STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of FORT ATKINSON EDUCATION ASSOCIATION, INC. To Initiate Mediation-Arbitration Between Said Petitioner and SCHOOL DISTRICT OF FORT ATKINSON	Case XII No. 24533 MED/ARB-379 Decision No. 17103-A

Appearances:

Mr. A. Phillip Borkenhagen, UniServ Director, Capital Area UniServ-North, appearing on behalf of the Association.

Melli, Shiels, Walker & Pease, S. C., Attorneys at Law, by Mr. James K. Buhly, appearing on behalf of the Employer.

ARBITRATION AWARD:

On July 10, 1979, the undersigned was appointed by the Wisconsin Employment Relations Commission as Mediator-Arbitrator, pursuant to Section 111.70 (4)(cm) 6.b. of the Municipal Employment Relations Act, in the matter of the dispute existing between Fort Atkinson Education Association, Inc., referred to herein as the Association, and School District of Fort Atkinson, referred to herein as the Employer. Pursuant to the statutory responsibilities, the undersigned conducted mediation proceedings between the Association and Employer on September 18, 1979, at Fort Atkinson, Wisconsin, over the matters which were in dispute between the parties as they were set forth in their final offers filed with the Wisconsin Employment Relations Commission. The dispute remained unresolved at the conclusion of the mediation phase of the proceedings, and consistent with prior notice that arbitration would be conducted on September 18, 1979, in the event the parties were unable to resolve the dispute in mediation, the Association and the Employer waived the statutory provisions of Section 111.70 (4)(cm) 6.c. which require the Mediator-Arbitrator to provide written notification to the parties and the Commission of his intent to arbitrate, and to establish a time limit within which each party may withdraw its final offer. Arbitration proceedings were conducted on September 18, 1979, at which time the parties were present and given full opportunity to present oral and written evidence and to make relevant argument. The proceedings were not transcribed, however, briefs were filed in the matter, which were exchanged by the Arbitrator on October 29, 1979.

THE ISSUES:

The final offers of the parties filed with the Wisconsin Employment Relations Commission contained two issues: a layoff issue and a personal business leave issue. The final offers with respect to the personal business leave issue were identical in each party's final offer, and it was stipulated at hearing that said issue was no longer disputed and would be considered as one of the stipulations. There remains, then, one outstanding issue between the parties, i.e., the layoff clause.

ASSOCIATION FINAL OFFER:

The Association proposes the deletion of the provisions of the predecessor Collective Bargaining Agreement at Section 1.9 (2) E, and proposes that the following language be adopted in its place at Section 1.9 (3) of the successor Agreement:

1.9(3) Lay-Off, and Reinstatement Following Lay-Off

A. Whenever a reduction in the number of teachers is deemed necessary by the Board of Education for the following school year for reasons such as enrollment decline, educational program changes, and budgeting or financial limitations, the Board will prepare a rank-ordered list of all experienced teachers in the district, from the greatest point total to the least. (See Part B, Step 3 below.) A copy of the list shall be given to each teacher on or before February 15. The list shall also itemize after each teacher's name, the teacher's point total (as of February 1), the area(s) in which they currently teach, and the area(s) in which they are currently certified to teach.

B. The Board, after consultation with the District administrator(s), and after representatives of the FEA, Inc. have been given an opportunity to provide input on an advisory basis, will then determine which teaching positions (or fractions thereof) are to be eliminated for the ensuing year. The individual teachers affected by that decision will then be determined by following, in the order listed, the procedure set forth below. A notice of lay-off and a written explanation of the reasons shall be forwarded to each teacher affected on or before February 28. in accordance with Section 118.22, Wisconsin Stats. A list of the names of the teachers so affected shall be forwarded to the FEA, Inc. by the same date.

Step 1. Retirements and Resignations

Normal attrition resulting from teachers' retiring or resigning will be relied upon to the extent it is administratively feasible.

Step 2. Probationary Teachers

Teachers who have completed three years of teaching or less in the District shall be laid-off first. The Board shall select those teachers who are to be laid-off.

