

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BANGOR SCHOOL DISTRICT

and

**BANGOR EDUCATION ASSOCIATION
COULEE REGION UNITED EDUCATORS**

Case 26
No. 67137
MA-13770

(Nindorf Recall Grievance)

Appearances:

Mr. Gerald Roethel, Executive Director, Coulee Region United Educators, 2020 Caroline Street, LaCrosse, Wisconsin 54603, on behalf of the Association.

Mr. Scott R. Mikesh, Staff Counsel, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, Wisconsin 53703, on behalf of the District.

ARBITRATION AWARD

On August 16, 2007, the Bangor School District, hereafter Employer or District, and the Bangor Education Association/Coulee Region United Educators, hereafter Association, requested the Wisconsin Employment Relations Commission to appoint Coleen A. Burns, a Commission staff member, as Arbitrator to hear and resolve the instant dispute. Following such appointment, a hearing was held on November 7, 2007 in Bangor, Wisconsin. The hearing was not transcribed and the record was closed on January 11, 2008, following receipt of each party's post-hearing written argument.

ISSUES

The parties were unable to agree upon a statement of the issues. The Association frames the issues as follows:

Did the School District of Bangor violate the collective bargaining agreement when it failed to recall Robert Nindorf?

If so, what shall the remedy be?

The District frames the issues as follows:

Is the Grievant entitled to the Resource Room assignment portion of Mrs. Rotering's Home Ec/FACE position?

CITED CONTRACT LANGUAGE

Article I

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G. Management Rights

The Board on its own behalf and on behalf of the electors of the District, hereby retains and reserves unto itself without limitation, all powers, rights, authority, duties and responsibility conferred upon and vested in it by the laws and Constitution of the State of Wisconsin and the United States, including, but without limiting the generality of the foregoing rights:

1. To the executive management and administrative control of the school system and its properties and facilities, and the assumed or contracted assigned school activities of its employees.
2. To hire all teachers and, subject to the provisions of law and this contract, to determine their qualifications and conditions for their continued employment or dismissal or demotion and to promote and transfer all such teachers.
3. To establish classes and courses of instruction, including special programs, and to provide athletic, recreational, and social events for students, all as deemed necessary or advisable by the Board.
4. To decide the means and methods of instruction, the selection of textbooks, and other teaching materials, and the uses of teaching aids of every kind.

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Article V – Contracts

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E. Vacancies

1. Notice of teaching and administrative vacancies will be posted on the District's website and sent by electronic mail to the BEA as soon as the Administration is aware of the existence of such vacancies.
2. Such notices contain the date of posting, description of the position, name and location of the school, requirements of the position, name of the person to whom the application is to be returned and the date by which the application is to be returned.

F. Layoff Procedures

The District will give notice of layoff by May 1 of the school year preceding the school year in which the layoff/reduction is to go into effect. The layoff notice shall specify the effective date of layoff. A copy of this notice will be sent to the president of the Union. Sec. 118.22, Wis. Stats. shall not apply to layoffs arising underneath this article.

When the Board determines to reduce the number of staff members, or to reduce the number of hours in any position (6th class excluded), the Board shall determine the teacher(s) to be laid off in accordance with the following procedures;

1. A point system for the purpose of determining order of layoff shall be established. The teacher(s) with the lowest points shall be laid off. In the event the point totals are equal, length of service in the District shall prevail.
2. Point System Criteria and Allocation:
 - a. Length of teaching based on years of service in the District: 2 points for each year. Experience outside the District will not qualify for years of service points.
 - b. Academic Training: BS + 8 = 2 points; BS + 15 = 3 points; BS + 23 = 4 points; MA or MS = 5 points; MA + 12 or MS + 12 = 6 points.

- c. Performance of extra duties listed in Appendix C: 1-5 points for the last year only. The points will be determined based upon the following salary table referencing the total salary of all positions held by the employee. Extra duty salaries are listed in Appendix C: The layoff benefit would be only for assignments in the year of layoff.

<u>Cumulative Salary Range – Salary of all positions held by the employee</u>	<u>Number of Points</u>
\$114-\$1000	1
\$1001-\$2000	2
\$2001-\$3000	3
\$3001-\$4000	4
\$4000 and above	5

3. The total accumulation of points under Section 2 of this provision will now be applied to those teachers who have the certification and teaching experience for the position to be affected. All those teachers who have the appropriate certification will have removed from their number any teacher whose certification is required in some other capacity by the District. This teaching experience may include both experience within the District or teaching experience acquired outside of the District. Teaching experience outside of the District for the purposes of this Article is defined as a teacher who has three (3) years of full-time teaching experience within the five (5) year period immediately prior to the commencement of employment with the Bangor School District. From the remaining teachers in the layoff pool, the teacher with the lowest accumulation of points will be laid off.
4. No member of the bargaining unit may be prevented from securing other employment during this period of layoff, providing said teacher(s) is certified or has the necessary qualifications for certification in the duties of the available position. Eligibility for reinstatement shall be for up to two (2) school years following such layoff. Such reinstatement shall not result in loss of credit for previous years of service. No appointment of new or substitute employees shall be made in those positions where teachers certified or possessing qualifications for certification are on layoff. Failure of a teacher on layoff to accept reinstatement within fifteen (15) days of their receipt of notification of

reemployment shall constitute a waiver of further employment rights under this provision.

Article VI – Compensation

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L. Denial of Increase

1. Only employees who render satisfactory service will advance on the salary schedule. The Board reserves the right to deny an increment to any employee not fully performing the duties of his/her position. Any complaints regarding such denials may be processed through the grievance procedure.
2. All teachers who fail to fulfill their in-service requirements will forfeit one (1) day of pay (7.5 hours)

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Article VII – Working Conditions

A. Instructional Load

1. A normal teaching load (middle school and high school) should consist of five (5) classes and one (1) hour of supervision with two (2) class hours of preparation.

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Article VIII – Leave Policy

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I. Family Leave

1. A leave of absence without pay or increment of up to one (1) year will be granted for the purpose of caring for a sick member of the teacher's immediate family. Upon return from such leave a teacher may be assigned to as substantially an equivalent position as available.

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RELEVANT BACKGROUND

Robert Nindorf, hereafter Grievant, has been employed as a teacher in the District since 1987. (Jt. Ex. #9) During the 2004-05 school year, the Grievant was employed as a full-time Art Teacher.

In a letter dated March 31, 2005, the District's Superintendent, John Wyatt, advised the Grievant as follows:

This letter is to notify you, pursuant to Article 5, Contracts, Section F – Layoff Procedures of the collective bargaining agreement between the Bangor Education Association and the Board of Education of the Bangor School District, that your current position will be reduced 25%, effective at the end of the 2004-2005 contract year. (Please note: The reason for this reduction is the projected declining revenues anticipated by the Bangor School District during the 2005-2006 fiscal year.) This reduction notice is not based upon your performance or conduct. Recall rights and the selection for reduction procedures are listed in Article 5, Contracts, Section F – Layoff of the 2001-2003 collective bargaining agreement. If you have any questions about this reduction in position notice feel free to contact me. (Jt. Ex. #6)

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On or about June 30, 2006, the District posted a .75 FTE Family & Consumer Education (FACE) Teaching position at the Bangor High/Middle School. (Jt. Ex. #10) This posting states, *inter alia*, that the qualifications are as follows: “Proper Wisconsin Teaching Certification Required.” The lone applicant for this .75 FTE was Britta Rotering. Following this posting, District Administration made the decision to increase Ms. Rotering's assignment by adding a 7th hour exploratory class of FACE/Health and an 8th hour resource room; which increase provided Ms. Rotering with a full-time position.

On or about August 21, 2006, the Grievant filed a grievance alleging, *inter alia*, that the District violated Article V, F, of the parties' collective bargaining agreement when the District failed to recall the Grievant to the “newly-created resource room assignment which has been given to the New FACE teacher” and that the Grievant was certified or had the necessary qualifications for certification for the duties of this assignment. As remedy, the Grievant requested that the District immediately assign the Grievant to the newly-created resource room assignment. (Jt. #7)

On or about August 30, 2006, District Middle/High School Principal Don Addington provided a Grievance Level I response as follows:

