

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CUMBERLAND SCHOOL DISTRICT

and

NORTHWEST UNITED EDUCATORS

Case 35
No. 69911
MA-14801

(Kelly Ryder Layoff Grievance)

Appearances:

Michael Phillips, Wisconsin Education Association Council, 33 Nob Hill Drive, Madison, Wisconsin 53708, appeared on behalf of the Association.

Thomas Rusboldt, Weld, Riley, Prenn & Ricci, 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin 54702, appeared on behalf of the District.

ARBITRATION AWARD

On June 4, 2010 Northwest United Educators filed a request with the Wisconsin Employment Relations Commission seeking to have one of three individuals assigned to hear and decide a dispute pending between the NUE and the School District of Cumberland. By letter received on June 9, 2010 the District joined in the request. The Commission appointed William C. Houlihan, a member of its staff, and one of the requested individuals to hear and decide the matter. A hearing was conducted on December 15, 2010 in Cumberland, Wisconsin. A transcript of the proceedings was taken and distributed by January 7, 2011. Post-hearing briefs and reply briefs were filed and exchanged by April 1, 2011.

This dispute involves the layoff of Kelly Ryder.

BACKGROUND AND FACTS

Kelly Ryder, the grievant, has been employed by the District since August of 1996. She has had a successful career with the District, earning positive evaluations and was the District's Teacher of the Year in 1998. As of the date of the hearing Ms. Ryder was certified to teach Broad Field Social Studies, grades 6-12, History, grades 6-12, and Political Science, grades 6-

12. For a number of years Ms. Ryder had an emergency license to teach in the area of Economics. Historically, Ms. Ryder had taught 2-3 sections of Economics as a part of her teaching load. The emergency license expired on June 30, 2010 and could not be renewed. The Wisconsin Department of Public Instruction advised the District of Ms Ryder's status by letter dated May 19, 2010.

The process for establishing and filling course schedules begins with students filling out a form indicating which classes they want (Course Request Tally). Those courses are then assembled to determine the overall course offerings. From this list it is determined which courses will be offered and how many sections of each will be scheduled. For the 2010-2011 school year students requested the following Social Studies courses:

<i>Student Requests</i>	<i>Number</i>
Human Relations	40
Economics	76
Political Science	71
US History	81
US History II	41
Geography	28

Given the number of student requests, the District determined to create 2 sections of Human relations, 3 sections of Economics, 3 sections of Political Science, 3 or 4 sections of US History, 2 sections of US History II, and 1 or 2 sections of Geography. Once the courses and number of sections is determined, the District builds a schedule. Mark Fuller, the senior Social Studies teacher, was given a fall schedule consisting of 4 sections of US History, 2 sections of Human Relations, and 1 section of Geography. He was given a spring schedule of 4 sections of US History, and 2 sections of US History II. William McCreary, who was junior to Ms. Ryder, and previously taught full time at the middle school, was given an assignment which split his time at the high school and the middle school. His high school assignment consisted of 3 Political Science sections in the fall and 3 Political Science sections in the spring. Another teacher picked up the classes McCreary previously taught in the middle school. As previously noted, Ryder is certified to teach Political Science.

The Economics sections were given to another teacher, Jessica Olson, as a part of her teaching load.

The District offers Alternative Education classes as a part of its at risk program. Those classes are taught by a variety of faculty members. No specific certification is required. However, it is common to assign the classes by discipline, i.e. an English teacher could be assigned to teach English in the Alternative Education program. The Alternative Education classes are used to fill out teaching class loads. Under Article XVI, Section D, which is set forth below, the District can assign 7 teaching periods for a semester. However, if a teacher is assigned 7 teaching sections for more than two consecutive semesters, there is a requirement

that the teacher be paid a pro rata overload salary. The District strives to assign in such a way as to avoid the overload pay.

Ms. Ryder has taught Alternative Education courses. Following her lay off, teachers less senior to Ms. Ryder were assigned to teach Alternative Education classes.

Ms. Ryder has been active in her Union. She was the Unit Director for the Cumberland teachers for a number of years. She was a member of the Northwest United Educators Political Action Committee. She is the Secretary of the NUE. She is on the Wisconsin Education Association Council board. As a representative of the Union she had 2 non-controversial meetings with Barry Rose, the Superintendent of Schools.

On April 14, 2010 Ms. Ryder was laid off. The letter notifying her of layoff included the following:

This letter is to inform you that the Board of Education, at its April 13th meeting, has taken action to place you on layoff status effective at the end of the 2009-2010 school year. Pursuant to Article XVIII, B.4. of the collective bargaining agreement, the District has used its contractual exemption authority right to exempt you from a seniority-based layoff. You will have recall rights for two years if a position becomes vacant in an assignment area in which you are certified and qualified.

The layoff was grieved by a letter dated April 20, 2010, signed by William Nelson, the NUE Executive Director, which included the following:

On April 14, Kelly Ryder was informed of action taken on April 13 to place her on layoff status effective at the end of the 2009-10 school year. Kelly was informed that the layoff was based on student numbers and that the District was invoking Article XVII, B.4. of the collective bargaining agreement exempting her from a seniority-based layoff.

...

Although the teacher involved, Kelly Ryder, was notified on April 14, NUE was not notified by the April 15 date therefore nullifying the Board's decision to utilize the exemption. The language is clear. NUE needed to be notified by April 15 and was not.

...

NUE's understanding is that Bill McCreary, an 8th Grade Social Studies/Language Arts teacher with 1-9 certification, was going to be partially

transferred to the High School into a one-half time 9th Grade Social Studies position.

...

The puzzling part of this attempt to lay off is that the person you are attempting to protect from layoff is not in danger of being laid off. On April 15, a 5th grade position was posted that Mr. McCreary, a 1-9 certified teacher, is qualified to teach (see enclosure).

...

Since no High School position was posted, moving Mr. McCreary to a 9th Grade Social Studies position is clearly a reassignment. To protect him you must have first offered to transfer him to another position for which he is qualified and certified.

...

NUE is concerned that Mr. McCreary was not offered the option to transfer to the only position that was open that he was qualified and certified to teach, the 5th Grade position which was posted on the 15th of April.

...

Superintendent Rose denied the grievance by letter dated April 30, 2010, which included the following:

The above Step II grievance is denied.

While the contract does provide for notice to NUE of the Board's utilization of the exception provision of Article XVII.B.4., the failure to provide such notice does not "nullify" the Board's actions. The NUE notice requirement is directory and prescriptive, but not mandatory. In this instance, the District gave timely notice to the adversely affected teacher and intended to give the same notice to NUE. See the "cc to NUE" on the notice letter. However, by past central office practice, the Union has been given a copy of the notice after the employee signed it. Ms. Ryder refused to sign the notice and the practice was disrupted. In any event, NUE had actual notice prior to April 15 and has filed a timely grievance; six days after Ms. Ryder was given notice. No prejudice has been suffered by Ms. Ryder or the NUE as a result of any notice deficiency.

The matter was appealed through the grievance procedure, leading to this arbitration.

There was evidence relating to the bargaining history of Article XVII as well as evidence relating to the administration of the layoff provision. Al Manson, retired NUE Executive Director testified that he negotiated the provision that has become Article XVII par. B.4., and that it was the intent of the parties that the District have the opportunity to exempt a promising junior teacher. It was Manson's testimony that the Association would never have agreed to a provision that allowed the District to target a teacher for layoff. Cy Lepak testified on behalf of the Association. Mr. Lepak was on the school board bargaining team when the Article XVII, par. B.4 provision came into the parties contract. Mr. Lepak offered the following explanation for the provision:

...

Q: (By Mr. Phillips, continuing) Cy, please describe what you – what you wanted to do with this – this provision, and describe it in detail.

A: In the – what we wanted were teachers that we could – that we could move about, that we could move around in order to keep our staffing needs, to avoid any, you know, laying off one teacher and hiring up another teacher simply to fill a position because the certifications were – were not proper, and, of course, to fill all these positions that were opening up, particularly those that were extracurricular, where we had preferred – as a board, preferred to have teachers in those positions, rather than someone off the street who didn't know what was going on in the school during the day, who was absent, all that other sort of stuff --

...

In 1982 the District laid off employee Bruce Gonzales, and in doing so by passed the junior employee, Mark Fuller. The District advised Mr. Gonzales of his layoff by letter which cited Article XVII, B.4 as authority. The District also sent Mr. Fuller a letter indicating that he was being exempted from layoff for "...factors unrelated to teaching performance...". When the Association grieved the notice to Fuller an amended letter was issued to Fuller setting forth the reasons that formed the basis for the exemption.

In 2009 the District laid off employee Billy Phillips and passed over junior employee Jon Pasko. Mr. Pasko did not receive any formal written notice. Mr. Phillips received a letter identical to the letter sent to Ms. Ryder in this proceeding. There was no objection or grievance filed.

ISSUE

The parties stipulated to the following issue:

Did the District violate the collective bargaining agreement by laying off Kelly Ryder on April 14, 2010?

If yes, what is the remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE V – BOARD FUNCTIONS

- A. The Board, on behalf of the District, hereby retains and reserves unto itself all powers, rights, authority, and duties and responsibilities conferred upon and vested in it by applicable law except where modified by or where it is inconsistent with provisions of this Agreement.
- B. It is expressly recognized that the Board’s operational and managerial responsibilities include such things as the following:

• • •

6. The direction and arrangement of the teaching staff, including the right to hire, suspend, discharge, discipline or transfer teachers.
7. To create, combine, modify or eliminate teaching positions.
8. To determine the size of the teaching staff, the allocation and assignment of work to teachers and the determination of policies affecting the selection of teachers and the establishment of standards for judging teacher performance.

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10. To make assignments for all programs of an extra-curricular nature.

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ARTICLE XIII – VACANCIES, TRANSFERS AND REASSIGNMENTS

- A. The Board shall make grade, subject and activity assignments and make transfers between schools which it deems to be in the best interest of the school district.

- B. Notices of teaching vacancies will be placed in all the teachers' mail boxes as soon as the vacancy is noted which will describe the position and the qualifications desired.
- C. Teachers who are interested in a vacancy will so advise the Administrator by written reply to the notice within 15 school days. The Administration will interview all qualified candidates for any teaching position.
- D. In making assignments and transfers, the Administration will take into consideration the professional training, experience and service to the District of the candidate, as well as the wishes and convenience of the teacher requesting the transfer or reassignment.

...

ARTICLE XIV – SPECIAL ASSIGNMENTS

- A. The Board may, during the term of this agreement, establish programs such as Summer School, Adult Education, Homebound and similar activities. If teachers are assigned to these programs it shall be done on the basis of qualifications, experience in the program and local service. Compensation shall be in accord with the provisions of the article on Compensation.

...

ARTICLE XVI – WORKING CONDITIONS

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- D. Work Day Assignment – A typical work day for a teacher in Grades 7-12 will consist of six (6) periods of teaching assignments, one (1) period of duty and one (1) period of preparation time. A teacher may be assigned a seventh (7th) teaching period for a semester or for the entire school year in lieu of a duty. Administration shall make every effort to avoid assigning a teacher to a seventh (7th) period of teaching for more than two (2) consecutive semesters. As long as other properly certified staff members are available, the seventh (7th) period of teaching duty will be rotated to other staff. If a teacher is assigned a seventh (7th) period of teaching duty beyond two (2) consecutive semesters, the teacher will be paid pro rata at 1/8th the teacher's salary.

The work day assignments in Grades K-6 will be similar as described above.

ARTICLE XVII – LAYOFF PROCEDURE

- A. When the Board determines that it is necessary to reduce the number of teachers in the District, in whole or in part, teachers may be laid off. Layoffs may occur at the start of the second semester, if the District has experienced a loss of revenue.
- B. The selection of the teacher to be laid off shall be made according to the following:
 - 1. Normal attrition resulting from teachers retiring or resigning will be relied upon to the extent possible.
 - 2. Volunteers will be considered next. In the event the teacher does volunteer, they shall be accorded all rights under this article.
 - 3. If there are insufficient volunteers from #2 above, the Board will lay off teachers on the basis of district-wide seniority of those teachers certified and teaching in the area of layoff.
 - 4. The Board shall have the authority to make one (1) exception per contract year to the above-described selection procedure. NUE and the teacher affected by a Board decision to exempt shall be notified of the Board’s decision to utilize the exemption authority by April 15 of the preceding school year.
- C. A teacher being laid off at the start of the second (2nd) semester shall be notified on or before December 15. A teacher being laid off for the subsequent school year shall be notified by April 15.
- D. Before a teacher is laid off they shall be offered a transfer to another position for which qualified and certified if such position is open and the teacher desires the position. Qualifications as used in this Article shall mean successful teaching in their area of certification within the previous ten (10) years. “Certification” will be determined by current certificates on file in the District office.

DISCUSSION

In assigning the Social Studies course curriculum, the District began by assigning Mark Fuller, the senior Social Studies teacher to a full load. This is not controversial in this

proceeding. Following the assignments to Fuller, the District assigned McCreary a work load that gave him a partial load at the Middle School, where he had previously taught, and 3 Political Science classes per semester at the High School. That assignment is controversial.

Under Article V the District has the authority to assign work (par.8) and the right to combine teaching positions (par.7). Taken together, these two provisions provide the District with flexibility relative to the assignment of work. I agree that the provisions cannot be exercised in a way as to violate rights provided elsewhere in the Agreement. However, absent such a restriction the District is free to combine teaching positions and assign work.

Ms. Ryder believed that the Economics course could be re-titled in such a way as to make it a fusion course, for which she was certified. The question was put to the Curriculum Committee, which declined to do so. Economics is a graduation requirement in Cumberland. It does not seem suspect that the Curriculum Committee would not want to either re-title or modify the course content of a graduation requirement.

Ms. Ryder has taught alternative learning courses over the years, and could do so again to fill out a teaching load. It appears that the District has historically assigned the courses to fill out work loads. While no specific certifications are required, the District assigns the courses within the teachers certifications. It also appears that the District assigns the courses with an eye on Article XVI. D., the overload provision. The Alternative Education courses are assigned on a rotating basis as a seventh period, to avoid added cost. What the grievant is seeking is that she be placed in the Alternative Education course assignment as a part of her working load. This entails a substantial cost to the District. Nothing in the contract requires such an assignment.

The Association notes that there was a 5th grade position open, and that the District should have offered that position to McCreary before it transferred or reassigned him. There is no contractual support for that contention. The District maintains the right to make grade assignments under Article XIII. Article XIII C. provides that teachers who are interested in vacancies should so advise the District. There is no indication in this record that McCreary expressed interest in a 5th grade position. Similarly Article XIII D. directs the District to take into consideration the wishes and convenience of the teacher. Mr. McCreary's wishes and convenience were not a part of this record. It is not clear what, if any prior discussion occurred with McCreary prior to his assignment. Under Article XVII McCreary would have been entitled to a transfer before he was designated for layoff. However, McCreary was never identified for layoff in this proceeding.

The layoff notice to Ryder cites Article XVIII, B.4 of the collective bargaining agreement, the exemption from seniority based layoff, as the basis for the layoff. There was a good deal of confusion over whether or not the exemption was needed or who the protected party was. Without reciting all of the claims made and positions taken, I believe the District did invoke the seniority exception.

Where the District invokes the exemption it is required to give the “NUE and the teacher affected...” notice by April 15. Ms. Ryder was notified verbally and in writing that she was being laid off on April 14. The District did not formally advise the NUE. However, Ms. Ryder called Bill Nelson, the NUE Executive director that same day, April 14. It was the testimony of Association witnesses that the reference to “teacher affected” in Article XVIII, B.4 is to the teacher who has been exempted. It is not clear what, if any, notice was provided to any potentially exempted teacher. However, the Association pursued the matter immediately, and filed a grievance timely.

The 1982 incident supports the Associations view as to how the clause is to be used and how notice is to be given. Gonzales was laid off. Fuller was advised that he had been exempted. The 2009 incident supports the District. Phillips was advised that he was being exempted. Pasko was given no formal notice. Manson’s testimony supports the Association construction of the Agreement. Mr. LePak’s testimony was less precise than that of Mr. Manson, but it offers far less support to the Association position. Mr. LePak talked about the District’s need for flexibility on the staff. Ms. Ryder was laid off because of her limited areas of certification. On balance, I believe the Association has the correct construction of the language. The 1982 incident is more persuasive.

When the course schedule was initially developed, Ms. Ryder had just lost her emergency license to teach Economics. At that point in time the District had Mr. Fuller and Ms. Ryder in the Social Sciences Department. Once Fuller was given a full course load it left essentially a half time load of Political Science courses that Ryder was certified to teach. There were 3 sections of Economics left, but she was not certified to teach Economics. The courses were covered by assigning McCreary to the Political Science sections, filling the balance of his Middle School load with someone else, and assigning the Economics to Ms. Olson from the Business Department.

The letter to Ryder indicates that the District intends to exempt her from a seniority based layoff. That is the same language directed at Phillips the year before, and the same phrase directed to Fuller in 1982 as he was exempted from layoff. The use of the term “exempt” has changed over time, at least in the eyes of the District. The letter to Ryder is awkward in that it attempts to use the words of the contract, but directs them at the wrong party. Ryder was not exempted.

It appears to me that the area of layoff referred to in Article XVII, B. 3 is Social Studies. When the class schedule was assembled the District initially found itself with Fuller with a full time load, Ryder with a half time load, and a number of Economics courses to be taught. It could have assigned Ryder to courses such as Alternative Education, which were assigned as no cost overloads to other teachers. It could also have laid her off half time and done the same to another teacher. The District chose instead to lay off the grievant and protect others.

I believe the exempted teacher was McCreary. He was assigned work that Ryder was certified to perform. He was junior to Ryder. I do not regard Economics to fall within the area of layoff. As the language is applied to Ryder she is not certified to teach Economics, and so cannot claim that, but for the seniority exception, she could be assigned the work.

The Association contends that neither the NUE nor McCreary were notified by the District that the District was claiming an exception to the seniority based layoff. There is no evidence in the record as to what, if any exchange was had between the District and McCreary. It does appear that no formal notice, such as was provided in 1982, was made. As a practical matter Ms. Ryder called the NUE almost immediately. It appears from the text of the grievance that the NUE was aware of the sequence of assignments and transfers that resulted in Ms. Ryders' layoff. I do believe there was a technical violation of the notice requirement. However, I do not regard it as substantial enough to reverse the layoff. All relevant parties were on actual notice. The District used the same process it used the year before, without objection.

It is the position of the Association that the District's action in laying off Ryder was borne of animus toward her protected concerted activity. Ms. Ryder was open and active in her Union activity. There can be no doubt the District was aware of that fact. However, the record lacks any evidence that the employer was hostile to her actions or that the District's decision to lay her off was motivated, even in part, by her protected Union activity.

It is the view of the Association that the District had other ways to protect McCreary. As a practical matter McCreary was not in jeopardy of losing his job. As a contractual matter, the contract does not limit the exemption to those circumstances where there is no other alternative to losing a valued junior employee.

It is the view of the Association that the purpose of the clause is to protect a valued junior employee. In essence that is what happened here. The junior employee had a sufficiently broad certification to be moved to cover an area of need. Ms. Ryder had a narrower certification. To give her a full time job would have stretched the resources of the District.

In summary, I believe there was a technical violation of the notice provision of Article XVII, B. 4. The violation has no substantive consequence. All parties were aware of the events that were transpiring.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 24th day of June, 2011.

William C. Houlihan /s/

William C. Houlihan, Arbitrator