn that was not the case:

> Dear Mr. Vaughn:
>
> As I indicated to you previously, I thought it would be satisfactory if Lynn Schlueter maintained at least a half-time secretarial position. However,, she is not satisfied with the half-time position and does not understand or believe that she has not performed at a satisfactory level.
>
> Given that fact and the fact that there is little evidence of evaluations to support the fact that she has not performed at a satisfactory level, I believe it is

necessary for the union to support her in a grievance seeking a full-time position. As Lynn and I look at the duties being performed, these are certainly duties that she has performed in the past and that have been her responsibility and not the responsibility of the employees newly assigned to do those activities.

Therefore, we believe the only acceptable position is that Lynn maintain the full time position and that the District provide her with a plan of improvement, if that really is the case, with a method of monitoring.

Absent Lynn being reassigned to, the full time position, please consider this letter a Step 1.b. of the grievance procedure.

. . .

On August 2, 2005, the District formally offered the Grievant the part-time Administrative Assistant position, which she accepted while reserving her right to grieve not receiving the full-time position.

On August 5, 2005, Degner filed the instant grievance, stating in relevant part:

STATEMENT OF GRIEVANCE:

The District is in violation of the collective bargaining agreement between the Mercer School District and NEST by layoff bargaining unit employee, Lynn Schlueter, and reposting those positions as a full time position and a half time position and offering Schlueter a half time administrative position when, indeed, she held the full time position for the 2004-05 school year.

This half time layoff for the 2005-06 school year is in violation of the collective bargaining agreement.

AREAS OF CONTRACT VIOLATED: (Articles/Sections)

Article I, Recognition; Article IV, Negotiations Procedures; Article XIV, Reduction in Force; and, XVI, Discipline Procedure.

REMEDY REQUESTED:

Lynn Schlueter be reinstated to a full time position and be afforded all benefits in accordance with the collective bargaining agreement and made whole, including but not limited to salary, fringe benefits, leave time, and any other benefits they would have accrued under the collective bargaining agreement if not for the violation of their rights.

. . .

The parties attempted to resolve their dispute, but were unsuccessful and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Association

Regarding the timeliness of the grievance, the Union asserts that the instant grievance was timely filed on August 5, 2005. There was some confusion about which grievance is involved in this case, as there was an earlier grievance that was filed on June 14, 2005. Following that grievance, a discussion was held between Degner and Vaughn regarding what was to happen to the positions. As there was no indication at that meeting as to who was going to be hired, the Union and the Grievant waited to see what was going to happen. Following the interview process and receipt of the August 2, 2005 letter of intent offering the Grievant the half-time position, it was clear she was not going to receive the full-time Administrative Assistant position. Thus, on August 5, 2005 the instant grievance was filed on behalf of the Grievant indicating that the District had violated her rights by laying her off, reposting the positions under a different title, and not placing the Grievant in the full-time position.

The Association asserts that all the District ultimately did was change the title of the position from "Secretary" to "Administrative Assistant" without any real substantive changes in the position or the amount of work. The Board made a motion to reduce staff due to budget constraints, as noted in the layoff notice to the Grievant and corroborated by Vaughn. The Board's motion was not to reorganize the office, but rather to layoff the Secretary due to those budget constraints. Had Vaughn wanted the Board to authorize more in its motion, he should have requested that authority from the Board, but he did not. Article XIV, Reduction in Force, requires that the layoff be the least senior employee in the affected classification. As the District only had one Secretary, the Grievant, it is correct to assume the Grievant would be laid off, if that is what the District intended to balance the budget. However, subsequent to its motion, the Board decided that the duties performed by the Secretary still needed to be done by someone. At that point, Article XIV, paragraph C directs that they shall recall in the inverse order of layoff. As the Grievant was the only Secretary, she must be recalled. Instead, the District attempted to subvert the contract by changing the title of the position from "Secretary" to "Administrative Assistant" and have the person in that position do the same job the Secretary did in 2004-05. The duty performed by the Office Aide and the Secretary in 2004-05 are the same duties being performed by the full-time and half-time Administrative Assistant positions. The position description for Secretary is almost identical to the position description for the full-time Administrative Assistant position. Thus, it is clear that the full-time Administrative Assistant position is the same as the previous Secretary position.

While management has the right to make certain duty changes within the parameters of assignments, that does not extend to giving it the authority to post the position unless there is a

significant change within the job assignment. This means that the Grievant is entitled to be recalled to that position, ignoring the change in title. While the Union is not challenging the District's right to assign some of the tasks in the office to various employees, it is challenging the District's right under the Agreement to change the title of positions and use that as an excuse to restructure and repost the position. Though the Union does not object to retitling the Secretary position to Administrative Assistant, it does challenge the District Administrator's right to restructure the office secretarial position when the only position the Board authorized the administrator to restructure and repost was the Office Aide position. That motion referenced only one office position and not the entire office staff. It is clear that the Administrator overreached the limited authority given him by the Board for restructuring. Any testimony to the contrary by the Administrator is self-serving hearsay at best, and cannot be refuted by the Union as it has no access to the Board's "executive sessions".

The Union asserts that the evidence shows how contrived the situation was when Vaughn testified that he and Ms. Boltz discussed the strengths and weaknesses of the four laid off employees and determined what tasks would be called full-time Administrative Assistant and what would be called part-time Administrative Assistant. There is not anything more management could do to pigeonhole employees into positions prior to the posting than this scenario. The Union was aware of none of this prior to the posting. Thus, it is clear that while the Board authorized Vaughn to restructure the Office Aide position, it did not give him the permission to restructure the secretarial position. That he did on his own. However, when the work was restored even though it was under a different title, the Agreement required that the Grievant be recalled to the full-time position.

The Union notes that Article XVI, Discipline Procedure, states that "No employee shall be. . .reduced in rank or compensation without just cause." The Union asserts that Vaughn's contrived actions certainly resulted in the Grievant being reduced in rank and compensation. By Vaughn's own testimony, he felt a secretarial position was higher in rank in both importance and pay. By placing the Grievant in the part-time Administrative Assistant position, she was reduced in rank without benefit of just cause and by being reduced to part-time from full-time, is certainly reduced in compensation. The testimony regarding the "little difficulties" the Grievant may have had while her son was serving in Iraq cannot justify Vaughn's action in restructuring her position so as to give her a part-time job and give her job to another employee who had not worked or served in that position. Further, the testimony regarding the Grievant's performance is irrelevant to the issue of recalling her to a half-time position from her full-time position.

As to the parties' agreement in their new collective bargaining agreement to change the name from "Secretary" to "Administrative Assistant", there is no evidence that the parties intended to agree to anything beyond changing the title of the position.

In sum, Vaughn took the three Board motions calling for reducing four employees due to budget-related restraints and reorganized and reposted the positions and made all the laid-off employees apply. As it was necessary for the employees to apply and grieve later, they had no

choice but to do so. While the District Administrator had indicated that the employees would be tested, nothing was done but an interview of the applicants. Prior to this however, Vaughn and Boltz had sat down and discussed the employees' strengths and came up with the postings for the positions, obviously pigeonholing the candidates into the positions based on their perceived strengths and weaknesses. However, both Vaughn and Boltz testified that all four employees could perform in any of the positions. Hence, it is clear that the restructuring was nothing more than retitling positions that existed in an attempt by the District to remove one employee from a full-time position and place her in a part-time position and take another employee from a part-time position and place her in a full-time position without following the procedures in the parties' Agreement.

The Union requests that the Grievant be ordered reinstated to a full-time position and made whole for all losses suffered as a result of the violation including back pay and fringe benefits.

District

The District first asserts that the grievance is timely only with respect to the decision to award the full-time Administrative Assistant position to Ranallo instead of the Grievant. Section B(1)(b) of Article VI, Grievance Procedure, clearly and unambiguously requires that the grievance "shall be presented in writing by the employee to the District Administrator within ten (10) days after the facts upon which the grievance is based first occurred." Where the parties have clearly agreed that grievances are to be filed within so many days of the action in question, arbitrators have generally upheld those provisions, however harsh the result may be.

Here, the Board passed the motions to layoff the Grievant and eliminate the secretarial classification and restructure the office on April 25, 2005. Months passed without a grievance being filed. During this time, the District Administrator continued his efforts at restructuring the office when he posted two positions in the new classification of "Administrative Assistant" on June 13, 2005. On June 14, 2005, almost two months after the Grievant received her layoff notice, a grievance was allegedly filed contesting the layoff as well as the posting of the Administrative Assistant positions. While the District does not have any record of this grievance, it does not contest its filing, as Vaughn acknowledged that it could have been misplaced while he was on vacation at the time. Regardless, the Union's failure to pursue the June 14 grievance establishes either that it was abandoned or that the Union concluded the grievance had been resolved to its satisfaction. Citing, COLUMBIA COUNTY, MA-12114 (Burns, 10/03).

The District continued the selection process for the two Administrative Assistant positions and on August 4, 2005, the Grievant accepted the part-time position she was offered and filed the instant grievance on August 5, 2005. While this grievance is timely with respect to the selection of employees for the two positions, the grievance attempts to contest much more than that. The Union is attempting to go back several months and grieve every step of

this lengthy process, including the initial layoff. However, by filing the grievance on August 4, 2005, the Union clearly failed to timely file a grievance during the prescribed ten day period, and therefore cannot contest the initial layoff and the elimination of the Grievant's classification or the posting of the new positions.

The District asserts that the April 28, 2005 layoff notice placed finality on the Board's decision to layoff the Grievant. Both the Grievant and the Union were very aware of when a grievance relating to a layoff should be filed, as the Grievant had previously received a notice of layoff in February of 2004 and filed the related grievance in a timely fashion in early March of 2004. The District asserts the contractual time limits ought to be construed in a manner that is consistent with the underlying purpose of arbitration, i.e., a relatively quick and inexpensive means for resolving disputes, and further asserts this purpose would be defeated, if the contract were interpreted to permit the Union to delay initiating the process indefinitely. By ignoring the time requirements in the grievance procedure, the Union acceded to the *status quo*. Citing, MANITOWOC SCHOOL DISTRICT, MA-12606 (Emory, 3/05).

Further, unreasonable prejudicial delays are not tolerated. Here, the District was prejudiced by the Union's failure to grieve according to the requirements of the grievance procedure. The District went through the lengthy process step by step and if the Union disagreed with or felt the District's actions violated the Agreement, it was contractually required to grieve the issue within ten days. In June, the parties even met and arrived at an agreement as to how to proceed with the posting, interview and selection process. The Union cannot in good faith sit back and wait for the District to conscientiously work through the entire process of laying off employees, eliminating classifications, creating new classifications and posting the new positions without protest and then, when they do not like the final result, try to grieve every step of the process. The failure to timely file a grievance is not only conclusive evidence of the Union's accession to the *status quo*, but also clearly prejudiced the District since they fully complied with the parties' agreement regarding the posting, interview and selection process, which far exceeded any contractual requirements.

Next, the District asserts that it fully complied with the terms and conditions of the parties' Agreement. First, the actions taken by the Board and the District Administrator, with respect to the elimination, restructuring and creation of job classifications were done pursuant to the Management Rights article of the Agreement. Specifically, elimination of the Secretary classification and creation of the Administrative Assistant classification were accomplished pursuant to Article II, Section K, which provides that the District maintains the right to "determine the kinds and amounts of services to be performed as pertains to school district operations, and to determine the number and kind of classifications to perform such services. . . " Further, Section G of that Article gives the District the right to "change existing methods or facilities" and Section K reserves to the District the right to "determine the methods, means and personnel by which school district operations are to be conducted." Last, the directive to Vaughn to restructure the District's office personnel was done to "maintain efficiency of school district operations" as permitted by Section E of Article II. The fact that the Agreement specifically listed the Secretary classification and a wage rate for that classification does not

have the implied effect of freezing classifications for the life of the Agreement, provided the new classification is considered part of the bargaining unit. Citing, GREIF BROS. CORP., INDUSTRIAL CONTAINER DIVISION, 114 LA 554 (Kenis, 1999).

The layoffs of the employees occurred pursuant to Article XIV, Reduction in Force. As all of the employees in the classifications of Secretary and Office Aide were laid off, it was unnecessary to consider the particular order of their seniority. However, the Grievant was not "recalled" pursuant to this Article, as this was never a recall situation, since the Grievant's prior job classification no longer exists. The Administrative Assistant classification is a different classification, and the Grievant had no recall rights with respect to openings in that classification. In fact, Ranallo would have had the much stronger "recall" argument since her classification of Office Aide was the classification the Board chose to "restructure" while the Secretary classification was eliminated.

The posting and selection for the new Administrative Assistant positions was done pursuant to the Vacancy and Reassignments article in the Agreement. The critical issue is the Grievant's claim that she should have been selected for the full-time position instead of Ranallo. The Grievant testified she assumed she would get the full-time position because she had been there longer, however, Section B of this Article states that "All present bargaining unit employes shall be given first consideration to transfer to any new or vacant position provided they are qualified." Thus, it is a "bargaining unit-based" system rather than a "seniority-based" system. As long as the District gives first consideration to bargaining unit employees, it has fully complied with the terms of the Agreement. Further, Section I of the Management Rights provision states that the District has the right "to select employees, establish quality standards, and evaluate employee performance."

Ranallo was awarded the full-time position, and as a member of the bargaining unit, she had an equal contractual right to the full-time position as any other employee. It is irrelevant that the Grievant is more senior than Ranallo by a few months, as the Agreement does not require any further differentiation based on length of service, and the Union cannot attempt to get a seniority-based system through arbitration when they have failed to do so at the bargaining table.