Please accept this memo as a response to your Level I Grievance. I am denying your Grievance based on the following contractual provisions and the fact that you do not possess certification in Family and Consumer Education. Article VII of the Master Agreement between the District and the Bangor Education Association support the District's decision in this matter. Article I delineates the rights that are reserved by the District. One of the rights set forth in section G of Article I allows the Board to establish classes and courses of instruction. The board decided as a matter of educational policy to increase Family and Consumer Education (FACE) instructional time by adding the fifth (5th) Exploratory class. The addition of this 5th class then made the FACE position a full-time position. Article VII Sec. I then states that a normal teaching load for a full-time position (middle school and high school) should consist of five (5) classes and one (1) hour of Supervision and two (2) class hours of preparation. The resource class that you reference in your grievance is a supervision assignment. It is not a separate and distinct class but rather part of a full-time assignment as such term is defined in Article VII, Section 1. There is no contractual obligation for the District to assign additional supervision assignments to employees who do not meet the full-time teaching load definition set forth in Article VII, Section 1. It should also be noted that the resource class was not newly Created and that it has been in existence for several years. (Jt. Ex. #8)

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On or about September 29, 2006, District Administrator Roger Foegen provided a Grievance Level II response as follows:

Please accept this memo as a response to your Level II Grievance. After reflecting on the discussion at our Level II Grievance meeting on September 18 and a review of the Master Agreement I am denying your Grievance based on the following contractual provisions and the fact that you do not possess certification in Family and Consumer Education. Article VII of the Master Agreement between the District and Bangor Education Association support the District's decision in this matter. Article I delineates the rights that are reserved by the District. One of the rights set forth in section G of Article I allows the Board to establish classes and courses of instruction. The Board decided as a matter of educational policy to increase Family and Consumer Education (FACE) instructional time by adding the fifth (5th) exploratory class. The addition of this 5th class then made the FACE position a full-time position. Article VII, A, 1 then states that a normal teaching load for a full-time position (middle school and high school) should consist of five (5) classes and one (1) hour of supervision and two (2) class hours of preparation. The resource class that you reference in your grievance is a supervision assignment. It is not a separate and distinct class but rather part of a full-time assignment as such term

is defined in Article VII, A, 1. There is no contractual obligation for the District to assign additional supervision assignments to employees who do not meet the full-time teaching load definition set forth in Article VII, Section 1. It should also be noted that the resource class was not newly created and that it has been in existence for several years. (Jt. Ex. #3)

On or about October 5, 2006, a grievance was submitted to the District's Board of Education alleging, *inter alia*, that the District violated Article V, F, of the parties' collective bargaining agreement when the District did not recall the Grievant to the newly-created resource room assignment which had been given to the New FACE teacher. As remedy, the Association requested that the District immediately assign the Grievant to the newly-created resource room assignment. (Jt. #2)

POSITIONS OF THE PARTIES

Association

The District created and continued a 75% Consumer Ed position. Two additional assignments (7th hour exploratory and 8th hour resource room) became available because of the internal transfer of Bruce Brewer to the Athletic Director position. The Association understands that the Grievant, a laid-off employee, is not qualified for the exploratory assignment.

In the case of the resource room assignment, the only requirement is that one possess a license to teach within the State of Wisconsin. The Grievant is licensed to teach within the State of Wisconsin.

The specific language of the contract must be followed. Article V(F) of the parties' collective bargaining agreement requires that the District provide recall to teachers in layoff status if they are certified or possess the necessary qualifications for the duties of the available work.

The District is narrowly defining the word "position." In Article V(F), Subsection 2, a "position" is used to refer to individual assignments in the extra-duty area. For the Arbitrator to accept the District's narrow definition, would subvert the collective bargaining agreement by allowing the District to reduce a senior employee to a partial position and never having to recall him/her even when there are openings.

This situation, where an employee was hired for a .75 position and then had two classes added, has not occurred before. In the 2005-06 school year, supervisory assignments were attached to an existing position.

For a past practice to exist, it must be known to both parties and both parties must have operated within the context of that particular methodology of operation. The District has not established a past practice between the parties as to how this situation should be handled.

The District forgot about the Grievant and his residual recall rights when it assigned the exploratory and resource room to the FACE teacher. This was a mistake.

The Association's interpretation of the collective bargaining agreement does not violate the District's right to manage. Nor does it create a rippling effect of transfers of positions.

The Association maintains that the District's failure to recall the Grievant to the 8th hour resource room violates the collective bargaining agreement. In remedy of the contract violation, the Association requests that the Grievant be awarded the 8th hour supervisory assignment and that he be made whole for the District's failure to recall him to the 8th hour resource room.

