

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RHINELANDER EDUCATION ASSOCIATION and NORTHERN TIER UNISERV

and

THE SCHOOL DISTRICT OF RHINELANDER

Case 77
No. 70722
MP-4661

(Liquidated Damages Grievance)

Appearances:

Fred Andrist, Director, Northern Tier-UniServ, 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501-1400, appeared on behalf of the Association.

Attorneys Dean Dietrich and Kevin Terry, Ruder Ware, L.L.S.C., Suite 8000, 500 First Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appeared on behalf of the District.

ARBITRATION AWARD

The Rhinelander Education Association and Northern Tier Uniserv, hereinafter referred to as the Association, and The School District of Rhinelander, hereinafter referred to as the District, are parties to a collective bargaining agreement (Agreement or Contract) which does not provide for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. On April 14, 2011 the Union filed a Complaint alleging violations of Secs. 111.70(3)(a)5 and (b)4, Stats. The undersigned was appointed as the Hearing Examiner. In a preliminary telephone conference the parties discussed the issues with the Examiner and, following said discussion, requested the Examiner act as Arbitrator and hear the matter as a grievance. Pursuant to the parties' request hearing was held on the matter on June 21, 2012 in Rhinelander, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. The parties agree that the matter is properly before the Arbitrator. The hearing was transcribed and becomes the official record of this proceeding. The parties filed post-hearing briefs by August 27, 2012 at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The Parties agree that the issue presented in this matter may be stated as follows:

1. Did the School District violate Article XXIII of the Agreement when it sought reimbursement for substitute teaching costs incurred with the Grievant's departure from the District?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

Article III Management Rights

- A. The Board retains all rights of possession, care, control and management that it has by law and retains the right to exercise these functions under the term of the collective bargaining agreement, except to the precise extent that functions and rights are explicitly, clearly, and unequivocally restricted by the express terms of this Agreement. These rights include, but are not limited by enumeration to, the following rights:
1. To direct all operations of the school system
 2. To establish and require observance of reasonable work rules and schedules of work
 3. To hire, promote, transfer, schedule, and assign employees in positions with the school system
 4. To suspend, discharge, and take other disciplinary action against employees
 5. To relieve employees from their duties
 6. To maintain efficiency of school system operations
 7. To take whatever action is necessary to comply with State or Federal law, or to comply with State or Federal agency decisions or orders
 8. To introduce new or improved methods or facilities
 9. To select employees, establish quality standards, and evaluate employee performance
 10. To contract out for goods or services
 11. To determine the methods, means, and personnel by which school system operations are to be conducted
 12. To take whatever action is necessary to carry out the functions of the school system in situations of emergency

13. To determine the educational policies of the District
 14. To determine all school activities
 15. To determine the means and methods of instruction, the selection of textbooks and other teaching materials, and the use of teaching aids, class schedules, hours of instruction, length of school year, and terms and conditions of employment
- B. The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the Board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes, Section 111.70, 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.
- C. The Board recognizes the desirability of teacher's input in curriculum planning.

...

Article XXIII Liquidated Damages

It is agreed by the parties that should any teacher on a continuing contract request to be released from his/her individual contract, the following conditions must be met.

1. The notice of resignation must be given at least two weeks prior to its effective date
2. The Board must have acted on the notice of resignation
3. A suitable replacement must have been arranged

Said teacher will then be subjected to liquidated damages in the amounts listed below.

1. A notice of resignation between when school is out and before July 1 \$200
2. A notice of resignation on July 1 and before August 1 \$400
3. A notice of resignation on August 1 and before the start of the school year \$600

4. A notice of resignation effective during the school year \$900

School year in this Section is defined as those dates as designated on the agreed upon calendar.

The liquidated damages for part-time employees will be prorated according to their FTE contract.

This provision does not apply to individuals retiring from the District at the end of a quarter under a District retirement benefit provided they comply with the requirements of Article XXII dealing with retirement, individuals notifying the District during the school year for the upcoming school year, and individuals terminating their contract because of losing long term disability status.

It is recognized by the parties that the Board may waive these damages in extenuating circumstances.

BACKGROUND

The Grievant began her employment with the Rhinelander School District as a teacher in October, 2009. In October, 2010 she resigned her position with the District to take another teaching job. The Board acted upon her request to resign on October 4, 2010 at an emergency Board meeting (which had been called for another purpose). The Board voted to accept the resignation of the Grievant “. . . pending a suitable replacement and receipt of liquidated damages in the amount of \$900.” Her last day of employment with the District was October 8, 2010.

Following her departure the District used a long-term substitute for 20 school days pending the hire of a regular teacher. The new teacher began her duties on November 5, 2010 and the District incurred expenses for the substitute teacher during the period of time between the Grievant's departure and the time the new hire began her duties, a period of 20 school days.

On October 27, 2010 the District sent an invoice to the Grievant in the amount of \$1,074.79. This amount included liquidated damages in the amount of \$900 in addition to other offsets for wages payable to the Grievant. On March 25, 2011 another invoice was sent to the Grievant in the amount of \$1,333.40 which also included various offsets, the liquidated damages amount of \$900 and 2 days of personal leave pay in the amount of \$528. In both instances (see Exhibits Joint 3 and Joint 4) the District unilaterally cut the total amount of the substitute teacher cost of \$3,882.80 in half to \$1,941.40.

This grievance followed.

THE PARTIES' POSITIONS

The District

The School District did not violate the Agreement when it sought reimbursement from the Grievant to pay for the educational costs of a substitute teacher. The Grievant breached the terms of the Agreement when she abandoned her position during the school year and the District now seeks to recover the costs it incurred in providing education until a replacement could be found. When a teacher breaks her contract during the term the District must 1) post the vacancy, 2) interview candidates, and 3) fill the position. To cover these costs a teacher who is released from her position during the term is subjected to liquidated damages consistent with Article XXIII of the Agreement. But this clause contains a number of "conditions" which must be met prior to being relieved of her duties: 1) the notice of resignation must be given at least two weeks prior to its effective date; 2) the Board must have acted on the notice of resignation; and 3) a suitable replacement must have been arranged. These conditions must have been met prior to the Board releasing a teacher from her contract.

The District and the Association understand that, in addition to the \$900 liquidated damage provision an individual teacher is responsible for educational costs incurred when a teacher violates the conditions of Article XXIII. In fact, it was at the suggestion of the Association President Connie Samz that the District consider seeking reimbursement from the Grievant at her per diem rate in an attempt to facilitate the Grievant's ability to start her new job as soon as possible. The Grievant knew that if she broke her contract, she would have to pay some additional fees to the District other than the \$900 liquidated damage fee. As further evidence of this the following exchange took place on the record at the hearing:

Q. Would you please explain that whole process?

A. I got an e-mail, and it was set for October 4th at 7:35 a.m., and Connie was present, and we just discussed some of my personal days and if I understood what the process would be if I were to not be released from my contract and if I understood what unpaid leave was and if I understood all the stipulations that went along with breaking my contract.

Q. At that meeting did the issue of reimbursing the district (sic) for sub pay come up?

A. I was told that if I would have to take unpaid leave days, that there would be a fee that goes along with that if I was not released from my contract. But there was not (sic) discussion about paying for a sub.

The Grievant misinterprets the terms of the Agreement regarding when she was released from her individual contract. She believes that the Board released her from her

contract on October 4, 2010 but she was not released until a new teacher was hired on November 5, 2010. She chose October 8, 2010 as her last day without consulting with the District and she understood that breaking her contract would require her to reimburse the District.

The District has the authority to require employees to pay the cost of a substitute teacher or to pay the per diem rate if the employee resigns from employment before a suitable replacement is hired by the School District. It may make this choice because of its management rights under Article III and due to the fact that the District “must have the right to solely determine what constitutes a suitable replacement in order to properly administer the terms of the Agreement”. The District’s decision to seek reimbursement from Grievant to offset the cost of a substitute teacher was within its contractual rights. The words “suitable replacement” were chosen (by the parties) as part of the (liquidated damages) provision because they give a certain meaning to the provision. To interpret the term “suitable replacement” to mean “any teacher” would make the language superfluous and meaning must be given to words of a contract. When read in connection with the entire Agreement it is clear that the meaning of “suitable replacement” is most appropriately interpreted by the District, (i.e. that a “suitable replacement” is a regular teacher and not a long-term substitute). Certainly, the Association cannot suggest that long-term substitute teachers suitably address the needs of students in the same manner as a full-time teacher.

The District’s determination of reimbursement due by the Grievant for vacating her position was reasonable and appropriate under the Agreement. She vacated her position by unilaterally terminating her employment on October 8, 2010, prior to any input from the District and prior to the time when a suitable replacement was hired. When she left all parties understood that some reimbursement would be owed by the Grievant for the educational costs incurred by the District. The Association asked the District to allow the Grievant to use her unpaid leave time and reimburse it at her per diem rate until she was released from her contract. Realizing that this amount (\$264 per day) would be unnecessarily burdensome upon the Grievant the District chose to charge her the actual costs of the substitute teacher. Mr. Wall, Assistant Superintendent, decided to only charge her one-half of that amount “as that seemed reasonable.” The financial hit taken by the District far exceeds the reimbursement amount. This reduction shows the District’s willingness to be reasonable.

This matter is unique because it is the first time that the Liquidated Damages provision has been implemented and the policy, when read in connection with the entire Agreement, intends for the District to recover the costs incurred when teachers fail to meet the contract language.

The Association

The District exceeded its authority to charge more than the liquidated damages amount. When the parties agreed to the language in Article XXIII it was in recognition of a deficiency in the CBA. A teacher asked to leave under similar circumstances and there was nothing in the

Agreement to determine a suitable dollar amount for being released from one's contract. Hence, the parties agreed to the language in Article XXIII. This Article also provides that "the Board may waive these damages in extenuating circumstances."

The Board effectively waived the requirement for the Grievant to give notice when it acted on her request for resignation on October 4, 2010. Regarding Condition #2, that the Board must have acted on the request, obviously that condition was met on October 4, 2010 too.

We are then left with the question of "when a suitable substitute replacement was arranged." The Association believes that a "suitable replacement" was the substitute teacher, not the teacher who started on November 8, 2010. The District at no time made it clear how it was defining the term "suitable replacement" and when it finally did define it the definition was not reasonable. The Grievant certainly believed the substitute was a suitable replacement. Dave Wall testified that the District does not hire unsatisfactory substitutes; the substitute, chosen by the District, was a long-standing substitute teacher who had been used to fill in for other absent teachers in the past; and has now been hired for a regular position within the District. As to the question whether the Grievant understood that the substitute was not "part of the deal", Mr. Wall, when asked about this on the record, "was evasive and then asked for time to find an e-mail that might answer the question. . ." When finally produced after the hearing this e-mail did not support Mr. Wall's assertion. The Association believes that Condition #3, the requirement for a suitable replacement, has been met and the District should be held responsible for its lack of clarity on this issue.

The District's position is not supported by reason. The District maintains that the Grievant was held under contract until November 5 when it hired a new replacement teacher and thus responsible for the substitute teacher costs. Presumably, the Administration informed the Board of the date the Grievant intended to start her job at Antigo and the Board's actions were taken with an understanding of that knowledge. Wisconsin Statutes make it clear that a teacher cannot be under contract to two different districts at the same time. (See Sec. 118.22(2) Stats.) It is illogical and irresponsible of the District not to tell her that she would be under contract until it found a permanent replacement for her in the classroom.

Troublesome for the Association is the fact that Mr. Wall believes he can arbitrarily adjust the penalty to make it more fair and reasonable. This may be admirable but shows that he realized it was unreasonable for him to charge per diem costs along with the substitute teacher costs.