The District asserts that it acted in good faith when it created the Administrative Assistant classification and awarded the full-time position to Ranallo instead of the Grievant. The District notes that there is the generally-recognized principle of contract interpretation that a covenant or commitment to good faith and fair dealing is ordinarily presumed to be implied in all agreements. Citing, ANTIGO SCHOOL DISTRICT, MA-11301 (Morrison, 7/01). This commitment requires that the rights reserved to a party will not be exercised arbitrarily, capriciously, or in a bad faith effort to undercut the benefits the contract provides to the other party. Here, the District has the inherent right to abolish existing classifications and create new ones when it is done in good faith for a justifiable purpose. However, the District does not have to eliminate all tasks in order to justify eliminating the classification. Here, the decision to eliminate the Secretary's classification was made in good faith. Contrary to the

Union's assertion, this case involves much more than a mere change in title. The District's decision to eliminate the Secretary classification and create the new classification was done for legitimate business reasons (i.e. to accommodate the reduction in staffing and to accurately reflect those activities actually performed). Thus, the District had a rational basis for making its decisions and they did not result from an "unconsidered, willful and irrational choice of conduct." Citing, DEERFIELD COMMUNITY SCHOOL DISTRICT (Crowley, 10/95).

Prior to the Grievant, the Secretary position was occupied by Ms. Hannemann for over 30 years, and her departure left a significant void in the office. However, it was not until Vaughn arrived in August of 2004 that the District was ready to reevaluate the Secretary position. During this evaluation of office staffing, it became clear that many of the duties previously performed by Ms. Hannemann were not being performed by the Grievant. In addition to the duties that the position was no longer performing, the vast majority of the District Administrator's typing is being performed by Ms. Boltz, rather than the Grievant. In reality, the actual secretarial duties changed over time and the District chose to address this in restructuring the office. The District had every right to restructure the office such that the job classifications accurately reflect the work done by the employees. The new classification of Administrative Assistant is truly a "merger" or "hybrid" of the previous Secretary and Office Aide classifications. By the Grievant's own testimony, during the 2004-05 school year, she did all of the duties described in the part-time Administrative Assistant job description, except the library duties, and had previously performed some of the duties listed in the full-time position's description, but at no point has she ever done all of the jobs associated with the new Administrative Assistant job classification. She admitted she only performed a few of the full-time duties in the past, and that Ranallo is currently performing some of the duties she had previously performed as the Secretary. In other words, some of the duties in the new full-time position have been performed by the Office Aide classification, and some by the Secretary classification. This is entirely appropriate and consistent with the District's contention that they restructured the office in good faith.

The Union suggested that the fact that the rate of pay for the new classification is the same as the Grievant's prior rate of pay is evidence that the new classification is really the Secretary classification; however, the District determined that as the positions were a combination of the two prior classifications, the rate of pay should be the higher of the two prior classifications. The Union never objected to this, and in the negotiations for the successor agreement, specifically agreed to it.

The District asserts that it also acted in good faith when it selected Ranallo for the full-time Administrative Assistant position. Instead of proceeding based solely on the contractual language, the District met repeatedly with the Union to develop an alternative and significantly more burdensome approach to the posting, interview and selection process. That it did so is evidence of its efforts to work with the Union in good faith throughout this entire period. Further, Vaughn and Boltz walked through each step to ensure their full compliance. In developing the interview questions, Vaughn and Boltz discussed the traits of an "ideal candidate" and determined that they needed staff that were able to multi-task in a fast paced

environment, able to work well with others and have good public relations skills, maintain confidentiality with respect to the activities of the office, and be accurate in their work. They legitimately considered each candidate's work performance. In addition to the day-to-day observations of the District's employees, Vaughn did a performance evaluation on each of the four candidates at the end of the 2004-05 school year as part of the agreement with the Union. In the Grievant's evaluation, Vaughn documented several performance-related concerns pertaining to accuracy, confidentiality and parent/student communications. The other candidates scored significantly higher than the Grievant on their evaluations.

At the conclusion of the interviews of the applicants, Vaughn and Boltz independently rated the candidates and both rated the Grievant fourth out of the four candidates. Given these ratings, the District acted in good faith when they offered the full-time position to Ranallo instead of the Grievant. If the District had done otherwise and offered the full-time position to the Grievant despite the rankings, Ranallo would then have a legitimate claim that the District acted in bad faith. Thus, the Union cannot reasonably suggest that it was bad faith to offer Ranallo the full-time position. The District concludes that it acted in good faith throughout the process and there is simply no violation of the parties' Agreement. Thus, the grievance must be denied.

