BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLINTONVILLE SCHOOL DISTRICT

and

CLINTONVILLE EDUCATION ASSOCIATION/
UNITED NORTHEAST EDUCATORS

Case 49
No. 66216
MA-13459

(Bumping Rights Grievance)

Appearances:

Mr. David Campshure, UniServ Director, United Northeast Educators, 1136 N. Military Avenue, Green Bay, Wisconsin, on behalf of the Association.

Mr. Robert W. Burns, Esq., Davis and Kuelthau, S.C., 318 South Washington Street, Suite 300, Green Bay, Wisconsin, on behalf of the District.

ARBITRATION AWARD

Pursuant to the parties' request to the Wisconsin Employment Relations Commission for a panel of five Arbitrators, Staff Arbitrator Sharon A. Gallagher was jointly selected to hear and resolve a dispute between them regarding whether School Nurse Michelle Kaczorowski (Grievant) should have been allowed to bump a portion of the work hours from a less senior School Nurse in order to maintain the part-time work hours she had before her leave of absence. Hearing was scheduled for November 10, 2006 but was cancelled due to a family emergency of a major witness. Hearing was rescheduled and held on February 12, 2007 at Clintonville, Wisconsin. A stenographic transcript of the proceedings was made and received by March 1, 2007. The parties submitted their briefs and reply briefs by May 12, 2007 whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the issues herein. However, they suggested issue statements, and agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument herein taking into consideration the parties' suggested issues.

The Association suggested the following issues:

1) Did the District violate the parties' collective bargaining agreement when it issued the Grievant a partial layoff for 2006-07 and then refused her request to exercise bumping rights to retain a position with hours and compensation substantially equivalent to the hours and compensation she held prior to the partial layoff?

2) If so, what is the appropriate remedy?

The District suggested the following issues for determination:

3) Did the District violate the collective bargaining agreement when it established two 45% nurse positions?

4) If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in the case and having considered the parties' suggested issues, I find that neither set of suggested issues accurately state the dispute between the parties and I find that the following issues shall be determined herein:

5) Did the District violate the parties' labor agreement or otherwise treat the Grievant in an arbitrary, capricious, discriminatory or bad faith manner when it issued her a partial layoff for 2006-07 and then refused her request to bump into a portion of another nursing position to retain the 60% FTE position which she had previously held?

6) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

2.1 Management Recognition

The Association recognizes the Board of Education, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, 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, including, but without limiting the generality of the foregoing, the right:

A. To the executive management and administrative control of the school system and its properties and facilities, and the activities of its employees within the total school program.

B. To hire all employees and, subject to the provision of law, to determine their qualifications, and the conditions of their continued employment, or their dismissal or demotion; to promote and transfer all such employees and to create, combine, or eliminate any positions as, in their judgment, are deemed necessary.

C. To establish grades and courses of instruction, including special programs, and to provide for athletic, recreational, and social events for students, all as deemed necessary or advisable by the Board after consideration is given to any recommendation which may be volunteered by a teacher or teachers involved.

D. To decide upon the means and methods of instruction, the selection of textbooks and other teaching materials, and the use of teaching aids of every kind and nature after consideration is given to any recommendation which may be volunteered by a teacher or teachers involved.

E. To determine class schedules, hours of instruction, assignments of teachers, and use of paraprofessionals after consideration is given to any recommendation which may be volunteered by a teacher or teachers involved.

F. To designate duties, responsibilities and extra and/or cocurricular assignments within the total program.

G. To determine the location of schools and other facilities and to establish new facilities and to relocate or close old facilities.

H. To establish the complete financial policies of the District.

I. To determine safety, health and property protection measures for the District.

2.2 Limitation of Rights

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

ARTICLE XI – LAYOFF PROCEDURE

11.1 Layoff Procedure

When the Board, in its discretion, determines to eliminate or reduce a teaching position because of a decrease in enrollment, budgetary or financial limitations, educational program changes, or to reduce or eliminate staff for reasons other than the performance or conduct of the teacher, it will consider continuous length of teaching experience within the District as the primary criteria.

