

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE ELCHO EDUCATION SUPPORT PERSONNEL ASSOCIATION

and

THE ELCHO SCHOOL DISTRICT

Case 51
No. 67663
MA-13978

Appearances:

Fred Andrist, Executive Director, Northern Tier UniServ, P.O. Box 1400, Rhinelander, Wisconsin 54501, for the labor organization

Barry Forbes and **Ben Richter**, Staff Counsels, Wisconsin Association of School Boards, Inc., 122 West Washington Avenue, Room 500, Madison, Wisconsin 53703, for the municipal employer.

ARBITRATION AWARD

The Association and the District are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the District concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to classification for purposes of layoff. The Commission designated Stuart D. Levitan as the impartial arbitrator. Hearing in the matter was held in Elcho, Wisconsin, on April 3, 2008. The parties submitted written arguments and replies by June 16, 2008.

ISSUE

The parties stipulated to the following issue:

“Did the District violate Article 14 A, B and C and Article 15 when it partially laid off Lisa Guth? If so, what is the remedy?”

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE VII - MANAGEMENT RIGHTS

- A. The board retains and reserves unto itself, except as limited by the specific and express terms of the Agreement, all powers, authorities, duties, responsibilities, and rights conferred upon and vested in it by the laws and the Constitutions or the State of Wisconsin and the United States. The Board of Education retains the right to exercise these functions during the term of the collective bargaining agreement.

- B. Without limiting the generality of the foregoing (paragraph A) and except to the precise extent such functions and rights are explicitly, clearly and unequivocally restricted by the express terms of this Agreement, it is expressly recognized that the Board's operational and managerial rights and responsibilities include the right to:
 - 1. Direct all operations of the school system;
 - 2. Establish reasonable rules and schedules of work;
 - 3. Create, combine, modify, and eliminate positions within the school system;
 - 4. Hire, promote, transfer, schedule, and assign employees in positions within the school system and to request a waiver to pay above the salary schedule by providing rational for a specific job that requires skills and knowledge beyond that which is recognized on the current salary schedule. Any deviation from the current salary schedule must be negotiated between the Association and Board, be mutually agreed upon and written in a Memorandum of Understanding.
 - 5. . . .
 - 6. Relieve employees of their duties because of lack of work or any other legitimate reason;
 - 7. Maintain efficiency of school system operation;
 - 8. . . .
 - 9. . . .

10. . . .
 11. Determine, direct, and manage the work force and assign work to employees on said jobs;
 12. Select employees, establish quality standards and evaluate employee performance;
 13. . . .
 14. Determine the kinds and amounts of services to be performed as pertains to school district operations, the number and kind of classifications to perform such services, and the size and composition of the work force;
 15. . . .
 16. . . .
- C. The exercise of the foregoing powers, authorities, duties, responsibilities and rights by the Board shall not be deemed to exclude other functions of the Board not specifically set fourth [sic] and shall be limited only by the specific and express terms of this Agreement.

. . .

ARTICLE XIV - SENIORITY

- A. Seniority shall be defined as the length of service within the District as a member of the bargaining unit. Accumulation of seniority shall begin from the employee's first working day.....
- B. The District, when requested, will annually produce a seniority list within five (5) working days of request and forward that list to the president of the Union. The Union will raise any objections to the proposed seniority list within two (2) weeks of receipt or it will be considered accurate as prepared.
- C. For purposes of this Agreement, all employees shall be placed in one of the following classifications based on their current assignments:
 - a. Custodial
 - b. Secretarial
 - c. Food Service

- d. Regular Educational Assistants
- e. Special Educational Assistants
- f. Child Care

...

ARTICLE XV - LAYOFF AND RECALL

In the event the board determines to reduce the number of position[s] (full Layoff) or the number of hours in any position (partial layoff) the provisions set fourth [sic] in this Article shall apply.

The District will give at least thirty (30) calendar days notice of layoff. The layoff notice shall specify the effective date of layoff. A copy of this notice will be sent to the President of the Association.

SELECTION FOR REDUCTION

In the implementation of staff reductions, employees shall be selected for full or partial layoff in accordance with the following steps:

Step One — Attrition. Normal attrition resulting from employees retiring or resigning will be relied upon to the extent administratively feasible in implementing layoffs.

Step Two — Reduction by Seniority. The Board shall select an employee for a reduction in the affected Classification in the order of the employee's seniority, with the employee having the least seniority being the first selected, provided the remaining employees are qualified to perform the work.

Any employee who is reduced in hours (partial layoff) may choose to be fully laid off without loss of any rights or benefits as provided herein. Full-time employees who are reduced in hours shall not lose any benefits they have accrued. Benefits are defined as seniority, sick leave, and vacation earned. Reduced in time employees shall have all the rights and privileges of full-time bargaining unit members under this Agreement except that economic provisions will be pro-rated to be consistent with the portion of a full-time position held.

BACKGROUND

This grievance challenges the District's re-classification of the Food Service Bookkeeper from a Food Service employee to a Secretarial one, and the incumbent's resultant partial layoff as the least senior secretarial employee.

The incumbent Food Service Bookkeeper is the grievant, Lisa Guth, hired on August 18, 2003. In her application letter, dated August 8, Guth wrote as follows:

. . .

I feel that I would be a great asset in the position, as I have an extensive background, which incorporates all the skills necessary for it. My current occupation involves extensive use of a computer system in managing and establishing customer's accounts. It also requires a great deal of confidentiality due to the personal information, which is obtained.

I have a strong background in the customer service industry and feel that it would be a benefit in the position, as it has involved interaction with the public on numerous levels.

Although the position of Food Service Bookkeeper pays less than what I'm currently making, the fixed work schedule and work proximity would benefit me and my family. Hopefully I possess the abilities and qualifications you are seeking in the person to fill the position, and will have the opportunity to interview for it.

Guth attached a resumé to her application, which stated she was proficient in detailed record keeping, with a strong background in customer service. The resumé noted she had graduated from Three Lakes High School, and had attended Nicolet College (with an emphasis on accounting) and UW-Green Bay. As her past employment, Guth listed being a Special Services Sales Associate at Home Depot, being a phone sales operator, being the owner/bookkeeper of a construction company, and manager of a convenience store/gas station. Guth did not list any commercial cooking experience or training.

Around the time Guth began work on started with the District, she enrolled in the Wisconsin Education Association and its insurance trust, and filled out the necessary forms, indicating she was a food service employee. The district's Financial Director, an unrepresented employee, was aware of these submissions, and assisted in part of their preparation.

The job description for the Food Service Bookkeeper, which the district published in 1999, and which has remained unchanged since, reads as follows:

Supervisor: District Administrator

Qualifications: High School Diploma or Equivalent

Proficiency in computerized lunch accounting; daily counts, invoicing and collections

Must be able to deal courteously with students, staff and guests

Confidentiality of Free and Reduced Meal Family Information

Work Year: School year

Responsibilities: Tabulation of daily meals served
Lunch and breakfast invoicing
Collection of past due accounts including working with collection agency
Daily counts of meals served
Local, state and federal lunch reports with District Financial Asst.
Maintains milk inventory and cooler
Student supervision in the lunch room
Other related responsibilities as assigned

As Food Service Bookkeeper, Guth works primarily on a computer on a desk in the cafeteria, performing the responsibilities indicated, other than collecting past due accounts. After taking the computer out of the closet in which it is kept, Guth positions herself at the head of the food line, where she scans each meal and tabulates the necessary data, which she submits to the Food Service Director. She tracks student food service accounts, invoicing and credits as needed. She also prepares monthly and annual reports as needed. Guth's only duties related to the delivery of food services consist of maintaining the milk inventory and cooler for about 15-20 minutes a day. On limited occasions, she may also assist in general cleaning of the cafeteria and kitchen, but not as a regular assignment. She works in the cafeteria, in the general area as employees engaged in the preparation and delivery of food, but does not assist or participate in either. Notwithstanding the supervisory relationship stated in this position description, it is the Food Service Director, Gerald Ferrigno, who directly supervises Guth, not the District Administrator. Guth has never filled in for an Assistant Cook or Cook/Helper or for any Secretarial employee.

There is no record evidence as to the duties or relationships of the employees in the Secretarial classification.

As of August, 2003, the only seniority list in the record was the Initial Seniority List which the District issued on August 10, 1994, following certification of this bargaining unit in June, 1993. The seniority list included the incumbent support staff personnel under the classifications Custodial, Secretarial, Food Service, Regular Educational Assistants and Special Educational Assistants, all of which were enumerated in the parties' 1993-1995 collective bargaining agreement. The 1994 seniority list placed the Food Service Bookkeeper under the Food Service heading.

The salary schedule in the parties' 1993-1995 master agreement grouped the represented positions as follows:

FOOD SERVICE

- Head Cook
- Assistant Cook
- Cook Helper/Server
- F.S. Bookkeeper

CUSTODIAL

- Head Custodian
- Custodian
- Probationary Cust.
- Custodian Assistant
- Night Differential

SECRETARIAL

- Building Secretary
- Clerk/Typist

EDUCATIONAL ASSISTANTS

- Regular Ed. Assistants
- Library Aide
- Special Ed. Assistants

The parties' 1995-1997 and 1997-1999 agreements remained the same, except for the amendment of the last line to read, "Special Ed Assts/Secretary." In the parties' 1999-2003 agreement, the "Special Ed Assistants" were included with the Building Secretary in the Secretarial group, with "Special Ed Assts/Secretary" still also listed in the Education Assistants category. In the 2003-2005 agreement, the "Special Ed Assistants" were listed under the Education Assistants group and "Special Ed Secretary" listed in the Secretarial group. The Food Service Bookkeeper remained listed in the Food Service category throughout.

In July, 1999, the District published a booklet of Job Descriptions for its support staff, arranged as follows:

Food Service

- Head Cook
- Assistant Cook
- Cook Helper
- Bookkeeper

Custodial

- Custodian
- Custodial Assistant

Secretarial

- Building Secretary

Education Assistants

- Regular Education Assistant
- Library Aide
- Special Education Assistant
- Special Education Secretary
- Title 1 Education Assistant
- Lunch Room Aides

There is nothing in the record to indicate the district has published another such booklet since 1999.

In the late summer of 2007, the Elcho School District faced a deficit of about \$300,000. Some time prior to August 27, 2007, the District Board decided to reduce its payroll costs by laying off the least senior employee in the Secretarial classification. Believing there was no current seniority list showing the classification of each employee, District Administrator Dr. Christopher Thomalla undertook to create a seniority/classification list. Thomalla reviewed the current assignments of the workforce, and classified each employee based on his understanding of their current assignments. He placed Guth in the Secretarial classification, where she was the least senior employee. On August 27, the District Board voted to implement Thomalla's analysis and reduce Guth's hours.

The EESPA Seniority list, dated August 29, 2007, is the first document which the District issued since 1994 which placed the Food Service Bookkeeper with Secretarial, rather than Food Service, employees. It grouped employees as follows:

Special Ed Assistants

Library Aides/Title 1 Aide/Virtual School Aide/Reading 1st Aide

Study Hall Supervisor

Special Ed Secretary/Building Secretary/F.S. Bookkeeper

Custodian/Custodian Asst.

Cook Helper/Asst Cook

Child Care/Child Care Teacher

On August 27, 2007, the Clerk of the Elcho School District issued a Notice of Partial Layoff to Lisa Guth, as follows:

PLEASE TAKE NOTICE that the School District of Elcho is issuing you a partial layoff notice for the 2007-2008 school year as Food Service Bookkeeper by reducing your current hours which are 30 to 35 hours per week to not more than 30 hours per week. The reason for the layoff is due to the elimination of recess supervision from your assignment. ¹ This layoff, however, is not related to your performance with the District.

Please contact your immediate supervisor, Mr. Ferrigno, to arrange your daily schedule.

When and if the District becomes aware of sufficient funding sources and/or available job assignments, you will be notified of the opportunity for reemployment with the School District of Elcho within the provisions of the Master Agreement with the EESPA.

This layoff takes place on October 1, 2007.

Action taken by the School Board this 27th day of August, 2007.

Promptly upon receipt of the new seniority list, Association President Julie Bruno raised two objections to it with the District Financial Director– the inclusion of the Food Service Bookkeeper in the Secretarial classification, and the placement of the Study Hall Supervisor in its own category. The Financial Director consulted with Thomalla, who acknowledged an error in its treatment of the Study Hall position, and clarified its placement, but maintained the classification of the Food Service Bookkeeper was proper and correct. On October 3, 2007, Guth and the EESPA grieved, claiming as follows:

STATEMENT OF GRIEVANCE

Lisa Guth's contract was reduced from a maximum of 35 hours to a maximum of 30 hours per week. The Union believes that this partial layoff is not in accordance with the layoff procedure found in the contract. Additionally, the seniority list does not reflect Ms. Guth's proper classification.

AREAS OF CONTRACT VIOLATED

- Article VII, Section A
- Article XIV, Sections A and C
- Article XV, and the CBA in total

¹ This duty was transferred to teacher aides.

REMEDY REQUESTED

The District must reinstate Ms. Guth's five hours weekly. Furthermore, they must correct the seniority list and place her in the Food Service classification. Should the District still want to reduce the overall hours of the Support Staff, they must follow the Master Agreement to determine which employee's hours will be reduced.

Finally, the District must place notices in all appropriate locations, such as where job postings are posted, explaining the details of the grievance and that they violated the Master Agreement and will not do it again.

By letter dated October 15, 2007, Thomalla replied to the EESPA as follows:

To Whom It May Concern:

It has been alleged that in reducing Mrs. Guth's position from 30-35 hours per week, the District has violated portions of the Master Agreement, specifically Article VII, Section A, Article XIV Sections A and C and Article XV and finally the Collective Bargaining Agreement in its entirety. Let us address each section individually:

- Article VII, Section A: This section reads as follows, "The Board retains and reserves unto itself, except as limited by the specific and express terms of the Agreement, all powers, authorities, duties, responsibilities, and rights conferred upon and vested in it by the laws and the Constitutions of the State of Wisconsin and of the United States. The Board of Education retains the right to exercise these functions during the term of the collective bargaining agreement." It can only be assumed that the EESPA's position is that in reducing Mrs. Guth's position, the District while exercising its Management Rights did so in a manner that exceeded the limits of "the specific and express terms of the Agreement" In light of that assumption, please draw your attention to Article VII, Section B wherein the Board's operational and managerial rights and responsibilities are specifically enumerated:
 2. Establish reasonable rules and schedules of work;
 3. Create, combine, modify, and eliminate positions within the school system;
 4. Hire, promote, transfer, schedule, and assign employees in positions with the school system...
 5. Maintain efficiency of school system operation;
 11. Determine, direct, and manage the work force and assign work to employees on said job;

14. Determine the kinds and amounts of services to be performed as pertains to school district operations, the number and kind of classifications to perform such services, and the size and composition of the work force. .
- Article XIV, Sections A and C: Article A deals with seniority and Article C deals with job classifications. The EESPA is alleging that the Board has placed Mrs. Guth in the wrong classification and therefore, improperly interpreted seniority laying off the wrong individual. Direct your attention to the wording of Section C. “For purposes of this Agreement, all employees shall be placed in one of the following classifications based on their current assignments:” The agreement is silent on who is to do the placing. Prior to filing this grievance, the EESPA requested a seniority list of their employees and how the District classified them. Evidently the EESPA also recognizes in the absence of language in the agreement that “explicitly, clearly and unequivocally” restrict the functions and the rights of the Board, then the Board has the inherent managerial right to:

Hire, promote, transfer, schedule, and assign employees in positions with the school system...

Having requested and received the Board’s classification of its employees, the EESPA is now alleging that the Board had violated the contract because it does not agree with those classifications. The rationale for the assignment of Mrs. Guth as a secretary is based upon her current job description and the skills and abilities for which she was interviewed and hired. Your argument that she is a Food Service employee is based upon the assignment location of her duties. While you may not agree with her classification assignment, the Master Agreement does not specifically grant to the EESPA the right to make that decision.

In the absence of contractual language which restricts the Board’s right to assign employees, there is no mis-classification and therefore no violation of seniority rights as Mrs. Guth is the least senior secretary in the District.

- Article XV deals with Layoff and Recall. The contract is clear in stating that layoffs should be based first of all on Attrition and secondly on Seniority. Since there was no mis-classification, there is no violation of seniority and finally no violation of Layoff language. However, let us assume for the sake of argument that the District would agree with you, that Mrs. Guth should be classified as a Food Service employee. Article XV reads, “Step Two — Reduction by Seniority. The Board shall select an employee for a reduction in the affected Classification in

the order of the employee's seniority, with the employee having least seniority being the first selected, provided the remaining employees are qualified to perform the remaining work." In this presumed scenario, Mrs. Guth would indeed be senior to the least senior person in the classification, the Assistant Cook. If qualified to perform the work of an assistant cook, she would have bumping rights. However, based upon the duties that the two perform, the interviews that were conducted, the referenced work experiences on the resumés submitted and the job descriptions of both positions, there would be no reason to believe that a bookkeeper responsible for utilizing a computer to keep track of lunch accounts would be qualified to replace an assistant cook responsible for the preparation of meals. The decision would fall back onto the District's managerial right to "assign employees in positions with the school system" based upon the information that it possesses to judge whether an employee is "qualified to perform the . . . work" not the assumed possibility that the employee can.

Accordingly, I am denying your grievance at the Second Level.

The Association on January 10, 2008, submitted a Request to Initiate Grievance Arbitration to the Wisconsin Employment Relations Commission. The District concurred that the matter was properly before a WERC arbitrator, and the matter was set for hearing and decision.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

The District has relied on its contractual ability to transfer to justify its placing the grievant in the secretarial classification. However, since the unit's organization, the parties have consistently agreed that the Food Service Bookkeeper is correctly placed in the Food Service classification, as reflected in the salary grid. Further, well before layoffs were an issue, the grievant consistently identified herself as being a Food Service employee in forms she filled out. This is in stark contrast to the District, which developed its self-serving seniority list in the middle of the layoff process. The District's own Job Description booklet also places the Food Service Bookkeeper in the Food Service classification. Finally, the initial seniority list from 1994 places the Food Service Bookkeeper in the Food Service classification.

The union challenged the new seniority list as soon as it received it in 2007, both as pertains to the grievant and also the position of Study Hall Supervisor. The District agreed with the union as to the latter position, but not as to the

Food Service Bookkeeper. Because the District has used an inaccurate seniority list, it cannot now say it applied the contractual layoff provisions correctly. The Superintendent testified he never considered whether the grievant was qualified for any other position in the Food Service classification, but insisted there was no improper classification of her position. Whether or not the grievant was qualified for any other position within Food Service has no bearing on this grievance, since the District never considered that question before they laid her off.

It may be appropriate to compare this layoff to a discharge, in that arbitrators have reversed such discipline when the action was based on inaccurate facts or lack of due process. Basing a decision on inaccurate facts does not afford an employee with any amount of due process and is contrary to the basic foundation of the Master Agreement.

The District made a fatal flaw when they did not consider all the evidence in the Master Agreement to determine what classification the grievant was in. The District would have us believe they were developing the seniority list for the first time ever. The Union believes there is plenty of evidence that properly places the grievant in the Food Service classification. Had the District done that, perhaps they would have come to the same conclusion, but it is clear the District never considered the grievant in the Food Service classification and thus never considered her qualifications. That was the second fatal flaw where they failed to comply with the contract. They can hardly say they properly laid off the correct person when they acknowledged that they did not even put the grievant in the running for another Food Service position.

Accordingly, the District should be ordered to reinstate the grievant's hours that she lost during the 2007-2008 school year, with interest due to her modest wage rate and the District's fundamental mistake. The District should also be ordered to correct the seniority list and post a notice explaining the grievance and their intention not to violate the contract again.

In support of its position that the grievance should be denied, the Employer asserts and avers as follows:

The Board acted within the clear and unambiguous provisions of the Agreement when it classified the grievant as a Secretarial employee based upon her "current assignments." Because the contract provisions are clear, unambiguous and not subject to multiple interpretations, the arbitrator should apply their clear and ordinary meaning. The agreement provides that, except as "explicitly, clearly and unequivocally restricted," the District has the full right to modify and eliminate positions, schedule and assign employees, and make all determinations regarding the work force. Consistent with those provisions, the District

classified the grievant as a Secretarial employee based upon the services she performed as the Food Service Bookkeeper.

The only clear, explicit and unequivocal restrictions on the District are found in Articles XIV and XV. Article XIV, C directs the District to place its employees into one of six classifications based upon their "current assignments." Based upon the current assignments which she performed as the Food Service Bookkeeper, and the clerical nature of those duties, the District classified the grievant as a Secretarial employee.

Pursuant to Article XV, the Board selected the least senior Secretarial employee for reduction, and thus selected the Grievant for layoff.

The Board was acting within the explicit and clear restrictions of clear and unambiguous contract provisions when it classified the grievant as a Secretarial employee. Further, its actions did not violate those provisions and were not arbitrary or capricious.

The salary schedules which the Association introduced do not represent an explicit, clear and unequivocal restriction on the Board's management right to classify the grievant as a Secretarial employee. The salary schedules contain no language or restrictions linking them to placement of positions within classifications.

Even if the relevant contract provisions are not clear and unambiguous, the Association has not proven that the District's actions, based upon its interpretation of "current assignments," violated the contract or were arbitrary or capricious. The District acted within the terms of Article XIV, C when it classified the grievant as a Secretarial employee based on her "current assignments." But in the unfortunate circumstance that the Arbitrator finds the term "current assignment" ambiguous, he must determine whether the Association has proven that the District's interpretation either violate the agreement, or was arbitrary and capricious.

Dr. Thomalla created the seniority list the District relied upon by interpreting the phrase "current assignments" to mean "current responsibilities and duties performed," which is reasonable and consistent with dictionary definitions. The Food Service Bookkeeper does not prepare, cook, bake, serve or handle any food item other than a *de minimus* amount of time stocking the milk cooler, but works exclusively with a computer, enters data and prints reports. The grievant has never substituted for any absent food service worker, and has nothing directly to do with food. As further supported by the federal Department of Labor's *Dictionary of Occupational Titles*, Dr. Thomalla correctly classified the grievant as a Secretarial employee based upon her "current assignments." The

fact that the District designated the grievant as the “Food Service” bookkeeper does not change the fact that she was properly classified as a Secretarial employee.

In contrast, the Association would have the Arbitrator interpret the contractual requirement that employees are to be classified based upon their “current assignments” to mean employees should be classified based either on their job title, designation, or the physical location within the building. That would improperly eliminate the words “based on their current assignments” from the agreement.

Nor does the record establish a binding past practice of classifying the Food Service Bookkeeper as a Food Service employee, as past practice generally does not require an employer to maintain job classifications or limit the employer’s management right to revise them. The single occurrence of the food service bookkeeper falling under the Food Service classification on the 1994 seniority list does not establish a binding past practice for classifying the position as a Food Service employee. A single occurrence from 1999 in which the “Bookkeeper” job description was placed in the “Food Service Job Category” does not establish such a binding past practice either. And the grouping of the Food Service Bookkeeper with the Food Service employees on the salary schedule does not establish a binding past practice for such a classification.

Further, the grievant is not qualified to perform the assignments of the Assistant Cook and does not have the right to bump into that position.

The agreement clearly and unambiguously grants the District the right to assign work to its employees and classify them based on those assignments. The Association has failed to prove the District’s classification of the grievant as a Secretarial employee either violated the clear and unambiguous terms of the agreement or was arbitrary and capricious.

In reply, the Union posits further as follows:

It is inconceivable that a seniority list from the prior year does not exist. The superintendent’s inability to find one is self-serving. Also, the phrase “current assignments” is applicable only when the employee is first hired; given the importance of classifications in consideration for layoff, no union would agree to allowing an employee’s classification to be switched without applying for another position. And if the position had changed that much in four years, the Food Service position should have been eliminated and a new Secretarial position created.

The fact that the union has not grieved the Special Ed Secretary out of the Secretarial classification points out that the wage schedules are an affirmation of the classifications. The district's argument that the union should want that position in the Special Ed classification merely because it has Special Ed in front of it proves the union's point in the converse.

The District errs in contending that an employee has to be in direct contact with food to be in the Food Service category. The subject position supports the Food Service category, and the union believes the cost of her position is within the Food Service budget. The union disagrees with the very narrow definition the district is applying.

Finally, the employees deserve protection from every new Superintendent that comes and wants to define things differently, namely the collective bargaining agreement. There is sufficient evidence to conclude that the parties agreed over a period of time that the Food Service Bookkeeper belongs in the Food Service classification. If that is true, the District laid off the wrong person.

In reply, the Employer posits further as follows:

The association errs in stating the district made a mistake when it classified the grievant as a secretarial employee, because her current assignments were indeed secretarial. The association errs in stating that the district relied on its ability to transfer employees, when it did not transfer the grievant, who remained in the same position she had held since her hire in 2003.

The association errs in claiming that the parties have consistently agreed that the Food Service Bookkeeper was correctly placed in the Food Service Classification, since none of the wage schedules contain the word "classification." By placing the grievant's position under the Food Service heading on the wage schedule, the District has not bargained away its right to classify the Food Service Bookkeeper as a Secretarial position. Neither the placement of this position in the job descriptions booklet, nor the initial seniority list, restricts the district's ability to classify the position. Also, the way in which the grievant identified herself on forms is irrelevant.

The Association errs in arguing that the grievant should be placed in the position of Assistant Cook, for which she is not qualified. The agreement does not require the District to train unqualified staff so they may avoid layoff.

The Association further errs in comparing this layoff to a discharge and in claiming the District based its layoff on inaccurate facts. The agreement provides employees selected for economic layoff with neither just cause protection, nor due process rights.

Because the agreement clearly and unambiguously grants the District the right to assign and classify its employees, and because the Superintendent properly classified the grievant as a Secretarial employee, the grievance is without merit and should be dismissed.

DISCUSSION

This grievance challenges the district's classification of the Food Service Bookkeeper as a Secretarial employee and the incumbent's resultant partial layoff. If the position is properly classified as a Secretarial position, the grievant was properly reduced in hours and the grievance must be dismissed. If the position should have remained in the Food Service classification, the grievant was not properly reduced in hours, and the grievance must be sustained.

Article XIV, paragraph C of the collective bargaining agreement requires that employees be placed in one of six classifications, "based on their current assignments." Pursuant to its Article VII Management Rights, it is the District that has the authority to make the classification, provided it does not do so in an arbitrary or capricious manner or contrary to any other provision of the agreement.

This reclassification fails on both accounts. It was arbitrary and capricious, and violated the terms of Article XV.

All documentary evidence from the time the bargaining unit was certified and organized in 1993-94 until the reduction in hours in 2007 classifies the Food Service Bookkeeper as a Food Service employee throughout. The Initial Seniority List of April 1994 placed the position within that classification, where it remained until the district's reclassification in August 2007. What the District refers to as a "single occurrence" of the Bookkeeper position falling under the Food Service classification is in fact a singular occurrence which began a course of conduct that ran unamended and unaltered for more than 13 years. Likewise the inclusion of the subject position within the Food Service category in the booklet of Job Descriptions, a placement unilaterally undertaken by the District in 1999 and as-yet unchanged, and the inclusion of the bookkeeper in the Food Service category in the salary schedule in every collective bargaining agreement from the initial agreement (1993-1995) to the most current (2003-2006).

Although some elements of Guth's duties have changed, she generally performs the same duties as indicated on the 1999 position description. There is nothing in the record to indicate any substantial change in the position between the recognition of the unit in 1993-94 and the publication of the position description in 1999. The Food Service Bookkeeper position in 2007 was thus essentially the same position as existed in 1994. By mutually, openly and unambiguously treating the Food Service Bookkeeper as a Food Service employee for 13 years, the parties have established that as of August 26, 2007, the Food Service Bookkeeper was classified as a Food Service position.

Article XV mandates that when the district cannot implement staff reductions through normal attrition, the Board “shall select an employee for a reduction in the affected Classification in the order of the employee’s seniority” Although the record does not indicate the date the Board decided to reduce its secretarial payroll, that decision had to have been made prior to August 27, 2007, in order for Thomalla to review the employee duties and position descriptions and make a report at the Board meeting of that date. But prior to August 27, the Food Service Bookkeeper position was still within the Food Service classification. The Board thus implemented the staff reduction by partially laying off an employee who was *not in* the affected Classification at the time the decision to reduce staff was made. In so doing, the district violates the express terms of Article XV.

This time line also points out the capricious nature of the Board’s action. Since the Food Service Bookkeeper was in the Food Service classification at the time the District decided to reduce Secretarial hours, the Board could not have included that position within its analysis of that classification. That is, prior to deciding where to reduce hours, the Board must have considered the respective workload and costs of the various classifications, in order to make an informed judgment. But it was not until Thomalla undertook to prepare a new classification list that the position was reclassified as Secretarial. Thus, when the Board considered workloads and costs in determining where to have the partial layoff, it could not have considered the FSB as part of the Secretarial class.

When the board considered which classification should bear the layoff, it could not have included the bookkeeper position within the secretarial class, because at that time it was still in the Food Service classification. As the district did not consider the bookkeeper in deciding to *have* the layoff in the secretarial classification, it cannot rely on the bookkeeper to *implement* that layoff.

The action is also capricious because it does not implement the Board’s policy; in fact, it directly contravenes its initial decision to reduce hours in the Secretarial classification by actually *adding* 30 hours, as the full bookkeeper position is transferred from the Food Service classification to Secretarial. Contrary to the Board’s adopted policy, it has actually reduced the Food Service payroll rather than the Secretarial one.

The record evidence establishes that the Food Service Bookkeeper works in the cafeteria, in the immediate vicinity of other Food Service personnel; performs tasks directly related to, and vital for, the operations of the Food Service program; is supervised by the Food Service Director; handles a Food Service item (milk), occasionally cleans in the cafeteria, and has never substituted for either a Food Service or Secretarial employee. There is clearly a rational basis for classifying this position as a Food Service position, as indeed the District has done since 1994.

In contrast, there is no evidence in the record at all indicating anything about the duties or conditions of employment of positions within the secretarial classification. Nor is there any explanation of why the District determined the Food Service Bookkeeper should be placed

therein. As the District brief indicates, all the record shows is that Thomalla understood that he was to classify each employee by their “current assignments,” and that, “upon reviewing the job descriptions for, and duties performed by, each employee,” he classified the Food Service Bookkeeper as a Secretarial employee. There is no further explanation, either in the record or the District’s briefs, for that action. An action taken without explanation or justification is, by definition, arbitrary.

The district asserts that since the bookkeeper doesn’t work with food, she can’t be a food service employee, especially when her basic tasks – entering data and producing reports – are inherently secretarial or clerical.

It is true that, other than stocking the milk cooler, and occasionally assisting to clean, Guth does not handle food. And, it is true that the duties of entering data and producing reports are generally performed by employees who work in an office, rather than in a kitchen/cafeteria. On its face, it was not unreasonable for Thomalla, and then the board, to consider Guth’s position to be a secretarial one.

But while it may be safely presumed that the Special Education and Building secretaries perform some clerical, record-keeping and reporting tasks, and use one or more pieces of office equipment, that presumption does not, by itself, automatically support the District’s reclassification, especially in light of the 13+ years of past practice, and in the absence of any evidence about the Secretarial position.

The District cites an entry from the *Dictionary of Occupational Titles* prepared by the Office of Administrative Law Judges Law Library, U.S Department of Labor, which appears to classify bookkeepers as clerical employees. While the duties in the dictionary entry do closely track those which Guth performs, there is nothing in the record to establish that the collective bargaining agreement reference to the “Secretarial” classification is necessarily coterminous with “clerical.” That is, just because a federal dictionary defines a generic bookkeeper as a “clerical” position does not mean that the Food Service Bookkeeper in the Elcho School District properly belongs in the “Secretarial” classification.

The District contends that the Association’s acquiescence in Thomalla’s placement of the Special Education Secretary in the Secretarial classification on the new seniority list undercuts the Association’s argument. It does not. First, there is no record evidence as to the duties or relationships of the Special Education assistants or secretary. Nor is there any testimony as to the apparent ambiguity in the 1999-2003 lists (i.e., the inclusion of both “Special Ed Assistants” under the Secretarial group and “Special Ed Assts/Secretary” within the Education Assistants.)

There is also the matter of fundamental fairness. At the time the board decided to impose a partial reduction in secretarial hours, Guth and the association could reasonably rely on the Food Service Bookkeeper being in the Food Service classification. Transferring her position from Food Service to Secretarial *after* the decision has been made to cut Secretarial

hours automatically subjected Guth to immediate partial layoff without any opportunity at all for Guth or the Association to advocate on her behalf. For the District to unilaterally and without notice reclassify the position out of Food Service and into a partial layoff is to deny Guth her due process right. To compound matters, the District's layoff letter of August 27 does not even reference the reclassification of Guth's position (still identified as "Food Service Bookkeeper,") which was not formally recorded in a seniority list until two days *after* the Board's action.

The District contends that Guth had neither the qualifications nor the right to bump into the Assistant Cook position. These are not relevant considerations in this controversy, which concerns a layoff in the Secretarial classification.

By partially laying off an employee who was not in the affected (Secretarial) Classification at the time the decision was made to reduce staff, the district has violated the terms of Article XV. Moreover, because there is no record evidence to explain or justify the re-classification of the Food Service Bookkeeper position as a Secretarial position after 13+ years as a Food Service position, and because the reclassification was contrary to the Board's directive to reduce its total Secretarial hours, the action was arbitrary and capricious, and thus invalid. As a Food Service employee, Guth should not have been partially laid off when the District implemented a reduction in hours in the Secretarial Classification.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

AWARD

1. That the grievance is sustained.
2. That the position of Food Service Bookkeeper shall be returned to the Food Service classification, pending future re-classification, if any, that is consistent with the terms of the collective bargaining agreement and this Award.
3. That the grievant shall be made whole for the partial layoff the District implemented on October 1, 2007.

Dated at Madison, Wisconsin, this 17th day of October, 2008.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

SDL/gjc
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