Association Reply

While the District indicated that Vaughn desired to evaluate staff prior to making any changes, he never did this, as there were no formal evaluations of staff prior to rearranging assignments and the layoffs. Instead, Vaughn used his permission from the Board to reevaluate staff as authority to reorganize the office without regard to the parties' Agreement. While the District argues that restructuring took place, the actual jobs remained the same and only the titles have been changed. The Union had every right to be concerned with the title change, as "Administrative Assistant" normally would indicate an employer is attempting to move the position out of the Union. However, after the Union was assured that the Administrative Assistant positions were just a title change and that they would be filled by the Union employees on layoff, and following a meeting with the employer caused by the initial grievance, the Union waited to see if the correct order of recall would be followed. Upon receiving the August 2 letter of intent recalling her to a part-time position, the Grievant definitely had an event that gave rise to the second grievance, which is the grievance before the Arbitrator. The initial grievance was originally filed because the Union was unsure what the District's plans were when they announced they were reorganizing the office staff and laid off all current staff for the 2005-06 school year. When Vaughn assured the Union during the summer meeting that the positions would be in the bargaining unit, the same as the prior positions were, and the same work would need to be done, the Union was satisfied with the disposition of that grievance and discontinued its advancement. The District cannot now argue that it was prejudiced by the Union's not continuing the first grievance, as they resolved it by maintaining the jobs within the bargaining unit to be filled by bargaining unit personnel who had previously been laid off, and the same work would need to be done. Originally, the Union had been told the layoffs were for budgetary reasons and not to reorganize the office.

While the District argues Management Rights, particularly Section J, it conveniently fails to cite the last part of that provision which reads, ". . .insofar as it is not inconsistent with the terms of this agreement." Vaughn's actions fly in the face of the Agreement in that the discipline procedure provides that no employee shall be "reduced in rank or compensation without just cause" and the Reduction in Force provision provides that layoff will be least senior employee in the classification and that employees laid off shall be recalled in the inverse order of layoff in their classification. Both of these contractual rights have been totally subverted by the District's actions. The title change of the position is merely a smokescreen to avoid the collective bargaining agreement and sound management practices. If employees are told they are being reassigned because of evaluations, they should have been evaluated, and with a right to review that evaluation, but this never occurred. Instead, the employer is simply attempting to avoid all contractual rights guaranteed to the employees under the recall provision of the Agreement. For the District to maintain that they considered these contractual rights is an after-the-fact justification never thought of until the administration needed an answer for arbitration.

It was only after the initial filing of the grievance and subsequent meetings with the Union's representative that the District believed they had any obligation under the Agreement to the employees who had been laid off. The District attempted to circumvent its contractual obligations regarding the layoff with the renaming of the Grievant's position from Secretary to Administrative Assistant. While the District attempts to justify its actions on the basis that they did this through an evaluation process and that there was a need to reorganize the office, the Administrator had never worked in the office, and had no knowledge of how the office operated because he had only been employed in the District one school year. Had the administration evaluated employees and dealt with any shortcomings or needs for change, it could have done so in a timely fashion, but that never occurred.

The Union requests that the grievance be sustained.

District Reply

First, the District disputes that this is a "recall situation" as the Union claims, despite the fact that this claim was not alleged prior to the briefing in this case and no evidence was offered at hearing to support such a contention. While the Union claims that the Grievant must be recalled because she is the only Secretary, that classification no longer exists, and the Grievant has no recall rights to the newly-created Administrative Assistant classification. Article XIV, Section C, states that employees laid off "shall be recalled in the inverse order of layoff in their classification."

Assuming *arguendo* that any employees involved in this situation have a recall claim, it would only be the employees in the classification of "Office Aide" because that classification was restructured, rather than eliminated. The Union acknowledges as much in its brief in stating that Ranallo was properly recalled to her "restructured" position. The Union fails to follow this argument to its logical conclusion. If the Union is claiming that Office Aides have

recall rights to the new classification, then it is prohibited, given the contractual language, from arguing that the Grievant should also have been recalled to the same classification, since "Office Aide" and "Secretary" classifications were distinct classifications with different duties and pay rates.

Further, in the parties' negotiations for their 2005-07 Agreement, they agreed to eliminate the job classifications of "Secretary" altogether, and there was no grandfathering of employees in that classification for purposes of recall, further evidence the Union never considered this to be a recall situation.

The Union's argument is also contradicted by the testimony and the facts. If this were merely a "recall" situation it would have been nonsensical for the District to have gone through the entire posting, interview and selection process. Evidence in this regard alone clearly indicates that the District never considered this to be a recall situation. Ranallo was awarded the position due to her ranking after the interview and not due to any alleged recall rights. Also, the Union would have been contractually obligated to grieve the District's failure to recall the Grievant immediately upon posting the new position. While the parties repeatedly met to discuss the situation, there is no evidence to suggest the Union ever told Vaughn or Boltz that the Grievant should have been recalled to the new position; rather, there is substantial evidence that the Union agreed, either implicitly by failing to timely grieve the issue, or explicitly based on Vaughn's testimony regarding the posting, interview and selection process.

While the Union asserts that the "Secretary" classification is identical to the newly-created "Administrative Assistant" classification, and that the District merely renamed the position, without any other adjustments, the evidence establishes that the duties previously performed by the Grievant have changed due to the restructuring of the office, and that the duties previously performed by the Office Aide are now being performed by the full-time Administrative Assistant. Not only have the job duties changed significantly through the office restructuring, the overall "goal" of the Secretary position is no longer applicable. The prior job goal for that position was "To provide receptionist and secretarial support services for the Administrator and his/her required support services to the Board of Education." These duties are now performed by Boltz. There is significant overlap between Secretary and Office Aide classifications and the new Administrative Assistant classification because the two prior classifications were merged into the new classification, however, unless the Grievant is claiming she did the jobs of both the full-time Office Aide and full-time Secretary, the Union's claim of a mere name change is invalid.

In sum, the duties performed by the full-time Office Aide in the 2004-05 school year are comparable to the duties of the full-time Administrative Assistant position in the 2005-06 school year, and the duties performed by the full-time Secretary in the 2004-05 school year are comparable to the duties of the part-time Administrative Assistant position in the 2005-06 school year. However, the duties of the full-time Administrative Assistant are very different from the duties of the 2004-05 full-time Secretary. At the same time, the duties of the 2004-05

full-time Secretary were very different than those duties detailed in the Secretary job description, and in fact, the Grievant acknowledged the duties outlined in the job description for the part-time Administrative Assistant are the duties she is currently performing. The job description for that position is an accurate reflection of the duties and responsibilities of the part-time Administrative Assistant position.

The District disputes that its decision to award the Grievant the part-time position instead of the full-time position was a disciplinary reduction in rank or compensation. The Grievant was laid off and her position eliminated. The District's actions in offering the Grievant a position and a new job classification when she had already been laid off is not a reduction in rank or compensation; rather, the District's actions exceeded its contractual requirements. The Grievant was not offered the full-time position because there was a better candidate. All four candidates had a legitimate and equal claim to the full-time and part-time Administrative Assistant positions because the new classification was a hybrid of the old Office Aide and Secretary classifications. The District considered the Grievant's performance issues in evaluating the candidates, and nothing in the contract prevents it from doing so.

The District adamantly disagrees with the Union's repeated claims that the layoff and reposting was in callous disregard of the Agreement and the rights of the Grievant, or that the District attempted to "subvert" the contract to its actions. These inflammatory claims were never proved by the Union. The Union attempts throughout its brief to restrict the District's management rights in ways the parties never agreed, e.g., despite the attempt to argue otherwise, the selection of candidates is not seniority-driven, and the fact that the Grievant may be senior to Ranallo by a few months is irrelevant. The District more than satisfied its contractual obligations by considering only bargaining unit employees for the two positions. Arguing that the Grievant has more of a right to the position than Ranallo, blatantly disregards the contractual language. Instead of attempting to subvert the contractual rights, the District went beyond what was contractually required when it proceeded, with the encouragement and permission of the Union's representative, with the time-consuming process it deemed best, when considering the totality of the circumstances.

The Union and the Grievant fail to acknowledge that this situation involves not just her position, it involves four bargaining unit employees, all of whom were laid off and had a claim to the new positions. The claim that employees were "pigeonholed" into the positions prior to the postings is refuted by the evidence. Vaughn testified he considered the responsibilities and duties that needed to be done and structured the positions so that any of the four people could perform those duties in the positions. Vaughn and Boltz both ranked the candidates after the interview process and the Grievant ranked fourth out of four. If the employees were "pigeonholed", the District would have ranked the Grievant second to ensure she was placed in the part-time position; however, the Grievant would not even have been offered the part-time position had either Anderson or Gransee accepted a position.