A. Experience will be considered beginning with the first contract day of year hired.

   1. Leave for military service, if during tenure in the Clintonville school system, counts toward accumulated longevity.

   2. Leaves of absence do not count as experience except as approved under 10.6 A.

B. Only teachers notified of a layoff may replace a less senior teacher.

C. If a vacancy occurs in an area where a laid off teacher has certification, that teacher shall be offered that vacant position.

. . .

G. Any teacher who is selected for a partial layoff and who is not able to exercise bumping rights to retain a position with hours and compensation substantially equivalent to the hours and compensation the teacher presently holds, may choose to be fully laid off without loss of any rights and benefits as set forth in Section A and Section C above. A partial layoff is defined as a reduction in a full-time or part-time teacher's teaching load.

   Teachers shall inform the Board in writing no later than JULY 1 if they intend to exercise their option to be fully laid off.

. . .

BACKGROUND

The District operates out of four school buildings. It has traditionally employed nurses' aides in each building to handle day-to-day nursing duties; and it utilized one or two school nurses on a part-time basis to provide nursing services. On three occasions prior to the 2006-07 school year, the District partially laid off employees who ultimately maintained a 100% contract. These situations and the facts surrounding them are as follows:

1) Lynne Kessler's situation: In May of 2004, Kessler (previously a full-time Elementary Music teacher) received a notice that her 100% contract would be reduced to 86% in 2004-05. The Association filed a grievance, citing Section 11.1, asking that Kessler receive a 100% contract, noting that there were less senior teachers than Kessler, and requesting that Kessler be allowed to bump on the basis of her seniority. Grievance Chair Terri Schultz became involved and the District ultimately reconfigured the Music positions so that Kessler could maintain a 100% schedule. Kessler never had to pursue her grievance, and insist on a partial bump. Schultz stated that she believed that less senior Music teacher Beth Dahl's schedule was cut to assure Kessler's 100% schedule in 2004-05, but that it was Schultz who suggested this action and the District later formally approved it. Kessler dropped her grievance short of arbitration; no written settlement agreement was entered into regarding the case. In the documentation and discussions surrounding Kessler's situation, the District never admitted that partial bumping would be appropriate or allowable under the labor agreement.

2) Karen Staats' situation: In 2003-04 there were three full-time District Band teachers; the most senior teacher, Bob Veleke was the High School Band teacher while Staats was the second most senior Band teacher, employed at the Middle School level. In 2004-05, the District reduced Staats to 65% and the least senior Band teacher was laid off entirely. In 2005-06 Staats was offered a 65% contract while Veleke (who never received a lay off notice for 2005-06) maintained a 100% contract after the Board reconfigured Veleke's High School Band position to give him eighth grade band as well. Staats did not file a grievance regarding her 2004-05 contract.

   At the end of 2005-06, Veleke retired and Staats sought his 100% High School Band position. However, thereafter Staats was offered a 70% contract. Staats filed a grievance. During the processing of the grievance, the Association took the position that Staats should be allowed to bump the hours of the less senior Band teacher in order to receive a 100% contract. The District then offered Staats an existing 30% Gifted and Talented position. Staats then withdrew her grievance and no written settlement agreement was entered into regarding her case. During the processing of Staats' grievance, the District never admitted that partial bumping would be appropriate or allowable under the contract.

3) Peggy Smit's situation: In 2004-05, Smits, an Elementary/Middle School Art teacher, was notified she would be reduced to an 80% contract. Smits then sent the District a letter requesting to bump "positions, all or in part," under Article 11. Thereafter, the District offered Smits an existing 20% Gifted and Talented position. Smits accepted this position which gave her a 100% contract; Smits never filed a formal grievance. In 2005-06 Smits was again offered an 80% Art contract and a 20% contract to teach High School Photography, equaling 100%. Smits never filed a grievance regarding her 2005-06 contract. At no time was Smits told she could or could not bump into part of a position by the District.