The language in Article XXIII is ambiguous and in the face of ambiguous language arbitrators must give that language a construction that is reasonable and equitable to both parties rather than one which would give one party an unfair and unreasonable advantage. (See Elkouri and Elkouri, *How Arbitration Works*, 6th Ed., p. 481 Citing *Clean-A-Rama*, 99 LA 370 (Concepcion, 1992)) The Arbitrator should "look at the language in the light of experience

and choose that course which does the least violence to the judgment of a reasonable man.” (Citing Clifton Paper Bd. Co., 11 LA 1019, 1020 (Stein, 1949))

The District's Response

The Association misrepresents a number of facts, among them that because of an emergency Board meeting the Board was able to act on this request and the Administration ***mutually agreed*** that October 8 would be her last day in Rhinelander. The meeting of the Board was scheduled for an entirely different reason and the fact that it was able to take action on the resignation was purely coincidental. As to the October 8th date, the Grievant unilaterally made that decision and there was never a “mutual” agreement. The Grievant’s release was specifically conditioned on the Administration’s finding a suitable replacement, and that did not occur.

The Grievant’s unilateral decision to leave on October 8, 2010 caused the District to incur costs above and beyond the \$900 specified in Article XXIII. The Grievant knew this and that is why she agreed to pay them. In fact, it was the Association President, Connie Samz, who recommended to the Administration that she be allowed to leave in exchange for the payment of her per diem rate of pay.

The Association mischaracterizes the District’s authority and discretion under the Agreement. The Association is right about one thing: “when the parties agreed to the language in Article XXIII, it was a (sic) recognition of a deficiency in the CBA.” Now, the Association seeks to re-write the language of Article XXIII to benefit a teacher who has inconvenienced the District. It cannot write a definition of a “suitable replacement.” That the District never “made it clear how they were defining a suitable replacement” is an argument that comes too late since the parties agreed in Article XXIII that a suitable replacement must be hired before a teacher can be released from the terms of her contract.

The Association argues that because the District found the substitute teacher to be satisfactory as a substitute, then she must be a suitable replacement for a full-time teacher too. The District rejects this reasoning. Obviously, there is a difference between satisfactory substitutes and full-time teachers. It is the Board and the Administration who are in the best position to determine what constitutes a suitable replacement. While Article XXIII does not specifically state that the District has the authority to make this determination, it does say that a suitable replacement must be hired and the District believes this function to be a management right.

The District was reasonable in its application of the contractual language. The Board made the only decision available to it pursuant to the Agreement when it determined the Grievant could be released conditioned on the hiring of a suitable substitute; the Administration reasonably sought recovery of partial costs incurred; it reasonably held the grievant to the terms of her contract until a suitable replacement was hired; and, Wall’s decision to reduce the

amount of costs owed by the Grievant was not only reasonable and fair, but it was a sign of the District's willingness to make a transition easier for the Grievant.

The Association's Response

The (Association) did not agree to hold an individual teacher responsible for the educational costs incurred when the teacher and the District agreed to part ways.

There is no evidence to support the District's position on the issue of unpaid days. Nothing in the record remotely suggests that the District granted any unpaid days and there was no agreement that confirms the District's position. Even Wall testified that there was no agreement which resulted from the meeting of Grievant, Samz and Wall.

Liquidated damages in the amount of \$900 are to be assessed in the event a teacher leaves. While the parties can argue as to exactly when the Grievant was released from her contract due to finding a suitable replacement, the language (of Article XXIII) remains: the consequence of being released from the contract is \$900.

The District's management rights require that they be exercised reasonably and are limited by the specific and express terms of the Agreement. The Association believes the parties mutually agreed to cap damages at \$900 in the event a teacher is released. If a suitable teacher is not available the District would be in a position to not allow the teacher to leave. Once the district sent the Grievant on her way, they were, in fact, saying the substitute was a suitable replacement.

The District's management rights do not give it the right to keep its intentions a secret. If the District's position that "Unless and until these conditions are met, the School District shall not release a teacher from her contract pursuant to Article XXIII," then it needs to make that unmistakably clear and tell the teacher she is not released from her contract and should not enter into another one.

The District equates "suitable replacement" to "the best possible employee," something the parties never agreed to, and if the language required "the best possible employee" the Agreement would be meaningless due to its open-endedness.

The Association believes this to be yet another attempt by the District to turn a situation around and blame Samz due to her Union activity.

The Arbitrator should uphold Article XXIII and assess the Grievant \$900 for breaking her contract.

DISCUSSION

Article XXIII (Liquidated Damages) of the parties' Agreement contains three conditions precedent to the application of the damages section of the Article. The first is that a notice of resignation must be given (to the District) at least two weeks prior to its effective date; the second is that the Board (school board of Rhinelander) must have acted upon the notice of resignation; and, the third is that a "suitable replacement" must have been arranged. If all three conditions are satisfied the inquiry moves to a determination of the amount of liquidated damages applicable under the Agreement. If not, the teacher is not released from his/her contract. There is no issue in this case regarding the sufficiency of the amount of the liquidated damages provided in Article XXIII. The parties do not disagree that the damages provided therein are adequate. Here, the first two conditions have been met or waived and the parties do not disagree on this. The Board met and acted on the resignation and decided to release the Grievant when a suitable replacement was found. The third condition, that a suitable replacement be found, presents two questions: 1) "What is a suitable replacement" and 2) "When did the District find a suitable replacement?"

What is a suitable replacement?

The Agreement does not define the term "suitable replacement". The Association argues that the substitute teacher was a "suitable replacement" and, since that substitute teacher began before the Grievant departed, this should not result in any payments from the Grievant other than the \$900 liquidated amount. The District says a "suitable replacement" is the full-time teacher it hired on November 5, 2010. It argues that the costs incurred for the substitute teacher during the lag time of 20 days should be borne by the Grievant. Hence, the District says it is entitled to recover the costs of the substitute teacher up until the time the full-time teacher began. The Association says the District is limited to the liquidated damages found in Article XXIII in the amount of \$900.

The District argues that both parties understand that, in addition to the \$900 liquidated damage provision, "an individual teacher is responsible for educational costs incurred when a teacher violates the conditions of Article XXIII." It points to Union Exhibit 1 as support for this position. Union Exhibit 1, dated 9/29/2010, is an e-mail from Connie Samz to Dave Wall and Superintendent Roger Erdahl and reads as follows:

(From Samz to Erdahl and Wall)

Roger and Dave,

I left a message on Dave's phone regarding talking about releasing and working with Tricia Cherek's contract; however, I have not heard back from him. Apparently, the Antigo's Superintendent also left a message for Roger as well concerning this. This is something that need (sic) to be addressed by the end of the week at the latest.

I have a sad teacher here teaching when she wants to be released and take this position in Antigo. Tricia and the Antigo's district (sic) need to know soon; it is not fair to make then hang until the middle of October. My understanding is that you could grant unpaid leave to Tricia and let her go to Antigo and teach. A couple of weeks ago our District benefitted from this in that the Wisconsin Rapids District released a teacher to teach at Rhinelander School District and even pay (sic) to get him released out of his contract. We need to work together in this. This is one reason why teachers are leaving the Rhinelander District. It is not the money, it is the appreciation and working with people in a respectful and professional way.

I hope that this will be resolved as soon as possible.

Connie

(Dave Wall responded)

Connie,

This was brought to my attention yesterday afternoon and as you may recall, I stopped by your office and talked with you about this and other communication issues I was waiting to hear from you on, e.g., status of the insurance committee expectations and negotiation issues. After our conversation, Mr. Howell and I went to Tricia's room to inform her of the need for a written resignation. She was teaching so we didn't want to interrupt her lesson and Mr. Howell would follow-up with her later on. I have not yet received her resignation. Upon return to my office yesterday afternoon, I authorized the posting of her position, assuming she would tender her resignation. Your comment with regard to appreciation, respect and professionalism are without merit and troubling based on these facts and would welcome (sic) the opportunity to hear how you would have done things differently. I'm hopeful we'd all agree that the well-being of our students will need to be remembered in this situation too.

I can be most easily reached at 715-493-0696.

Thank you,

Dave

Contrary to the District's assertion, there is no indication in this e-mail or anywhere else in this record that both parties agreed that the Grievant or any other teacher be responsible for the costs incurred, beyond the liquidated damage amount, when a teacher violates Article XXIII. What both parties do agree to is the language in Article XXIII. Nothing in that Article requires a payment in addition to the liquidated damage amount.

There is no question that the Grievant thought the substitute was a suitable replacement. Her testimony was entirely credible on this point and on November 1, 2010, after receiving the first invoice from the District, she responded to Samz via e-mail as follows:

Thanks Connie. I attached the invoice. I don't know why I was charged for 10 days of sub costs. What I understood was that I was released from the contract and a long term sub was a suitable replacement. *There was never any discussion of me having to pay sub costs.* (My emphasis.)

The reason she didn't know about the 10 day sub charge was because nobody ever told her about it. It was never considered. It was never a topic of discussion among the "powers that be" and the Grievant and, hence, became a matter of confusion and difficulty following the issuance of the invoice. There was no *communication* about the 10 day charge. A lack of communication almost always results in suspicion and disharmony, as it did here. The undersigned cannot hold the Grievant responsible for knowing what's in the mind of the District Administrators and the record here supports the notion that she had a subjective belief that she was free to go to Antigo without strings attached. Said another way, she believed that the substitute was a "suitable replacement."

The District's point that it should have the management right to determine what constitutes a "suitable replacement" is well taken. But management rights must be exercised with reason and not be arbitrary or capricious. Here, the District could conceivably drag the decision on a suitable replacement out forever.

The District says that the substitute is not a suitable replacement but does not define what is. The District argues that, while the term is not defined in the Liquidated Damages Clause, "the Management Rights Clause provides the School District sole authority to make this determination" because that clause gives it the authority to: "hire, promote, transfer, schedule and assign employees in positions with the school system; to relieve employees from their duties, to select employees, establish quality standards, and evaluate employee performance; and to determine the methods, means, and personnel by which school systems are to be conducted." The problem with this argument is that the Management Rights Clause, like the Liquidated Damage Clause, does not define what constitutes a "suitable replacement" and that definition is crucial to the question presented here. The Association argues that because the District allowed the Grievant to go to another district it was saying that the substitute was a suitable replacement. There is nothing in this record to support a contrary conclusion and the undersigned thus finds the substitute teacher to be a "suitable replacement" under these facts.

When did the District find a “Suitable Replacement?”

Having decided that a “suitable replacement” was the substitute hired to replace the Grievant, this question is easily answered. The Grievant left the employ of the District on October 8, 2010 and the substitute began on October 7, 2010. The Grievant worked in the classroom with the substitute for two days prior to her departure so as to ensure as seamless a transition as possible. The District said nothing about the Grievant having to reimburse the District for the substitute teacher during these two days and she left, reasonably thinking, that she was free from the District.

The District’s argument that the Grievant misinterpreted the terms of the Agreement regarding when she was released from her contract is not persuasive. If she believed, as the undersigned believes she did, that the substitute teacher was a “suitable replacement” then she was justified in believing that she was released from the terms of her contract on the day the Board voted to accept her resignation, October 4, 2010.

The District also argues “that it has the authority to require employees to pay the cost of a substitute teacher or to pay the per diem rate if the employee resigns from employment before a suitable replacement is hired. . .” As we have seen, a suitable replacement was hired and hence the Liquidated Damages Clause provides the amount of damages to which the District is entitled. This conclusion does not adversely affect the Management Rights Clause since the District still has all of the rights thereunder except the rights it gave away under Article XXIII.

A discussion of the District’s final argument, that its “determination of reimbursement due by the Grievant” is not required since Article XXIII provides the amount of damages available.

The Association argues that the events surrounding this grievance amount to “another attempt by the District to turn a situation around and blame Samz due to her Union activity.” This record does not support such a conclusion.

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

AWARD

1. The District did violate Article XXIII of the Agreement when it sought reimbursement for substitute teaching costs incurred with the Grievant’s departure.
2. Consistent with Article XXIII of the Agreement, the Grievant shall pay to the District the sum of \$900 as liquidated damages upon the issuance of this Award.

3. The undersigned will maintain jurisdiction for a period of 60 days.

Dated at Wausau, Wisconsin, this 31st day of October, 2012.

Steve Morrison /s/

Steve Morrison, Arbitrator

SM/gjc
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