Last, the Union admits that it "waited to see what was going to happen". If any act is subversive to the parties' agreement and overall relationship, this is it. Fortunately, the

grievance procedure does not permit such "waiting in the weeds", but requires filing of a grievance within ten (10) days after the facts upon which the grievance is based "first occurred." As the Union failed to timely grieve any of the preceding issues, the only timely issue before the Arbitrator is whether the selection of Ranallo for the full-time position instead of the Grievant violates the Agreement.

The District requests that the grievance be dismissed in its entirety.

DISCUSSION

Timeliness and Scope of the Grievance

It must first be determined whether the issues before the Arbitrator involves the District's decision to layoff the Grievant from her Secretary position, the reposting of the position as a full-time and a half-time Administrative Assistant position, and the failure to recall her to the full-time Administrative Assistant position, as the Union states, or whether it involves only the District's decision to award Ranallo the new full-time Administrative Assistant position, instead of the Grievant, as the District states. For the following reasons, it is concluded that the issues are limited to the latter. Therefore, the District's statement of the substantive issue is adopted.

As the District notes, the parties' contractual grievance procedure provides at Article VI, B,1:

> b. If the matter is not resolved, the grievance shall be presented in writing by the employe to the District Administrator within ten (10) days after the facts upon which the grievance is based first occurred. The District Administrator shall respond in writing within ten (10) days of the time the grievance was presented in writing.

Article VI, A, defines "days" as "district business days."

The essence of the Union's claim in its August 5, 2005 grievance is that the District did not really eliminate the Grievant's position of Secretary when it laid her off, it merely retitled the position and posted it as the full-time Administrative Assistant position. However, this was also the gist of the grievance the Union filed on June 14, 2005, on behalf of Schlueter and Ranallo, the day after the District posted the full-time and half-time Administrative Assistant positions. That grievance requested as a remedy that the Grievant and Ranallo be reinstated to their former positions. It was clear to all with the positions posted on June 13th that the District did not agree that Schlueter and Ranallo's positions still existed and that they would not be "recalled" to the new positions, but would have to apply like any other employees.

The District does not dispute that the June 14th grievance was filed, however, Vaughn testified he was on vacation at the time and had never seen it prior to the hearing in this case.

There is no indication in the record that the District ever responded to that grievance or that it was ever discussed by the parties. The Union acknowledges that at that point they decided to wait and see who got the posted positions. Although the record indicates Vaughn and Degner discussed and agreed upon a procedure to be followed in filling the Administrative Assistant positions, there is no evidence that they agreed, or even discussed, holding the June 14, 2005 grievance in abeyance while that process ran its course. Nor was there any assurance that the Grievant or Ranallo would get the new positions; rather, the parties agreed that the applicants would be the four laid off employees. It in fact appears the Union's primary concern at the time was that the new positions be in the unit. While at some later point in the process Vaughn and Degner discussed whether it would be acceptable to the Union if the Grievant were awarded the part-time position, there was no assurance at any time that the Grievant would get the full-time position, such that the Union could argue it reasonably relied on such an assurance in not processing the June 14, 2005 grievance further. To the contrary, both Vaughn and Boltz testified that when they met with Degner after the positions had been posted to discuss the procedures for filling the positions, they expressed concerns about the Grievant's skills.

While the Grievant first testified that Vaughn had told her in June that there was a good chance she would be right where she was when they were done rehiring the Administrative Assistant, and that he "more or less" told her she would be the full-time Administrative Assistant, she later conceded no one had told her she would be given the full-time position, that she had assumed that because she had been there the longest and had been doing those jobs, she would be given first consideration for the full-time position. Vaughn testified that he told the Grievant after she was working in the half-time position that, if she worked hard and did a good job, the Board had authorized him and Boltz to increase the hours in the position if they felt it were justified.

For these reasons, it is concluded that the Union failed to timely grieve the issues of the Grievant's layoff, the restructuring of the positions in the office into Administrative Assistant positions, and the posting of those positions, as it relates to the Grievant's recall rights, and therefore, these issues are not appropriately before the Arbitrator. Thus, the only issue left to be decided by the August 5, 2005 grievance is whether the District violated the parties' Agreement when it awarded the less senior Ranallo the full-time Administrative Assistant position, rather than the Grievant.

Substantive Issue

The Union essentially makes two claims regarding the award of the position to Ranallo, rather than to the Grievant. First, it claims that Vaughn and Boltz "pigeonholed" the employees into the two positions in that they discussed the strengths and weaknesses of the four candidates and then decided on the attributes and qualifications that would be needed in the positions. Second, the Union claims that the District reduced the Grievant in rank and compensation without just cause, in violation of Article XVI, B, by awarding her the part-time position instead of the full-time position. This latter claim can only have a basis if it is

considered that the Grievant was removed from her full-time Secretary position and placed in the lesser paid part-time position as a disciplinary measure. This would of course again implicate the Grievant's layoff from her full-time Secretary position and the claim that it was done for disciplinary reasons, rather than budgetary reasons. As previously concluded, the issue of the Grievant's layoff is not appropriately before the Arbitrator. However, to the extent the Union is asserting the Grievant's alleged performance problems were improperly considered by Vaughn and Boltz in their rankings of the candidates, that claim will be considered and assessed.

Article XV – Vacancies and Reassignments, provides that all vacant or new positions will be posted internally for three days prior to being posted externally, and that, "All present bargaining unit employees shall be given first consideration to transfer to any new or vacant position provided they are qualified."

As the District notes, there is no reference in this provision to any sort of preference on the basis of seniority, the only requirement being that bargaining unit employees be given "first consideration", presumably ahead of outside applicants "provided they are qualified". Given this wording and the management rights in Article II, I, "to select employees", there is no contractual standard the District must meet in selecting among qualified employees for the position, other than that the employer's actions may not be arbitrary, capricious, discriminatory or in bad faith. Said another way, the District's decision must have some rational basis.

In this case, there is no dispute that all four of the candidates were qualified for the two positions. Vaughn and Boltz testified this was the case.

According to Vaughn, the process to be followed included drafting a set of uniform questions that each candidate would be asked, at Degner's suggestion, and the evaluations Vaughn had already done in May of 2005. Vaughn and Boltz then discussed and agreed upon a set of qualifications and attributes they would be looking for in the candidates: confidential, able to multi-task, good team player, good attitudes, good public relations skills, good rapport with students and staff, do accurate work, organized, and efficient. All of the foregoing would be attributes that an employer would reasonably look for in a school office setting.

Both Vaughn and Boltz testified that, independently of each other, they ranked the four candidates based upon their answers to the questions in the interview and their familiarity with each candidate's work in their prior positions, and came up with the same rankings of the candidates: (1st) Anderson (2nd) Ranallo (3rd) Gransee and (4th) the Grievant. In explaining these rankings, Vaughn noted Anderson had previously implemented the computer program for the District's lunch program, that the Grievant scored lower than the other candidates in their May, 2005 evaluations, and the assessment that the Grievant had some difficulty in answering the interview questions and that her responses were not as in-depth as those of the other candidates. Vaughn attributed the latter to the Grievant's lacking formal training in this area, as her college degree is in an unrelated field; however, there is nothing in the record to

indicate what kind of related training or experience the other candidates had so as to make a comparison in this regard.

It is evident that the performance problems noted in the Grievant's evaluation played some part in her ranking, based on the concerns both Vaughn and Boltz had expressed to Degner before the interviews regarding the Grievant's skills. The Grievant submitted a response to her May, 2005 evaluation disputing the validity of most of the concerns Vaughn had expressed. It is noted, however, that a number of the concerns Vaughn mentions in the evaluation had also been raised previously with the Grievant by the prior District Administrator, i.e., her interpersonal communications with students, parents and other staff, and the efficient use of her time. While the Grievant disputed the validity of those prior concerns as well, it is noted that she was given the Secretary position in 2003 on a probationary basis, which arrangement she had agreed to, due to these same concerns.

Although an objective measure of employees' relevant skills and abilities is preferable to the personal opinions of a supervisor based upon personal observations of the employees' prior work, which Vaughn and Boltz testified they had relied on to assess and rank the candidates' respective skills and abilities, that is not to say that the latter basis for ranking is not entitled to any weight. Personal opinions are more susceptible than objective tests to a claim that the management is biased, however, there has been no showing of any animosity toward the Grievant or any bias in favor of Ranallo on the part of either Vaughn or Boltz. As to any claimed bias against the Grievant on the part of Board members, Vaughn testified that the Board went out of its way to have no role in filling the positions, leaving it totally in the hands of Vaughn and Boltz to select the persons to fill the Administrative Assistant positions.

Realizing that Article XV leaves it to management's discretion to select among qualified employees to fill a new position, and that the only limitation on that discretion is that management's decision not be arbitrary, capricious or made in bad faith in order to withstand challenge, it is concluded that there is a sufficient rational basis in the record for the decision not to award the Grievant the full-time Administrative Assistant position ahead of Ranallo. Thus, the District did not violate the parties' Agreement when it awarded Ranallo, rather than the Grievant, the full-time position.

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 2nd day of October, 2006.

David E. Shaw /s/

David E. Shaw, Arbitrator
DES/gjc
7049