FACTS

The Grievant, Michelle Kaczorowski, has never been disciplined by the District and this grievance does not concern discipline. [1] The Grievant has been employed by the District since 1992 as a School Nurse. At hire, the Grievant accepted an 80% contract as the only School Nurse and a 20% contract as AODA Coordinator for the District. Thereafter, the District hired another School Nurse, Maureen Driebel, and offered her a 60% contract. At this time, (2004-05) the Grievant agreed to go to a 60% contract also. Driebel and the Grievant then covered the District's School Nurse needs at all of its school buildings. In 2005-06 the Grievant took an approved leave of absence from the District for personal reasons. During the 2005-06 school year, Nurse Driebel agreed to go to a 90% contract to cover the District's School Nurse needs during the Grievant's absence so that no one else was hired to fill the remaining 30% nursing time that Driebel and the Grievant's schedules had afforded in 2004-05.

On March 9, 2006, the District held a meeting concerning the Grievant's return to work in 2006–07 from her leave of absence. During the meeting other issues involving the Grievant's past job performance were addressed and the District also notified the Grievant that her 2006-07 contract would likely be reduced to 45%. By letter dated March 20, 2006, the Grievant requested to bump (under Article 11) into a portion of Nurse Driebel's contract so that the Grievant could maintain the 60% contract she had had previously. On April 5th the District responded to the Grievant's letter, asserting it had the right to configure jobs and decide to have two 45% nursing positions in 2006-07 to "allow for the necessary flexibility in scheduling…and coverage…."

[1] The record evidence concerning the discussion of the Grievant's job performance on March 9, 2006 is neither relevant nor material to this case. Here, as will be discussed more fully infra, the Association failed to prove a causal connection between the clearly critical comments District Administrators made of the Grievant's prior job performance and the District's decision to cut the Grievant's work time from 60% (in 2004-05) to 45% for the 2006-07 school year.

By letter dated April 12th, the Association moved the Grievant's grievance forward and stated as follows:

> On Thursday March 9, 2006 Michelle Kaczorowski was notified that her 60% position was being reduced to 45% for the 2006-07 school year. On March 20, 2006 Michelle submitted a letter to you exercising her rights to bump a less senior employee to retain a position with hours substantially equivalent to the hours she held prior to her leave of absence. On April 6, Michelle received another letter from you stating a denial of these rights. By denying Michelle's rights to bump the hours of a less senior employee to retain hours substantially equivalent to the hours she held prior to her leave of absence, the District violated Article XI – Layoff Procedure of the parties agreement.
>
> The CEA requests that Michelle be allowed to bump the hours of a less senior employee in order to retain a position with hours substantially equivalent to the hours she held prior to her leave of absence. CEA request that Michelle be made whole for any and all lost wages and benefits.
>
> I look forward to hearing from you and resolving this grievance at this level.

In its April 25th response to the Association, the District denied the grievance and stated, *inter alia*:

> The District had 90% FTE nurses for the 2005-06 school year. For the 2006-07 school year the district will have two 45% positions, thus a total of 90% FTE nursing staff and no reduction in total nursing staff. It is the Board's right to assign the % and schedule to part-time staff members.

Finally, in its May 10th response to the District's April 25th letter, the Association reiterated its prior position and added the following verbiage:

. . .

> Another letter was sent by Michelle on May, 1, 2206 [sic] exercising her right to bump under Article XI, Layoff Procedure. As of this letter conception, Michelle has not received a response from you. Therefore CEA is refilling the original grievance. By denying Michelle's rights to bump the hours of a less senior employee to retain hours substantially equivalent to the hours she held prior to her leave of absence, the District violated Article XI – Layoff Procedure of the parties' agreement.
>
> . . .

The grievance was then brought forth to arbitration.

POSITIONS OF THE PARTIES

District:

The District argued that it reserved the right to "create, combine, or to eliminate any positions" in Article II – Management Rights; and that the provision also reserved to the District the right to establish positions by determining "…class schedules, hours of instruction, assignments of teachers…." The District cited a prior Award issued by Arbitrator Gunderman, Clintonville School District, A/P M-80-245 (12/24/80) which it asserted was precisely on point and should control the outcome here as it interpreted the same management rights clause as is involved in this case. In this prior case, the District noted that Arbitrator Gunderman found that there was no contract language (and therefore no District obligation) requiring the District to reconfigure assignments/ positions so that the Grievant could continue to work full-time, citing also Bangor School District, Case 19, No. 51030, MA-8468 (Jones, 1/95).

