

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**RIVERDALE EDUCATION ASSOCIATION**

and

**RIVERDALE SCHOOL BOARD**

Case #31

No. 67658

MA-13976

(Paasch Layoff - Preliminary Award on Procedural Arbitrability  
- Timeliness of the Grievance)

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**Appearances:**

**Shana Lewis**, Attorney, Lathrop & Clark, LLP, Post Office Box 1507, Madison, Wisconsin, 53701, appearing on behalf of the Riverdale School Board.

**Gregory Spring**, Negotiations Specialist, Wisconsin Education Association, Post Office Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Riverdale Education Association.

**INTERIM ARBITRATION AWARD ON TIMELINESS**

Pursuant to the terms of their collective bargaining agreement, the Riverdale School Board (hereinafter referred to as either the District or the Employer) and the Riverdale Education Association (hereinafter referred to as the Association) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the District's selection of Elizabeth Paasch for layoff in the 2007-2008 school year. The undersigned was so designated. The District's answers to the grievance included an objection to timeliness, and a hearing was held on April 1, 2008 at the District offices in Muscoda, Wisconsin, at which time the parties submitted such exhibits, testimony and other evidence as were relevant to the preliminary question of procedural arbitrability. A stenographic record was made. The parties submitted the matter on closing arguments at the end of the hearing, and the undersigned agreed to issue an expedited ruling.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Interim Arbitration Award.

**ISSUE**

The issue in this phase of the proceeding is whether the grievance is procedurally arbitrable, based upon timeliness of filing.

**RELEVANT CONTRACT LANGUAGE**

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**ARTICLE V - GRIEVANCE PROCEDURE**

A. Definitions:

1. A grievance is a claim based upon an alleged violation of the specific provisions of this agreement.
2. A grievant may be an employee or group of employees within the bargaining unit or the REA.
3. The term "days," when used in this article, shall mean working days.

B. The purpose of this procedure is to resolve at the lowest possible level problems which may from time to time arise affecting the wages, hours and conditions of employment of bargaining unit employees.

C. Initiation and Processing:

1. Level One. Within ten (10) days of the time the grievant knew of the action claimed to be the basis for a grievance, the grievant shall first attempt to satisfy the grievance through informal discussion with the immediate supervisor.
2. Level Two. (a) If a grievance is not satisfied in the informal discussion, the grievant may within five (5) days present a formal written grievance to the immediate supervisor. The grievance shall clearly state the nature of the complaint, the provision of the collective bargaining agreement alleged to be violated, and the relief sought. (b) Within five (5) days of the receipt of the written grievance, the immediate supervisor shall render a written decision to the grievant.
3. Level Three. (a) If the grievant is not satisfied with the disposition of the grievance at Level Two, or if no decision has been rendered, the grievant may within five (5) days refer the grievance to the District Administrator.  
  
(b) Within five (5) days of receipt of the grievance, the District Administrator will meet with the grievant in an effort to resolve the grievance. The District Administrator shall render a written decision within five (5) days of the conference or ten (10) days of receipt of grievance, whichever is sooner.

4. Level Four. (a) If a grievant is not satisfied with the disposition of the grievance at Level Three or if no decision has been rendered, the grievant may, within five (5) days, refer the grievance to the Board of Education.  
(b) The Board of Education, at its regularly scheduled meeting, or at a special meeting within fifteen (15) days of receipt of the grievance, shall meet with the grievant for the purpose of resolving the grievance. The Board shall render its written decision to the grievant and the Association within ten (10) days of said meeting.
  
5. Level Five. Arbitration. If the grievance is not resolved at Level Four, the grievant may appeal the grievance to arbitration within ten (10) days of the Board's answer by sending notice of the intent to arbitrate to the Board President.

When a timely request for arbitration has been made and received, the parties or their designated representatives shall attempt to select an impartial arbitrator. Failing to do so either party may, within ten (10) school days of notice of intent to arbitrate, request the Wisconsin Employment Relations Commission to submit a panel of five (5) arbitrators. Within ten (10) days of receipt of the list of names, the parties or their designated representatives shall determine, by the following procedure, the arbitrator. The parties shall determine who strikes first by the toss of a coin. The parties shall alternately strike a name from the list with the fifth and remaining name acting as the arbitrator.

The arbitrator shall schedule a hearing on the grievance and, after hearing such evidence as the parties desire to present, shall render a written decision. The arbitrator shall have no power to advise on salary adjustment, except as to the improper application thereof, not to add to, subtract from, modify or amend any terms of this agreement. A decision of the arbitrator shall, within the scope of his authority, be binding upon the parties. The parties shall share equally in the costs of the arbitrator. However, each party is responsible for its own cost of representation, witnesses, transcripts and other associated expenses.

- D. It is understood that the grievant in any or all cases is entitled to representation at all levels of the grievance procedure and that the Association shall be afforded the opportunity to be present and defend its position on the contract at the conference.

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### STATEMENT OF THE CASE

The District provides public education services to the citizens of Muscoda. The Association is the exclusive bargaining representative of the District certified instructional staff. The Grievant, Beth Paasch, was employed by the District in the 2006-2007 school year as a math teacher in the middle and high schools.

On February 13, 2007, the Grievant was served with a preliminary notice of layoff for the 2007-2008 school year. On March 13<sup>th</sup>, she received her final notice of layoff. She did not seek a private conference with the Board or the administration to discuss the layoff decision, nor was any grievance filed at that time, protesting the layoff notices.

A grievance was presented to Middle School Principal Dr. Sharon Ennis during the first week of the 2007-2008 school year, on or about September 6. She and Association President Dennis Baumann agreed to hold it in abeyance until September 17 to allow Ennis time to investigate and provide additional information. A written grievance was submitted on September 24, at Step 2 of the grievance procedure. Ennis denied the grievance, noting in her written response that the Grievant and the Association had knowledge of the layoff as of March 24, and that the contract requires a grievance be raised within 10 days of the date on which “the grievant knew of the action claimed to be the basis for a grievance...” She concluded that the grievance was untimely. She also addressed the merits of the claim, asserting that the Grievant was correctly identified as the candidate for layoff at the end of the 2006-2007 school year. The matter was thereafter appealed through the remainder of the grievance procedure and was referred to arbitration.

At the arbitration hearing, the District presented the testimony of District Administrator Bryce Bird, who stated his recollection that the first conversations he had had with any Association representative about the grievance were in the Fall of 2007, at the 3<sup>rd</sup> Step meeting. He had known nothing of a formal grievance prior to that time, although he had heard some rumblings through the grapevine the previous Spring that there were concerns that the wrong person may have been laid off. The Association claimed to him that a grievance could not be filed until the start of the 2007-2008 school year, when the actual teaching assignment of another teacher, Erin Blakely, was known. However, Bird noted that a matrix showing 2007-2008 teaching assignments had been prepared and distributed in January of 2007, and that that matrix listed the exact schedule that Blakely taught at the outset of the 2007-2008 school year.

On cross examination, Bird agreed that Paasch and Blakely had different licensure, with Paasch certified to teach Grades 6-12 Math, and Blakely certified to teach all middle school subjects for Grades 4-9. Bird acknowledged that he had had some conversations and exchange of correspondence with the Association’s previous President, Mary Ann Carmody, in the Spring of 2007, in the course of which she sought information about the layoffs and asked for

an inventory of staff assignments. The inventory he provided to her listed Blakely simply as “Middle School Teacher” without specifying any subject area. Carmody followed up with a letter in late May, asking for specific assignments, and Bird did not respond, because he assumed that Dr. Ennis had distributed the matrix of assignments in January, and that Carmody would have that. Bird acknowledged that he was not present when the matrix was distributed, but said the normal procedure would be to hand it out at a staff meeting.

The Grievant, Elizabeth Paasch, testified that she initially spoke to the Association when she received her layoff notice. She was told that the District had the right to layoff employees, and that she had no cause to grieve unless it turned out that a junior employee was assigned to teach a schedule that she was qualified to teach. Given that schedules are subject to change up until the start of the year, she was told there could be no valid grievance until the Fall semester started. When the school year began, a friend called her, and told her that Blakely was teaching a schedule consisting of all math classes at the middle school. That was when she raised the grievance.

Mary Ann Carmody testified that she was the Association President in the 2005-2006 and 2006-2007 school years. She received copies of the preliminary and final notices of layoff for Paasch in February and March, 2007, as well as notices to some other staff members, but had no reason to doubt at the time that they were appropriate. In April, some colleagues raised the question of whether assignment changes for the next school year might affect the layoff decisions, and she followed up by requesting specific information from Bird about who was going to be assigned to what classes in the Fall. Bird’s mid-April response was very general. It listed Blakely as simply a Middle School teacher, which really did not answer the question. Near the end of May, she wrote back, asking for more specific information, and giving examples of what she wished to know, but Bird gave her no response. On the last day of school, she approached him and asked where the information was, and he replied that she should “stay on top of him” about getting back to her with that. The two of them had no more discussion about it over the Summer, but on the first day of school she saw that Blakely had been assigned a full load of math classes within Paasch’s area of licensure, and determined that the layoff of Paasch was inappropriate.

