

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
ARROWHEAD UNITED TEACHERS' ORGANIZATION
and
BOARD OF EDUCATION
HARTLAND-LAKESIDE JOINT SCHOOL DISTRICT NO. 3

Case #25
No. 68892
MA-14394

(Carolyn Ovans)

Appearances:

Eileen A. Brownlee, Attorney, Kramer & Brownlee, 1038 Lincoln Avenue, Fennimore, WI 53809 appearing on behalf of the Board of Education.

Mary Pitassi, Attorney, Wisconsin Education Association Council, Post Office Box 8003, Madison, WI 53708, appearing on behalf of the Arrowhead United Teachers' Association.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the Hartland-Lakeside School District (hereinafter referred to as either the District or the Employer) and the Arrowhead United Teachers' Association (hereinafter referred to as either the Association or AUTO) 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 decision not recall Carolyn Ovans to a full-time position in the Spring of 2008. The undersigned was so designated. A hearing was held on November 17, 2009 at the District's offices, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted briefs and reply briefs, the last of which were exchanged through the arbitrator on February 3, 2010, whereupon the record was closed.

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

ISSUES

The parties could not agree on a statement of the issue and stipulated that the arbitrator should frame the issue in his Award. The issue may be fairly stated as follows:

1. Did the District violate the collective bargaining agreement when it failed to recall the Grievant, Carolyn Ovans, to at least 60% FTE for the 2008-2009 school year?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE III LAYOFF PROCEDURE

A. If it becomes necessary to reduce the number of teaching positions and/or the number of hours in a given teaching position, the procedure outlined below shall be followed.

B. Teachers to be laid off will be notified in writing by the Superintendent of such layoff by May 1 of the year preceding the layoff. The layoff notice shall specify the effective date of layoff. A copy of this notice will be sent to the president of AUTO. Sec. 118.22, Wis. Stats. shall not apply to layoffs arising underneath this Article.

C. Layoff Selection: The School Board shall lay off those teachers necessary in the inverse order of appointment of such teachers within the teaching area according to district-wide certification. A teacher laid off may replace a less senior teacher if the laid off teacher is certified to teach in the other teacher's position.

If two or more teachers were appointed at the same time, then the teacher(s) receiving the layoff notice shall be determined by the date on the teacher's original contract. If original contracts are not available for all teachers involved, the date of Board approval would be used. Should that date be the same, the date on the teacher's state certificate will determine who is laid off. Contracts will be dated with the exact time noted and that will determine the layoff notice. The Superintendent will provide the union with an updated seniority list, which will include the names of all bargaining unit employees, the date and time of the employee's original contract was received in the District office, the dates on each employee's state certificate and area(s) of certification. This list shall be given to the President of AUTO no later than October 1 of each school year.

D. No teacher may be prevented from seeking other jobs during such layoff, and teachers will be reinstated in the inverse order of their layoff if certified for available teaching positions, provided, however, that no full-time teacher shall be required to accept recall to less than a full-time position. Layoffs shall not result in loss of credit for previous years of service, including salary schedule, nor shall layoffs result in any other loss of accumulated benefits. No new substitute appointments may be made while there are laid off teachers from the district available and certified to fill available teaching positions. If a teacher's contract has been reduced pursuant to this article, such teacher shall be restored to his or her prior number of hours if certified to fill available teaching position [sic].

E. Teachers shall have up to fourteen (14) days from the date of receipt of notification of recall during which to notify the Superintendent in writing of their intent to accept the District's offer of reemployment or to indicate in writing their intent to waive their option to be reemployed in the position offered.

F. If a teacher waives his or her right to reemployment in the position offered, the position shall be offered to the laid off teacher with the next greatest seniority, provided that teacher is licensed for that position.

G. Any teacher who refuses recall shall be considered to have voluntarily removed his or her name from the seniority list, provided, however, that a teacher may refuse recall to less than a full-time position in accordance with section D above. Such refusal shall not count as refusal to recall for purposes of this subdivision.

H. Teachers shall be eligible for recall for up to two (2) years from date unrequested leave commenced.

I. Part-time teachers shall enjoy the same contractual language for layoff procedures as full-time teachers. However, if a part-time teacher is laid off he/she may only replace a less senior teacher with similar or less percentage of employment. Part-time teachers are only guaranteed recall at the same percentage of employment at the time of layoff if, in fact, a recall is necessary.

ARTICLE VI GRIEVANCE PROCEDURE

. . .

C. Presentation and Administration of the Grievance

Step 4: If the grievance is not resolved to the satisfaction of the grievant at Step 3, AUTO will notify the Board within twenty (20) days that the grievance shall be advanced to arbitration by AUTO.