Here, the District had sound reasons for having two 45% nursing positions for the 2006-07 school year based on its experience in 2005-06 and a need for flexibility and overlapping assignments for the two nurses. Furthermore, the District argued that this case does not involve layoff or bumping rights as both available nursing positions were 45% FTE positions and no 15%, 30%, or 60% positions were available, so that the Grievant could not get an additional 15% FTE to retain a position substantially equivalent to her 2004-05 hours of work. If the Grievant's assertion herein were adopted that she has the right to bump any portion of any nursing position created by the District, the District's right to create, combine or eliminate any positions would be abrogated thereby. The District also argued that "[o]nly if the Board had decided to create a 50%, 55% or 60% nursing position would bumping be available" (ER Br. p. 10).

Finally, the District contended that the past practice examples submitted by the Association were irrelevant. In this regard, the District noted that Lynne Kessler was notified her contract would be reduced in 2002-03 and thereafter Kessler's schedule was reworked, revised and that revision was then approved by the Board so as to maintain her 100% music contract. Therefore, the District argued that the Kessler example had nothing to do with bumping rights. Regarding Ms. Staats and Mr. Veleke, no grievance was filed by Veleke to take a 100% 8-12th grade Band Director position in 2004-05 when one middle school band teacher position was eliminated. In 2006-07, Staats filed a grievance when her full-time Band position was reduced to 70% and her right to bump was denied. The District denied the grievance but ultimately assigned Staats a separate 30% Gifted and Talented position so Staats never bumped.

Regarding Peggy Smits, as with Staats, no bumping rights arose as the District assigned Smits to an available 20% Gifted and Talented class so she could be a 100% FTE after her art/photography position was reduced from 100% to 80% in 2004-05. The District asserted that in each past case, it had available positions which these individual teachers were qualified to teach and that none of these past cases involved positions which the teachers were allowed to "pull parts of a contract from another teacher in order to retain their full-time equivalency" (ER Br., p. 13). The District therefore urged the Arbitrator to deny and dismiss the grievance.

Association:

The Association urged that once the Grievant indicated she intended to return to work (after a year-long leave of absence), the District treated her in an unreasonable and almost threatening manner, raising claims (which had never been raised before) that she had performed her job poorly (although the Grievant's personnel file contained no documentation thereof); that the District then unreasonably partially laid off the Grievant; and that it unreasonably denied her the right to bump a less senior nurse in order to retain her individual contract at the level prior to her leave, even though the District had allowed such bumping rights to others in the past.

The Association urged that the language of Article XI, Section 11.1(G) clearly provides a "direct inference" that teachers who have been notified of their partial layoff have the right to bump in order to retain a working time percentage similar to that held before their partial layoff. To read this provision otherwise would read out the language of Section 11.1(G) and such a reading would erase the arbitral rule of construction which requires that contract language should be read to give full effect to all contract language. The Association would resist the District's anticipated argument that the language of Section 11.1(G) only allows employees to bump into a complete position held by a less senior employee by emphasizing that the Section uses the verb "retain," the ordinary meaning of which strongly suggests that unit employees can bump into a partial position in order to obtain hours sufficient to maintain their prior work hours, citing BENTON SCHOOL DISTRICT CASE NO. MA-12351 (LEVITAN, 3/04).

In addition, the Association argued that past practice supports the Association's position that the language of Article XI has been consistently applied to allow unit employees to bump into partial positions in order to maintain their work hours. In this regard, the Association pointed to four teacher examples (Lynne Kessler, Karen Staats, Bob Veleke and Peggy Smits), where unit employees' contract work percentages were reduced from 100% to less than full-time and the District agreed to partially reduce the contracts of other less senior employees or take other available teaching positions to restore the senior employees' contracts.

Furthermore, the Association argued that the District's treatment of the Grievant demonstrated its bad faith toward her and its willingness to treat her arbitrarily and capriciously. In this regard, the Association noted the harsh, demeaning, uncalled for and antagonistic criticism of the Grievant at the March 9th meeting, a summary of which (with annotations) was unfairly placed in the Grievant's personnel file. Notably, the Grievant had never been warned or disciplined by the District, showing that the District Administrators' criticisms of the Grievant are groundless. The Association therefore sought an Award sustaining the Grievant's 60% of full-time contract and making her whole.