On cross-examination, Carmody agreed that she had never specifically raised the prospect of a grievance with Bird, nor did any of her communications specifically identify Paasch or Blakely as the focus of her inquiries. She also agreed that she had never requested any waiver of the contract’s timelines to allow for a delayed filing of this grievance. On redirect examination, she explained that there were other positions besides the math job that were of concern to the Association, and that she could not know whether a grievance was appropriate until the actual assignments were made at the beginning of the school year.

Dennis Baumann testified that, as Carmody’s successor as Association President, he processed the grievance in the 2007-2008 school year. He reviewed the matrix that Bird said was distributed in January, and said he had first seen it at the end of the Summer. He noted

that documents with that format were typically not available until the start of the school year, since assignments can change over the Summer, as the District's needs change and as staff may leave unexpectedly. According to Baumann, the tentative schedule for the coming year was generally shared with teachers in the Spring, usually as a list of teachers and classes projected against a wall, but would not be treated as final until the Fall.

Additional facts as necessary will be set forth below.

### DISCUSSION

The Grievant was laid off for the 2007-2008 school year. She was given preliminary notice and final notice of the layoff in the Spring of 2007, as required by the collective bargaining agreement. The question in this case is when knowledge of the grievable event took place. The Association asserts that it occurred in the late Summer, when another teacher began working a schedule that the Grievant was qualified to work. The District asserts that it took place when the final notice was issued in the early Spring. There are potentially two issues that must be resolved in order to answer the timeliness of the grievance. The first is whether the grievable event is the layoff notice, or the employment of a junior teacher in a position that the Grievant is qualified to fill. If the answer is that employment of a junior teacher is the grievable event, then the question is when the parties reasonably knew that Blakely was going to be employed as a middle school math teacher in 2007-2008.

I agree with the Association that the issuance of a layoff notice to the Grievant is not, per se, a grievable event. The District has a contractual right to layoff teachers, and unless there is some reason to believe that the Grievant was not the proper candidate for layoff, there would be no basis for filing a grievance. The contract violation, if any, consists of having the junior teacher employed in a job that the Grievant is contractually entitled to fill. The central question, then, is at what point did the Grievant know of the action forming the basis for her grievance – e.g. the employment of Blakely in a middle school math position. The District claims that Blakely's assignment was known before the layoff notices were issued, when the assignment matrix was distributed to the staff in January. The Grievant claims it was in August, when school reconvened and Blakely actually began working the assignment.

From the record as it stands, I cannot state with confidence that the matrix the District Administrator relies upon as notice of the next year's assignments actually was distributed to the staff in January of 2007. No teacher claimed to have seen it prior to August, and Baumann said the preliminary assignments were revealed later in the Spring, in a different format. The Association's actions make little sense if they knew to a certainty that Blakely would teach a middle school math schedule in 2007-2008. The Grievant went to Carmody at the time of the layoff notice, and was told they would have to wait and see what the assignments were before they would know whether a grievance was warranted. If they all knew that the assignments

had already been made, there would be no reason to wait. Moreover, the April and May requests for information about the 2007-2008 teaching assignments do not make a great deal of sense if they already had the matrix in hand, nor does Mr. Bird's response. If he had the matrix, it seems he could have provided that in answer to their questions, rather than the ambiguous document he gave Carmody, listing Blakely as a middle school teacher instead of as a middle school math teacher. It bears remembering that Mr. Bird had no personal knowledge that the matrix was distributed in the Winter of 2007. His claim that it was distributed in January was based upon that being the normal practice, but it appears that 2006-2007 was his first year in the District, and so the extent of his knowledge of normal practice is unclear.

If the practice in this District has been that assignments for the following year are made in the preceding Winter and are firm, and if Blakely's assignment as a math teacher was distributed to the staff at that time and did not change in any way, I would agree that the Grievant could be said to have known of her cause to grieve at the time she received notice of layoff. The evidence, however, is at best mixed. The District bears the burden of proof on procedural arbitrability. Inasmuch as the record does not allow me to say with positive assurance that the Grievant knew of Blakely's assignment to teach a middle school math schedule before the start of the school year, I conclude that the grievance is procedurally arbitrable.

On the basis of the foregoing, and the record as a whole, I have made the following

**INTERIM AWARD**

The Grievance is procedurally arbitrable, and should proceed to hearing on the merits.

Dated at Racine, Wisconsin, this 10<sup>th</sup> day of April, 2008.

Dan Nielsen /s/

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Daniel Nielsen, Arbitrator