The parties agree to the following procedure in selecting an arbitrator to resolve the dispute. First, the parties will attempt to mutually agree to an arbitrator. Second, if the parties are unable to mutually agree to an arbitrator within ten (10) days of AUTO's notification to the Board that the grievance is being advanced to arbitration, AUTO will begin the process for selecting an arbitrator by requesting the Wisconsin Employment Relations Commission (WERC) to submit a list of five (5) arbitrators from the WERC's staff. As soon as the list has been received, the grieving party shall strike a name first. The Board shall strike the second name. Each party thereafter shall alternately strike a name from the list and the fifth and remaining name shall act as the arbitrator. If the parties are unable to mutually agree to an arbitrator and the WERC will not provide a panel of five (5) potential arbitrators from the WERC staff, then the WERC shall be asked to appoint an arbitrator from its staff. No grievance may be submitted to arbitration without the consent of the Association.

It is understood between the parties that the function of the arbitrator shall be to provide a final and binding ruling.

The arbitrator shall not have the power, without specific written consent of the parties, to either advise on salary adjustments, except the improper application thereof, or to issue any opinions or rulings that would have the parties add to, subtract from, modify or amend any terms of the Agreement.

. . .

ARTICLE XX MANAGEMENT RIGHTS

The Board, on its own behalf and on behalf of the electors of the District, hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred 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, the right:

- A. To the executive management and administrative control of the school system, its properties and facilities, and the activities of its employees.
- B. To hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions for their continued employment, or their dismissal or demotion; and to promote and transfer all such employees in the best interest of the school. Teachers employed after July 1, 1982 shall serve a probationary period of three (3) contract years. The probationary period is only for new teachers to the District.
- C. After due consultation through the administrator with the appropriate teacher or teacher's committee, to consider recommendations and then:

- 1) Approve grades and courses of instruction, including special programs, and to provide for athletic, recreation and social events for students;
- 2) Approve the means and methods of instruction, the selection of textbooks and other teaching materials;
- 3) Determine class schedules, hours of instruction, and the duties, responsibilities, and assignments of teachers and other employees with respect to administrative and non-teaching activities, and the terms and conditions of employment.

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

...

BACKGROUND

The Grievant, Carolyn Ovans, is a part-time Physical Education Teacher for the Hartland-Lakeside School District. She has worked for the District since 1995. She holds both a 530 license (Physical Education) and an 860 license (Adaptive Physical Education). Until the 2008-2009 school year, she was employed at 60% FTE in the elementary school. Due to layoffs for the 2008-2009 school year, she was reduced to 42% FTE. That reduction is the focus of this grievance.

In 2007-2008, the staffing of physical education classes in the District was:

Anita Allwardt –	Elementary Physical Education and Adaptive PE – Full-time
David Christman –	Middle School Physical Education – Full-time
John Frye –	Middle School Physical Education – Full-time
Roberta Breeden –	Middle School Physical Education – Full-time
Carolyn Ovans –	Elementary Physical Education and Adaptive PE – 60% FTE
Melissa Brengosz –	Middle School Health and Physical Education – 44% FTE
Barb Taege –	Elementary Physical Education – 20% FTE

John Frye and Roberta Breeden decided to retire at the end of the 2007-2008 school year, and the District decided to fill only one of those positions. At roughly the same time, the District decided to reduce the elementary PE and middle school Adaptive PE offerings. The positions held by Taege and Brengosz were eliminated and the Grievant's position was reduced from 60% FTE to 30% FTE. As more fully explained below, the Grievant's position was later increased to 42% FTE. Allwardt maintained her 100% FTE by being assigned Taege's

kindergarten and first grade classes, and the Grievant's first and second grade classes. As the contract does not allow part-time faculty to bump full-time faculty, Taege and Brengosz were laid-off completely, and the Grievant was reduced.

In March, 2008, the District posted a full-time middle school PE position to replace Frye and Breeden. The posting specified that both 530 and 860 licenses would be required. The Grievant applied for this position and had a positive interview with the Middle School Principal. However, the District opted to instead hire Sarah Huffner, an outside applicant who held 530 DPI licensure in Physical Education, and a national certification in Adaptive Education but not the 860 DPI license in Adaptive Physical Education. Huffner was hired on the understanding that the District would seek a one year license for her, and that she would obtain an 860 license by the start of the 2009-2010 school year. After she was hired, however, the District increased the Grievant's contract to 42% FTE to cover Adaptive PE, and did not assign any Adaptive PE classes to Huffman in 2008-2010. Again in the 2009-2010 school year, the Grievant was initially offered a 30% contract, which was increased to 42%.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