REPLY BRIEFS

District:

The District urged that Section 11.1(G) must be read as a whole and if that is done, the language is clear that bumping rights in Section 11.1(G) are designed to "retain a position" with similar hours/compensation, not to obtain similar work hours by taking hours from another position. As there was no 15% position, the Grievant had no Section 11.1(G) right to take six work hours from the less senior nurse's 45% position. Furthermore, the District noted that Article XI consistently used the word "position," and did not refer to a portion or percentage of a position. Put another way, only if a position existed that would have restored the Grievant's hours to 60% could the Grievant (potentially) have bumped into that compete position, citing LAKE GENEVA JOINT SCHOOL DISTRICT (TEACHERS), DECISION NO. 8350 (1994), AND ALTOONA SCHOOL DISTRICT, CASE 49, NO. 65052 MA-13102 (JONES, 2006).

Also, the District asserted that the Benton School District Award cited by the Association is distinguishable because the contract in that case specifically allowed teachers partially laid off to assume any "portion of an assignment." Were the Grievant allowed to do as she wished herein, she would have created/designed a new position not authorized or approved by the District. In addition, had the Grievant attempted to bump the other nurse entirely to gain her 45% position, this would not be allowed under Section 11.1(G), in the District's view, as a 90% position would not have been substantially equivalent in pay and hours to her 60% position.

The District contended that the three separate and distinct examples of past accommodations agreed to by the parties where employees had been notified of a partial layoff (Kessler, Staats and Smits) did not constitute an unequivocal, clear and binding past practice and were factually different from the case at hand. In this regard, the District noted that Staats and Smits were offered distinct, existing part-time positions to fill out their full-time schedules; and that regarding Kessler, the 100% position Kessler assumed was agreed to by both parties—Kessler never bumped into the position of another employee. Thus, the District contended that no evidence was submitted that showed that the District has allowed employees to partially bump into other positions to retain their prior contract percentages.

Finally, the District noted that this is not a discipline case and the Grievant admitted that nothing in the contract would prevent the District from discussing her work performance at a meeting designed to discuss the Grievant's work hours/contract. The District's actions in creating two 45% positions was based on objective considerations—that 90% coverage had worked in the prior year, the District needed to cut its budget and the flexibility and better coverage the deployment of two school nurses would provide generally and in an emergency were rational reasons for the District's decision to employ two 45% nurses in 2006-07. The District therefore urged the Arbitrator to deny and dismiss the grievance.

Association:

The Association urged that, as a general rule, this Arbitrator must read the broad rights listed in Article II – Management Rights (to create, combine or eliminate positions), as being limited by the more specific provisions of Article XI, Section 11.1(G). Here, Article II specifically states that that Article is to be limited by the "specific and express terms" of the labor agreement. The Association argued that the District exceeded its management rights when it met with the Grievant and criticized her past work, and when it later denied the Grievant bumping rights under practice and the contract in order to maintain her prior work percentage.

The Association argued that the cases cited by the District in its initial brief are not on point. Concerning the Gunderman Award, issued in December of 1980, the Association noted that the 1979-80 labor agreement contained different layoff language than appears in the effective agreement, as the 1979-80 agreement did not contain the partial layoff language at the heart of this dispute. Also, the Association asserted that the Bangor School District Award is distinguishable as the contract there contained no language concerning bumping partial positions and the facts there concerned a part-time employee temporarily assigned to a full-time position who wished to retain a full-time position.

Furthermore, the Association contended that the District has failed to prove that sustaining the grievance would reduce or compromise District nursing services. In this regard, the Union noted that during the Grievant's one-year leave of absence the remaining incumbent of the school nurse position worked a 90% FTE and this met the District's needs; if the District had allowed the Grievant to partially bump the less senior nurse (taking six hours per week from her), this would have resulted in the Grievant working four six-hour days, while the less senior nurse would have worked two six-hour days per week with one overlapping or shared work day. Here, the District failed to show how the above schedule would reduce or compromise nursing services but that having both nurses work three six-hour days per week with one shared or overlapping day as the District required in 2006-07 would not do so. The Association cited NECEDAH AREA SCHOOL DISTRICT, CASE 20, NO. 58146, MA-10854 (AMERY, 11/00) for the proposition that seniority in layoffs should be followed rather than reducing all employees' work hours.

