

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL DISTRICT OF MANAWA

and

MANAWA EDUCATION ASSOCIATION

Case # 24

No. 69978

MA-14824

Appearances:

Tony J. Renning, Davis & Kuelthau, S.C., P.O. Box 1278, Oshkosh, WI 54903-1278, appearing on behalf of School District of Manawa.

Sandra A. Fults, UniServ Director, Central Wisconsin UniServ Council, 370 Orbiting Drive, P.O. Box 158, Mosinee, WI 54455-0158, appearing on behalf of Manawa Education Association.

ARBITRATION AWARD

The School District of Manawa, hereinafter District or Employer, and the Manawa Education Association, hereinafter Association, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Association filed a request for arbitration in which the District concurred. The undersigned was selected from a panel of five Commissioners or Commission staff members to hear and decide this grievance regarding the layoff of a teacher, Tracy Breaker. A hearing was held on October 8, 2010, in Manawa, Wisconsin. The hearing was transcribed, and the transcript was filed on November 3, 2010. The record was closed on January 25, 2011, following receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Award.

ISSUE

There are no procedural issues in this case. The parties were unable to agree to a statement of the substantive issues, but agreed that the undersigned may formulate the issues based upon the evidence and arguments presented by the parties. The Union proposes the following issues for resolution:

Whether the employer violated the collective bargaining agreement when it laid off six-year veteran teacher, Tracy Breaker? If so, what is the appropriate remedy?

The District proposes the following issues for resolution:

Did the district violate the master agreement when it laid off Tracy Breaker for the 2010-2011 school year pursuant to the teacher layoff provision in the master agreement, and, if so, what is the appropriate remedy?

The undersigned has determined the issues to be:

Did the Employer violate the collective bargaining agreement when it laid off Tracy Breaker for the 2010-2011 school year?

If so, what is the appropriate remedy?

FACTS

The Grievant, Tracy Breaker, was a teacher in the Manawa School District for six (6) years prior to her layoff for the 2010 - 2011 school year. She was originally hired as an At-Risk coordinator/teacher, serving students in the 7th and 8th grades. She also taught 7th and 8th Grade reading strategy, and provided math instruction to students in 6th, 7th, and 8th grades under the at-risk umbrella. During the 2009 - 2010 school year, Ms. Breaker taught Middle School Social Studies to both 7th and 8th graders. Ms. Breaker is certified to teach elementary education, grades 1 through 8 and mathematics, grades 1 through 9.

Like many other school districts in Wisconsin, the Manawa School District was under pressure to reduce costs for the 2010 - 2011 school year. In order to meet budgetary concerns resulting from, among other factors, declining enrollment, the District consolidated from three (3) school buildings to two (2) buildings. In addition, it reviewed staffing needs and determined that a number of teaching positions needed to

be eliminated. While preliminary layoff notices were sent to ten (10) teachers, the District ultimately eliminated four and one-half (4½) positions and five (5) teachers, including the Grievant.

One of the positions that the District eliminated was that of a middle school social studies teacher. Of the four teachers that taught social studies, grades 7-12, during the 2009 – 2010 school year, Breaker had the least seniority – six years.¹ Accordingly, the District advised Ms. Breaker that she would be laid off.²

A high school social studies teacher, Eugene Mattke, had 30 years of experience in the District. Although Mr. Mattke also received a preliminary notice of layoff, he was not laid off. Rather, he retired at the end of the 2009 – 2010 school year. Initially, the District sought to obtain emergency certification for the 2010 – 2011 school year from the Department of Public Instruction (DPI) to allow Ms. Breaker to teach high school social studies in addition to middle school social studies for which she is certified. DPI denied the request.

Rather than hire a part-time teacher to teach the high school social studies classes that Mattke had taught, the District decided to advertise for, and hire, a full-time teacher who is certified to teach 7-12 social studies. Shannon Huettner's contract was approved by the School Board at the same meeting as it voted to layoff Ms. Breaker.

For the 2010 - 2011 school year, the District assigned 7th grade social studies to Bortle, a teacher with 9 years of seniority. 8th grade social studies classes were assigned to Huettner who had no seniority in the District but who also taught high school social studies classes.

Breaker grieved her layoff with the assistance of the Manawa Education Association. The nature of the grievance was described on the attachment to the Grievance Report as follows:

After being given a final notice of reduction letter (final layoff notice) on Thursday April 29, 2010, this official document is being presented to the School District of Manawa in regard to employment opportunities that Tracy Breaker is qualified and certified to teach in this district. Currently Tracy is licensed to teach 1st – 8th grade general education along with mathematics courses on a 1st – 9th grade level. A newly hired teacher with less seniority is being assigned 7th and 8th grade Social Studies classes which Tracy is currently teaching. Other math classes are also currently scheduled to be taught by faculty with less seniority than Tracy.

¹ The seniority list that was posted early in the 2009 – 2010 school year failed to list Breaker in the listing of 7 – 12 social studies teachers. The District concedes that Breaker should have been so listed. There are a number of additional issues with the seniority list that are not relevant to the resolution of the instant grievance.

² There is no question on this record that, procedurally, Ms. Breaker received timely notice of her potential layoff and timely notice that she would, in fact, be laid off.

In the master contract, (page 8, Teacher Layoff, Section 1, part b) states: 7 – 12 classroom teachers in specified departments: Social Studies, English, Mathematics, Science, Foreign Language, Home Economics, Industrial Arts, Vocational Industrial Art (Agriculture), Computer Science are released based on seniority within the department. Our current seniority list does not even include Tracy in the Social Studies department where she currently teaches. In addition, she should be listed in the math department (where she is also not listed) because she has taught math for the district in past years.

Therefore, an official grievance is being filed on this day, Monday May 3, 2010 claiming that Tracy is entitled to teach the following classes scheduled for 2010 – 2011 year:

- 7th Grade Social Studies
- 8th Grade Social Studies
- Consumer Math
- Algebra 1
- Pre-Algebra A
- 8th Grade Algebra 1

Remedy sought: Assign Tracy Breaker a full-time teaching position for the 2010 – 2011 school year.

The grievance was processed through the contractual steps of the grievance procedure and was presented to the Board of Education. By letter dated June 16, 2010, Dan Nolan, President, Manawa Board of Education responded to Kris Kluever, Grievance Committee Chair, denying the grievance:

After careful consideration of all of the information presented on behalf of Tracy Breaker and the District's Administration to the Board of Education on Tuesday, June 15, 2010, the Board of Education decided to deny the above-referenced Grievance. The Board determined the layoff of Tracy Breaker did not violate the terms and conditions of the Master Agreement.

The Master Agreement provides that if the MEA is not satisfied with the disposition of the Grievance by the Board of Education, the MEA may, within ten (10) business days, submit the Grievance to binding arbitration.

The MEA timely submitted the grievance to binding arbitration.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

MANAGEMENT RIGHTS

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

1. To the executive management and administrative control of the school system and its properties and facilities, and the activities of its employees;
2. To hire all employees and subject to the provision of law, to determine their qualifications and the conditions for their continued employment, or their dismissal, demotion, or suspension; and to promote, transfer, schedule, and assign employees in positions within the School District;
3. To establish grades and courses of instruction, including special programs, and to provide for athletic, recreational and social events for students, all as deemed necessary or advisable by the Board;
4. To decide upon the means and method of instruction, the selection of textbooks and other teaching materials, and the use of teaching aids of every kind and nature;
5. To determine class schedules, the hours of instruction, the duties, responsibilities, and assignments of teachers and other employees with respect thereto, and with respect to administrative and non-teaching activities, and the terms and conditions of employment.
6. To take whatever action [sic] are necessary to carry out the functions of the school district in situations of emergency.

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

TEACHER LAYOFF

The following procedures shall apply when the Board reduces the teaching staff. The Board shall have the sole right to determine the teaching position or positions to be eliminated. After the Board has determined which position shall be eliminated, the following procedures shall be used:

1. Teachers shall be released considering three separate levels:
 - a. K-6 classroom teachers
 - i. The least district seniority within the level
 - b. 7-12 classroom teachers in specified department: Social Studies, English, Mathematics, Science, Foreign Language, Home Economics, Industrial Arts, Vocational Industrial Arts (Agriculture), Computer Science
 - i. The least district seniority within the department
 - c. K-12 teachers in the following departments: Art, Physical Education, Reading, Instrumental Music, Vocal Music, Library Science, Guidance, Special Education
 - i. The least district seniority within the department
 - d. Seniority is defined as the length of continuous service based on the employee's most recent date of hire. In case of identical beginning dates, the tie shall be resolved by lot. Seniority lists for each level and department will be established and posed at the beginning of each school year.
 - e. 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 and terminated if the teacher: (i) resigns or quits; (ii) is discharged; (iii) fails to report to work within five (5) working days after termination of a leave of absence; (iv) fails to respond to a recall notification within ten (10) calendar days; (v) is retired; (vi) is on layoff for more than two (2) years.
 - f. In the event the Board decides to layoff staff for the next contract year, the teachers so affected will be notified by May 1st, of the preceding year. However, the teacher shall be issued an individual teaching contract contingent upon the availability of work.
2. When a position is eliminated, the Board of Education may place teachers in other available positions for the improvement of the educational program.

3. The recalling of teachers shall be done from the recall list in reverse order of layoff, i.e., last out, first back. Individuals shall be kept on the recall list for two years.
 - a. Individuals on the recall list will retain seniority in their level only.
 - b. Notification of recall shall be by certified mail and an affirmative response must be made to the District Administrator within twenty (20) days or the individual will be dropped from the recall list. It shall be the individual's responsibility to keep a current address on file with the District Office.
 - c. Teachers called back must be certified or certifiable for the position in question and must produce the proper license prior to the school year identified on the contract.
 - d. No one would lose position on the recall list because they are passed over because of certification.
4. The Board will make every effort to provide the teacher(s) and the Association with the maximum possible time prior to imposing any layoff. Whenever possible, preliminary layoff notices will be issued prior to any offer of continuing employment being extended to the teacher by the Board.
5. Employee(s) on layoff will be eligible for inclusion in all of the District's group insurance programs, to the extent such policies allow their eligibility, and they will be responsible for their own premiums when layoff becomes effective.

DISCUSSION

Tracy Breaker had been a teacher in the Manawa School District for six (6) years prior to her layoff for the 2010 – 2011 school year. Ms. Breaker is certified to teach elementary education, grades 1 through 8, and mathematics, grades 1 through 9. During the course of her employment with the District she had taught in several areas, the most recent having been 7th and 8th grade social studies during the 2009 – 2010 school year.

Declining enrollments, and the general financial situation in the Manawa School District, the State and the nation, required that the District make significant changes in its physical plant and teaching faculty for the 2010 – 2011 school year. The District decided to reduce the number of school buildings from three to two, and it laid off four and one-half teaching positions, affecting five persons. Ms. Breaker was, unfortunately, one of the teachers laid off. Although it is the position of the District that it eliminated a middle social studies position, the department in which Ms. Breaker

was the least senior employee, it is the contention of the Association that Ms. Breaker's layoff was the result of the elimination of student services and "an arbitrary and capricious assignment of classes with no regard for departmental areas of experience and seniority earned." The Association also argues that the seniority list utilized by the District in making its layoff decisions was flawed and the District made no attempt to investigate and correct the list prior to making its layoff decision. It is the position of the Association that Ms. Breaker should not have been laid off and that she was certified to teach numerous classes that would have encompassed a full-time position for her. Accordingly, the Association seeks to have Ms. Breaker reinstated and made whole for lost wages and benefits retroactive to the beginning of the 2010 - 2011 school year.

It is the position of the District that the School Board made a rational and determined decision to eliminate a middle school social studies teacher. In accordance with the language of the collective bargaining agreement, the decision as to what position or positions to layoff is that of the Board: "The Board shall have the sole right to determine the teaching position or positions to be eliminated." Once the decision to layoff a position is made, the person to be laid off is determined in accordance with the contractual language that provides:

Teachers shall be released considering three separate levels:

- a. K-6 classroom teachers
 - i. The least district seniority within the level
- b. 7-12 classroom teachers in specified department: Social Studies, English, Mathematics, Science, Foreign Language, Home Economics, Industrial Arts, Vocational Industrial Arts (Agriculture), Computer Science
 - i. The least district seniority within the department
- c. K-12 teachers in the following departments: Art, Physical Education, Reading, Instrumental Music, Vocal Music, Library Science, Guidance, Special Education
 - i. The least district seniority within the department

The Association points out that declining enrollments in the elementary grades prompted the District to eliminate two elementary classrooms and layoff the least senior two elementary teachers. Declining enrollment also caused the District to reduce the number of high school physical education classes, resulting in the layoff of a half-time physical education teacher. Similarly, the Association points out that the District reduced the number of high school Science classes and eliminated unmandated health classes at the middle school, resulting in the layoff of the person who taught the 7th and 8th grade health classes and science. However, the Association argues that the District did not eliminate social studies classes. Rather, those classes were re-assigned to other teachers. The District did reduce student support programs at the 7th and 8th grade level and 7-12 at-risk programs. Therefore, the Association contends, the layoff of Tracy Breaker, the least senior social studies teacher, was arbitrary and capricious.

The District contends that it made the decision to eliminate a middle school social studies teacher. It presented uncontested evidence to support its argument that a social studies teacher was eliminated. There is one (1) less social studies teacher in the Manawa School District this year than last. Accordingly, the Association's argument that the decision to layoff Ms. Breaker violated the contract must fail inasmuch as the District determined to layoff a social studies teacher and Breaker was the least senior such teacher. Additionally, the contract language at issue here does not address the question about which the Association makes its argument. The contract provides that the District can determine the *position* to be eliminated. The language is silent with regard to the classes that are to be eliminated. Thus, the Association's argument that the number of social studies classes to be taught did not change fails to address the number of *positions* that exist or are eliminated.

Although the District's decision to layoff Ms. Breaker did not violate the collective bargaining agreement, this does not resolve the instant matter. The Association points out that the seniority list utilized by the District is inaccurate in many respects, not the least of which is that it does not include Ms. Breaker under the social studies classification. The District does not deny that there are errors in the list. There are valid questions as to how the list is to be established and maintained, and whether once a teacher has taught a particular subject, that teacher continues to have district wide seniority in that classification. (For example, should Ms. Breaker have been listed in the mathematics and at-risk categories as well as the social studies department? Should she have been listed in the elementary category based on her licensure?) These are, however, questions that need not be addressed by the undersigned. They would be extremely important if the collective bargaining agreement provided for bumping – if a teacher who was laid off in one subject area could bump into another in which she/he had more seniority than another teacher. Although the Association points to many classes that Ms. Breaker could have taught, particularly in mathematics, if she had the right to bump another teacher, the terms of the collective bargaining agreement between the District and the Association do not provide for bumping.³ Because the District acknowledges that Ms. Breaker should have been listed on the seniority list in the social studies classification with six years of seniority, the problems with the seniority list do not affect the decision here.

If Eugene Mattke, a social studies teacher with 30 years of experience in the district, had not resigned at the end of the 2009 – 2010 school year, no social studies classes in 2010 – 2011 would have been taught by a teacher with less seniority than the Grievant and this matter would be concluded. However, Mr. Mattke did retire. Although the District attempted to obtain emergency certification for Ms. Breaker to teach high school social studies, the Department of Public Instruction refused to issue

³ This could be of significant import in the event of a recall. There is no question that Ms. Breaker has six years of seniority in the District and is certified and experienced in a number of areas.

the license. The District needed someone to teach high school social studies. Instead of seeking a part-time teacher to fill this need, the District decided to hire a full-time teacher, Shannon Huettner, to teach both the high school classes and some middle school social studies classes that Ms. Breaker is certified to teach.

The District contends that it decided to hire a full-time 7-12 social studies teacher for the 2010 – 2011 school year in order to maintain efficient staffing. It argues that the District's right to schedule work includes the right to do so with a view toward optimum efficiency, analyzed from the "point of view of the needs of the District as opposed to the desires of the Union or its members." The District states that the action it took was not to evade seniority, to attack or weaken the Union or its members, or to destroy the gains and job security achieved by senior employees.

Although the Management Rights clause of the collective bargaining agreement does reserve to the District the right "[t]o hire all employees and subject to the provision of law, to determine their qualifications and the conditions for their continued employment, or their dismissal, demotion, or suspension; and to promote, transfer, schedule, and assign employees in positions within the School District;" and the right "[t]o determine class schedules, the hours of instruction, the duties, responsibilities, and assignments of teachers and other employees with respect thereto, and with respect to administrative and non-teaching activities, and the terms and conditions of employment", these rights are limited by the terms of the collective bargaining agreement. That is, the District is not free to hire, schedule, or layoff or otherwise take actions that conflict with the specific terms of the collective bargaining agreement.

The "Teacher Layoff" clause is a clear statement that the District and the Association recognize the importance of seniority, particularly insofar as protecting more senior teachers in a particular classification from being replaced by a less senior teacher. The contract provides that the District has an absolute, unchallengeable right to determine the position or positions to be eliminated. Thereafter, however, the person to be laid off is clearly the least senior in the level under consideration be it K-6 teachers, 7-12 classroom teachers in a specified department, or K-12 teachers in "special" subjects. There is no discretion allowed to the District, once it has determined the position to be eliminated. Accordingly, having determined to eliminate a middle school social studies teacher, the person to be laid off had to be the least senior 7-12 social studies teacher, that person being the grievant, Tracy Breaker. However, the District still needed someone to teach middle school social studies and Breaker is certified to teach 7th and 8th grade social studies. Had the District had other personnel available, with more seniority than Breaker, to teach 7th and 8th grade social studies, such as the retired Eugene Mattke or the person selected to teach 7th grade social studies, Bortle, who had prior social studies teaching experience in the District and nine (9) years of District seniority, there would be no contractual violation. The

District, however, assigned the 8th grade social studies duties to the new teacher, Huettner. Huettner was a new hire in the District. She could not be assigned to teach the 8th grade social studies classes when Breaker was laid off. Such an assignment is clearly violative of the seniority concept and the language of the collective bargaining agreement.

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

AWARD

The District violated the collective bargaining agreement when it laid off Tracy Breaker and assigned a teacher with less seniority to teach the 8th grade social studies classes.

As a remedy, Breaker is to be made whole for lost wages and benefits that she should have earned if she had been assigned the two 8th grade social studies classes and any preparation time to which she is entitled under the terms of the collective bargaining agreement and practices of the parties.

The undersigned will retain jurisdiction for a period of thirty days from the date of this award to resolve any issues regarding the remedy ordered.

Dated at Madison, Wisconsin, this 28th day of February, 2011.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator