

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUSAUKEE EDUCATION ASSOCIATION

and

WAUSAUKEE SCHOOL DISTRICT

Case 60
No. 69076
MA-14466

(Kostelecky Grievances)

Appearances:

Mr. Fred Andrist, Director, Northern Tier UniServ, 901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin appearing on behalf of Wausaukee Education Association.

Mr. Scott Mikesh, Attorney, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, Wisconsin, appearing on behalf of Wausaukee School District.

ARBITRATION AWARD

Wausaukee Education Association, hereinafter “Association” and Wausaukee School District, hereinafter “District,” jointly requested that the Wisconsin Employment Relations Commission assign Lauri A. Millot, staff arbitrator, to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the undersigned on December 18, 2009, in Wausaukee, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received by February 19, 2010 at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The District challenged the procedural arbitrability of the grievance asserting that it was beyond the scope of the Arbitrator’s authority in as much as curriculum decisions are statutorily vested with the District’s Board of Education.

The parties stipulated as to the substantives issues and framed them as follows:

Did the District violate the collective bargaining agreement and specifically, Articles 3, 11, 16 or 17, when it reduced the Grievant from 62.5 percent full time equivalent teacher to 37.5 percent full time equivalent teacher for the 2009-2010 school year? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE III – LAWS, RULES AND REGULATIONS

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- B. In addition to any rights or privileges under this agreement, this agreement herein incorporates all rights, decisions, privileges, and responsibilities secured or mandated under Wisconsin or Federal law.
- C. Nothing contained herein shall be construed to deny or to restrict any teacher such rights under the laws of Wisconsin and the United States or other applicable laws, decisions, and regulations. The rights granted to teachers hereunder shall be deemed to be in addition to those provided elsewhere.

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ARTICLE XI – LAYOFF PROVISIONS

- A. If necessary to decrease the number of teachers, in whole or in part, the Board may lay-off the necessary number of teachers, in whole or in part, taking into account and protecting the district-wide seniority of all teachers who are certified for renewal. No teacher may be prevented from securing other employment during the period s/he is laid off under this article. Such teachers shall be reinstated in inverse order of their being laid off, if qualified for and makes application for the vacancies. Such reinstatement shall not result in a loss of credit for previous years of service. No new or substitute appointments may be made while there are laid-off teachers available who are certified to fill the vacancies and who apply for the position.
- B. If any lay-offs are being contemplated, the Association shall be informed by the administrator at all stages of recommendations and plans regarding said lay-offs.

- C. Teachers affected by a staff reduction will be notified of vacant positions within the district and areas of certification and department from which they were laid off when they occur. To be recalled, a teacher must be certified for the open position. Recalled teachers will be re-employed only if they accept the offer of employment within five (5) days after receiving the offer, or within thirty (30) working days if the offer is made for employment for the beginning of a school term. The notice shall be sent to the last known address of the employee on file in the district records.
- D. A teacher who is on lay-off may continue membership in group insurance by assuming payment.
- E. The limitation of recall rights shall be for a period of three (3) years.
- F. Teachers moved from full-time to part-time positions shall retain their seniority status.
- G. Preliminary notice of lay-off shall be given to bargaining unit members affected by April 15 with final notice on or before May 1 of each year. Bargaining unit members being laid off shall have the right to a private conference with the Board if requested by the bargaining unit member within five (5) days of the preliminary notice. The conference shall be scheduled prior to May 1 unless the parties mutually agree to an extension. No bargaining unit member shall be laid off except by a majority vote of the full membership of the Board.

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ARTICLE XVI - FAIR DISMISSAL

- A. No teacher shall be non-renewed unless there is a reasonable basis in fact, and the reason is supported by substantial evidence.
- B. No teacher shall be non-renewed unless the reasons therefore are reasonably related to the operations of the school district.
- C. No teacher shall be non-renewed unless the teacher has been advised in advance of the reasons for non-renewal.
- D. No teacher shall be non-renewed unless the Board or its designee conducted an investigation of the reasons for non-renewal.

- E. No teacher shall be non-renewed for any reason that is prohibited by state or federal statute.
- F. All teachers, whether presently employed with less than three (3) years service in our system or newly hired, shall serve a two (2) year probationary period. At the end of the second year, the Board shall, on an individual basis, determine whether the teacher shall remain on probationary status. If the Board, or its designee, feels the individual teacher still has some deficiencies, it can continue the probationary status for one (1) additional year. If the teacher has still not corrected the deficiencies, s/he shall be non-renewed. Any teacher whose probation has been extended shall have his/her status reviewed annually to determine if s/he should remain on probation. When probation is extended beyond the second year, the teacher shall not receive the increment normally due him.
- G. If a teacher has successfully completed his/her probationary period, s/he shall not be terminated, non-renewed, suspended, disciplined, reprimanded, reduced in rank or compensation except for cause.

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ARTICLE XVII – FAIR DISCLOSURE

- A. When the Board determines that it will consider the possible non-renewal of a teacher it shall give the teacher notice as defined in Wisconsin State Statute 118.22.
- B. The Board shall at the time of notice also supply the rationale and all facts supporting the reasons for the non-renewal.

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ARTICLE XXIII- EVALUATION

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- C. The performance of non-probationary school personnel will be evaluated in writing at least every third year.
- D. Each teacher shall receive a signed (by the evaluator), duplicate copy of each of his/her evaluations. If there are deficiencies to be corrected, then such evaluation shall be returned promptly to the teacher.

- E. All evaluations are to be current and complete with the length of time of classroom observation noted on the evaluation and signed by the evaluator.
- F. A teacher, feeling his/her evaluation is unjust, may appeal to the Administrator.
- G. Areas needing improvement shall be listed on the initial evaluation and on all subsequent evaluations.
- H. Personnel files are open to the inspection of only one's individual file. The personal (sic) file shall contain, at the teacher's discretion, a written explanation of any statements contained therein.
- I. All evaluations shall be made openly.
- J. The principal or teachers appointed by him shall provide assistance to the teacher so as to attempt to improve the quality of instruction. No teacher providing assistance to another teacher shall be held accountable for the outcome of the teacher to whom assistance is being given.
- K. No evaluations of employment shall be written on a personal contract.
- L. All evaluations shall be returned to the teacher within fifteen working (15) days of the observation or said evaluation shall be considered null and void.
- M. Evaluations shall be signed by the teacher as an acknowledgement of receipt.
- N. No evaluation shall be done by electronic means.

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ARTICLE XXVI - GRIEVANCE PROCEDURE

- A. Purpose. The purpose of this procedure is to provide an orderly method for resolving differences arising out of the interpretation of this agreement and to secure at the lowest possible administrative level equitable solutions to the problems which may from time to time arise affecting the welfare of the teachers. An effort shall be made to settle any such differences through the use of the grievance procedure.

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**ARTICLE XXXIII – COMPENSATION, MISCELLANEOUS
AND GENERAL PROVISIONS**

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- O. Teachers must be notified of tentative class assignment for the following year by no later than April 1.

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STATUTORY PROVISIONS

- 118.01 Educational goals and expectations. (1) **PURPOSE.** Public education is a fundamental responsibility of the state. The constitution vests in the state superintendent the supervision of public instruction and directs the legislature to provide for the establishment of district schools. The effective operation of the public schools is dependent upon a common understanding of what public schools should be and do. Establishing such goals and expectations is a necessary and proper complement to the state's financial contribution to education. Each school board should provide curriculum, course requirements and instruction consistent with the goals and expectations established under sub. (2). (2). Parents and guardians of pupils enrolled in the school district share with the state and school board the responsibility for pupils meeting the goals and expectations under sub. (2).

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BACKGROUND AND FACTS

The Grievant, Kurt Kostelecky, was hired full-time by the District in 1999 to teach Technology Education. The District Administrator at that time was Bill LaChappell. LaChappell knew the Grievant from when they both worked in the Bonduel School District; LaChappell as the principal and the Grievant as a teacher. LaChappell favorably evaluated the Grievant in December of 2003 noting that the Grievant was satisfactorily performing his duties in most categories and rating him "commendable" in classroom content, understanding technology, creating quality products, self directed learning and participation in in-service activities. LaChappell left the District in 2003.