The Association urged the Arbitrator to reject the District's assertion that this case does not concern a layoff/bumping issue. On this point, the Association argued that the language of Section 11.1(G) clearly allowed the Grievant to bump into part of a position so as to retain a position with similar hours and pay as in some other cases it cited: RANDOM LAKE SCHOOL DISTRICT, CASE 28, NO. 53455, MA-9363 (NIELSEN, 11/96); LAKE HOLCOMBE SCHOOL DISTRICT, CASE 47, NO. 54838, MA-6775 (MCGILLIGAN, 2/92). Based on the record herein, the Association urged the Arbitrator to sustain the grievance and make the grievant whole.

DISCUSSION

Several preliminary issues must be put to rest before the central issues in this case can be dealt with. The District has argued that the Gunderman Award is on point here. I disagree. The language of the Section 11.1(G) at issue here was very different from what Arbitrator Gunderman had before him. For example, the former contract language contained no language similar to Section 11.1(G) and no reference was made therein to bumping to retain a substantially equivalent position. Therefore, I find the Gunderman Award irrelevant to this case.

In addition, the various arbitration awards cited by the parties in their briefs, such as RANDOM LAKE SCHOOL DISTRICT, LAKE HOLCOMBE SCHOOL DISTRICT, BANGOR SCHOOL DISTRICT and BENTON SCHOOL DISTRICT, each concerned contract language and fact situations different from those before me. As such, the cited cases are inappropriate.

Furthermore, the Association's assertions regarding what was said to the Grievant by District managers at the March 9, 2006 meeting and the weight and value

of Association Exhibit 7 have limited impact on this case. This is so, because no mention of the District's treatment of the Grievant at the March 9th meeting was made in any of the grievance documents in this case; no grievance was filed thereon, according to this record; and no evidence was proffered herein to show that the District took any formal disciplinary action against the Grievant during her employment.

Regarding the weight and value to be given Association Exhibit 7, the document as a whole shows that pages 2 through 4 of this Exhibit appear to have been a working document, intended to be shared only among managers, which was used to list items for discussion and to make notations of comments made by those present at the March 9th meeting for historical purposes. Also, it appears from this record that pages 2 through 4 of Association Exhibit 7 were never used for any purpose other than to create page 1 of the document. In these circumstances, the weight and value of Association Exhibit 7 on the outcome of this bumping case is minimal at best.[2]

The central question in this case is how to properly interpret Section 11.1(G). In my view, the language of Section 11.1(G) is ambiguous. The fact that the Association and the District argued so passionately herein for opposite interpretations of this language supports this view. The Association has argued that the references to "partial layoff" and to the "exercise of bumping rights to retain a position with hours and compensation substantially equivalent to the hours and compensation the teacher presently holds. . ." require a conclusion that partially laid off senior teachers/professionals can bump hours or portions of positions of less senior teachers/professionals in order to retain a substantially equivalent position to the one they had formerly.

Based on the express language of Section 11.1(G) and that of Article II, I disagree. In my view, the fact that Section 11.1(G) uses the term "a position" not "hours" and does not refer to a portion or percentage of a position is determinative. Also, the reference to the phrase "retain a position" supports a conclusion that a partial bump to gain some of the hours of another position was not contemplated by the parties as an appropriate bump.

The ordinary meaning of the phrase "to retain a position" in this context is to continue to hold or to have one position or to keep possession of one position with hours and compensation subsequently equivalent to the employee's prior position. It is significant that the contractual language does not state that the employee can retain hours. Nor does it make any express reference to a "partial bump" or to "partial bumping." The fact that the contract refers only to "a position" clearly indicates that the parties contemplated that an appropriate bump would be into a whole, discrete or

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[2] In addition, I note that the Grievant submitted her written rebuttal to Association Exhibit 7 after she found that document in her personnel file and that the Grievant's rebuttal (Association Exh. 8) was also retained in her personnel file.

entire position substantially equivalent in hours and compensation to the employee's prior position. In addition, the reference in Section 11.1(G) to "hours and compensation" further supports this conclusion.[3] Had the parties referred only to "hours" (not hours and compensation) in this area of Section 11.1(G), this would have tended to support the Association's arguments herein. The parties chose not to do this.