District

Throughout the grievance procedure, the Association asserted an Article V(F) right to the 8th hour resource room "assignment." Article V(F) refers to "position." The word "position" is not normally interchangeable with the word "assignment." (Cites Omitted) An examination of the contract, as a whole, leads to the conclusion that the parties did not intend the word "position" to be interchangeable with the word "assignment" or to refer to a single one-period supervisory assignment.

Assuming *arguendo*, that "position" could be reasonably construed to be a one-period assignment, the language of Article V(F), as well as a line of arbitral cases, support the conclusion that layoff and recall language pertaining to assignments (or positions) with a certification requirement necessarily excludes supervisory assignments on the basis that they do not require certification. (Cites Omitted) The 8th hour resource room cannot be a "position" because there is no certification requirement.

Both District witnesses testified that the critical factor in giving the supervisory assignment to Ms. Rotering was that her "exploratory class" was her fifth class; which triggered the District responsibility, under Article VII, Section A, to assign her a supervisory assignment and two prep periods. The District Superintendent and the Middle School/High School Principal testified that there has never been a practice of allowing laid-off teachers to "cherry pick" supervisory assignments from newly hired or current bargaining unit employees. During the first year of the Grievant's lay-off, the Grievant and the District acquiesced in the District's interpretation of Article V and waived any claims to the supervisory assignments of several newly hired teachers by failing to take action on the contract interpretation being pressed in this grievance.

The Association has the burden to show that the District violated the collective bargaining agreement by failing to assign the 8th hour resource room to the Grievant. The 8th hour resource room is not a “position” within the meaning of Article V(F) of the parties’ collective bargaining agreement.

The Association seeks a right which has the potential to significantly impact the District’s assignment of work, but for which the Association has not bargained. The grievance should be denied.

DISCUSSION

Issue

The parties were unable to stipulate to a statement of the issue(s). The Association frames the issue as follows:

Did the School District of Bangor violate the collective bargaining agreement when it failed to recall Robert Nindorf?

If so, what shall the remedy be?

The District frames the issues as follows:

Is the Grievant entitled to the Resource Room assignment portion of Mrs. Roterling’s Home Ec/FACE position?

In the grievance that was filed and processed through the contractual grievance procedure, the Association claims that the District violated Article V(F) of the parties’ collective bargaining agreement when the District did not recall the Grievant to the 8th hour resource room assignment. Accordingly, the issues are most appropriately framed as follows:

1. Did the District violate Article V(F) when it did not recall the Grievant to the 8th hour resource room assignment?
2. Is so, what is the appropriate remedy?

Merits

On or about June 30, 2006, the District posted a .75 FTE FACE teacher position. (Jt. Ex. #10) It is undisputed that, at the time of this posting, the Grievant was on lay-off as a result of his reduction to a .75 FTE. The District’s right to lay-off the Grievant is not at issue in this proceeding.

According to District witnesses Principal Addington and District Administrator Foegen, there was one applicant for the .75 FTE position, *i.e.*, Britta Rotering; that before this position was filled, the Athletic Director resigned; that, when the District hired Bruce Brewer as its new Athletic Director, the District was required to grant Mr. Brewer two periods of release time at the end of the school day; that this requirement caused Mr. Brewer's 7th hour exploratory class and 8th hour resource room to become open; that the District decided to make the 7th hour exploratory class a FACE/Health class because the District had been seeking to add Health to the middle school curriculum; that Ms. Rotering, but not the Grievant, was certified to teach FACE/Health; that, once the 5th class (FACE/Health exploratory) was added to Ms. Rotering's schedule, she became a full-time teacher; and that the normal teaching load requirements of Article VII, Subsection A, were satisfied by assigning Ms. Rotering one (1) hour of supervision, *i.e.*, the 8th hour resource room. The Association, contrary to the District, argues that, under Article V(F) of the parties' collective bargaining agreement, the Grievant has "recall rights" to the 8th hour resource room that the District assigned to Ms. Britta Rotering.

Article V(F), Layoff Procedures, does not mention "recall." "Reinstatement" is addressed in Article V(F), Subsection 4, which states:

4. No member of the bargaining unit may be prevented from securing other employment during this period of layoff, providing said teacher(s) is certified or has the necessary qualifications for certification in the duties of the available position. Eligibility for reinstatement shall be for up to two (2) school years following such layoff. Such reinstatement shall not result in loss of credit for previous years of service. No appointment of new or substitute employees shall be made in those positions where teachers certified or possessing qualifications for certification are on layoff. Failure of a teacher on layoff to accept reinstatement within fifteen (15) days of their receipt of notification of reemployment shall constitute a waiver of further employment rights under this provision.

The Association relies upon the first sentence of Subsection 4, to argue that the words "other employment" describe a broad category for employees to be recalled to. Assuming *arguendo*, that this sentence would provide the Grievant with a "recall right," such a "recall right" would not be to a broad category of employment. Rather, such a "recall right" would be limited to an "available position" for which the Grievant "is certified or has the necessary qualifications for certification in the duties" of the "available position." Similarly, the limitation upon appointments of new or substitute employees applies to "positions where teachers certified or possessing qualifications for certification are on layoff." (Emphasis supplied) The District, contrary to the Association, asserts that the 8th hour resource room is not a "position" within the meaning of Article V(F).

Subsections 1, 2, 3, and 4 of Article V(F) are subordinate to the two introductory paragraphs of Article V(F). It is reasonable to conclude, therefore, that, when the word

“position” is used in one of these Subsections, it should be given the meaning that is reflected in the introductory paragraphs, unless the language of the subordinate Subsections provides a reasonable basis to conclude that the parties intended otherwise.

The first reference to the word “position” occurs in the second introductory paragraph. This reference is found in the following sentence: “When the Board determines to reduce the number of staff members, or to reduce the number of hours in any position (6th class excluded), the Board shall determine the teacher(s) to be laid off in accordance with the following procedures.” While not without ambiguity, this sentence most reasonably indicates that a position is comprised of “hours” or “classes.” It follows, therefore, that the word “position,” as used by the parties in Article V(F), is not a “class” or “hour.”

The second reference to “position” is found in Article V(F), Subsection 2.c, entitled “Point System Criteria and Allocation.” This subsection addresses the procedure for determining points to be used in establishing the order of layoff. The language of Article V(F), Subsection 2.c, reasonably indicates that, for the purposes of determining these points, a “position” includes any extra duty listed in Appendix C, Pay Schedule for Extracurricular Duties” that had been performed during the last year.

As a review of Appendix C establishes, the 8th hour resource room is not a listed extra duty. The language of Article V(F), Subsection 2.c, does not provide a reasonable basis to conclude that the parties intended the word “position” to include individual assignments in general, or the 8th hour resource room in particular.

The next reference to “position” is found in the first sentence of Subsection 3, which states: “The total accumulation of points under Section 2 of this provision will now be applied to those teachers who have the certification and teaching experience for the position to be affected.” The next references to “position” are found in the Subsection 4 sentences which state: “No member of the bargaining unit may be prevented from securing other employment during this period of layoff, providing said teacher(s) is certified or has the necessary qualifications for certification in the duties of the available position.” . . . “No appointment of new or substitute employees shall be made in those positions where teachers certified or possessing qualifications for certification are on layoff.” Neither the language of these sentences, nor any other language in Article V(F), Subsections 3 and 4, provides a reasonable basis to conclude that the parties intended the word “position” to be synonymous with “class” or “hour.”

In Article V(F), Subsection 4, which provides the Grievant with reinstatement rights, it is recognized that a “position” will have a certification requirement. Principal Addington credibly testified that the 8th hour resource room is a supervision for which there is no “certification” requirement.

In summary, Article V(F), Subsection 4, provides laid-off employees, such as the Grievant, with certain reinstatement rights to a District “position.” For the reasons discussed

above, the most reasonable construction of the plain language of Article V(F), Subsection 4, is that an “hour” for which there is no certification requirement, such as the resource room in dispute, is not a “position.”

Conclusion

Under the plain language of Article V(F), the 8th hour resource room in dispute is not a “position” for which the Grievant has an Article V(F), Subsection 4, reinstatement right. There is no evidence of bargaining history, or past practice, which establishes that the parties mutually intended the language of Article V(F) to be construed as providing the Grievant with a “recall right”, or any other right, to the 8th hour resource room.

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

AWARD

1. The District did not violate Article V (F) of the parties’ collective bargaining agreement when it did not recall the Grievant to the 8th hour resource room assignment.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 8th day of May, 2008.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