At some point during the 2004-2005 school-year, then Principal Pamela Beach recommended the termination of the Grievant. The Association filed a grievance and ultimately, the District did not accept Beach's recommendation.

During the 2005-2006 school year the Grievant successfully litigated a prohibited practice complaint and a grievance which he filed against the District. The Grievant was issued a layoff notice for budgetary reasons before the school year started, but was later recalled to half time employment following passage of the biennial budget. The Grievant filed a complaint regarding the partial layoff recall because another teacher, not certified in technology education, was recalled before him and assigned to teach two technology education courses for which she was not certified. The Grievant was returned to full time work by the Hearing Examiner.

The grievance was in response to a suspension pending termination recommended by Beach as a result of the Grievant making modifications to his District assigned computer. The Board reduced the termination to a six week suspension. The arbitrator found in favor of the Grievant and expunged the suspension from his record.

The Grievant was evaluated by Beach in November 2006 and she concluded he was satisfactorily performing in all areas except “shares professional load” explaining that he was not fulfilling his supervisory time expectation.

In the 2007-2008 school year the District experienced financial difficulties resulting in a general reduction in force. The Grievant received a partial lay off notice of lay off During the spring of 2008, the Grievant received notice of a partial lay off for the following school year. The Grievant was informed on July 22, 2008 by District Administrator Jan Dooley that even if the referendum passed on August 19, his full time equivalency would not change. The Grievant was employed 62.5 percent for the 2008-2009 school-year.

Dooley observed the Grievant on December 4, 2008 and prepared an Observation/Evaluation Report which rated his performance as “Needs Improvement.” The Report encompasses the time period between December 2008 and May 2009. Dooley signed the Report on May 29, 2009 and commented as follows:

Kurt,

You did a good job in teaching the lesson that I observed. I encourage you to thoroughly plan each and every lesson that you teach, in each and every class that you teach.

As I have indicated to you previously, my evaluation will exceed the one-time classroom observation to encompass the total nature of your Technology Education program. Red flags have arisen for me that have been incorporated into this report. The first red flag comes from the review of your lesson plans, from which I question the substance of the content of your courses and whether you are following a solid curriculum. The second red flag comes from the lack of documentation on safety training and related assessment procedures. The third red flag comes from lack of documentation for specific curriculum for

each course, including solid units of study in your courses, the specific skill sets being taught, a cohesive scope and sequence and solid assessment procedures. If you need additional resources in order to effectively teach your courses, you need to identify what those resources are and identify costs associated with the purpose of those resources. This year, you did not submit a budget for your program. This budget should have been one of the top priorities so that you can effectively teach your classes.

As I indicated, you are not to have individualized student projects in Auto 1 until you have taught the necessary foundational technical skills to enable the students to effectively troubleshoot and repair a vehicle.

In order for me to rate you in each category, I need more information and thus will be observing your other courses and am asking you to supply more detailed documentation. If you do not have such documentation, you will need to develop it. I will provide scores for each standard as I continue my observations and data collection.

By January 16, prior to the start of semester 2, I will need the following documentation from you:

1. The substantive units of study, including the technical skill sets that will be taught in Tech Ed 8, Woodworking, Auto 2, and Intermediate CAD.
2. The assessments that will be used to determine student understanding of the knowledge/concepts being taught along with the assessments to determine application of the knowledge/concepts in the form of a developing skill. I ask you to redesign your grading scale to have an emphasis on technical skill development prior to the start of second semester.
3. Documentation of your safety training with the students including any handouts provided, test/quizzes (sic) given, and hands-on assessments that demonstrate that each and every student clearly understands how to safely use each piece of equipment in your courses.

You have an opportunity to build a quality program, Kurt. Your program should be developing technical skills within your students that will enable them to enter the world of work upon graduation from high school or provide them with a solid foundation to enter post-secondary education. Your course content should be such that would enable you to articulate some of your courses with

NWTC. Your courses should have substance and rigor. Our students deserve no less.

Subsequent to the December observation report, the following measures were taken to improve your program:

1. You identified the units of study for your second semester courses to serve as the basis for instruction.
2. Your 1st semester Auto 1 class lacked substance. Textbooks and supplemental resource materials were purchased to support your Auto 2 course. The units of study taught in Auto 2 should have been taught in Auto 1. When in your Auto 2 class on April 30, I was pleased to see the effective use of the resource materials to do a Chapter 12 review with your students prior to the test.
3. In order to ensure the safety of the students in the shop area the areas were cleaned, organized, and inspected. An inventory of equipment was also developed, since this procedure was done, you have done a good job in keeping your shop areas clean and organized.
4. You developed additional safety materials and provided more extensive training and assessment of safety procedures.
5. You redesigned your grading structure for your courses to place greater emphasis on assessing knowledge and concepts and skills for all of your 2nd semester courses.

It is important that the changes that you made for 2008-2009 continue into 2009-2010. It is critical that all the courses that you teach have substance and rigor and that you teach specific units of study (knowledge/concepts and developed skill sets) for each course that you teach. Prior to the start first semester for the 2009-10 school year, please submit the identified units of study for Home Maintenance, along with a breakdown of your grading structure placing greater emphasis on knowledge/concepts and skills assessment, rather than employability skills. Prior to the start of second semester, please do the same for Introduction to Welding.

Your license with the Wisconsin Department of Public Instruction only allows you to teach basic-level courses in technology education. In order for you to teach advanced-level coursework, you will need to meet the requirements for vocational certification in each specialized area. These licenses include #291 – New & Emerging Fields in Technology Education; #292 – Manufacturing; #293

– Communications; #299- Construction. Without such vocational certification, you are limited to teaching basic-level courses. I am attaching a document from the Wisconsin Department of Public Instruction that outlines the requirements to obtain such certification.

Please continue to develop and implement educationally sound safety instruments (documents) and safety assessment measurements for using the equipment in your courses for the 2009-10 school year. In addition, you are to report any equipment malfunctions immediately and have a lock box placed on the equipment until it is repaired by our Building Sites Manager or other trained professional. Under no circumstances should any equipment that is faulty be used. For each class that you teach, please allow time at the end of every class period to continue the practice of shop clean up. All materials, tools, and small equipment should be put away in an organized fashion for easy access.

By July 1, which is the deadline for all teaching staff, submit your requested budget for the 2009-10 school year. As with other staff members, any budget requests over \$250 must be discussed in a meeting with me and with Kelly. Budgets over \$250 must be based on solid program goals and needs. Not submitting a budget, which you did not do for the 2008-09 school year, is not acceptable.

As I indicated in your report, it will be important for you to adjust your negative, disruptive approach in communicating with administrative personnel. Please look for ways to communicate more effectively.

The Grievant did not respond in writing to the administrative commentary.

On December 31, 2008, Dooley sent an e-mail to the Grievant indicating she had located a 2004 safety evaluation prepared by the EMC Insurance Companies that identified safety concerns in the Grievant's work area. The e-mail stated that after she found the e-mail she immediately toured the area, concluded that many of the safety conditions had not been rectified and set a meeting for January 7 to discuss how to clean, organize and inventory the work areas in advance of the start of the second semester. Dooley offered to hire a substitute teacher for the Grievant's classes so that he could complete the clean-up and organization. Dooley also requested an inventory of all equipment and tools and offered the Grievant the services of another staff member to assist in completing the inventory.

Dooley followed up on her December 31 e-mail on January 5, 2009, writing:

Kurt,

Have you located any textbooks or other resources to teach a solid curriculum in all your classes 2nd semester? We will need to discuss the costs and, if within

reason, get some materials ordered soon. What types of woodworking projects will the students be doing in your Woodworking class 2nd semester?

I have doing (sic) extensive thinking about the condition of your shop areas. Please be prepared to act immediately on the clean-up. Until the shop areas are cleaned, organized, inventoried, and inspected, they are to be off limits for student use. We'll talk more on Wednesday. Plan on teaching specific units of study in your courses (without use of the shop areas) until the tasks are accomplished. You may want to coordinate with Jim the best way to get everything done.

Thanks, Jan

A subsequent e-mail exchange addressing the clean up and organization in the shop areas occurred. Additionally, Dooley requested that the Grievant investigate textbooks or other resources to allow him "to teach a solid curriculum." The Grievant responded with recommendations for textbooks for the Modern Automotive Technology class, for the Woodworking class and indicated that he was looking for a text for the Automotive II class. The anticipated cost for the automotive text was \$61 each with a need for 25 copies, the instructor resource at \$180 and the power point text for \$195 for a total of \$1900. In a February 12, 2009 e-mail record, Dooley documented that the students were responding well to the textbooks and that the power point was "great."