Furthermore, in my view, the language of Article II, is uncharacteristically detailed, specifically reserving to the District the right (at Section 2.1B) "to create, combine or eliminate any positions, as in (the Board's) judgment, are deemed necessary.[4] This language also tends to support the District's assertions herein that it has the right, if its judgments are rational and reasonable, to create, combine or eliminate positions.

The next question to be determined herein is whether a binding past practice exists supporting the Association's interpretation of Section 11.1(G). In this case, the Association has argued that the prior situations involving Kessler, Staats, Veleke and Smits formed a clear, mutually agreed upon and binding past practice that should fill in the ambiguity contained in Section 11.1(G). I have studied the documents and the testimony regarding these situations closely and I find these situations, even taken in the most favorable light, do not prove a true past practice.

Rather, in each instance, the District failed to concede or even acknowledge, either verbally or in writing, that the Association's assertions were correct that Article XI, Section 11.1(G) gave its senior teachers the right to bump less senior teachers' classes in order to maintain the FTE percentage the senior teachers had previously had. In addition, in only two situations, Kessler's and Veleke's, did the District make accommodations where it appears to have taken classes formerly assigned to one teacher and to have given them to the more senior teacher to fill out their schedules. However in the latter case, Veleke was never partially laid off or notified that he would be. Thus, no bumping was ever contemplated and none occurred. There, the Board simply reconfigured Veleke's High School Band schedule to include 8th grade Band and Section 11.1(G) was never invoked, by the Association. Also, no grievance was filed over this situation.

In Kessler's case, the Association invoked Section 11.1(G) on Kessler's behalf but again, the District never conceded its applicability or that the Association's interpretation that Section 11.1(G) allowed partial bumping, was correct. There, the District appears to have reconfigured Kessler's position, taking 14% of Elementary

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[3] I note that the question whether the Grievant could have bumped into Driebel's entire 45% position is not before me.

[4] I note that no limitations on the Board's discretion are expressed in Section 2.1(B) as are listed in Sections 2.1(C), (D) and E.

Music classes from less senior teacher Beth Dahl based on Schultz' study and recommendations. No documentation was made and no settlement agreement was entered into in this situation to indicate what actually occurred regarding Dahl's position.

Given these prior situations, the Association appears to have concluded that the District agreed with its interpretation of Section 11.1(G). However, this evidence failed to prove a long-standing, mutually acceptable, clearly understood and consistently applied past practice existed in favor of the Association. With no verbal or written concession by the District, one could reasonably conclude that in Kessler and Veleke's situations, the District exercised its Article II management rights to create, combine and eliminate jobs in favor of continuing to offer more senior teachers 100% FTE's while partially laying off less senior teachers.

Furthermore, the remaining situations cited by the Association, Staats and Smits, actually support the District's contentions herein and undercut the weight of the Kessler and Veleke examples. Both Staats and Smits were offered discrete, separate part-time positions in other areas they were certified to teach in order to maintain their prior FTE percentages. Indeed, it is significant that in neither of these situations did the District concede in any way that Section 11.1(G) included a partial bumping right. Rather, in Staats[5] and Smits' cases (indeed, in the Kessler and Veleke cases as well) the Board ultimately and independently approved all schedule changes. In my view, the evidence in this case was simply insufficient to show that the District knowingly and mutually agreed with the Association's position that partial bumping was available to unit employees under Section 11.1(G) and/or past practice.

The next question in this case is whether the District's decision to create two 45% FTE nursing positions was rational and reasonable or was based on arbitrary, capricious, discriminatory or bad faith reasons. Here, the record evidence showed that prior to 2004-05, the Grievant and her colleague, Maureen Driebel, were both employed at 90% FTE to provide school nursing services; that in 2004-05 the District asked the Grievant and Driebel to go to 60% FTE schedules and they agreed, resulting in a 60% FTE decrease in nursing time. Then, for 2005-06 Driebel agreed to work a 90% FTE schedule while the Grievant went on leave of absence which resulted in another 30% FTE decrease in nursing services.