A. The Arguments of the Association

The Association argues that the District violated the contract by not recalling the Grievant to at least a portion of the position ultimately filled by Huffner. The contract distinguishes between full-time and part-time faculty for the purpose of bumping. A part-time teacher may only bump less senior teachers having a similar or lower percentage of employment. However, the layoff and recall rights of part-time teachers are stated in clear and mandatory terms:

I. Part-time teachers shall enjoy the same contractual language for layoff procedures as full-time teachers. ... Part-time teachers are only guaranteed recall at the same percentage of employment at the time of layoff if, in fact, a recall is necessary. [emphasis added]

The "contractual language for layoff procedures" makes it clear that seniority and certification are the linchpins of layoff and recall. Specifically, Paragraph D provides, in relevant part, that:

... teachers will be reinstated in the inverse order of their layoff if certified for available teaching positions, provided, however, that no full-time teacher shall be required to accept recall to less than a full-time position. If a teacher's contract has been reduced pursuant to this article, such teacher shall be restored to his or her prior number of hours if certified to fill available teaching position.

Here the District hired an outsider to perform available work within the Grievant's area of certification, even though that outsider did not possess the required certification for the job.

The hiring of Huffner makes it clear that the District believed it was necessary to have PE and Adaptive PE work performed, work which was within the Grievant's area of certification. This should have triggered the recall language of the contract. The District's argument against this, that recall is to "positions" and that there was no "position" available to restore the Grievant's former FTE, is more rhetoric than substance. The contract guarantees the Grievant recall to at least the FTE she previously held, but it does not prevent the District from recalling her to a greater FTE, including full-time. The Association notes that there is a prior case, involving Jean Tarjan in the early 2000's, where a part-time teacher was recalled to a full-time job. There are other cases where part-time teachers were not recalled to full-time jobs, but the practice is at least mixed, and it is within the District's capacity to do so if it wishes.

Even if the District does not wish to award the Grievant a full-time position, it may not wall off the classes that would otherwise be available to her in favor of constructing a full-time position for someone else. It is contrary to what the District has done in other cases, and contrary to the operation of the contract language. While the District objects to parsing out portions of a job, it had no difficulty in carving up the positions held by Taege and the Grievant in order to maintain Allwardt at 100% FTE. Yet it argues that the vacant classes formerly taught by Frye and Breeden cannot be made available to the Grievant, and must instead be bundled into a full-time position for a person new to the District, favoring a potential employee over those with actual service to the District and actual seniority rights. That cannot be squared with the guaranteed recall rights of the Grievant. The District cannot be allowed to evade the language and the purposes of the contract merely by declaring that it wishes to create a new position at a greater FTE rather than respecting the recall rights bestowed on part-time teachers by a binding contract.

B. The Arguments of the District

The District takes the position that the Grievant was properly reduced in hours, and that the grievance must be denied. The Association bears the burden in this language case, and it simply cannot meet that burden. The District maintains the right under the collective bargaining agreement to manage the affairs of the District, including the right to create and fill positions. The essence of the Grievant's claim is that the District does not retain the right to create positions so long as any part-time teacher is on layoff in that area of certification. Rather it must parcel out classes to the laid off part-timers and then create a position with what is left over. That represents a transfer of management rights to the laid off teachers, and denies the Board the right to decide whether it wants to staff an area with full-time teachers rather than part-time teachers. Nothing in the contract supports that claim.

The contract uses the term "positions" when discussing recall rights. If the contract permitted the type of parsing out of positions the Association claims, there would be no reason for the limitations on bumping for part-time faculty. The contract provides that, in the event of

a layoff, “However, if a part-time teacher is laid off he/she may only replace a less senior teacher with similar or less percentage of employment.” If the contract does not contemplate positions as the basis for claiming jobs, rather than classes, all portions of a less senior part-time teacher’s workload would presumably be fair game. They are not. Plainly the parties to the contract knew the difference between positions and classes, and opted to use positions as the basis for these transactions. History supports this analysis – there is no example of a laid off or reduced part-time teacher claiming portions of vacant full-time positions. There is one example of the District recalling a part-time teacher to a full-time opening, but no one was able to explain the circumstances of that case. Even there, however, the transaction involved a position, and not portions of a position.

The behavior of the Association and the Grievant in this instance demonstrate that they understood that the Grievant’s recall rights were to be exercised if positions became available, not if classes became available. The Grievant did not initially challenge the District’s posting of a full-time position. Neither she nor the Association claimed that 30% of the posting was hers by right. Nor have they sought to have the remainder of the position parceled out to Melissa Brengosz and Barb Taege, even though those two would have an equally valid claim. The contract simply does not require the District to Balkanize positions in order to satisfy the Grievant’s desire for a return to 60% FTE.

DISCUSSION

The Grievant, a part-time PE teacher, was reduced from 60% FTE to 30% FTE, and two of her less senior part-time colleagues were completely laid off, as part of a general reduction in force in the PE program. At the same time, two full-time PE jobs for which the Grievant was certified fell vacant due to retirement. The District chose to fill only one of the jobs, and posted it. The Grievant and an outside applicant competed for the posting, and the outside applicant was hired for the position. The instant grievance was thereafter filed, contending that the job, or a portion of it, should have been awarded to the Grievant in the exercise of her recall rights. The issue in this case therefore is whether the contract requires the District to offer available classes to the Grievant, in order to restore her to 60% FTE, rather than filling a vacant full-time teaching position. I conclude that it does not, and that the grievance must be denied.

Article III of the collective bargaining agreement addresses layoffs. Subsection C speaks to the selection of teachers for layoff and their bumping rights:

C. Layoff Selection: The School Board shall lay off those teachers necessary in the inverse order of appointment of such teachers within the teaching area according to district-wide certification. A teacher laid off may replace a less senior teacher if the laid off teacher is certified to teach in the other teacher’s position.

Subsection D is concerned with, among other things, recall rights in general, the rights of full-time teachers to refuse a partial recall, and the recall rights of a teacher who has been reduced, rather than completely laid off:

D. No teacher may be prevented from seeking other jobs during such layoff, and teachers will be reinstated in the inverse order of their layoff if certified for available teaching positions, provided, however, that no full-time teacher shall be required to accept recall to less than a full-time position. If a teacher's contract has been reduced pursuant to this article, such teacher shall be restored to his or her prior number of hours if certified to fill available teaching position (sic).

Finally, Subsection I addresses the layoff and recall of part-time teachers. It prevents upward bumping to a greater FTE, and limits recall rights to the same percentage of FTE as was held at the time of the layoff:

I. Part-time teachers shall enjoy the same contractual language for layoff procedures as full-time teachers. However, if a part-time teacher is laid off he/she may only replace a less senior teacher with similar or less percentage of employment. Part-time teachers are only guaranteed recall at the same percentage of employment at the time of layoff if, in fact, a recall is necessary.

The Association focuses on the final sentence of §I and asserts that the Grievant is "guaranteed" recall. This ignores the conditional phrasing at the end of the provision, "if, in fact, a recall is necessary." It also misperceives the overall thrust of the sentence, which is to limit and clarify the recall rights of part-time faculty by avoiding a claim for a materially greater FTE than the employee originally had, if and when a recall opportunity arises.

Subsection D is the general provision regarding recall and, as the District argues, it speaks to recalling teachers to available "positions." As both parties acknowledge in their briefs, I have previously addressed the distinction between positions and assignments in the context of layoffs. In LAKE GENEVA SCHOOLS, CASE #20, NO. 50707, MA-8350 (NIELSEN, 9/22/94), I rejected an effort by a teacher to bump into portions of other jobs based on her certification and greater seniority than the persons holding those jobs. The contract language provided that "Teachers selected for layoff may request in writing to bump into another teaching position in the district for which they are officially certified and for which they have more seniority in the district." In determining that the teacher did not have the right to bump, I found that "positions" had a meaning which was distinct from "classes" or "assignments":

A "position" is a bundle of duties (in the case of teachers, a bundle of classes and/or supervisions) tied together into a job, created by management to accomplish the educational and administrative goals of the District. Balkanizing positions into separate class and supervision components for bumping purposes suggests that teachers in a layoff setting may design their own jobs. If a "position" is the same as a "class", why could not a full-time teacher facing

layoff take individual classes from a number of junior teachers to create a job, leaving those teachers to cherry-pick the classes they desired from other less senior teachers, and so on throughout the District? Given that the parties here agree that upward bumping is permissible, from a part-time into a full-time position, it would also be possible for the grievant to claim sufficient classes from junior teachers, full or part-time, to craft a job with a greater FTE than the one she had before the reduction ordered by the School Board. These are absurd results, but they are entirely permissible under the interpretation urged by the grievant. Certainly the parties could negotiate for these results, or could construct an orderly system to regulate bumping based on classes, but there is nothing in their contract or past history to suggest that they have done so.

