BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

ST. FRANCIS EDUCATION ASSOCIATION

and

ST. FRANCIS SCHOOL DISTRICT

Case 88
No. 70912
MA-15084

AWARD NO. 7885

Appearances:

Attorney Rebecca Ferber Osborne, Wisconsin Education Association Council, 13805 W. Burleigh Road, Brookfield Wisconsin 53005-3058, appearing on behalf of the St. Francis Education Association.

Attorney Mary L. Hubacher, Buelow, Vetter, Buikema, Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha Wisconsin 53186-1873, appearing on behalf of the St. Francis School District.

ARBITRATION AWARD

On August 29, 2011, the above-referenced parties requested a panel of arbitrators from the Wisconsin Employment Relations Commission. A panel of arbitrators was provided on September 8, 2011. On March 5, 2013, the parties requested a new panel. On March 6, 2013, a new panel was provided. On March 27, 2013, the parties selected Danielle Carne as the arbitrator to hear and decide this matter. The parties were considering June 27 and 28, 2013, as potential hearing dates, when, on May 9, 2013, Arbitrator Carne advised the parties that she was leaving the Commission and would not be available to hear and decide the matter. The parties subsequently, on or about June 21, 2013, selected William C. Houlihan to hear this dispute. A hearing was conducted on September 11, 2013, in St. Francis, Wisconsin. A transcript of the proceedings was taken and distributed by September 23, 2013. Post hearing briefs and reply briefs were filed by November 13, 2013.

This dispute concerns whether or not the District complied with the contractual layoff provisions when it laid off music teacher Kathy Jo Doty and art teacher Kathy Getchel.

BACKGROUND AND FACTS

The facts underlying this matter are not in dispute. Kathy Doty, one of two grievants in this proceeding, has taught music in the St. Francis School District since she was hired in the fall of 2003. Ms. Doty is certified to teach pre-kindergarten through twelfth grade general music and grades six through twelve choral music. In 2010-2011 Ms. Doty taught fourth and fifth grade general music at Deer Creek Intermediate School and kindergarten through third grade general music at Willow Glen Elementary School. Ms. Doty traveled between the two schools during the 2010-2011 school year and most years prior to that.

There are two other music teachers in the St. Francis School District. Elizabeth Lewis has been with the District since she was hired on August 7, 2008. Ms. Lewis is certified in choral music, grades six through twelve; general music, grades pre-kindergarten through twelve; and instrumental music, grades pre-kindergarten through twelve. In 2010-2011, Ms. Lewis taught sixth grade general music, seventh and eighth grades choir, and seventh and eighth grade band. Paul Oestreich has been with the District since his hire on August 5, 2008. Mr. Oestreich is certified in general music, birth through age twenty-one; choral music, birth through age twenty-one; and instrumental music, birth through age twenty-one. In 2010-2011, Mr. Oestreich taught grades nine through twelve choir, grades nine through twelve band, and music theory.

Kathy Getchel, the other grievant in this dispute, has been employed as an art teacher by the District for 15.8 (10/3/94) years as of the date of this dispute. She is certified to teach pre-kindergarten through twelfth grade in art. In 2010-2011, Ms. Getchel taught art in grades six through twelve in the Deer Creek Intermediate School.

There are two other art teachers in the St. Francis School District. Brooke Shapiro has been with the District since her hire on April 28, 2008. Ms. Shapiro is certified to teach art, birth through age twenty-one. In 2010-2011, Ms. Shapiro taught art in grades four through six at Deer Creek Intermediate School and kindergarten through third grade at Willow Glen Elementary School. It appears that Ms. Shapiro traveled between the two schools during the 2010-2011 school year. Stephanie Henkhaus has been with the District for 15.81 years (10/3/94). She is certified to teach art, pre-kindergarten through twelfth grade. In 2010-2011, Ms. Henkhaus taught art in the High School.

All three art teachers were full time in 2010-2011. All three art teachers are certified to teach all art courses offered by the District.

The St. Francis School District faced a significant financial deficit as it approached the 2011-2012 school year. There is no dispute that the financial circumstances surrounding the District satisfied Article X of the collective bargaining agreement relative to the District's right to lay off.

The District determined to reduce one music position by fifty percent (50%). It eliminated instrumental classes and vocal lessons taught by Elizabeth Lewis. In determining whose position should be reduced, the District considered the broader certifications of Lewis and Oestreich, and the travel implications of the decision, and determined to reduce or partially lay off Doty.

With respect to art, the District determined to reduce art the equivalent of one full-time position. Certain grade levels were to receive art for a semester instead of a full year. In order to reduce travel time, Ms. Getchel and Ms. Shapiro were each reduced or partially laid off one half-time.

There was a lengthy timeline leading up to the final decision to lay- off. On February 24, 2011, both Getchel and Doty were informed that they would be reduced (Getchel) or non-renewed entirely (Doty). Each was advised that the reduction was "[i]n accordance with Article X – Layoff and Recall …." This notice was provided in order to satisfy § 118.22, Wis. Stats., and the collective bargaining agreement. Each of the notices explained that the District was losing revenue for reasons beyond the District's control, and that there existed a "… unknown impact of the 2011-2013 State budget on the district's budget."

The Union and the District met and executed a memorandum of understanding, dated March 10, 2011, that essentially allowed the District to lay off teachers without having to go through the non-renewal process. The memo required a thirty (30) day notice of layoff.

On March 11, 2011, Butch Bretzel, who, among other things, represented teachers in the parties' grievance procedure, met with Carol Topinka, Superintendent of Schools, to discuss who should be laid off in the Music Department. It was Bretzel's testimony that the conclusion of the meeting was that it was the junior employee, Lewis, who should be laid off. Bretzel confirmed that to Doty that same day. Topinka had no recollection of the conversation.

On March 14, 2011, both Doty and Getchel were advised that their contracts for 2011-2012 were to be restored to full-time status, but that the District reserved the right to lay them off consistent with the collective bargaining agreement. This notice was consistent with the memorandum executed between the parties.

On April 19, 2011, Ms. Doty and Ms. Getchel each received letters advising that their respective contracts were being reduced by .5 FTE for the 2011-2012 school year. Each of the letters cited Article X – Layoff and Recall, Section A.

There followed an email exchange between Bretzel and Topinka, which is set forth below in chronological order:

> **From:** Bretzel, Butch
> **Sent:** Thursday, April 21, 2011 1:14 PM
> **To:** Topinka, Carol
> **Subject:** kathy doty
>
> today kathy recieved (sic) a notice of layoff to 50%……it should have gone to beth lewis who is less senior than kathy……we had talked about this in the conference room outside your office shortly after the original notices went out……trudy and i were there……you probably want to compare……kathy should never have recieved (sic) the first one, but since it was preliminary, we never filed a grievance……but this time, since it is final, we will have to grieve if necessary……let me know your thoughts……butch

> **From:** Topinka, Carol
> **Sent:** Thursday, April 28, 2011 11:40 AM
> **To:** Bretzel, Butch
> **Subject:** RE: kathy doty
>
> Butch,
> I do recall our meeting at which we discussed the lay off of Kathy Doty. Upon further reflection, I believe that we do have the right to the .50 lay off. According to article X Section A of the SFEA contract the District may lay off a unit employee for the following reasons: loss of operating revenue, and changes in or elimination of an education program. We are also required to consider certification, seniority and date of initial contract when a lay off occurs.
>
> Our goals is (sic) to maintain the music program at the high school making it impossible for Paul to travel and maintain the high school program. We also want to maintain the band program at Deer Creek and so need Beth, who has the instrumental license, to remain full time.
>
> Carol

From: Bretzel, Butch
Sent: Saturday, April 30, 2011 1:08 PM
To: Topinka, Carol
Subject: RE: kathy doty

Carol.....you have the right to the 50 % reduction, but it must be done first with seniority.....and the reason cited for the layoff seems plausible.....so in all reality, you need to recall kathy to 100 % and beth gets reduced to 50 %.....the layoff language says nothing about traveling.....that is a staffing issue that the district will need to work around.....i need your response quickly, because the time-clock is ticking for a grievance to be filed.....butch

RE: kathy doty

Topinka, Carol
Sent: Monday, May 2, 2011 1:01 PM
To: Bretzel, Butch

You're right. I'll get the appropriate letters out right away.

art

Topinka, Carol
Sent: Monday, May 02, 2011 3:41 PM
To: Bretzel, Butch

Butch,

What's your opinion/interpretation of the contract on the two .5 lay offs in art? Shapiro and Getchel have each been reduced by .5.
Thanks.
Carol

From: Bretzel, Butch
Sent: Tuesday, May 03, 2011 2:20 PM
To: Topinka, Carol
Subject: art teachers

did you agree with my understanding regarding the art teachers.....kathy gets recalled to 100 % and beth shapiro gets laid off 100 %.....when you have a chance.....butch

ps……..i will be in greenlake the rest of the week, but will check my e-mail daily……

RE: art teachers

Topinka, Carol
Sent: Tuesday, May 03, 2011 3:09 PM
To: Bretzel, Butch

I do agree with the reasoning. Sorry – I thought I'd sent that e-mail to you. Have a great time in Green Lake. Carol.

From: Topinka, Carol
Sent: Monday, May 09, 2011 12:10 PM
To: Bretzel, Butch
Subject: LAY OFF LETTERS

Butch,

I will ask the Board to reinstate Doty and Getchel to full time at the May 16 Board meeting. So excluding them the current list of those laid off part or full time include WG art teacher, DC speech and language pathologist and the most recently hired social studies teacher at the high school.

Carol

From: Bretzel, Butch
Sent: Monday, May 09, 2011 3:18 PM
To: Topinka, Carol
Subject: RE: LAY OFF LETTERS

so there are no other layoff notices……does that mean for example that erin robers is full time next year, that ej higgins is full-time, the two special ed teachers at dc will be back to 100 %……etc……

ps……if you are reinstating doty and getchel to full time, then beth lewis will be laid off full time (100 %) and brooke shapiro will be laid off full time (100 %)……

thanks for getting back to me……butch

RE: LAY OFF LETTERS

Topinka, Carol
Sent: Tuesday, May 10, 2011 12:49 PM
To: Bretzel, Butch

You are correct.

Board decision

Topinka, Carol
Sent: Tuesday, May 17, 2011 2:22 PM
To: Bretzel, Butch

Hello Butch,

Last night in closed session I discussed the Doty and Getchel lay off notices with the Board. As you know they had approved those notices when they approved the staffing plan for 2011-12. Last night they decided to stay with the plan they had approved and to keep the lay off notices as they are: Getchel as .5 and Doty as .5.

I realize that this means that you will be filing a grievance.

Carol

On May 27, 2011, Mr. Bretzel filed grievances on behalf of Doty and Getchel. Those grievances, in essence, contend that the junior employees should be laid off, and the more senior employees (Doty and Getchel) should be restored to full time status.

The grievances were denied by Superintendent Topinka in letters dated June 6, 2011. With respect to Ms. Doty, Topinka wrote "…the District will first consider the certification of the employees potentially subject to layoff. In this situation, two of the three teachers have an additional certification in Instrumental Music, which Ms. Doty does not have. Therefore, the District appropriately selected Ms. Doty for the partial layoff giving consideration first to the certifications held by the three employees."

With respect to Ms. Getchel, Topinka wrote "…the District reduced Ms. Getchel's contract to 50% in order to lessen the impact on the art educational program and maximize teachers' student contact time. The decision was not made for arbitrary or capricious reasons."

The Association appealed the Superintendent's denial on June 15, 2011. The School Board denied the appeal on July 1, 2011. On August 25, 2011, the Association requested a panel of arbitrators from the Commission. The Commission provided a panel on September 8, 2011.

On September 15, 2011, Mary Hubacher, the attorney for the District, telephoned Val Gabriel, the UniServ Director who represented the St. Francis Education Association, to inquire what the Association expected to gain from the grievance, given the significant changes brought about by Wisconsin Act 10. The two talked and Gabriel committed to call back. Hubacher indicated that Gabriel never called back. Hubacher sent her School Board client an email summarizing the conversation. It provides:

> Good Afternoon John and Julie,
>
> I spoke with Val about the two pending SFEA grievances. When asked what the Association was hoping to accomplish by taking these to arbitration in light of the changes in management rights/flexibility, she seemed a little "vague" and basically said that she wasn't sure what the SFEA hopes to accomplish by pursuing arbitration. She said she knows there is a lot of uncertainty about what position the WERC is going to take on things like this but said the SFEA feels that it needs to pursue it. She referenced that if they prevail she knows that it would only be for this school year. I said that it could be even more temporary than that but she didn't ask what I meant by that. She said that she is going to take a look at the grievances over the weekend (she said she hadn't looked at them in a while) and will give me a call next week after she has had time to review and "reflect." Basically, she said that if the SFEA asks her to do something she is going to do it because they are all so "fried" over there that she will do whatever. Reading between the lines, in order to preserve the representation relationship, she will go to arbitration regardless of the possible ultimate outcome.
>
> I will let you know what, if anything, she has to say next week.
>
> Mary

Gabriel subsequently retired and her St. Francis Education Association assignment was assumed by UniServ Director Ted Kraig. It was Mr. Kraig's testimony that he was extraordinarily busy, and that there was a great deal of conflict and change transpiring. This was the period of Act 10 protests and recertification and recall elections. At some point, a member or members asked Kraig as to the status of the grievances. He called Hubacher on June 1, 2012, and subsequently contacted John Thomsen, who had succeeded Topinka as Superintendent. On July 11, 2012, Hubacher advised Kraig that since the contract had expired in June 2011 the grievances were not arbitrable.

On August 8, 2012, the District filed a motion with the Commission, which sought to have the Commission confirm that it had no duty to arbitrate the two grievances. The District made two basic arguments to the Commission. The first was that the collective bargaining agreement had expired on June 30, 2011 and had been replaced with a unilateral grievance procedure, per Act 10, which had no arbitration provision. "The grievances in this matter were not submitted to the Commission until after July 1, 2011, which was after a new grievance procedure was in place."

The second basis for objection was an assertion of the Doctrine of Laches. The District asserted that the long delay in striking arbitrators was unreasonable and prejudicial to the District, and thus barred by the Doctrine.

The Commission denied the request to bar arbitration. On October 2, 2012, the Association filed a complaint with the Commission to compel arbitration. In March 2013, the District agreed to arbitrate the matter and preserved its Laches defense for submission to the arbitrator.

ISSUES

The District believes the initial issue for determination is whether a decision on the merits is precluded by the Doctrine of Laches.

Both parties agree that the substantive issues are:

1. Did the District violate Article X of the 2009-2011 collective bargaining agreement when it laid off Kathy Doty from a full time to a fifty percent (50%) permanent position and laid off Kathy Getchel from a full time to a fifty percent (50%) position?

2. If so, what is the appropriate relief, assuming the matter goes to the merits.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article II – School Board Functions

> The Board of Education, on behalf of the electors of the District, hereby retains and reserves unto itself all powers, rights, authority, responsibilities, and duties conferred upon and vested in it by the laws and Constitution of the state of Wisconsin and the United States. The exercise of the powers, rights, authority,

duties, rules, responsibilities by the Board of Education, the adoption of policies, rules, and regulations, and the practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by this agreement.

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Article IX – Grievance Procedure

Section A. Definitions

A grievance shall be an alleged violation of the terms of this agreement. All days specified in Section B of this article are workdays as defined by [a] 190-day calendar.

Section B. Steps

The following steps shall be initiated within ten working days after the unit employee knew or should have known about the problem. Whenever possible, the unit employee bringing the grievance shall be present at all meetings to consider the grievance.

1. A grievance shall be discussed informally with the unit employee's immediate supervisor. If a satisfactory resolution of the matter is not reached within five work days of the informal conference, the unit employee shall have an additional five days to implement step 2 of this procedure.

2. The unit employee shall submit the grievance to the immediate supervisor in writing. The immediate supervisor shall have ten days from the receipt of the grievance to provide a written disposition of the matter. The unit employee shall have ten days following receipt of the disposition in step 2 to appeal the matter to step 3.

3. The unit employee may submit the grievance to the superintendent in writing. The superintendent shall have ten days from receipt of the grievance to provide a written disposition of the matter. The unit employee shall have ten days following receipt

of the disposition in step 3 to appeal the matter to step 4.

4. The unit employee may submit the grievance to the school board in writing. The board shall have ten days from receipt of the grievance to provide a written disposition of the matter. Union shall have ten days following receipt of the board disposition to appeal the matter to step 5.

5. Arbitration. The Union may submit unresolved grievances to arbitration within the framework and limitations of the law. The decision of the arbitrator shall be binding on both parties. The parties shall promptly meet and select an impartial arbitrator. If the parties fail to select an arbitrator within five days, they shall request the WERC to furnish a panel of five arbitrators. The parties shall alternately strike names from one panel until one remains who shall act as the impartial arbitrator. The expenses of the arbitration proceedings shall be borne equally by the parties provided further that the parties shall pay the expenses of their own counsel. The arbitrator shall determine the meaning, interpretation and application of the terms of this agreement and shall have no power to add to, or subtract from, or modify any of the terms of this agreement.

   The parties shall make an effort to schedule arbitration hearings during non-school hours. Should it be necessary to schedule the arbitration hearing during school hours, all participating Union representatives (limit of two) and unit employee witnesses who must be present during school hours shall be served with a subpoena from the appropriate authority. Union representatives and unit employee witnesses shall not lose pay nor be charged a paid leave day. However, the Union shall reimburse the District the actual cost of hiring replacement employees for unit employees participating in the arbitration.

Article X – Layoff and Recall

Section A. Layoff

District may lay off a unit employee only under one or more of the following circumstances:

1. a substantial decrease in the total student population or in the enrollment in a specific program area or grade level;
2. changes in or elimination of an education program;
3. loss of operating revenue through means beyond the District's control;
4. a unit employee's return from a leave of absence;
5. other reasons which are sufficiently grave as to require a reduction in staff.

Unit employees may not be laid off or reduced in hours under this paragraph for reasons relating to their performance or conduct. Any decision to lay off unit employees shall not be arbitrary or capricious.

***

District shall not lay off a unit employee if the necessary staff reduction can occur through normal attrition or if a volunteer is available. (A person volunteering for layoff shall be provided the same benefits, rights and procedures as a unit employee involuntarily laid off.) If an involuntary layoff is necessary, District will consider, in this order, the certification, the seniority, and the date of initial contract of all employees in the area or level affected.

Unit employees shall be laid off in the inverse order of seniority. If the unit employee laid off is certified in another area or level and his/her seniority exceeds that of a unit employee in the second area or level, he/she may exert his/her seniority against the less senior unit employee, and the procedure shall again be applied to determine which unit employee in the second area or level will be laid off.

If certification and seniority are the same, unit employees shall be laid off in the inverse order of date of initial contract. If the

necessary reduction cannot be achieved by attrition, volunteers or application of the above three criteria, District may select the unit employee to be laid off.

A reduction in employment status from full-time to part-time, and subsequent reductions in hours, shall be considered a layoff subject to the above procedures; however, bumping into another area or level of certification is limited to restoring the reduced hours.

Seniority is defined as the number of years (or partial years counted in days) of continuous employment under contract in the district. Part-time unit employees shall accrue seniority in proportion to the percentage to which they are assigned of a full-time unit employee's assignment. Time spent as a replacement unit employee or on unpaid non-medical leave of absence or on layoff shall not be counted towards seniority. Upon request by Union, District will provide a current bargaining unit seniority list containing the name of each unit employee, date of employment, the number of years of local experience, and his/her DPI certification code, as well as any available information regarding leaves of absence and part-time or full-time employment. Upon specific request, District will provide Union the date a unit employee signed her/his initial contract.

While on layoff, a unit employee retains his/her seniority. …

Section B. Recall

Criteria for determining the order of recall shall be the same as for the order of layoff. Unit employees shall be recalled to available positions for which they are certified in order of seniority. If two or more unit employees who are qualified (by certification) for the vacancy have the same seniority, District will first recall the unit employee with the earliest date of initial contract.

DISCUSSION

Doctrine of Laches

The District contends that the matter should not proceed to the merits due to the delay in proceeding to strike arbitrators. It invokes the Doctrine of Laches as a defense to proceeding

on the merits. The parties to this dispute agree as to the elements of laches. They disagree as to the application of the doctrine to this dispute. The parties agree that the doctrine consists of three elements: (1) unreasonable delay; (2) knowledge of the course of events and acquiescence therein; and (3) prejudice to the party asserting the doctrine.

There was a significant delay in moving to strike arbitrators from the panel originally provided on September 8, 2011. It was not until June that the Association sought to follow up on the selection of an arbitrator. The Association explains the delay by reference to the turmoil of the time. Act 10 was controversial and its enactment played out over a long period of time. Thousands protested. The Act was delayed and subsequently challenged in the courts. A number of recall elections were organized and conducted. The state Senate changed hands twice. There existed an atmosphere of uncertainty and change that was unprecedented in my lifetime.

The District was both aware of the swirling changes and attempting to adapt to them. It was the budget uncertainty and concerns about the viability of the collective bargaining agreement that caused the District and Association to enter into the memorandum of understanding on March 10, 2011.

The UniServ Director representing the Association retired and was replaced.

It is against this backdrop that I am to determine whether the nine-month delay was unreasonable.

It is appropriate to first consider the provisions of the collective bargaining agreement. The contract sets forth the rights of the parties and is the source of my jurisdiction in this matter. Article IX, set forth above, is the grievance procedure negotiated by the parties. It is designed to handle disputes that arise as to the substantive provisions of the agreement. Section B sets forth the steps to be followed. It is noteworthy that each step of the grievance procedure is specifically regulated as to time limits, with the sole exception of the arbitration step.

The employee has ten working days to bring his claim forward. Subsequent steps allow for ten-day periods for the employee to appeal and the employer to respond. The ten day limits are applied to the employee, the Association, the Administration and the School Board. Once the internal procedure is exhausted, the Association may submit the matter to arbitration within ten days.

The parties are then directed to promptly meet to select an arbitrator. They are given five days to do so. It is only upon their failure to do so that they are to proceed to the Commission for a panel. The contract is silent as to the timeline, if any, that regulates striking names from the panel. That silence stands in stark contrast to the heavily regulated procedure that precedes it. The language relative to striking names from a panel appears in a paragraph

whose lead sentence is quite expansive. The last sentence of paragraph 5 sets forth my jurisdiction in this proceeding. I am to "… determine the meaning, interpretation and application of the terms of this agreement and shall have no power to add to, or subtract from, or modify any of the terms of this agreement."

I am reluctant to invoke an equitable doctrine in order to conclude that a timeline that is arguably consistent with the agreement of the parties is unreasonable. Implicit in a contrary conclusion is the notion that some delay is permissible but that a line is ultimately crossed. Paragraph 5 suggests that I should be cautious in drawing that line. No one argues that the delay violates Article IX, paragraph 5.

Superintendent Thomsen testified that he believed the grievance was not being pursued. There were signs to the contrary. Ms. Hubacher's email of September 15, 2011, concludes by speculating that the Association will proceed to arbitration. Thomsen met with local Association leaders on an approximate monthly basis. He indicated that the matter came up and that his impression was that the Association was still trying to figure out what the next step was. As a practical matter, Thomsen inherited the grievance. It arose while Topinka was superintendent. All of the grievance conversations were with Topinka. Topinka left. Thomsen arrived on or about July 1, 2011.

By the time Thomsen arrived the die had been cast. The events had already occurred. The grievance was filed and denied. The layoffs had been issued. His testimony was that he was following the School Board's direction in this matter. He indicated that, if the District was ordered to reinstate the grievants, he would have done so. Regardless of his understanding as to the status of the grievance, he was not positioned to alter the staffing for 2011-2012.