It is undisputed that in 2006-07, the District decided to maintain nursing hours at a total of 90%, offering both the Grievant and Driebel 45% contracts, having the Grievant work Mondays through Wednesdays and Driebel work Wednesdays through Fridays to cover District nursing needs and provide some over-lap time. District

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[5] One could argue, as with Veleke, that the Staats case did not involve bumping at all, as Staats had been reduced to 65% in 2004-05 and never grieved that action and in 2005-06 she was offered a 70% contract.

Administrator O'Toole stated that because the 90% FTE nursing services provided by Driebel in 2005-06 were sufficient, the Board decided to create two 45% FTE Nursing positions for 2006-07. O'Toole also stated without contradiction that the work hours/week of the School Nurse in 2005-06 fully met the District's nursing needs; and that for 2006-07 the District needed flexibility so that one nurse could cover for the other nurse if the latter needed to be absent and the District could have both nurses present for in-services and emergencies (such as a teen pregnancy or a severe head lice or flu outbreaks). O'Toole also stated that one 30% position and one 60% position were not chosen by the Board for 2006-07 because it was concerned about the difficulty of recruiting and retaining employees. In the circumstances, O'Toole stated, as the District needed to hold the line on its 2006-07 budget, the District decided to maintain nursing hours at a total of 90% FTE, the same as in 2005-06. As a result, the Board offered two identical percentage contracts to the Grievant and Driebel due to its need for flexibility and for coverage across the 5 day work week.

The Association has argued that because no evidence was presented to show that if the District had allowed the Grievant to bump 15% of Driebel's position, nursing services would have been adversely affected, the District should have accommodated the Grievant's request. Although it is true that the District could have made this accommodation had it chosen to do so, the fact is that the labor agreement does not contain specific language that would require the District to do so and the District's refusal to do so does not require a conclusion that the District's approach was necessarily unreasonable or irrational.

The last question to be dealt with in this case is whether the District's clearly harsh and critical treatment of the Grievant at the March 9, 2006 meeting constituted evidence of the District's bad faith or evidence that it treated the Grievant in an arbitrary, capricious or discriminatory manner by assigning her a 45% FTE schedule for 2006-07. In all of the circumstances proven here, I do not believe the evidence was sufficient to support such a conclusion.

Although it was certainly unorthodox for the District to critique the Grievant's past job performance at the March 9th meeting, which the Grievant believed was intended to discuss her return to work from her year – long leave of absence, nothing in the labor agreement prohibited such an approach. In addition, in my view, it was highly unusual for District managers to criticize the Grievant for long – past alleged misconduct regarding which she had never been counseled, disciplined or warned. However, I note that the Association never mentioned the District's March 31, 2006 memo (Association Exhibit 6) in the instant grievance and as far as this record reflected, it never filed a separate grievance thereon. Rather, the Grievant chose to file a letter in response to the District's memo (Association Exh. 8) which was placed in her personnel file. Given the fact that the District proved it had a rational and reasonable basis for creating two 45% positions for 2006-07 and that the District treated the

Grievant the same as it did Driebel in assigning nursing work for 2006-07, the evidence failed to show that the District acted in bad faith or that it treated the Grievant in an arbitrary, capricious or discriminatory manner based on the content of the attachments to Association Exhibit 7 and the District managers' criticism of the Grievant on March 9th.

As stated above, I have found the weight and value of the comments made to the Grievant on March 9th and the content of the attachments to Association Exhibit 7 to be minimal in this non-disciplinary case. In my view, the evidence was insufficient to prove a causal connection between the harsh and critical March 9th comments, the content of the attachments to Association Exhibit 7 and the District's otherwise rational and reasonable decision to treat the Grievant the same as Driebel, and to maintain the same overall 90% FTE nursing services as it had in 2005-06. I therefore issue the following

AWARD

The District did not violate the parties' labor agreement or otherwise treat the Grievant in an arbitrary, capricious, discriminatory or bad faith manner when it issued the Grievant a partial layoff for 2006-07 and then refused her request to bump into a portion of another nursing position to retain the 60% position which she had previously held. Therefore, the grievance is denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 27th day of July, 2007.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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