

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WAUPACA TEACHERS' ASSOCIATION**

and

**WAUPACA SCHOOL DISTRICT**

Case 38  
No. 69709  
MA-14713

Case 39  
No. 69727  
MA-14718

(Tim Hiddeman and Doug Spadoni Grievances)

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**Appearances:**

**Attorney Christine Galinat**, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Association.

Davis and Kuelthau, S.C, by **Attorney James R. Macy**, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, on behalf of the District.

**ARBITRATION AWARD**

At all times pertinent hereto, the Waupaca Education Association (herein the Association) and the Waupaca School District (herein the District) were parties to a collective bargaining agreement covering the period from July 1, 2007 through June 30, 2009. On March 23, 2010, the Association filed requests with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over disputes concerning the District's layoff of bargaining unit members Tim Hiddeman and Doug Spadoni and subsequent refusal to permit them to bump into positions held by less senior teachers in areas wherein they were certified. The Undersigned was selected from a panel of WERC staff members to hear the dispute. The grievances were consolidated for hearing and a hearing was conducted on June 17, 2010. The proceedings were transcribed. The parties filed their initial briefs by July 30, 2010 and their reply briefs by August 16, 2010, whereupon the record was closed.

## ISSUES

The parties did not stipulate to a statement of the issues. The Association would frame the issues as follows:

Did the District violate Article VI when it denied teachers the ability to bump into other areas of certification?

The Association also submits that if the District violated the collective bargaining agreement, the Arbitrator has the inherent authority to determine the appropriate remedy.

The District would frame the issues, as follows:

Did the District violate Article VI (B) (4) of the Collective Bargaining Agreement when it laid off the least senior teachers within the areas where the layoff occurred?

If so, what is the appropriate remedy?

The Arbitrator frames the issues, as follows:

Did the District violate Article VI of the Collective Bargaining Agreement when it laid off the least senior teachers within the areas where the layoff occurred and denied the teachers the ability to bump into other areas of certification?

If so, what is the appropriate remedy?

## PERTINENT CONTRACT LANGUAGE

### ARTICLE VI

#### STAFF REDUCTION

- A. The provisions set forth in this Article shall apply if the Board determines that a reduction in the number of teachers for the forthcoming year is necessary. This Article shall supersede the individual teaching contract. Teachers selected for layoff under this procedure shall be given preliminary notice of such selection no later than May 1 of the current school year. A teacher laid off will be given first consideration according to the usual procedures, as a short-term substitute teacher (one to ten days) within the District for one full school year following the year in which he/she was laid off. In the event a long-term substitution (more

than 10 days) would become available, a laid off teacher would be given first consideration in his/her area of certification.

B. The selection of the teachers to be laid off shall be made according to the following guidelines:

1. Normal attrition due to teacher retirement or resigning.
2. Volunteers will be considered next. In the event the teacher does volunteer he/she shall be accorded all rights under this Article.
3. Part-time employees, covered by the Master Contract, will be considered next.
4. If steps 1, 2, and 3 are insufficient to accomplish the desired reduction in staff, the least senior teacher teaching within their area of certification or group where the reduction is to occur, will be laid off according to Section C. When the seniority of teachers to be laid off is equal, the administrative evaluations which are on file shall be considered as the determining factor.
5. If a teacher has a major certification in a special area such as music, art, physical education, special education, guidance, librarians, or other special areas, the Board may retain such teacher rather than a more senior teacher.
6. No bumping shall occur between grouping specified in Section C, unless the teacher is certified for such other grouping and has had one year of successful teaching experience within such grouping within four years immediately preceding the year in which the layoff occurs. If such teacher meets these requirements for bumping, they may only bump the least senior member of such group. This section shall not diminish number 5 above.

C. SENIORITY: "Seniority" for the purposes of this agreement shall be defined as the number of years of uninterrupted service, on a group basis, within one of the three groups designated. The groups shall be (1) K through Grade 5; (2) Grades 6, 7, and 8; and (3) Grades 9 through 12.

1. All teachers must be certified to teach in the grade or area of certification they are currently assigned.
2. "Seniority" dates from when they start their first teaching assignment in the District.

3. "Certification" will be determined by the current certificates on file in the District Office.
  4. "Seniority" shall be applied in the inverse order of the earliest date on which the individual teacher began his/her first teaching assignment within the District in the specified group or area of certification.
  5. Any teacher who teaches in more than one (1) specified group shall have seniority rights based on years in the District and shall retain all bumping rights.
- D. LOSS OF SENIORITY: There shall be no loss of seniority in the event of a layoff of two (2) years or less, but seniority and the employment relationship shall be broken if the teacher:
1. Resigns or quits.
  2. Is discharged
  3. Fails to report to work within five (5) working days after termination of a leave of absence.
  4. Is retired
  5. Is on layoff for more than two (2) years.
- E. APPEAL OF LAYOFF DECISION: If a teacher who has been or will be laid off wishes to contest such action, the teacher must file a written grievance with the District Administrator within ten (10) working days after receiving the final written notice of layoff. The grievance will enter the grievance procedure at the District Administrator's level and the layoff decision shall stand unless, in making the layoff determination, the District Administrator or the Board acted contrary to the procedures provided in this Article.
- F. RECALL: Full-time teachers laid off under the terms of this Article will be given first consideration for such vacancies that shall occur in the area of certification and group from which the layoff occurs for two (2) years following the layoff. Full-time teachers who had previously been reduced to less than full-time by the District shall be given the same consideration as full-time teachers for purposes of recall. Part-time teachers shall be considered next. Reinstatement shall be made without loss of benefits accrued from prior years of service in the District. Within ten (10)

calendar days after a teacher receives notice of re-employment he/she must advise the District in writing that he/she accepts the position offered by such notice and will be able to commence employment on the date specified therein. Any notice shall be considered received when sent by registered letter, return receipt requested, to the last known address of the teacher as shown on the District's records. It shall be the responsibility of each teacher on layoff to keep the District advised of his/her current whereabouts. Any and all re-employment rights granted to a teacher on layoff shall terminate upon such teacher's failure to accept within ten (10) calendar days any position for which he/she is certified. offered to him/her by the District.

- G. No teacher may be prevented from seeking or securing other employment during the period he or she is laid off under this Article.

### **BACKGROUND**

In November 2009, the Waupaca School District determined that it needed to reduce teaching staff for the 2010-11 school year and issued preliminary layoff notices to a number of teachers. One of the teachers receiving such a notice was Cathy Wilhite, who taught Emotional Behavioral Disabilities in the High School Special Education Department. Wilhite, who is also licensed to teach Learning Disabilities, opted to exercise her right to bump a less senior teacher in the Special Education Department, Doug Spadoni, who taught the Learning Disabilities class in 2009-10. Spadoni, in turn, notified the District on December 8, 2009 that he wished to bump into an Alternative Education teaching position, for which he was certified, which was held by a less senior teacher, Shane Dornfeld. On December 11, 2009, District Administrator David Poeschl denied Spadoni's request asserting that the collective bargaining agreement did not permit him to bump into the Alternative Education position.

Another teacher who received a notice of layoff was High School Computer Science teacher Tim Hiddeman. Hiddeman, who is also licensed to teach history and government, then notified the District that he wished to bump a less senior teacher in the High School Social Studies Department. As with Spadoni, Hiddeman's request was denied by the District on the basis that he was not contractually entitled to bump into a Social Studies position.

On December 21, 2009, both Spadoni and Hiddeman filed separate grievances, challenging the District's determinations that they were ineligible to bump into other positions. The District denied both grievances and they proceeded through the steps of the contractual grievance procedure to arbitration. Prior to hearing the parties agreed to have the grievances consolidated for decision. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

## POSITIONS OF THE PARTIES

### The Association

The Association asserts that the collective bargaining agreement does not limit the right of teachers to bump within their group. Article VI.C establishes that there are three groups of teachers for seniority purposes – K through Grade 5, Grades 6 through 8, and Grades 9 through 12. The Association maintains that teachers are permitted to bump into the position of any less senior teacher in their group for which they are certified. The Grievants both sought to bump into positions in the high school for which they were certified that were held by less senior teachers and should have been allowed to do so. The District maintains, however, that teachers in the high school may only bump less senior teachers within their own departments. This position is not supported by contract language and, if sustained, would nullify the seniority rights provision.

There is considerable arbitral precedent for the proposition that, where there is a plant-wide seniority provision, the right to bump into the position of a less senior employee is implicit as long as the senior employee is qualified to do the work. MATANUSAKA ELEC. ASS'N., 107 LA 402, 407 (Landau, 1996); AMOCO OIL CO., 67 LA 14, 21-22 (Hellman, 1976) CERRO GORDO CARE FACILITY, 80 LA 11, 13 (Loihl, 1982) MESABI REGIONAL MEDICAL CENTER, 90 LA 753, 755 (Ver Ploeg, 1988) The seniority provision in the contract here is analogous to those at issue in the cited cases. Specifically, that seniority extends within groups must imply that bumping rights exist within the particular groups and this is also supported by the bargaining history of the parties. Article VI was introduced in the 1980-81 contract, but did not contain the restriction on bumping between groups found in Article VI. B.6, or the provision in Article VI. B.5 providing for retention of all seniority for teachers teaching in multiple groups. Under the original language, therefore, a teacher could be laid off, but, under the cases cited above, could bump a less senior teacher in the group, provided he or she was certified for the position. Article VI.B.6 was added in the 1983-85 contract, and restricted bumping between groups, not within groups. Thus, it is a limitation of an existing right, not the creation of a new right. It is also noteworthy that the language permits bumping into a position for which the teacher is certified, without a requirement that the teacher have actually taught the subject. It would not make sense for a teacher to be able to bump into another group based upon certification, but not be able to do so within the same group.

Article VI. B.5 also supports the Association's position. This language, also adopted in 1983-85, protects seniority rights and bumping rights for teachers who teach in more than one group. This would not make sense if bumping rights only extended between groups, because that protection exists in Article VI.B.6. The group-wide seniority language of Article VI.B must be given some meaning. The language defines groups and preserves seniority within them. Article VI. B.4 and C.4 specify that layoffs are by seniority or area of certification. Since Article VI.B.6 adds nothing to the layoff language, it must be intended to convey a separate right. The Grievants were laid off, but were not the least senior teachers in their group. Allowing teachers to bump within their groups gives meaning to Article VI. B.6 and

protects the rights of teachers who have obtained multiple certifications. Reading Article VI.B.6 as preventing within group bumping would render Article VI.C superfluous, and such a reading should be avoided. Reading Article VI.B.6 as permitting within group bumping gives effect to all the language.

The contract also does not give the District the discretion to unilaterally determine when a teacher may bump within a group. The District apparently recognizes some right to bump within groups, because it has permitted this in some cases. Dr. Poeschl also testified that the contract permits bumping, but only by department in the high school. In the elementary school and middle school, however, bumping is allowed school-wide. This interpretation is not supported by Article VI, which does not refer to departments and does not distinguish between groups. The contract does refer to areas of certification, but this is not to be construed as meaning departments because some certifications would not necessarily qualify a teacher for any position within a given department. Likewise, Article VI.F provides for recall to vacancies within the area of certification or group. There is no basis, therefore, for treating “certification” as synonymous with “department.”

There is no basis in the contract for treating high school teachers differently than elementary or middle school teachers. Treating elementary teachers as a whole group rather than by departments provides them with greater rights than high school teachers, because they can bump throughout the group, regardless of what they taught. This was done in the cases of Linda Easland and Melissa Durrant. There is no basis for treating high school teachers differently. In fact, in 2005 Spadoni was told that the At-Risk teacher, Barb Blair, would be bumping into his Special Education position, even though they were in different departments. The District explained this by maintaining that Blair was originally hired to teach Learning Disabilities, but the contract provides no basis for bumping within a group based on what a teacher has previously taught. The District also prevented Cathy Wilhite from bumping into a Biology position in 2005 because she did not have the exact certification held by the incumbent, although she was certified in Biology. At hearing, however, the District maintained simply that there is no bumping between departments. It appears, therefore, that the District merely wants to retain discretion to decide when a teacher can bump, although this discretion does not exist under the contract.

The Association has also not waived its right to pursue these grievances. The Association has filed grievances in the past when teachers were denied bumping rights, but withdrew them after the layoffs were rescinded. The grievances were withdrawn without prejudice, however, and the Association did not waive its right to raise the issue at a later date. Therefore, these withdrawals cannot be used to support a District argument that the Association has in some fashion acquiesced in the District’s interpretation of the contract bumping language.

Seniority is a fundamental right in collective bargaining agreements, which recognizes the years of service of senior employees and also the relative difficulty for them to find a similar position, in comparison to junior teachers. Also, teachers invest time and resources in

obtaining additional certifications in order to improve their chances of retaining employment if their positions are eliminated. In the cases of Easland and Wilhite, their additional certifications made it possible for them to stay in the District in different positions. Allowing bumping within groups serves the ends of preserving seniority and recognizing the efforts of teachers in obtaining additional certifications. It is particularly egregious that here the District would not allow Spadoni to bump into a position whose previous occupant had been advised to bump him. He obtained an At-Risk certification specifically in response to that incident only to have the District change the rules on him. The Arbitrator should find a right to bump within the high school group and sustain the grievances.

### The District

The District asserts that its position is supported by the plain language of the contract and the Arbitrator is constrained by the contract to give effect to its terms. Article VI.B.4 specifies that in reducing staff "...the least senior teacher teaching within their area of certification or group where the reduction is to occur, will be laid off according to Section C." Section C defines the groups as elementary (K through Grade 5), middle school (Grades 6 through 8) and high school (Grades 9 through 12). The record establishes that in the elementary school, the entire group is the seniority unit, whereas in the middle school and high school the groups are separated into departments for seniority purposes. There is no reference to bumping in this section. The District determined the departments wherein the layoffs would occur and laid off employees in inverse order of seniority in accordance with Section VI.B.4.

Bumping is referenced in Section VI.B.6, which applies to bumping between groups. There is no reference to bumping within groups, or into other departments not designated for layoff. Since there is language expressing where bumping does apply, under the principle of *expressio unius est exclusio alterius* bumping rights are restricted to the express terms of the contract and any asserted bumping rights not contained in the language are excluded. The Association asserts that the Arbitrator should infer additional bumping rights under general principles of seniority, arguing that all seniority based contracts necessarily confer bumping rights regardless of whether they are expressly provided. This would require the Arbitrator to add language to the contract, which is forbidden under the terms of the grievance procedure. This proposition has been generally rejected by arbitrators. SAUK COUNTY, MA-13190, (GORDON, 2007); KAISER FLUID TECHNOLOGIES, INC., 114 LA 262 (Hoffman, 2000); SUB-ZERO FREEZER COMPANY, INC., A-4682 (Greco, 1991) Also, Article VI.F, addressing recall, states:

"Full-time teachers laid off under the terms of this Article will be given first consideration for such vacancies that shall occur in the area of certification and group from which the layoff occurs for two (2) years following the layoff."

Thus, recall is limited to a return to the area of certification and group where the layoff occurred. Since recall should be consistent with the layoff language, this provision supports the District's position, whereas the Association's position would result in significantly different



applications of the layoff and recall provisions. The contract language provides that layoffs will be in inverse order of seniority and provides for specific seniority units corresponding to high school departments. Absent specific language providing for bumping rights outside an employee's seniority unit, therefore, the contract language supports the District's position.

The District's position is also supported by bargaining history and past practice. Over the years, the Association has proposed significant expansions of employees' bumping rights on three separate occasions. In each case, the Association was unable to secure those expansions in bargaining. This establishes that the Association recognized that under Article VI it did not have the bumping rights it claims in this case and is attempting to gain in arbitration what it could not gain through negotiation. In 1980-81, the Association sought language requiring the District to layoff the least senior teacher in the District regardless of certification. The District rejected the proposal and the parties agreed to the current language of Article VI. In 1983-84, the Association sought to extend bumping rights to partial layoffs and to allow bumping when the employee was certified for the new position. This attempt was also unsuccessful. Finally, in 1985-86, the Association sought language permitting laid off employees to bump into the position of the employee with the shortest length of service in the District holding a position for which the laid off employee is certified. This effort, too, was unsuccessful. The Association may argue that these proposals simply sought to clarify existing rights and should not be construed against it, but that argument was rejected by Arbitrator Richard McLaughlin in a previous arbitration between these parties. WAUPACA SCHOOL DISTRICT, MA-8042 (McLaughlin, 1994) The Association repeatedly sought to expand its bumping rights in bargaining without success, revealing that it did not have the rights that it claims under current language. The Arbitrator should not award in arbitration what could not be obtained in bargaining and should deny the grievances.

A review of the record also reveals that for a period of more than twenty years the District has been consistent in denying bumping rights between departments in the high school. Linda Easland was given a notice of layoff in 1990 from her elementary position. Ultimately, Easland was transferred to another elementary position without bumping. In 1993-94 a Technology Education teacher was given a layoff notice. The Association grieved the fact that the a more senior Technology Education teacher was laid off before a less senior teacher, but did not seek bumping rights into another department. In 2005, Cathy Wilhite was laid off from a Special Education position and sought to bump into the Science department because she was certified to teach some science courses. The request was denied. Eventually, a new position was created combining Special Education and Science courses and was offered to Wilhite, but no bumping occurred. Also in 2005, two high school teachers were reduced to half time and sought to bump Tim Hiddeman from his Computer Science position because it did not require specific certification. The requests were denied because Hiddeman's position was outside the departments where the layoffs occurred. On another occasion, two laid off 6<sup>th</sup> Grade teachers, Timothy Guyer and Melissa Geitner, sought to bump into the Dean of Students position, which was denied. Eventually, Guyer was awarded the position, but no bumping occurred and the Association did not grieve the action. The record reveals no situations where a high school teacher has been permitted to bump into another department. This has been a consistent

practice as long as the current language has been in the contract and the grievances should, therefore, be denied.

### **Association Reply**

The Association asserts that the cases cited by the District do not support the proposition that bumping rights are limited to departments. The cases cited by the Association establish that bumping rights are inherent where, as here, contracts have seniority-based layoff provisions and plant-wide seniority. The District's cases can be distinguished. In KAISER FLUID TECHNOLOGIES, seniority was defined within job occupations, rather than by groups. The parties had also agreed to limit bumping, which had not occurred here. Further, the arbitrator found that the employees did not have the ability to operate the machines in the positions they sought to bump into, whereas here the Grievants are certified for the positions they sought. SUB-ZERO FREEZER CO. involved a employee who sought to bump into another shift where there was no layoff and the arbitrator ruled there is no right to bump a junior employee where no layoff is involved. In SAUK COUNTY, the arbitrator found there was no language implying any bumping rights, but here Article VI clearly sets forth a right to bump. Article VI.B.6 restricts bumping rights between groups which implies that there are bumping right within groups. Further, Article VI.B.5 preserves bumping rights for teachers who teach in multiple groups, lending support to the proposition that there are bumping rights within groups. The layoff language and group-wide seniority provisions also imply the existence of bumping rights and the parties have operated on the understanding that there are bumping rights; the only question is the scope of those rights.

The contract language does not support limiting to bumping to within departments. The principle of *expressio unius est exclusio alterius* is inapposite here, because the language of Article VI.B.6 works to limit bumping rights, not to create them. By expressing one exclusion here, the language, in effect, prohibits other exclusions to bumping. The District's position is, thus, contrary to the clear language of the contract, which defines seniority as being on a group basis.

There is also no support in the contract for treating high school teachers differently and limiting their bumping rights only to departments. Further, the WAUPACA SCHOOL DISTRICT award cited by the District is inapposite because there the issue was a reduction of hours, nota layoff. The Grievant was reduced from full-time to 12.5%, and, further, had only one certification, Technical Education, so he could not request to bump into another department. The arbitrator held that the District did not violate the contract by not permitting the Grievant to glean duties from less senior teachers in order to remain full-time. Further, the previous layoffs of Wilhite, Nowak and Gustke do not support the District's position because the refusals to permit bumping were based on different premises. Notwithstanding, the Association grieved those instances, but withdrew them without prejudice when the layoffs were rescinded, thus preserving the Association's grievances for another day. The Association submits that the contract does not permit treating teachers in separate groups differently with respect to bumping rights. The District asserts that elementary teachers are different because the license

applies as a whole, but this is not true. Where special education is involved, a separate special education certification is required. In the cases of Linda Eastland and Missy Durrant, the teachers held both regular and special education certifications and were told that they could bump from one area to the other, although ultimately no bumping was required. There is no basis for not treating high school teachers as a whole group for bumping purposes, as well. The District also cites the case of Timothy Guyer and Melissa Geitner to support its position, but these cases involve recall from layoff, not bumping. The recall language is significantly different than the layoff language because it specifies that teachers receive consideration for vacancies occurring in the group and area of certification from which the layoff occurred. By contrast, the layoff language provides for layoff by group or area of certification. The difference in the language makes the Guyer and Geitner cases distinguishable. On the other hand, in 2005, Spadoni was advised that the At-Risk teacher, Barb Blair, would be bumping into his Special Education position. Since At-Risk and Special Education are in separate departments, this case supports the Association's position.

The bargaining history also does not support the District. The District cites previous bargains for the proposition that the Association is trying to achieve in arbitration what it could not gain through negotiation, but an examination of the Association's previous bargaining proposals reveals that the Association was trying to achieve broader rights than just group-wide bumping rights, so the failure to gain those provision cannot be used to support the District here.

### **District Reply**

The District asserts that the Association's claim that arbitral authority supports an implied bumping right in this case is incorrect and ignores the specific language of the contract. In all the cases cited by the Association the arbitrators implied bumping rights in cases where there was no limitation on the arbitrators authority to add to the contract or imply certain rights. The case closest to this one is SAUK COUNTY, wherein the arbitrator held that implying bumping rights would require him to add language to the agreement, which he was prohibited from doing. This principle is universally recognized and the arbitrator should reject the Association's argument because it requires him to add language to the contract which is not there. The Association also interprets its cited cases too broadly. In those case, the arbitrator found bumping right within seniority groups, whereas here the Association is seeking bumping rights outside the seniority groups wherein the layoffs occurred. The Association relies on the language of Article VI.C.1 for the proposition that the only relevant seniority unit is the group and that, therefore, teachers should be able to bump within the group into any position for which they are certified. This ignores other language that limits teachers' seniority rights for layoff purposes. It also ignores the bargaining history wherein the Association has failed to obtain these rights in previous negotiations. The Association further fails to note that Article VI.C.4 provides that:

“Seniority” shall be applied in the inverse order of the earliest date on which the individual teacher began his/her first teaching assignment with the District in the specified group or area of certification.

Thus, the contract establishes that the seniority unit for layoff purposes is the group or area of certification designated for layoff by the District. In the elementary school and most of the middle school, the seniority unit is the entire group. In the high school, however, the seniority unit is the specific area of certification designated for layoff that corresponds to a department. In the case of Hiddeman, he seeks to bump into a Social Studies position because he is certified to teach some Social Studies courses. He is not able to teach the course of the teacher he seeks to bump, however, because he is certified in history and political science, but not in geography. This is a simplistic reading of the contract language, which has never been applied as the Association suggests. The Association’s position is also curious because in a previous arbitration it asserted that layoffs in the high school were unique and should be implemented by departments. Now, the Association seeks a bumping right outside the seniority unit traditionally recognized in the high school for layoff purposes. This position has been regularly rejected by other arbitrators. As was stated by the arbitrator in KAISER FLUID TECHNOLOGIES:

Other arbitrators have concluded that where the parties agree on specific seniority units, grievants have no seniority or bumping rights in other departments where junior employees are working.

The Association’s faulty interpretation of the applicable layoff language is further exposed by its argument involving the actual bumping language. The Association argues that Article VI(B)6 allows teachers to bump between groups, whether or not they have actually taught the subject they are bumping into, as long as they are certified. This is incorrect. In fact, Article VI(B)6 only permits bumping between groups if a teacher has at least one year of successful teaching in the group into which he or she seeks to bump. It is clear that the parties know how to negotiate bumping rights and clearly did not intend the kind of broad bumping rights the Association is seeking here. The arbitrator should decline to expand the concept of bumping rights in this proceeding.

The Association’s position would also lead to absurd results under the contract’s recall positions and should, therefore be rejected. It is widely recognized that interpretations of contract language that would lead to absurd results should be rejected. The layoff and recall language in the contract provides that:

Full-time teachers laid off under the terms of this Article will be given first consideration for such vacancies that shall occur in the area of certification and group from which the layoff occurs for two (2) years following the layoff.

(emphasis added)

Thus, teachers who are laid off are only entitled to recall if a vacancy occurs in the areas of certification and group designated for layoff. If teachers are permitted to bump based on certification, the result will be that the teacher ultimately left without employment will not be certified in the area of certification wherein the layoff occurred. This interpretation would effectively eliminate recall rights. Thus, in this case Doug Spadoni sought to bump into an At-Risk position held by Shane Dornfeld. If allowed, Dornfeld would be laid off, but, since he is not certified in Special Ed., where the layoff occurred, Dornfeld would have no meaningful recall rights. This would be an absurd result that should be avoided.

The Association's past interpretation arguments are also unpersuasive, because they confuse management-directed transfers with employee-directed bumping. The past cases, where the Association claims teachers were told they would have bumping rights, actually involve transfers, not bumping rights. Further, the Association's argument that the District has inconsistently applied the layoff language is refuted by the testimony of Dr. Poeschl, whereas the Association's position is only supported by self-serving hearsay testimony. The only teacher who was ever allowed to bump was Cathy Wilhite, who was only allowed to do so because the bump was within the same department designated for layoff..

The Association's claim is also inconsistent with the bargaining history of the parties. The bargaining history does not support the Association's position that the contract provides bumping rights within the specified groups based on certification alone. Several District exhibits establish that the Association has unsuccessfully sought to expand members' bumping rights on several occasions. In 1983-84, the Association sought language allowing bumping in cases of partial layoff and to allowing bumping based upon certification. Likewise, in 1985-86 the Association sought bumping rights for laid off employees based upon certification. As Arbitrator McLaughlin held in *WAUPACA SCHOOL DISTRICT, ID.*, this is an attempt to expand through arbitration the Association's rights under Article VI, which should be rejected. The Association repeatedly proposed language in bargaining that would have provided the rights it seeks here. This reveals that the Association does not have the rights it claims and the grievances should be rejected.

### DISCUSSION

The essence of the dispute between the parties in these two grievances is the scope of the bumping rights available under the collective bargaining agreement to teachers who are laid off from their positions. It is the position of the Association that Article VI.C. of the contract creates separate seniority groups for Grades K-5, Grades 6-8 and Grades 9-12, and that, in the event of layoff, there is an inherent right of teachers within those groups to bump less senior teachers as long as the teacher is certified to teach the grade or subject into which he or she seeks to bump. While this right is not specifically spelled out in the contract, the Association argues it should be inferred from the seniority language and also from the fact that the contract does spell out limited bumping rights between groups in Article VI.B.6 and also for teachers who teach in multiple groups in Article VI.C.5. The Association asserts that this language does not create bumping rights, but rather places limitations on existing rights, which are otherwise

unrestricted. It also asserts that it would be illogical for the contract to provide bumping rights across groups based on certification, but not within groups on the same basis. The Association also maintains that the District has permitted bumping into other departments, or has at least acknowledged the existence of the right, in the past, supporting its argument for the existence of the bumping rights asserted by the Grievants.

The District disagrees and argues that, while the seniority groups in the Grades K-5 and Grades 6-8 encompass the entire group, in Grades 9-12 seniority is determined by areas of certification. Thus, in the case of a layoff, a teacher's bumping rights are limited to the area of certification in which he or she teaches and the teacher may not bump a less senior teacher in another area, even if certified to teach the subject matter. The District points to the language of Article VI.B.4, which specifies that staff reductions are to be accomplished by laying off the least senior teacher teaching within the group or area of certification wherein the reduction is to occur. It also points to the language of Article VI.F, which states that teachers on layoff will be given preference for recall for two years for vacancies that occur within the area of certification and group from which the layoff occurred. The District maintains that this language makes it clear that within the high school, layoffs are accomplished by area of certification and that it would be inconsistent to permit bumping using different criteria than that used for layoffs and recalls. It also asserts that adopting the Association's position would effectively eliminate the recall rights provided by Article VI.F because a teacher bumped from his or her position by another teacher would likely not be certified in the area where the layoff originally occurred and so would never be eligible for recall. The District also denies any practice of permitting group-wide bumping in the high school and asserts that bargaining history supports its position, in that the Association has in the past unsuccessfully sought the bumping rights it asserts here in bargaining. The District argues that it would be improper to grant the Association rights in arbitration that it could not obtain through negotiation.

Clearly, the crux of the case is the extent to which the collective bargaining agreement provides bumping rights to high school teachers in the event of layoff. In order to make this determination, it is first necessary to examine Article VI of the contract in its entirety and to analyze the interplay of its various provisions in the event of staff reductions. I first note that Article VI. C, which defines the existence and scope of seniority, states:

“Seniority” for the purposes of this agreement shall be defined as the number of years of uninterrupted service, on a group basis, within one of the three groups designated. The groups shall be (1) K through Grade 5; (2) Grades 6, 7, and 8; and (3) Grades 9 through 12. (emphasis added)

Moreover, paragraph 5 of Article VI.C states:

Any teacher who teaches in more than one (1) specified group shall have Seniority rights based on years in the District and shall retain all bumping rights. (emphasis added)

These provisions support the position of the Association that seniority in the high school is building-wide and that teachers in the high school have bumping rights based on group seniority.

Article VI.B, which sets forth the layoff procedure, states, in paragraph 4, in pertinent part:

If steps 1, 2, and 3 (which deal with normal attrition, volunteers and part-time employees) are insufficient to accomplish the desired reduction in staff, the least senior teacher teaching within their area of certification or group where the reduction is to occur will be laid off according to Section C. (emphasis added)

Further, paragraph 6 of Article VI.B states, in pertinent part:

No bumping shall occur between the grouping specified in Section C, unless the teacher is certified for such other grouping and has had one year of successful teaching experience within such grouping within four years immediately preceding the year in which the layoff occurs. If such teacher meets these requirements for bumping, they may only bump the least senior member of such group.

Paragraph 4 appears to comport with the District's position that layoffs within groups may be made according to area of certification. Thus, a reduction may be made in a department by laying off the least senior teacher therein, even though that teacher might not be the least senior within the grouping defined in Article VI.C. By the same token, however, paragraph 6 again refers to bumping, this time restricting the ability of teachers to bump from one group into another, unless certain conditions are met.

It is clear from the language of Article VI.C.5 and Article VI.B.6 that the contract does provide bumping rights for displaced teachers. The question then becomes, to what extent? The Association asserts that bumping rights must be group-wide according to Article VI.C. In its view, furthermore, the restriction in Article VI.B.6 supports this view because it implies that there must be broader inherent bumping rights otherwise the restriction would not be necessary. The District argues, however, that the bumping rights must mirror the layoff provision, meaning that, as layoffs in the high school occur within areas of certification, so too bumping can only occur within the departments wherein the reductions occur. It points also to the language of Article VI.F, which provides that laid off teachers will be given the first opportunity to fill vacancies occurring in the area of certification wherein the layoff occurred. It argues that group-wide bumping would likely render this language moot because a teacher laid off due to bumping would likely not be certified to fill any vacancy in the area of certification wherein the original layoff occurred.

Both parties cite several arbitration awards supporting their positions. The Association cites *DARIN & ARMSTRONG*, 13 LA 843 (Platt, 1950) and *MATANUSKA ELEC. ASS'N*, 107 LA 402 (Landau, 1996) for the proposition that, unless there is an explicit contract prohibition,

senior employees have the right to bump junior employees under a plant-wide seniority system as long as they are competent to perform the work. The District counters by citing SAUK COUNTY, DEC. NO. MA-13190 (Gordon, 2007), KAISER FLUID TECHNOLOGIES, INC., 114 LA 262 (Hoffman, 2000) and SUB-ZERO FREEZER COMPANY, INC., DEC. NO. A-4682 (Greco, 1991) for the proposition that bumping rights cannot be implied from a general seniority provision, but must be spelled out. The District also asserts that unlike the awards cited by the Association, the contract here limits the arbitrator to interpreting the language of the contract and does not permit him to add to the contract or imply the existence of rights that are not spelled out.

In my view, none of the cited cases is particularly instructive in this set of circumstances, because they all arose under circumstances where there was no specific contract language addressing the subject of bumping and the arbitrators were asked to infer the existence and scope of bumping rights based on seniority provisions and past practice alone. That is not the case here, because, as noted above, there are provisions in the contract that directly reference bumping rights and my task, therefore, is not to determine whether there are bumping rights, but rather the extent of the rights that the contract provides. Further, in so doing I am not adding to, subtracting from, or otherwise modifying the agreement, as prohibited by the grievance procedure, but rather am construing and interpreting the language that exists.

I consider the Association's position as to the proper interpretation of the contract language to be stronger than that of the District. First, it is difficult to get around the fact that Article VI.C clearly defines seniority groups by grade levels, not by departments or areas of certification. To be sure, Article VI.B.4 specifies that layoffs may be according to areas of certification, but this language is specifically limited to layoffs and does not address the issue of bumping, which is an entirely separate area of inquiry. The District has a legitimate management interest in being able to control the areas wherein reductions occur according to its determined needs, so being able to conduct layoffs within areas of certification makes sense, but the modifying language must be limited to its terms. Bumping rights are separate from the determination of where to impose a layoff, and go instead to whether a qualified senior teacher may assume the position of a less senior teacher in another department after the reduction has occurred. Indeed, were the District's position to prevail, it would have the effect of nullifying that part of Article VI.C that defines the Grades 9 through 12 seniority group, because if layoffs, recalls and bumping rights were all to be determined by area of certification the contractually defined seniority group would become meaningless.

It is also apparent to me that the reference to bumping rights contained in Article VI.B.6 does not create bumping rights, but rather, as the Association suggests, places limitations on existing rights by specifically stating that teachers seeking to bump into different seniority groups may only do so under specific circumstances. Combined with the language of Article VI.C.5, which guarantees that teachers who teach in multiple groups retain all bumping rights, the clear implication is that, unless specifically restricted, there is a general bumping right under the contract within the contractually defined seniority groups as long as the teacher



is certified to teach in the area into which he or she seeks to bump. Indeed, this must be so, because it would make no logical sense to afford bumping rights to teachers across seniority groups, based on certification and having taught within the desired group within the past four years, but to not do so for teachers within seniority groups as long as they are certified for the positions into which they seek to bump. In the case of the Grievants here, both Hiddeman and Spadoni were in the Grade 9-12 seniority group and were certified to teach in the areas into which they sought to bump, which were in the same seniority group. According to my interpretation of the contract, therefore, the moves should have been allowed.

I note the District's point that the recall language in Article VI.F only provides for laid off teachers to be offered opportunities to fill vacancies in the group and area of certification wherein the layoff occurred. It asserts that the effect of a group-wide bumping right would make this language superfluous because the teacher laid off after bumping occurred would likely not be certified to fill a vacancy in the area wherein the original layoff occurred. I do not agree. In the first place, it is by no means certain that a laid off teacher would have multiple certifications that would permit him or her to bump. Thus, he or she would experience the layoff and would be eligible for recall should a vacancy arise later. Furthermore, it is also possible that the teacher ultimately laid off could also be cross-certified and, therefore, able to fill a later vacancy in the group and area wherein the original layoff occurred.

The District argues that its position is supported by both bargaining history and past practice, but I do not find these arguments to be persuasive. In the first place, bargaining history and past practice are tools that are used to construe ambiguous contract language, but I do not find the contract to be ambiguous. In my view, the words of limitation in Article VI.B.6 fairly clearly establish the underlying right, else they would be superfluous. Nonetheless, even were I to view the contract language as ambiguous, I am not convinced that either the bargaining history or the past practice of the parties here would carry the day for the District.

The District points to contract proposals made by the Association at various times in the 1980s, which were not adopted, to support its view that a general bumping right was sought, but not obtained, in past bargains. As I look at these proposals, however, it appears to me that they sought rights beyond the ability to bump into another area of certification. The original version of Article VI was added to the contract in 1980-81. The Association had sought language establishing district-wide seniority and calling for layoffs in inverse order of seniority, but the District did not agree. Ultimately, both Article VI.C, defining seniority groups, and Article VI.B, setting forth the layoff procedure, were added in their current form, but there was no reference at that time to bumping. In negotiations for the 1983-85 contract, the Association proposed language that would have made Article VI applicable to partial layoffs and would have permitted partial bumping in such cases in order that a senior teacher subject to a partial layoff could retain a substantially equivalent position. Again, the District did not agree to the proposal, but in the final agreement Article VI.B.6 and Article VI.C.5 were added in their present form. In negotiations for the 1985-87 contract, the Association proposed language that would again have provided for bumping into all or part of a less senior teacher's position in the event of a total or partial layoff, and would also have allowed a

teacher to bump into a position for which he or she is either certified or certifiable. The District did not agree and the language remained unchanged. In each instance, the Association did, indeed, make layoff and/or bumping proposals that the District rejected, but none specifically sought the general group-wide bumping rights at issue here. Rather, they sought expansions of those rights to partial layoff situations and to permit bumping into areas where a teacher was merely certifiable, rather than certified. These proposals do not, to my mind, suggest that the Association did not believe it had general group-wide bumping rights under the existing contract language.

The past practice evidence cited by the District concerns a number of teachers who have been issued notices of layoff or transfer over the last several years. As the District notes, in each instance the teachers in question were informed that they could not bump into another position in their group, but in another area of certification. Grievances were filed over the refusals, but were later withdrawn when the layoffs or transfers were rescinded. Thus, the issue of bumping rights has not been heretofore litigated. The record does reveal, however, that on at least one occasion in 2005 the District apparently informed Hiddeman that he was being bumped from his Learning Disabilities position by the At-Risk teacher, despite the fact that the positions are in different departments. This would suggest that at least in one instance the District did recognize a right to bump into different departments within the Grade 9-12 seniority group. Even if this instance is discounted, however, all the evidence suggests is that the District did not recognize a group-wide seniority right. It does not suggest that the Association acquiesced to that understanding.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

### AWARD

The District violated Article VI of the Collective Bargaining Agreement when it laid off the least senior teachers within the areas where the layoff occurred and denied the teachers the ability to bump into other areas of certification. As and for a remedy, the District shall recall the Grievants to the positions into which they sought to bump and shall make them whole for all wages and benefits to which they would have been entitled but for the layoffs.

The Arbitrator will retain jurisdiction for a period of thirty days in order to resolve any issues that may arise in the implementation of this award.

Dated at Fond du Lac, Wisconsin, this 9th day of November, 2010.

John R. Emery /s/

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John R. Emery, Arbitrator

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