The Association certainly had knowledge as to what was transpiring. Two people were laid off. Grievances were filed. Conversations directly on point occurred. If there was acquiescence, it would have to be inferred from the lack of action on the grievances.

The District claims prejudice. The essence of the claim is that had the parties proceeded in September 2011, and had the District lost the arbitration, it could have reinstated the grievants and received work in exchange for the back pay awarded. There is no claim that the District modified its behavior because it regarded the matter resolved. To the contrary, it acted with full knowledge that if it proceeded to layoff Doty and Getchel, its action would be challenged. There was no claim that witnesses were no longer available or that memory had faded.

The District's claim in this regard is both speculative and unrealistic. The Association sought to pursue the grievance in June 2012. In July 2012, the District advised the Association that the matter was not arbitrable because the contract had expired. In August 2012 the District asked the Commission to dismiss the grievance because the contract had expired and due to laches. When the Commission declined to do so, the parties did not proceed to arbitration, but

rather, in October the Association filed a complaint to compel arbitration. The parties ultimately agreed to arbitrate in March 2013.

To conclude that the District was prejudiced by the delay requires that I assume the District would not have raised the defense that the contract had expired. The contract expired on June 30, 2011. It was two and one half months later that the parties would have selected an arbitrator had the process moved expeditiously. Had the District raised the contract expiration defense that it raised in 2012, it is likely that claim would have resulted in a significant delay in the proceedings.

Ultimately, the parties selected Arbitrator Carne. The Association cited the published awards of Arbitrator Carne and noted that her awards consistently issued more than ten months following the corresponding requests for a panel. I was subsequently selected to hear this matter on, or about, June 21, 2013. This award has issued in February 2014, eight months following my selection. Had I been selected on September 15, 2011, and had this same timetable played out, the award would have issued in late May 2012. School was dismissed on June 7, 2012.

As a practical matter, the District could not have realistically expected to go through an arbitration process and receive an award in time to reinstate the grievants for a significant amount of time in school year 2011-2012. It is a common remedy in discharge cases for an arbitrator to order reinstatement with back pay. Such a remedy is regarded as make whole to the grievant. It is not regarded as punitive to the employer, notwithstanding the fact that the employer has received no work for the back pay, since the employer was found to have discharged the employee contrary to the provision of the collective bargaining agreement.

There is no basis to conclude that the District suffered prejudice as a consequence of the delay.

Layoff

Article X, Section A. Layoff, sets forth the circumstances under which the District may lay off. There is no dispute in this proceeding that the circumstances existed which authorized the reduction in staff. The last sentence of the first paragraph provides "[a]ny decision to lay off unit employees shall not be arbitrary or capricious." The District has argued that this sentence sets forth the standard against which its selection of employees for layoff is to be measured. Grievance correspondence from the District confirms this to be the position of the District. I do not read the clause this way. The first paragraph of Article X, Section A, addresses the circumstances under which the District may lay employees off. Sentences one through five set forth a number of reasons which would justify a layoff. The paragraph goes on to provide that neither performance nor conduct shall form a basis for invoking the layoff clause. The numbered sentences are broad and sweeping in describing the circumstances for

layoff. The final sentence sets an arbitrary and capricious standard against which to measure the District's decision to lay off unit employees.

The first paragraph does not address which employees are to be laid off. That occurs further in the article. The first paragraph is limited to defining the conditions under which the District can invoke the layoff clause.

The contractual language which addresses who is to go in the event of a layoff is found in the subsequent paragraphs of Article X, Section A. The language provides "[i]f an involuntary layoff is necessary, District will consider, in this order, the certification, the seniority, and the date of initial contract of all employees in the area or level affected." It further provides "[u]nit employees shall be laid off in the inverse order of seniority." And finally "[i]f certification and seniority are the same, unit employees shall be laid off in the inverse order of date of initial contract."

It is the view of the District that it did consider the certifications of the employees in the level affected. It identified Doty for layoff in the Music Department because her two colleagues had instrumental certifications that she lacked. Former Superintendent Topinka testified that it was important to retain the certifications necessary to preserve the instrumental programs. In the Art Department, all employees had certifications that allowed them to teach all course offerings of the District. It is not clear how certification was considered first in the Art Department.

If the District is right, it is free to consider certification, and not much else. The contract provides that "[u]nit employees shall be laid off in the inverse order of seniority." That provision is rendered meaningless under the District's reading of the contract.

I believe the two sentences must be harmonized in a way that they each have meaning. My reading of the contract is that it authorizes the District to lay off under certain circumstances. Those conditions were present here. Once the decision to lay off has been made, the contract directs the layoff to occur in the inverse order of seniority. In order to accomplish that the District is directed to consider certification first. If the employees who survive the layoff are not certified to perform the work that remains, the procedure is not operationally viable. It makes sense to require a review of certifications before proceeding down the seniority list.

The first sentence set forth above requires the District to consider certain factors in the process of layoff. In contrast, the second sentence set forth above directs the order of layoff. It requires the layoff to occur in the inverse order of seniority. The sentence uses the term "shall' in directing the order of layoff by seniority.

The music layoff serves as an illustration of the interplay between the provisions. Doty, the senior music teacher, was laid off notwithstanding the command of the layoff by seniority

provision. She was identified for layoff because of considerations of certification. The consideration was to the future of the instrumental program. However, as a practical matter, the District elected to eliminate certain instrumental lessons and vocal lessons previously taught by the junior employee.

I do not believe that the District is free to ignore the contractual provision that requires layoff by seniority by considering certifications that are not required to teach the curriculum it determines to offer. This construction is consistent with Section B, the recall provision. Employees are to be recalled to positions for which they are certified, in order of seniority. The sequence of recall is "the same as for the order of layoff."

As to the art position, the District determined to divide the reduction in position between the two junior employees. Ms. Getchel is junior to Ms. Henkhaus by the slimmest of margins. This dispute does not involve the competing certifications of employees, since all employees are certified to teach in all areas. This decision appears to reflect a preference to minimize travel time between buildings.

Layoff is a term commonly used to mean "[a] temporary or indefinite separation from employment initiated by the employer without prejudice to the worker for reasons such as lack of orders, model changeover, termination of seasonal or temporary employment, inventory taking, introduction of labor saving devices, plant breakdown, or shortage of materials." (Roberts' Dictionary of Industrial Relations, Fourth Ed., Harold S. Roberts, BNA, Washington, D.C. 1994, p.417)

Layoff, typically by seniority, has been used to insulate senior workers from downturns in the levels of employment of the employer. It stands in contrast to spreading the reductions among the workforce in general. I believe this concept is reflected in the collective bargaining agreement. The introductory paragraph of Article X distinguishes between layoff and reduction in hours. The Article goes on to regulate layoff and to treat a reduction in hours as a layoff.

The contract requires that unit employees be laid off in the inverse order of seniority. The concept is that the junior employee is to bear the burden of a downturn in employment. I do not believe the employer is free to spread the pain to some undefined number of employees. If that were so, the seniority-based layoff provision would have no meaning. For example, if the employer, proceeding by seniority, were to reduce the hours of everyone in the bargaining unit by a modest number of minutes per day, the required savings could be achieved. The layoff by seniority clause would have no meaning.

The District desired to eliminate the inefficiency of travel time. This is a fact to be considered in the negotiation of the contractual provision regulating how layoff should proceed. Once the negotiation has occurred and the contract signed, it is not a factor that permits me to void a provision of the agreement.

AWARD

Grievance sustained.

REMEDY

The District is directed to reinstate Doty and Getchel to full-time positions for the 2011-2012 school year and to make them whole for any losses they suffered as a consequence of the layoff. The District is entitled to offset the back pay with unemployment compensation, if any, and / or interim earnings, if any, which were earned during the hours the grievants would otherwise have been at work.

Dated at Madison, Wisconsin, this 27th day of February 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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William C. Houlihan, Arbitrator