During the same time period, the District was preparing the schedule for the 2009-2010 school-year. The preliminary scheduling matrix reduced the Grievant an additional 12.5 percent from his 62.5 percent full time equivalency in 2008-2009. Additional staffing modifications for the 2009-2010 school year included increasing special education teacher C. Deschane from half time to full time and shifting her to CESA employment, increasing library media specialist S. Schlies from 75 percent full time, and approving mathematics/physics teacher R. Figas' request to be reduced from full time to half time. The Grievant was the only staff member recommended for involuntary reduction and the overall teacher staffing, if approved as Dooley recommended, would have been increased by 0.25 full time equivalency.

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On March 30, 2009, Dooley sent the following to the Grievant:

Kurt,

¹ I have discounted the reduction in bus driver positions as a result of the elimination of the bus service and its 10 drivers (5.18 full time equivalents) simply because that was a result beyond the control of the District. That decision was made by Arbitrator Schiavoni in March of 2009.

On Friday, I indicated that you will be teaching three blocks with one prep/duty on Day 1. Bill and I are proposing the following courses in order to keep your high school electives on an every-other-year rotation:

- Block 1 - Construction 1 (semester 1) and Construction 2 (semester 2)
- Block 2 - Tech Ed 8 (semester course – both semesters)
- Block 3 - Duty/Prep or Prep/Duty depending on the schedule
- Block 4 - Home Maintenance (semester 1) and Welding (semester 2)

If you would like to see any changes, please arrange to meet with Bill and me. If no changes are made, please have your course descriptions to Misty by Monday, April 6.

Thanks, Jan

The Grievant responded 14 minutes later with the following e-mail:

Jan,

I would like to see for next year:

Block 1 – Woodworking (1st semester)/Welding (2nd semester) – these would be freshman/sophomore oriented courses so Misty will have to make sure there isn't a conflict with 9th/10th grade required courses.

Block 2 – Tech. Ed. 8

Block 3 – Duty/Prep

Block 4 – Construction I (1st semester)/Home Maintenance (2nd semester) – these would be upper-level courses which Woodworking students from this year should take next year. Construction I should be at the end of the day when it is warmer outside if we are doing outdoor projects.

I do not feel we should offer an advanced level of Construction next year (as well as advanced levels of ANYTHING) unless we can increase staffing in TE. It leaves out too many kids who are interested in other areas. If you don't think that Woodworking should be offered instead of Construction II, then another class can be substituted instead. Please get back to me as soon as you can so I can begin planning course descriptions.

The Grievant did not hear anything further from Dooley and on April 1 the scheduling matrix for 2009-2010 was posted. The Grievant's schedule, as proposed by Dooley, did not change. As a result of that posting, the Grievant sent the following e-mail to Dooley:

Jan,

I see on the proposed matrix for next year it shows what you had originally sent me in the e-mail from Monday @ 1:20 for Tech. Ed. Offerings. I replied 14 minutes after your e-mail was sent to me suggesting that we offer Woodworking 1st semester (with Welding 2nd semester) in lieu of Construction II and move Home Maintenance opposite Construction I. Woodworking and Welding are both underclassman-level course with Construction and H.M. being upper-level courses. I'm assuming I gave you as much time as possible to think my suggestions over having replied within 14 minutes of your e-mail to me. Is there still room to change these to fit my suggestions? You asked me what I thought then I never heard back from you. I e-mailed both you and Bill when I originally replied.

Thank you for your cooperation.

Dooley did not respond to the Grievant.

The District Board of Education met on April 8, 2009. The agenda included the topic, "Parent Concern Regarding Technology Education Course Offerings - James Duer." In advance of the meeting, Duer requested to be included on the agenda and was a part of an informal citizen group interested in retaining technology education course offerings in the District. Duer had prepared a presentation for the Board that included students and other parents, but when he finished speaking and invited other citizen group members to speak, Board President Dennis Taylor informed Duer that he (Duer) was the only person on the agenda to speak concerning technology education. The Grievant, who was at the meeting, intervened and publicly communicated to the Board his belief that the parents and students should be heard. Taylor interrupted the Grievant, informed him he was out of order and told him that he needed to be quiet or risk being removed from the meeting. Later during the meeting, the District took action in closed session with regard to staffing and teacher contracts for the following school year.

The next day the District offered the Grievant a teaching contract at 37.5 percent full time equivalency rather than the 50 percent teaching contract that Dooley recommended in the scheduling matrix. The preliminary notice of lay off offered the Grievant a conference to discuss his employment status with the Board.

Within days of the April 8 board meeting, Taylor visited Duer at Duer's home. Taylor, who had served on the board from 2003-2006 and again from 2006-2009, had recently lost his re-election bid and his term would be expiring later that month. Taylor discussed with

Duer the continuation of the technology education department and told Duer that the Grievant's employment would be cut. Taylor asked Duer to inform the Grievant that a severance package, similar to that which was offered to him in 2005-2006 when he was in litigation with the District, was available to him and that if the Grievant was interested, the Grievant should contact the Board of Education. Taylor further asked Duer to keep their conversation confidential and told Duer that if asked about it in the future, he (Taylor) would deny it occurred.

The Grievant initially accepted the District offer to conference with him regarding his lay off notice, but later withdrew his request opting to file a grievance challenging the lay off which read as follows:

STATEMENT OF THE GRIEVANCE

The District has reduced Kurt Kostelecky's contract over a period of time. It is presently scheduled to be 35% for the 2009-2010 school year. The Union believes that this is an overt attempt to terminate Mr. Kostelecky. Rather than deal with the District's concerns in an appropriate manner, the District has chosen to take actions that are designed to force Mr. Kostelecky to resign.

The District denied the grievance at the step 2 level in a May 27, 2009 letter offering the following reasons:

RE: Kurt Kostelecky Reduction

Please accept this letter as the Article XXVI, D, Step 2 written denial of the Wausaukee Education Association (hereinafter, "WEA") grievance regarding the "reduction of Kurt Kostelecky's contract over a period of time." I am denying the grievance for the reasons set forth below.

1. You have provided no relevant evidence to support your claim that the District has "taken actions designed to force Mr. Kostelecky to resign."
2. You take issue with the fact that the District **reduced** Mr. Kostelecky's technology education position from 100% down to 62.5% for the 2008-2009 school year, and down to 37.5% for the 2009-2010 school year. However, as noted below, the District has completely eliminated its other vocational education course offerings, including FACE and Business Education. Recent District cuts impacted, not only Mr. Kostelecky and his technology education position, but many aspects of the District's operations. For example,
 - a. Prior to the start of the 2008-2009 school year, the District proposed the elimination of 8.745 FTE teacher positions.

However, with the assistance of the Department of Public Instruction, the District was able to determine that SAGE revenues would exceed SAGE expenditures. Therefore, the District was able to rehire two SAGE teachers, making the final 2008-2009 reduction in teaching staff 6.745 FTE. The position eliminations included:

- (1) 1.0 FTE art position, with the elementary art teacher becoming the K-12 art teacher.
 - (2) 0.5 FTE business education position, thus eliminating all business education programming.
 - (3) 0.87 FTE family and consumer education position, thus eliminating all family and consumer education programming.
 - (4) 0.25 FTE in English from 75% to 50%.
 - (5) .025 FTE library media specialist position from 100% down to 75%.
 - (6) 0.375 FTE technology education position from 100% to 62.5%.
 - (7) 1.0 FTE special education position.
 - (8) 2.5 FTE elementary regular education positions.
- b. The District has made significant cuts in its extra-curricular offerings. For example, the District eliminated an assistant junior varsity football coach, an assistant junior high football coach, two junior high advisor positions, freshman volleyball, the position for forensics, and a position for cheerleading.
- c. Prior to the start of the 2007-2008 school year, the District eliminated its only full-time principal with the District Administrator assuming the roles and responsibilities of a K-12 principal.
- d. At the start of the 2007-2008 school year, the District eliminated approximately 3.5 FTE support staff positions. The position eliminations included:

- (1) 0.5 FTE custodian position.
 - (2) 1.0 FTE special education aide position.
 - (3) 1.0 FTE 4-year-old kindergarten aide position.
 - (4) 1.0 FTE general aide position.
- e. During the 2007-2008 school year, the District eliminated a 0.5 FTE bus driver position.
- f. Prior to the start of the 2008-2009 school year, the District completely redesigned its Junior High and High School schedules to maximize the efficiency of the teachers who remained in the District.
- g. Recently, the District won the right to subcontract its transportation services with Lamers Bus Company. This resulted in the elimination of 10 bargaining unit positions from the AFSCME bargaining group as these individuals became employees of Lamers.
3. It is the obligation and right of the Wausaukee Board of Education to set the District's curriculum. In addition, the Board's decisions regarding the amount of Technology Education curriculum were within its authority. Finally, the staffing decision to have Mr. Kostelecky teach the determined curriculum were within the requirements of Article XI concerning layoffs and reductions.
4. Your assertion that Articles XVI and XVII are applicable to this grievance are erroneous. Both of the aforementioned Articles concern situations where the District has non-renewed a member of the bargaining unit. Considering that Mr. Kostelecky is a 37.5% employee during the upcoming 2009-2010 school year, he has not been non-renewed and these sections of the contract are inapplicable.

On the contrary, Article XI concerns layoffs and reductions. A review of this Article provides clear evidence that the District did not violate the contract when it determined to reduce the Technology Education curriculum and staff it accordingly.

Very truly yours,

/s/

Jan Dooley, District Administrator/Principal

The grievance proceeded to the step three level and the District denied it in a June 29, 2009 letter. In addition to reiterating the reasons contained in the May 27 letter (above), the District responded to the District's arguments:

RE: Kurt Kostelecky Reduction

Please accept this letter as the Article XXVI, D, Step 3 written denial of the Wausaukee Education Association (hereinafter, "WEA") grievance regarding the "reduction of Kurt Kostelecky's contract of a period of time." Upon deliberations following June 24, 2009 appeal to the Board of the Education (hereinafter, the "Board"), the Board is denying the grievance for the reasons set forth below.

1. You have provided no relevant evidence to support your claim that the Board as a whole has "taken actions designed to force Mr. Kostelecky to resign." Although you offered vague and general statements regarding your belief that a personal conflict existed between one prior Board Member and Mr. Kostelecky, you offered no factual evidence to support you beliefs that any conflict, whether real or imagined, actually impacted the Board's decision as a whole to reduce Mr. Kostelcky. (underline in original)

...

5. Finally, your assertion that the Board is "disciplining" Mr. Kostelecky by reducing his position to 37.5% is erroneous. There is a wealth of evidence to suggest that the District treated Mr. Kostelecky no differently than any other teaching member of the Wausaukee School District. In situations where Mr. Kostelecky performed at or above expectations he was praised. In situations where Mr. Kostelecky performed below expectations, the District made its expectations known and offered Mr. Kostelecky any assistance that may have been available. However, at no time, were the District's actions toward Mr. Kostelecky disciplinary in nature.

On the contrary, Mr. Kostelecky's reduction, as with all other staff reductions, above, was due solely to the District's attempt to balance its long-term financial

obligation and reduce costs while maximizing the educational offerings provided to the students of the District.

Very truly yours,

/s/

N. David Kipp, Board President, Wausaukee Board of Education

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

ARGUMENTS OF THE PARTIES

Association

The District reduced the Grievant's teaching contract in violation of the collective bargaining agreement.

The Board of Education's decision to reduce the Grievant was improperly influenced by his history with the Board rather than budgetary concerns. The facts establish that the decision was not made for solely budgetary reasons. Rather, the District's reliance on the budgetary situation of the District is a pretext and the real reason that the Grievant's contract was further reduced was based on the Board and Administration's dissatisfaction with the Grievant and his prior conduct.

The District claims it reduced the Grievant to 37.5 percent for financial reasons. This is a fallacy. The District had just passed a referendum and therefore it was not in such a dire financial situation. Additionally, within days of the meeting, Board President Taylor extended a severance package offer to the Grievant through a mutual friend, Dave Duer. Duer credibility testified as to his conversation with Taylor and the Board's buy out offer to get the Grievant to leave the District. Taylor's testimony was self serving and disingenuous and should not be found credible.

This case is very similar to SCHOOL DISTRICT OF ALBANY, (Hutchinson, 11/19/85) wherein the Albany School Board reduced a teacher's position from full time to 4/7s in violation of the agreement. In that case, the Board claimed its decision was due to low enrollment, but enrollment did not decrease. Arbitrator Hutchinson found the Board's decision to be "suspect" which gave credence to the Association's argument that the action was designed to discipline that grievant.

Just like ALBANY, Id. the District has a history of ill-intent with the Grievant. The Grievant's contract was reduced after a contentious Board meeting. The District's reason – budgetary – is a sham. Four of the seven Board members have a history of taking inappropriate

actions against the Grievant and the Board President Taylor was fully aware of the Grievant's situation. Taylor's subsequent conversation with Duer exposed the District's true motivation.

The Board's decision to dramatically change the Grievant's full time equivalency from 50 percent to 37.5 percent after the April 8, 2009 meeting was in response to the Grievant's advocacy for parents and students at the meeting. Board President Taylor's over-reaction to the Grievant's advocacy for students and parents and his ultimate threat to remove the Grievant from the meeting evidence his hostility toward the Grievant.

The timing of the Board's decision to reduce the Grievant's contract is suspect. Arbitrators traditionally consider the timing of adverse employment actions against employees. An adverse inference is often drawn against an employer when an adverse action against an employee occurs close in time to an employee's objectionable conduct.

District

The District has the sole authority to reduce its technology education curriculum and that decision is not reviewable in grievance arbitration. Wis. Stats. Section 120.13 states, "the school board of a common or union high school district may do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions and activities." (Emphasis in District Brief.) It is not the province of teachers, teacher unions or grievance arbitrators to determine how many classes in a given discipline will be offered. A finding, without specific contractual authority, that arbitrators have the ability to review and overturn statutory curriculum decisions could set unintended precedent and open the door to increased litigation costs in Wausaukee and school districts facing similar financial problems. Following the Association's argument to the end, any teacher with a history of deficiencies in their evaluations, a history of filing grievances or prohibited practice complaints, or a history of other incidences with board members or administrators could assert that curriculum modifications are a form of improper discipline.

The District offers a method of analysis that balances its statutory authority with its contractual obligation. There is no contractual language that allows for arbitral review of curriculum decisions, therefore, after the District establishes curriculum, the arbitrator has the authority to determine whether the District applied the lay off language of the parties' agreement properly. This approach would protect the rights of the individual employees affected by curriculum decisions and not infringe on the District's authority.

Even if the arbitrator finds that the District's curriculum decision is subject to review, the District's decision was based on several legitimate business reasons and was not disciplinary. The District's decision to reduce the technology education department was based on sound business rationale. The District has experienced financial difficulties for a number of years during which time it completely eliminated the business education, family and consumer education and art education programs. In 2008-2009, the District reduced the technology education curriculum by 37.5 percent full time equivalency.

In 2009-2010 the District further reduced the technology education curriculum. It tentatively reduced it down to 50 percent full time equivalency and finally down to 37.5 percent full time equivalency. This was a proper exercise of statutory rights and responsibilities. The Grievant responded to the news of the initial reduction by sending two e-mails to District Administrator Dooley stating his belief that the District shouldn't offer any advanced level courses unless staffing increased. The District was within its authority to accept a portion of the Grievant's advice when it decided to not offer advanced level courses in technology education. Moreover, it was well within its statutory right to reject the portion of the Grievant's advice wherein he recommended that the District offer more basic level classes.

Just as Arbitrator Nielsen found in SOUTHERN DOOR SCHOOL DISTRICT, MA-10773 (Nielsen, 8/28/2000) a partial layoff as a result of low enrollments and a tight budget does not have the characteristics of a disciplinary act. An impartial analysis of the relevant facts, documentary evidence, and witness testimony in this case proves the District's actions were not disciplinary nor were they taken with any ill-will toward the Grievant.