Step 3. Experienced Teachers

a. Teachers who have completed more than three years of teaching in the District shall be laid-off only in the event that the use of Steps 1 and 2 above do not effect the necessary staff reduction.

b. Should further reduction be necessary, the Board shall first retain those teachers possessing current teaching certificates with the greatest amount of seniority in the District (as defined using the following point system, based upon the number of years of experience in the District and the number of credits earned while teaching in the District) who are qualified by virtue of their existing certification to teach in those areas of discipline to be preserved.

c. The point system shall be:

Years of Teaching Experience in this District (# that will be completed when the	Credits earned (as of February 1) while teaching in this District

the lay-off takes effect)

# of Years	Points
3	2
4	4
5	6
6	8
7	10

For each year beyond 7, add 2 more points. Unlike the salary schedule, there will be no limit in this category for lay-ff purposes.

For credits earned after the Bachelor's Degree and before the Master's Degree:

1 point for every 6 credits up to a maximum of 6 points.

For credits earned after the Master's Degree:

1 point for every 6 credits, with no limit.

d. Excluded from an accumulation of years of experience in this district are:

1) Substitute teachers
2) Graduate residents
3) Interns
4) Student teachers
5) Days in excess of 190 in a contract year
6) Any unpaid leave-of-absence time

e. Regular part-time teacher's years of experience in this District will be based on full-time equivalency using 190 days as a "year". In such a case, or in a case where a teacher is full-time but for only part of the year, the result shall always be rounded off to the nearest one-half (1/2) year. Since each year is worth 2 points, one-half (1/2) of a year would be worth 1 point.

f. In the event that two or more teachers are equal by using the point system, then the teacher with the fewest total number of years of teaching experience, including outside the District experience, shall be laid-off first. In the event that this method is still not decisive, the Board shall make the final selection of who is to be laid-off.

C. Every attempt will be made to reassign duties (curricular and/or extracurricular) in order to adhere to the point system lay-off. Where the duties cannot be reassigned, the teacher with those duties will be exempt from lay-off, but the Board shall not use this provision in an arbitrary or capricious manner.

D. No teacher may be prevented from securing other employment during the period he/she is laid-off under this policy.

E. No new or substitute appointment shall be made before reinstatement has been offered to any teacher previously laid-off from the District who is certified to fill the position. When there is a choice, the last person to be laid-off shall be the first to be reinstated. It shall be the responsibility of the teacher to annually notify the Superintendent on or before February 28 of his/her desire to be reemployed.

F. All benefits to which teachers were entitled at the time of their lay-offs, including unused accumulated reimbursable absence and credited years of service and education, will be restored to teachers upon their return to active employment, and such teachers will be placed on the proper step of the salary schedule.

G. The recall rights and benefits listed above shall be null and void after two (2) years following lay-off.

H. The Board shall allow any teacher who is laid-off the right to participate in available group insurance programs for up to one (1) year following lay-off, at the teacher's expense.

EMPLOYER FINAL OFFER:

The Employer proposes to leave the terms of Section 1.9(2) E of the predecessor Agreement essentially unchanged as follows:

E. Whenever a reduction in teachers is deemed necessary by the Board of Education for the following school year due to the reasons of the type such as a decrease in enrollment, educational program changes and budgeting or financial limitations, such reduction shall be brought to the attention of the FEA, INC. and the teacher by March 1, the procedure for reduction shall be as follows:

The Board will first determine the number of teachers to be laid off and then, in consultation with the Superintendent and such other administrators as may be appropriate, will determine the individual teachers to be laid off in accordance with the following steps:

Step 1.

Normal attrition resulting from teachers' retiring or resigning will be relied upon to the extent it is administratively feasible.

Step 2.

The remaining teachers to be laid off will be selected by the Board, taking into account, both on an individual basis and in comparison to other teachers, factors such as the individual teacher's length of service in the District, overall teaching experience, academic training, ability and performance as a teacher as previously and currently evaluated by the appropriate administrators, assignment to co-curricular and other special activities and past and potential contribution to the educational program of the District. A written explanation shall be forwarded to the teacher affected.

Step 3.

No new or substitute appointment may be made before reinstatement has been offered to any teacher previously laid off from the district who is qualified to fill the position. In the event of reinstatement, there shall be no loss of credited years of service or accumulated reimbursable absence. It shall be the responsibility of the teacher to annually notify the Superintendent of his desire to be reemployed prior to March 1.

Step 4.

Step 3 of this agreement is nullified and void after two years following lay-off.

DISCUSSION:

The statutory criteria, which the undersigned is to consider, is set forth at Section 111.70 (4)(cm) 7, paragraphs a through h. At hearing, and again in their briefs, both parties presented evidence and argument directed to criteria d, f and h. Additionally, the Employer relies on criteria c as well.

Thus, the undersigned will focus his attention toward the criteria upon which the parties rely, which can be stated in summary as follows:

c. The interest and welfare of the public.
d. The comparables.
f. Changes in circumstances during the pendency of the proceedings.
h. Traditionally considered other factors.

THE COMPARABLES

The comparables relied on by the parties are not identical. Within their respective comparables, however, the parties have relied on some of the same school districts as being comparable to that of the instant Employer. Both parties rely on the athletic conference schools which consists of Monona Grove, Middleton, Monroe, Oregon, Sauk-Prairie and Stoughton. Additionally, both parties contend that non-conference schools of Jefferson, Edgarton and Whitewater are appropriate comparables. The parties are in disagreement with respect to several other proposed comparables. The Employer urges that Lake Mills, Cambridge, Evansville, Clinton, Milton and Palmyra, neighboring districts to that of the Employer, and a part of CESA 17, should be included. The Association does not include Lake Mills, Cambridge, Milton and Palmyra as urged by the Employer, but rather urges that Watertown, Elkhorn, Kettle-Moraine and Mukwonago be considered comparable, because they are within a thirty mile radius of the instant school district, and have similar pupil and full-time teacher equivalency counts.

A review of the evidence satisfies the undersigned that the comparables upon which both parties rely in common give a sufficient cross section for the purposes of determining comparabilities in this dispute. The undersigned will consider as comparables, then, the Badger Athletic Conference, plus the three districts which both parties agree are comparable outside of the conference, Jefferson, Edgarton and Whitewater. A summary of what are now determined to be the comparables shows the following:

1. Middleton - seniority controls.

2. Monona Grove - seniority controls among probationary teachers; seniority controls among non-probationary teachers if otherwise qualified.

3. Monroe - seniority weighted point system for lay-off.

4. Oregon - seniority controls lay-off among non-probationary teachers, probationary teachers laid off first, extracurricular exceptions.

5. Sauk-Prairie - seniority controls.

6. Stoughton - non-overlapping departmental classifications and lay-off requires only "consideration" of four criteria, of which seniority or length of service to the District is one.

7. Jefferson - seniority controls within grade level classifications, possible co-curricular exemptions.

8. Edgarton - seniority controls.

9. Whitewater - sequential criteria for selection within non-overlapping departmental classifications as follows: first, length of departmental service; second, length of service in the district; third, qualifications, including evaluation of teacher performance and appropriateness of training, experience, certification, vis a vis remaining assignments; and four, activities or co-curricular assignments held or to be filled.

From the foregoing enumeration of the comparables with respect to the role seniority plays in lay-offs, only Stoughton has a provision in its agreement which is comparable to the language found in the predecessor Agreement in the instant school district which the Employer here proposes to continue. From a review of the comparables, the undersigned is satisfied, then, that a finding for the Association, based exclusively on the criteria of comparables, is in order.

THE BURDEN OF PROOF

The Employer argues that a party proposing a change from existing language which heretofore had voluntarily been agreed upon has the burden of showing by extremely persuasive reasons that there is need for change. Essentially, the

Employer contends that there is a presumption that favors continuance of existing language, unless the party proposing the change demonstrates that the existing language is unworkable or inequitable; there is an equivalent "buy out" or quid pro quo; or there is a compelling need. The Employer contends that the Association proof in this matter falls short of sustaining their burden. In support of his argument the Employer cites prior interest arbitration awards as follows: Greendale Education Assn. (Kerkman, Sept. 1978); School District of Barron, Med/Arb 14, Dec. No. 16276-A. (Krinsky, Nov. 1978); City of Kenosha Med/Arb-15, Dec. No. 16159-C (Kerkman, Aug. 1978): Fox Point Jt. School District, Dec. No. 16352OA (Kerkman, Nov. 1978). The principle enunciated by the Employer that the proposer of a change to existing contract language must assume a high burden to sustain his position is correct. A conclusion, therefore, is essential in this matter as to whether the Association in this case has sustained its burden for the proposed change. The Association claim as to need for the change lies principally in their contention that the application of the language governing lay-offs in the predecessor Agreement was inequitable. In order to determine whether the language proposed by the Association relieves an inequitable situation under the prior language, an examination of the application of the language as it existed in all predecessor agreements is appropriate.

The undersigned is satisfied that the change in the lay-off language proposed by the Association was triggered as a result of lay-offs effectuated by the Employer in the spring of 1979 for the current school year. Grievances were filed as a result of the lay-offs effectuated by the Employer, and the parties were unable to resolve the grievances and went to arbitration hearing on said grievances before Arbitrator Krinsky to determine whether the lay-offs were in violation of the terms of the predecessor Agreement. In the instant hearing, the parties stipulated into the record before this Arbitrator, the record which was created in the hearing before Arbitrator Krinsky on August 21 and 22, 1979. From the Krinsky record, which is in evidence before me, as well as from the testimony adduced at hearing in the arbitration proceedings which were conducted by me; the undersigned is satisfied that the Employer for the first time in the lay-offs in the spring of 1979 utilized any other criteria than seniority in determining which teachers would be laid off. In all prior lay-offs, seniority had governed. The foregoing conclusion is consistent with the findings made by Arbitrator Krinsky in the grievance arbitration that prior to 1979 all lay-offs were made in accordance with seniority.[1] The evidence establishes that the language of the predecessor Agreement governing lay-offs has been essentially the same at least as far back as the year 1972. Given the finding that the Employer has applied that language in all prior lay-offs so as to have seniority control, except for the lay-offs of 1979; and given what the undersigned concludes to be a natural understanding on the part of the Association that seniority would continue to control under the existing language; the undersigned concludes that the change in the application of the lay-off language in 1979 constitutes sufficient reason to favorably entertain the Association proposal in this matter. The Association is essentially proposing language which until the spring of 1979 had been the method that the Employer had utilized in determining which employee is to be laid off.

The Employer has cited School District of Alma, Med/Arb-115, Dec. 16672-A (Hutchinson, May 1979), and School District of Barron, Med/Arb-14, (Krinsky, Nov. 1978), supra, asserting that the decision of both Arbitrators stand for the proposition that completely restructuring the parties' collective bargaining relationship, absent exceptional circumstances, should be left for the voluntary negotiations of the parties and not imposed by an arbitrator. The undersigned accepts the foregoing principle, however, the Employer's reliance on that principle in the instant matter is misplaced. Here we have terms of a predecessor Collective Bargaining Agreement, which in the opinion of the undersigned, leaves almost entirely within the discretion of the Employer, without limitation, which employee is to be laid off. At the same time, from 1972 to 1979, when lay-offs were

1) The undersigned has taken arbitral notice of the Krinsky Award which has been furnished to him, at his request, by Arbitrator Krinsky. Since the parties have elected to stipulate the record created by Arbitrator Krinsky into the instant record, the undersigned considers it appropriate to take notice of the Award solely with respect to Krinsky's findings of fact. The decision of Arbitrator Krinsky as to whether the Collective Bargaining Agreement had been violated is not considered, since the undersigned considers it not to be relevant.

necessary, the Employer implemented them based solely on seniority considerations. Thus, it cannot be said that the relationship, if the Association proposal is accepted, will be altered by adopting the Association proposal. Rather, the bargaining relationship as it had been practiced in actuality, except for the lay-off in the spring of 1979, would remain unaltered if the Association proposal is adopted. Given the history of the application of the language which heretofore existed in the Collective Bargaining Agreement governing lay-offs, the undersigned can only conclude that the Association proposal in the instant matter would restore the collective bargaining relationships previously enjoyed with respect to selection of personnel for lay-off, except for the spring of 1979. It would follow, then, that the Association proposal should be adopted. The burden in this case, then, can legitimately be said to have shifted to the Employer to show why seniority should not be applied once the prior practice of having seniority applied has been recognized.

IS THE ASSOCIATION PROPOSAL FLAWED?

The Employer contends that the proposal of the Association is flawed. The undersigned has considered each of the separate arguments advanced by the Employer and concludes that the Association proposal should not be rejected because it contains flaws.

First, the Employer contends that the escape clause by reason of the words "every attempt" being made to assign duties elsewhere imposes an undue burden on the Employer in that it infers the teachers are at liberty to reject the assignment of extracurricular duties. The undersigned sees no such inference, and whatever method of extracurricular duty assignments control in the relationship between this Employer and this Association will be continued under the Association proposal. Additionally, the Employer contends that the term "every attempt" is ambiguous, and that the time frame with respect to implementing the extracurricular assignments in order to effectuate lay-offs are constrictive. The undersigned has concern with respect to the words "every attempt" and the time periods to which the Employer speaks. However, given the earlier conclusions that the Association proposal in this matter is supported by the comparables, and that it more nearly reflects the bargaining relationship with respect to lay-offs as they had been implemented heretofore: it is now concluded that whatever ambiguity exists with respect to the term "every attempt" and the concerns over the narrow time frame within which to work out reassignment of extracurricular duties, are not sufficient reason to deny the Association proposal.

The Employer further contends the proposal is flawed by reason of the advisory input from the Association with respect to the implementation of the lay-off, in that it is an invitation to further litigation. The undersigned cannot conceive that litigation will follow when the input of the Association here is limited to an advisory status. Even more important, however, the record is clear that the Association has been afforded advisory input on prior lay-offs in this District, and based exclusively on that practice the undersigned cannot agree that the advisory input in this matter constitutes a flaw to the Association proposal.

With respect to the Employer argument that there is a conflict in the provision dealing with a third year teacher, the undersigned sees none. The Employer has contended that the language would require him to provide a rating number for teachers in their third year when they are still probationary, and that that rating is unnecessary in view of the language which leaves probationary teacher lay-off to the discretion of the Board. Under the proposed language, in the opinion of the undersigned, the Board would have no obligation to provide ratings for teachers in their third year and, therefore, the Employer concern is rejected.

The Employer further objects to the recall provision which changes the eligibility for recall by the substitution of the word "certified" for "qualified". Given the ongoing employment relationship enjoyed by an employee on lay-off, the undersigned does not view the Employer's objection to be sufficient reason to reject the Association proposal in its entirety.

Lastly, the Employer objects to making group insurance available to laid off teachers for the first year that they are laid off, at the teacher's expense. Conceptually, permitting laid off employees to continue for a limited period of time health insurance coverage is not a foreign concept in labor relations matters, and consequently, the Association position here with respect to lay-offs will not be rejected for that reason. Additionally, the Employer expresses concern about the possibility of default on the part of the laid off teacher and the problems it then creates for the District to collect the default. The undersigned sees no problem with respect to default, because the District, in the opinion of the undersigned, has the right to request prepayment from the laid off teacher, if he elects to continue health insurance coverage, before the Employer would be required to continue the coverage for said teacher.

CONCLUSIONS:

The undersigned has concluded that the comparables support the Association proposal on lay-offs: that the Association has met its burden in demonstrating a need for the proposed change; and that the proposal of the Association is not flawed so as to make the provision inoperable or to establish sufficient reason that the proposal should be rejected. From the foregoing it then follows that the Association offer is to be adopted in this matter. Based, then, upon the record in its entirety; the argument of counsel; the discussion set forth above; and after applying the statutory criteria, the undersigned makes the following:

AWARD

The final offer of the Association, along with the stipulations of the parties which reflect prior agreements in bargaining, are to be incorporated into the Collective Bargaining Agreement of the parties.

Dated at Fond du Lac, Wisconsin, this 12th day of December, 1979.

Jos. B. Kerkman,
Mediator-Arbitrator

JBK:rr