Where the exercise of District rights impairs the exercise of contractually guaranteed seniority rights, the District has an obligation to act in good faith. If there were evidence that the available positions were somehow gerrymandered into odd class combinations in order to frustrate the grievant's seniority rights, a case could be made out under the contract's seniority provisions. The grievant's difficulty in bumping does not appear to be connected to any bad faith by the District. Instead, it flows from the fact that the need for reductions only became evident after the positions and class schedules for the school year had already been determined. While it would not have been impossible for the District to construct a position for the grievant at 0.87 FTE or above, nothing in the contract required it to do so at that late date. . . .

LAKE GENEVA SCHOOLS, at pages 6 and 7.

It remains the case that where parties use the word "positions" to describe bumping or recall rights, they do not generally contemplate that the contours of the position will be defined by what is left after the exercise of those rights. Rather, the position is, in the first instance, determined by the District, according to its bona fide educational needs. This, of course, is subject to scrutiny, to determine whether the creation and configuration of the position was done in good faith, for purposes other than denying employees the full exercise of their negotiated seniority rights.

Within the context of a part-time employee, defining what is and is not a position can be somewhat problematic. Here, for example, a part-time PE position at 75% FTE would, assuming the necessary scheduling of classes permitted, allow for the restoration of the Grievant's FTE, as well as that of either Taege or Brengosz, but only if it was parceled out among them. None of them could claim the position in its entirety as a matter of right, because it would represent a material increase in their FTE prior to the layoff. In the case of such a part-time position, the Association would be entitled to question the need for bundling the available part-time work into a single position, as it would offer the District a means of frustrating recall rights for no apparent legitimate purpose. However, that is not what happened here.

The posting filled by Huffner was for someone to fill a bona fide, existing position made available by retirement. This is not a case of a District combining PE classes with different disciplines into one job to avoid recalling laid off teachers, or creating part-time jobs that are larger FTE than those of laid off workers in order to evade their recall rights. Instead, it is a decision to maintain an existing full-time position rather than creating two part-time positions. Certainly the District could have chosen to create two part-time positions, and the Grievant would have been eminently qualified to fill one of them. But the question is not so much whether it could have been done, but whether it had to be done.

To illustrate the difficulty with the Association's position, assume a slightly different recall scenario. If Frye and Breeden had not retired, the staffing plan would have required the layoff of one full-time instructor. Assume that instructor is less senior than the part-time instructors. If the District then decided to restore that position, under the Association's approach, the Grievant would have been entitled to claim 30% of it, Taege would have been able to claim 20%, and Brengosz would have been entitled to 44%, leaving 6% for the laid off full-time instructor, even though it was precisely the same position that that full-time instructor had been laid off from.¹ That is not an impossible result, but it is not the result suggested by the language of the collective bargaining agreement.

The right of the District to insist on posting a single, coherent "position" is, of course, subject to its duty to act in good faith. As discussed above, the fact that this was an opening in an existing position made available through retirement creates a presumption that it is bona fide. The Association questions, however, why Huffman was selected for this opening, given that the Grievant possessed the required Adaptive PE licensure and Huffman did not. It argues that the reasonable implication is that the District wanted to avoid recalling a more expensive senior teacher. This argument goes more to the legitimacy of the posting procedure than to the recall rights of the Grievant, since it focuses on the filling of the position rather than the creation of the position. Its significance is reduced by the fact that, after Huffman was hired, the District increased the Grievant's contract and assigned her rather than Huffman the available Adaptive PE work. Moreover, Superintendent Glenn Schilling plausibly explained that Huffman had the credentials to become licensed in Adaptive PE in Wisconsin, and could have worked under a temporary license for her first year, if the District had not decided to segregate out the Adaptive PE work and give it to the Grievant. While it is easy to appreciate the Grievant's disappointment with the decision to hire Huffman rather than her, I cannot find that that choice is evidence that the District acted from a bad faith desire to avoid recalling her from her partial layoff.

¹ This illustration is somewhat inaccurate, since a portion of Brengosz's FTE consisted of Health classes.

The contract contemplates recall to available positions. While the concept of position maybe somewhat murky if the positions are part-time, the disputed position here was full-time. It was a bona fide, pre-existing position, not something created as a ruse to avoid recalling the Grievant. The posting of that position, and the process used to fill it, do not demonstrate that the District was acting in bad faith by using the posting process rather than the recall provisions of the contract. I therefore conclude that the District did not violate the collective bargaining agreement. Accordingly, I have denied the grievance in its entirety.

AWARD

The District did not violate the collective bargaining agreement when it failed to recall the Grievant, Carolyn Ovans, to at least 60% FTE for the 2008-2009 school year. The grievance is denied.

Dated at Racine, Wisconsin, this 16th day of August, 2010.

Dan Nielsen /s/

Daniel Nielsen, Arbitrator