The Association cannot prove that the District's decision to reduce the technology education curriculum was an improper disciplinary action contrary to Article XVI, Section G. The Association cannot link the Grievant's prior litigation with any member of the school board and cannot identify any incident in his evaluation documents that would give the District reason to take disciplinary action against him. Instead, the Grievant asserts a wide ranging conspiracy which cannot be credibly substantiated.

The District decided to reduce the technology education curriculum based on four sound business reasons. First, the District offered significant documentary evidence and testimony explaining that the Board's decision was based on past, present and future financial difficulties. Second, the District considered the Grievant's recommendations. Third, the District sought to expand its entire vocational education program through cooperative agreements with NWTC and surrounding schools. And fourth, the conversations between Taylor and Duer and occurred after the Board made its decision and were not maliciously motivated.

Association in Reply

The Association responds to the four arguments posited by the District.

The District recycled exhibits and statements to justify its claim of financial woe. The District's financial situation has changed – it was once a District in trouble but has become a District capable of paying off its debts. The District has not explained why the Grievant was first told he would be 50 percent and then he was reduced to 37.5 percent. What changed in the District's financial picture between when they told the Grievant he would be 50 percent and the morning of April 9?

The District's claim that it relied on the Grievant's e-mails as the basis for its decision is non-sensical. The Grievant did not recommend to Superintendent Dooley that the District reduce his workload. Rather, the Grievant recommended that the District offer basic level classes instead of advanced level classes. Moreover, the District points out that it isn't the Grievant's place to question or give advice to the District on course selections, yet it claims it took his advice.

The District argues that it intended to work with NWTC, yet there is no reference to NWTC in the grievance responses dated May 27 and June 29. Had the District actually been working to enter into a relationship with NWTC, it is reasonable to conclude that it would have identified this goal when responding to the grievance.

Enrollment did not affect the Board's decision. The testimony does not support the claim that declining enrollment was the reason for reducing the technology education position. Board Member Jones could not recall enrollment being discussed when the decision was made to reduce the Grievant to 37.5 percent.

The Arbitrator is not being asked to rule on the curriculum of the District. Instead, the Arbitrator is being asked to look at Article 16 of the labor agreement and conclude that the Grievant was disciplined. Just like Arbitrator Morrison found in HURLEY SCHOOL DISTRICT, Case 47, No. 60928, MA-1758 (Morrison, 2009), the issue in this case is due process and just cause and not a what classes must be offered.

As to Arbitrator Nielsen's decision of eight years ago in another school district, it is not identical to the case at hand. The only similarity is that the District is claiming that it did not imposed discipline.

The Association believes this case is dependent on an accumulation of events. There is no smoking gun. The events and explanations of the District are suspicious. The Association asks the Arbitrator to piece together the events and conclude that the District was not honest and fair and therefore it is appropriate to sustain the grievance. The Association asks the Arbitrator order the Grievant be returned to his 2007-2008 contract status; reimburse him for lost wages, plus interest; and post the arbitration award in all buildings.

For all these reasons, the Union Asks that the grievance be sustained and an appropriate remedy ordered.

District in Reply

The District is not financially sound and the Association's claim that the referendum eliminated its financial troubles is false. The financial data supplied at hearing illustrate that the 2009-2010 school year was the first since 2001 that resulted in a budget surplus. Over that same time period, enrollment has dropped 22.5 percent and state aid is at 10 percent. The District's extraordinary financial troubles and the Board's extraordinary steps taken in order to

sustain the life of the District provide compelling evidence that the Board's decision to reduce its technology education curriculum was motivated by the District's concern to maintain financial stability. In addition to staff cuts, the District is planning to weather its financial storm by increasing collaboration with neighboring school districts and NWTC.

The Grievant's contract was not reduced because of his comments at the April 8, 2009 board meeting. Board President Taylor did not recall the meeting being contentious or out of control. Taylor's comment that he would remove the Grievant from the meeting if the Grievant interrupted Duer's time on the agenda a second time and was required by board policy. No witness testified that any board member or administration was angry or upset as a result of the meeting, therefore there is no reasonable basis to conclude that the Board or Administration were hostile to the Grievant.

The Association's claim that the Grievant's reduction in contract was in retaliation for the Grievant's involvement at the Board meeting fails for a lack of evidence. A claim of retaliation necessitates proof. The District points to *BEISCHEL V. STONE BANK SCHOOL DISTRICT*, 362 F.3D 430 (7th Cir. 2004) and the Seventh Circuit Court of Appeals expectation that the Association, "must overcome the presumption that Board members carry out their duties with honesty and integrity". Paragraph 29. The Association cannot make its case. It failed to present its concerns regarding the conversation between Taylor and Duer to the full Board before the Board made its decision in April. Lacking this and recognizing there is scant evidence to prove board member anger, hostility or bias, the Association's claim is without evidentiary support.

The majority of the Board that made the decision to reduce the technology education curriculum was unaware of the Grievant's past litigation. No evidence was offered to prove negative feelings against the Grievant by board members. Of those board members who testified, Jones had no knowledge of the Grievant or his past. Taylor was never asked if the Board reviewed the prior litigation when making its decision. And finally, if the Board members wanted the Grievant to leave, why didn't they eliminate the technology education curriculum entirely in 2008-2009 when it eliminated business education and family and consumer education? Consistent with the United States Supreme Court's holding in *WITHROW V. LARKING*, 421 US 35 (1975), the Association was unable to offer any evidence to show a bad faith motive and therefore the Association's argument must fail.

There was no evidence offered at hearing to support a claim that the District was dissatisfied with the Grievant. All of the District's witnesses offered credible testimony that they had no knowledge of the Grievant and had no reason to be dissatisfied with him.

The *SCHOOL DISTRICT OF ALBANY, Id.* case is distinguishable. The Albany School Board based its preliminary layoff decision on inaccurate enrollment data and even after the information was corrected, refused to reconsider their layoff decision. In this case, the referendum passed six months prior to the Board's decision to reduce technology education. Neither the Grievant nor the Association presented any evidence to dispute the District's

budgetary concerns and prior to the Board making its final decision, the Association refused to discuss the Grievant's reduction with the Board.

Finally, the remedies the Association seeks are untenable and unacceptable. Requests for interest are regularly rejected and the parties' labor agreement does not provide for interest penalties. The Grievant was 100 percent employed in 2007-2008. No challenge was made when he was reduced in 2008-2009 to 62.5 percent full time equivalency, therefore there is no basis for the demand to return the Grievant to full employment. Moreover, as previously indicated, it is only the Board that may determine curriculum decisions and therefore the Arbitrator would be exceeding her authority to increase the Grievant's contract.

The last District concern is when exactly can the District make changes to technology education if the grievance is sustained? The Grievant is not entitled to lifetime immunity simply because he engaged in protected activity.

For the reasons stated, the District respectfully requests that the Arbitrator deny and dismiss the grievance in its entirety.

DISCUSSION

As a preliminary matter, the District challenges the arbitrability of the grievance asserting it is improperly before the arbitrator because it impinges on the Board's statutory right to establish the school district programs, functions and activities. There is no question that the Board is vested with certain management rights and obligations pursuant to 113.11 Wis. Stats., but there are additional statutory rights and obligations that the District must adhere to including the negotiated terms of the collective bargaining agreement. Moreover, there is a "broad presumption of arbitrability," and courts are limited to determining whether the arbitration language in the contract encompasses the grievance in question and whether any other provision of the contract excludes arbitration. *CITY OF MADISON V. WERC*, 261 Wis.2d 423 (2003). Given this, I find the grievance is arbitrable.

Moving to the substantive issues, the Grievant's full time equivalency was reduced from 62.5 percent full time equivalency in 2008-09 to 37.5 percent full time equivalency in 2009-2010. The Association is challenging the Grievant's lay off, asserting it was pretextual, tainted by disciplinary overtones and Board member animus. In response, the District maintains that the Grievant was laid off for a legitimate business reason – the District was suffering financially and it was motivated to attain financial stability. The District furthered its position with three additional reasons for the lay off at hearing and post hearing. Reasons cited during the litigation phase of grievance processing are suspect and subject to additional scrutiny simply because they are untimely and generated in response to the litigation.

Article XI – Layoff Provisions, provides the District the management right to "decrease the number of teachers, in whole or in part." That right is limited only by seniority and certification. It was therefore within the District's prerogative to determine when and if lay

offs were necessary and further, who would be laid off and to what degree. I accept the legal standard set forth by the District wherein the Union bears the burden of producing evidence establishing that the District's decision was unreasonable either because it was not supported by the facts or because it was based on an improper motive. WISCONSIN INDIANHEAD TECHNICAL COLLEGE, MA-10837 (Emery, 7/7/2000). Lacking this and provided the District's decision was based on justifiable reasons free of improper motive or bad faith, it will stand.

The Grievant was laid off by the Board of Education on April 8. That lay off took him from 62.5 percent full time equivalency to 37.5 percent full time equivalency. I recognize that the scheduling matrix issued on March 30 recommended a lay off of just 12.5 percent, but that was Dooley's preliminary recommendation and it cannot be viewed as the official action of the District. As such, for purposes of addressing the amount of lay off in dispute in this case, I accept that the Board's action was the final and formal lay off and it will be the amount subject to arbitral examination.

The first reason the District offered to justify the Grievant's lay off was the District's poor financial situation. The District has a unique and tumultuous financial history which must be considered.

Financial History of the District

- * In July 2007, the District auditors determined that the 2006-2007 school year ended with a negative fund balance in the amount of \$55,280. Projecting forward into the 2007-2008 school year, the District anticipated deficit spending in the amount of \$182,239. To reduce this amount, three and one-half support staff positions were eliminated.
- * The District held a referendum vote to exceed revenue limits on February 19, 2007. The referendum failed.
- * During the spring of 2008, the District proposed the layoff of 11.245 teaching positions for the 2008-2009 school-year. After negotiations were complete for the teaching staff, the layoff projection was reduced to 8.245. This included the elimination of the family and consumer education and business education departments. The Grievant was affected by these reductions in that he was reduced from full-time to 62.5 percent.
- * The District held a referendum vote to exceed the revenue limits on June 24, 2008. The referendum failed by 19 votes.
- * On June 26, 2008, the Board of Education voted to consider dissolution of the District. In response to the dissolution action, a third referendum was scheduled.

- * On August 19, 2008 the District successfully passed a referendum.
- * The District was involved in an interest arbitration proceeding with its support staff unit. The matter was heard on November 10, 2008. There was a huge disparity between the final offers of the parties and the interest arbitration decision was still pending during the staffing and associated budget deliberations.

It is against this backdrop that Dooley prepared the 2009-2010 scheduling matrix and scheduled the Grievant for .50 percent full time employment. In preparing the schedule, Dooley considered the budgetary impact and continued her efforts of restoring the District to financial solvency. It is therefore reasonable to conclude that there were monies available on or about March 30 to cover the cost of the Grievant employed half time.

When Dooley informed the Grievant that he would be teaching half time in 2009-2010, the District was still awaiting the outcome of the support staff interest arbitration proceeding. That result would significantly affect the District's fiscal situation. If the Union's offer was accepted, support staff would receive \$0.29 per hour each year for the 2007-2008 and 2008-2009 school years and employees would pay four percent in the first year and six percent in the second year of their health insurance premiums. If the District's offer was accepted, 10 bus drivers positions amounting to 5.18 full time equivalents would be eliminated and the District would subcontract its transportation services, employee health insurance benefit eligibility would be based on a hours worked prospectively, current employees would pay between 20 percent and 50 percent of their health insurance premium and there would be zero percent wage increase for both years, although a \$1000 bonus would be paid each year. Given the significant difference in the offers, Dooley likely prepared two budgets for 2009-2010; one if the interest arbitrator found in the union's favor and a second if the District was victorious. Regardless of the result of the proceeding, Dooley's preliminary staffing matrix would have accounted for either outcome.

On March 31, 2009, the interest arbitration decision was issued in SCHOOL DISTRICT OF WAUSAUKEE, 32479-A, p. 33 (Schiavoni, 3/31/2009). Schiavoni's award found in favor of the District resulting in minimum savings of \$54, 622 over the union's offer and excluding the cost savings that would result from eliminating transportation services and drivers which was anticipated to be between \$688,348 and \$840,742 over four years. In reaching her decision, Arbitrator Schiavoni acknowledged that the referendum did not solve all of the District financial difficulties because:

Since the hearing in this case, the general economy has gone into a serious recession. There are foreclosures, job losses, and shrinking sources of revenue within the state of Wisconsin. Credit has all but dried up. This unanticipated turn in the general economy is a factor to be considered under subsections 7r., (j) and (i). No one anticipated the severity of the recession even as of the date of the arbitral hearing in this matter. The District has established that

throughout the 2007-2008 school year it was experiencing significant budgetary pressures that affected its ability to pay before the referendum and way before the turn of the general economy. Although there has been an intervening subsection 7r., (i) factor, the voters passage of the third referendum, the general economy has “tanked.” Although the referendum has passed, the District has convincingly established that its position remains precarious, more precarious than that of comparable districts, for the future under either offer. The District’s offer attempts to pay down debt to save interest costs and to ensure future borrowing at the lowest rates to keep the District financially viable. ...

With the issuance of Schiavoni’s decision in March 31, 2009, the District’s financial picture brightened. Not only did the District save actual dollars, but also granted the District the right to reduce its transportation costs exponentially. Yet, after receiving the Schiavoni award, the Board further decreased the Grievant’s full time equivalency. If the reason the Grievant was laid off was financial, it doesn’t follow that the Board, when it had more, not less dollars available for future costs, including the 2009-2010 school year, would then further decrease the Grievant’s employment percentage in excess of his that recommended by its administration.

Not only was the District financial picture stronger on April 8 – post interest arbitration decision – than it was on March 30, but the District’s actions were not consistent with a district experiencing financial hardship. Arbitrator Schiavoni credited the District with the cost saving efforts it initiated - laying off employees, not purchasing textbooks, borrowing short term, and delaying payment on the unfunded pension as evidence of the District financial suffering. *Id.* at 33. The financial challenges cited by the District were history. The only teacher lay off issued for the 2009-2010 school year was the Grievant. The District not only purchased new textbooks, but Dooley directed the Grievant to purchase textbooks for two classes which he was scheduled to teach in 2009-2010. The District had sufficient funds available to repay its local loans and it paid off its unfunded liability with the retirement system. These actions indicate solvency, not financial misfortune. The evidence does not support a conclusion that the District laid off the Grievant for financial reasons.

Additional Reasons Relied Upon by the District to Lay Off the Grievant

The District argued three events occurred after Dooley prepared the preliminary scheduling matrix which caused the Board to further reduce the Grievant’s full time equivalency. Those three events include 1) the Grievant’s e-mail responses of March 30 and April 1; 2) the District’s discovery that the Grievant lacked the necessary licensure to teach upper level courses; and 3) the District’s impending collaborative relationship with NWTC.

The Grievant’s E-mails of March 30 and April 1

Dooley sent the Grievant an e-mail on March 30 informing him of his 2009-2010 schedule of classes. That preliminary schedule was one class shy of the teaching load he

carried in 2008-2009 and represented a 12.5 percent reduction in his full time equivalency. That preliminary schedule also included some advance level courses. His e-mail included the following:

I do not feel we should offer an advanced level of Construction next year (as well as advanced levels of ANYTHING) unless we can increase staffing in TE. It leaves out too many kids who are interested in other areas. If you don't think that Woodworking should be offered instead of Construction II, then another class can be substituted instead. Please get back to me as soon as you can so I can begin planning course descriptions.

Dooley did not respond to this e-mail and following the posting of the scheduling matrix, the Grievant again voiced his concerns in an e-mail to Dooley explaining:

I see on the proposed matrix for next year it shows what you had originally sent me in the e-mail from Monday @ 1:20 for Tech. Ed. Offerings. I replied 14 minutes after your e-mail was sent to me suggesting that we offer Woodworking 1st semester (with Welding 2nd semester) in lieu of Construction II and move Home Maintenance opposite Construction I. Woodworking and Welding are both underclassman-level course with Construction and H.M. being upper-level courses. I'm assuming I gave you as much time as possible to think my suggestions over having replied within 14 minutes of your e-mail to me. Is there still room to change these to fit my suggestions? You asked me what I thought then I never heard back from you. I e-mailed both you and Bill when I originally replied.

The District argues in its brief that it reduced the technology education course offerings and the Grievant's full time equivalency based on the Grievant's recommendation to not offer any advanced level courses. The District asserts it "was listening to and following the advice of the lone technology education teacher" and that "it is within the District's authority to reject the advice contained in his two e-mails."

In looking to the e-mails that the Grievant sent the District, it is clear he was not recommending the elimination of all advanced level courses. Rather he was communicating to Dooley that he believed it would be in the best interest of the students to reconfigure the classes offerings to encourage new students to take technology education course, but also to retain the seasoned technology education students. The District's argument, coined by its splicing and dicing of the Grievant's e-mails to contrive an intervening reason to eliminate classes and justify the Grievant's lay off not only misrepresents the Grievant's emails, but is implausible.

The Grievant Was Not Licensed to Teach Advanced Level Courses

The District next points out that the Grievant's class schedule was further reduced because was not certified to teach advanced level courses and asserts that "the District became aware of this information after it had made the decision to reduce its technology education curriculum". Reply Br. p. 22. The District points to Dooley's testimony at hearing wherein the following exchange occurred between she and the District's legal counsel:

Q: Now, regarding upper level tech ed. classes, did you later find out with regards to Kurt's certification that he is not certified to teach upper level tech ed. classes?

A. He has a 220 license, which is a broad license. But, for any advanced level classes, as indicated in that one document that's already been submitted, in order to teach advanced level classes, the instructor has to have vocational certification within the technical area that – that he would choose to teach the advanced level classes in.

Q: Would that be Exhibit 2, the other document that you were referencing?

A: Yes, Exhibit 2.

Q: So would it even be possible—The District's initial statement to him via e-mail was that he might be teaching a construction two class. He objected to the construction two class. Under his license, could he even be—would he even be certified to teach a construction two level class?

A: I would say that according to certifications or licensing, I would say no. That's not to say that he didn't teach them in the past. That isn't to say that I didn't say that he would be teaching it because I did.

Tr. 127-128.

The problem with Dooley's testimony and the District's argument is that it is false. Dooley observed the Grievant on December 4, 2008 and completed an evaluation thereafter. Inclusive to that evaluation, Dooley offered the following commentary:

Reflection is an important part of teaching – analyzing what we do and determining ways to improve upon what we do. It will be important to develop solid programs of learning for your students. You are certified as a grade 6-12 technology education teacher which enables you to teach basic level technology education coursework. In order to teach advanced level coursework, you will need to become vocationally certified in the areas in which you will be teaching advanced-level coursework. Ex. U5.

Dooley was fully aware of the Grievant's licensure and knew that he was not certified to teach certain advanced level technology education courses. If the Board of Education increased the Grievant's lay off percentage based on learning that the Grievant had licensing deficiencies, it was because Dooley informed them of that, but Dooley knew well before the meeting. Dooley is a representative for the District and her knowledge of the Grievant's licensure limitations is imputed on the Board. The District's assertion that the Grievant's increased percentage of lay off was based on that knowledge is evidence of pretext.

The District was Entering Into a Collaborative Relationship with NWTC

The District argues that its decision to further reduce the technology education curriculum and the Grievant's percentage of lay off on April 8 was based on the District's desire to reinvent its vocational education program through partnership agreements and collaboration with Northeast Wisconsin Technical College.

I start with the District's involvement in the NWTC collaboration. Dooley testified that on April 3 she learned from Ron Saari, former District Administrator for the Crivitz School District, that a business partnership relationship meeting had occurred on March 25, 2009 between an NWTC representative and business leaders in the Crivitz area. Dooley was not at the meeting. The meeting minutes indicate the focus of the meeting was "the School District of Crivitz, NWTC, and area business want to identify ways to help high school students gain skills and experiences that will enable them to find gainful employment in the Crivitz area upon graduation from high school." Ex. 45. Nowhere in the minutes is there any reference to a collaboration effort between NWTC and local school districts to share instructors and provide technology education courses at a single location.

The District Board of Education met on April 8. Dooley testified that she informed the Board of Education on April 8 of her conversation with Saari and "what was unfolding." Dooley described "it was just the direction that they were looking to. They were looking to establish this area business partnership. They were looking at ways that - And he invited me because of looking at ways where we could begin to collaborate and share services and share ideas." Tr. 133.

Board member Ken Jones testified that he recalled the NWTC discussion at the April 8th meeting and described "it was just in the beginning stages, but the goal there was to be able to offer college level courses and work cooperatively with NWTC." Tr. 136. Board member Joe Lanich testified that the NWTC discussion "sounded like it was too good of a deal to pass up. It was a win-win situation for us." Tr. 142.

The first time the District Board of Education addressed the partnership with NWTC as an agenda item was at its May 21, 2009 meeting. The topic was contained under "New Business" and the agenda item was labeled "Discussion on Vocational Training Opportunities/College Credit through Youth Options."

The District's move toward working with NWTC to provide technology education to the students of the District occurred well after the April 2009 Board of Education meeting. The Board had insufficient information on April 8 to foresee what would result, if anything, from conversations with NWTC. Dooley had yet to attend a meeting and in fact, did not meet with any representative from NWTC until May 12, 2009. Given this, it is unbelievable that the Board relied on such preliminary and incomplete information to make a lay off decision regarding a nine year employee of the District.

The District argued three intervening events precipitated the Grievant's lay off on April 8. The evidence does not support the authenticity of any of the events nor does it support the conclusion that any of the events played into the Board of Education's decision to lay off the Grievant. Having found that none of the legitimate business reasons proffered by the District sustain the District's decision to reduce the Grievant's full time equivalency to 37.5 percent, I move to the Association's arguments.

Was the District Hostile to the Grievant?

The Association maintains that the lay off notice issued to the Grievant on April 9 was a disciplinary non-renewal masked under the auspices of a lay off designed to bypass the contractual disciplinary and non-renewal procedures. Moreover, the Union asserts that the notice was issued as a result of the District's hostility toward the Grievant as evidenced by the heated exchange between the Grievant and Board President Taylor, the District's dissatisfaction with the Grievant's performance, the District's severance offer to the Grievant, and the Grievant's history with the District. The District denies the Union's assertions.

I start with the Board meeting itself. The meeting notice for the April 8 meeting included an entry under new business identified as "Parent Concern Regarding Technology Course Offerings - James Duer." Ex. Jt. 7. Duer attended the meeting and when it came to his item on the agenda, he spoke and then attempted to introduce a student who wanted to speak on the topic. Board President Dennis Taylor denied the student and others interested in the opportunity to speak, consistent with board policy. Duer testified that it was at that point in the meeting that the Grievant "stood up to say, hey, they should be heard too. And Dennis Taylor pretty much told him to either sit down and be quiet or you're going to be removed from the meeting." Tr. 16.

Board president Taylor testified that he thought the meeting "got a little vocal. I don't think it was - I don't remember it being out of control or nothing." Tr. 82. Board member Jones testified that he did not believe that Taylor acted with malice or bias against the Grievant. Tr. 145.

This record does not support a finding that the Grievant was so offensive or Taylor's response excessive such that the board meeting can be characterized as contentious or unruly. It is fair to say that this was not the first time the Grievant questioned the Board of Education. The Grievant had a history of filing grievances and voicing his dissatisfaction with

Administration and the District. Four of the board members were on the Board in 2005-2006 when the Grievant successfully litigated against the District. Given the Grievant's history with the District, his blurting out created an overall negative atmosphere of irrationality.

Was the District Decision to Further Lay Off the Grievant Based on Performance?

I now move to the Union's claim that the District was concerned with the Grievant's performance and considered it in reaching the decision to lay off the Grievant. Leading up to the April 8 meeting, the record establishes that the District was monitoring the Grievant and Dooley had identified him as a teacher in need of improvement. In the Grievant's December 4, 2008 Classroom Observation/Evaluation Report, Dooley included the commentary:

I encourage you to work on modifying your approach in communicating with administrative personnel" and "[a]s I indicated in your report, it will be important for you to adjust your negative, disrespectful approach in communicating with administrative personnel. Please look for ways to communicate more effectively. Ex. 7 p. 7, 9.

Dooley's conclusions further placed expectations on the Grievant to develop substantive units of study for four courses and their accompanying assessments. Dooley's evaluation was not positive and not only identified performance deficiencies, but also identified interpersonal and collegiality deficiencies. Given Dooley's conclusion that the Grievant was in need of improvement, she monitored his behavior and performance during the 2008-2009 school year with numerous e-mail directives.

Dooley prepared another observation on November 17, 2009, well after the filing of this grievance, but before hearing. Dooley's commentary in the 2009 evaluation was complimentary in some areas, but she again included definitive expectations and recommendations and withheld final evaluation of the Grievant pending completion of the year.

Dooley testified that she was present during the Board discussion on April 8 regarding the Grievant's lay off and responded as follows to the District's legal counsel regarding the topics of conversation at that meeting relative to the Grievant:

Q: Was there any discussion of any deficiencies that Kurt Kostelecky may have exhibited in his teaching over the last year, two years?

A: No

Q: Any ever in his teaching history?

A: No

Q: Any discussion of his prep time grievance Kurt had filed?

A: No

Q: Any discussion of the grievances that Kurt had filed in previous years?

A: No

Q: Any discussion of Kurt's past disciplinary history?

A: No

Q: Has Kurt ever been disciplined by you in the last couple years?

A: No

Tr. 126-127.

Board member Jones testified that the Board engaged in a "general discussion" of the Grievant and reviewed complaints made against him. Board member Lanich testified that the Grievant's performance was not discussed. Board member Kipp testified that the decision to reduce the Grievant did not have anything to do with the Grievant's deficiencies.

Based on the December 2008 evaluation and the numerous e-mail directives, there is no question that Dooley had concerns with the Grievant's performance. Moreover, the fact that complaints were aired during a closed session meeting noticed to address lay offs rather than discipline or non-renewal is troublesome at best and lends credence to the Union's argument.

What is the Meaning of the Severance Offer Extended to the Grievant?

The Union maintains that the severance package offered to the Grievant is evidence that the District's intent was to get rid of him. Taylor and Duer's recollection of their conversation at Duer's home are very similar, with the only significant discrepancy being the reason that the severance offer was being extended to the Grievant. Taylor maintained it was the result of "switching" the way the District offered technology education to its students due to financial reasons and that the offer was being extended because he believed "people are owed something for service given to a district." Tr. 85. In contrast, Duer understood that the Grievant was the problem, and that the District was willing to compensate him to resign. Duer recalled that Taylor told him that the Grievant was in "a no-win situation ... he just should take the deal that they had offered and run, " and "[i]f Kurt wasn't here, within two years' time all tech ed. Classes would be back and with a full-time teacher." Tr. 14-15 and 18. Given the differences in Duer and Taylor's recollection of the conversations, their credibility is at issue.

Duer is a friend of the Grievant, but went to great lengths during his testimony to maintain Taylor's trust and confidence. Duer had nothing to gain by testifying at hearing. His testimony was neither biased for or against the Grievant, Taylor or the District. I find Duer credible.

I have greater difficulty with Taylor's testimony in that he contradicted himself on relatively benign issues. Taylor was vague when asked about his knowledge of the Grievant's successful 2006 litigation. Taylor was vague when asked about whether he was at the board meeting when the interest arbitration decision was announced that approved wage freezes and eliminated the bus service. Yet, Taylor was able to recall the names of staff members who retired in years past and recalled the amount of money LaChappell gave his sons for a graduation gift. Taylor is a knowledgeable, experienced, hands-on board member and his lack of recollection on these noteworthy events in the District's history is suspicious.

Taylor's credibility is further challenged by his rationale for offering the Grievant a buy out. When questioned, he justified the offer as essentially monies due for loyalty and service to the District and then indicated that he (and the District) had "a record" of offering benefits to outgoing personnel. There is no history of Taylor or the District having offered other laid off personnel a severance benefit. The only person offered severance was LaChappell when his administrative responsibilities were combined and his position eliminated. Taylor's attempt to downplay the severance offered to the Grievant as a course of conduct that the District regularly extended to laid off teaching staff members was simply untrue. It is more believable that Taylor's offer to the Grievant followed the Board's conversation during closed session on April 8 which included a general discussion of the Grievant, including his deficiencies. Following that discussion, Taylor recognized that the Grievant had no future with the District and communicated this to Duer.

Finally, the Union points to the Grievant's litigation history with the District as a basis for hostility. The sole link between the Grievant's history and the lay off was Duer's testimony wherein Taylor referenced and linked the 2006 severance offer to the proposed 2009 severance offer and accepting that that comparison occurred, it could have been for explanatory reasons. This record lacks compelling direct evidence that the Grievant's past litigation, in and of itself, was a factor in the Board's decision-making.

Conclusion

This record establishes that the Grievant was laid off on April 8 for what the District claimed on May 27 and June 29 to be financial reasons. At hearing and in post-hearing briefs, the District further asserted that the Grievant's e-mail communications of March 30 and April 1, the Grievant's limited licensure, and a potential collaborative relationship with NWTC were relied upon when making the lay off decision on April 8.

Dooley informed the Grievant on March 30 that she would be recommending a schedule matrix that would result in the Grievant being employed half-time. On April 8, that

was reduced to 37.5 full time equivalency. The District did not offer any evidence to show it experienced an intervening financial event that created the obligation to further reduce the Grievant's teaching load. In fact, the only intervening event was the issuance of an interest arbitration decision that increased the amount of available funding for the District. The evidence does not support an authentic financial reason for the Grievant's lay off.

Moving to the three belated reasons for the lay off, none are supported in this record. The e-mails were innocent, albeit potentially disrespectful, communications that explained the Grievant's view as to which classes should be offered. The Grievant was not properly licensed for some advanced level course, but Dooley knew this and the Grievant had previously taught advanced level classes lacking the proper licensure. As for the NWTC relationship, it did not exist on April 8. The District has not met its burden to provide a rationale business justification supported in fact for its decision to lay off the Grievant.

The Association asserted the District was hostile to the Grievant. The fact of the matter is the Grievant's history, performance and likely attitude were discussed during the April 8 board meeting. There was no reason for the Board to have a "general conversation regarding complaints lodged against the Grievant" during an economy driven decision. Dooley's testimony that board members did not discuss the Grievant's employment history and/or performance on April 8 is incredible as was her testimony that she did not know the Grievant's licensure was limited.

Taylor left the April 8 board meeting with the knowledge that the Grievant's tenure with the District was short-lived. I believe that Taylor's motives were genuine when he communicated to Duer that the Grievant was in a "no-win" situation and proposed a buy out. Taylor's desire to soften the blow does not change the fact that the District's lay off decision was contractually impermissible. Taylor's attempts to avoid responding to questions regarding the discussion of the Grievant's history with the District convince me he knew the nature of the discussion was inappropriate. He further attempted to conceal the uniqueness of the severance offer nature by claiming that it was similar to that extended to others in similar situations which is factually false.

For the above reasons, I find the District's motives to be inappropriate and in bad faith. I therefore find in favor of the Association.

What is the Appropriate Remedy?

The Union asks that I return the Grievant to his 2007-2008 full time status. This I will not do. There is no support in this record nor did the originally filed grievance challenge the Grievant's 2008-2009 full time equivalency. It is therefore beyond the scope of my authority to order such a remedy.

Dooley recommended a 12.5 percent reduction for the Grievant. While it is unlikely that Dooley's recommendation was financially motivated since only one technology education

class, representing 0.125 full time equivalency, was the only teaching staff reduction for 2009-2010, the Board of Education increased that reduction to 25 percent. The Board acts on the District's behalf and holds the final authority on lay off decisions. I will not apportion the remedy.

I recognize that the District has made substantial progress in developing a collaborative relationship with NWTC. This relationship would have occurred regardless of whether the Grievant was employed in a part time or full time capacity and irrespective of the Grievant.

AWARD

1. Yes, the grievance is substantively arbitrable.
2. The District's decision to reduce the Grievant's full time equivalency from 62.5 percent to 37.5 was for improper reasons and in bad faith and therefore violated the collective bargaining agreement.
3. The appropriate remedy is to make the Grievant by compensating him for an additional 25 percent full time equivalency for the 2009-2010 school year.
4. I will retain jurisdiction for 60 days to allow the parties sufficient time to implement the terms of this award.

Dated at Rhinelander, Wisconsin, this 17th day of August, 2010.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator