WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

BEFORE THE MEDIATOR-ARBITRATOR

In the Matter of the Mediation-Arbitration Between SCHOOL DISTRICT OF EDGERTON and EDGERTON EDUCATION ASSOCIATION	VOLUNTARY IMPASSE PROCEDURE

APPEARANCES: DAVID R. FRIEDMAN, Staff Counsel, Wisconsin Association of School Boards, appearing on behalf of the District.

MALLORY K. KEENER, Executive Director, Capital Area UniServ-South, appearing on behalf of the Association.

ARBITRATION AWARD

The School District of Edgerton, hereinafter referred to as the District or Board, and the Edgerton Education Association, hereinafter referred to as the Association, were unable to agree upon the wording of the provision dealing with reduction in force to be included in their 1982-1983 Collective Bargaining Agreement and entered into a voluntary impasse procedure, pursuant to the provisions of Section 111.70(4)(cm)5. of the Wisconsin Statutes, for purposes of resolving said dispute. Pursuant to a request of the parties, the Wisconsin Employment Relations Commission (WERC) provided the parties with a list of mediator-arbitrators and the undersigned was selected by the parties to be the mediator-arbitrator in this proceeding. On February 2, 1983, the undersigned was notified of his selection and a mediation meeting was then

scheduled for April 27, 1983. During the mediation meeting the parties resolved their differences with regard to the proper wording of the reduction in force article but remained in disagreement as to the number of days' notice which should be given prior to the end of the school year for purposes of laying off a teacher for the subsequent school year. The parties entered into a modified voluntary impasse procedure agreement wherein they agreed to change their final offers to reflect the results of the mediation meeting and their agreement as to the authority of the mediator-arbitrator in this proceeding. Thereafter, on June 30, 1983, a hearing was held before the mediator-arbitrator, wherein the parties presented evidence in support of their final offers. By agreement between the parties, the Association made an oral argument at the conclusion of the hearing and the District filed a brief in support of its position. On August 5, 1983, the Union filed a reply brief, to the District's written brief, pursuant to said agreement. Full consideration has been given to the evidence and arguments presented in rendering the award herein.

THE ISSUE IN DISPUTE

The parties first entered into an agreement containing a reduction in force provision as part of their three-year, 1977-1980 Collective Bargaining Agreement. Paragraph B8 of that procedure required that the Board give notice of layoff by February 28 of the school year prior to the school year during which the layoff would become effective. It read in relevant

part as follows:

> "The Board will notify the teacher of lay-off by the 28th of February of the current school year as that lay-off would pertain to the ensuing year."

During the mediation before the mediator-arbitrator, the parties agreed, in relevant part, that the District would continue to give notice of intent to layoff prior to the end of the school year which precedes the school year during which the layoff will become effective. The remaining difference between their positions in that regard relates to the number of days' notice which should be given. The Association proposes that the number of days' notice should be 90 days and the District proposes that the number of days' notice should be 30 days. As part of their modified voluntary impasse procedure agreement, the parties agreed that the undersigned should not be restricted to their final offers and should be permitted to pick either party's amended final offer or to modify the number of days' notice provided for in either party's final offer, provided that such modification did not allow for notice of layoff which was greater than 90 days or less than 30 days. Thus, omitting the number of days' notice for purposes of illustration, new paragraph B8 will read as follows under either party's final offer:

"B.8

a. The Board will give the teachers _____ days notice prior to layoff. The notice will be in writing, and the notice of layoff will contain the reason for layoff and the teacher's reemployment rights.

b. A copy of the layoff notice will be given to the Association president.

c. The layoff of each teacher shall commence on the

date that the teacher completes the teaching contract for the current school year."

ASSOCIATION'S POSITION

At the hearing, the Association made the following seven points in support of its position that a 90-day period of notice, or a period close to 90 days, is more reasonable than the 30 days proposed by the District:

"1. The contract language and practice of other Rock Valley conference school districts support the Union's position on notice for impending layoffs as they are consistent with Wis. Stats. 118.22 timelines which is more in line with the 90-day notice proposed by the Union than the 30-day notice proposed by the Employer.

2. The Edgerton Community School District has followed the timelines of Wis. Stats. 118.22 in the past and the Employer has the burden of convincingly proving the need for change.

3. More than 30 days notice is necessary to accomodate the 'reassignment' provision which is in the layoff provision as already agreed to by the parties. Article 800, B., 6. provides for reassignment of teachers and for those teachers who will ultimately be laid off to have sufficient notice of the impending layoff, 90 days is more workable and realistic than 30 days. This is particularly true where the Board and not the teachers control reassignment of staff members in layoff situations.

4. Teachers in Edgerton have just cause protection for nonrenewal (Article 102, A., 2.) but have no such substantive protection for layoff. Wis. Stats. 118.22 has strict timelines for nonrenewal and employers have been known to miss those timelines in efforts to nonrenew teaching staff. It is possible for a board which has missed 118.22 timelines to yield to the temptation to rely on layoff provisions to terminate an employee and setting the timing of layoffs to coincide with the nonrenewal decision mitigates against a board falling back on layoff in lieu of nonrenewal. Therefore, 90 days notice is the more reasonable period of notice.

5. Teachers are employed under individual contracts in the State of Wisconsin. The Union's position on 90 day notice for layoffs would not call for any breach of the individual contract or waiver implicit in the breach of an individual contract. The Board's proposal of 30 days notice would entail issuing an individual contract and then reneging on it which opens the door to possible litigation with the Employer over the breach of an individual contract.

6. The Union's position on 90 days notice is the more reasonable in its ameliorating effect on personal and professional disadvantages of short notice for impending layoff, as follows:

   A. If an employee is required to register for additional education to obtain certification in a more marketable field, it is necessary to have the maximum period of notice for an impending layoff to make the required financial and procedural plans to enroll in a college or university.

   B. Laid-off teachers from Edgerton will be competing for jobs with students graduating from colleges and universities as well as other teachers who have been nonrenewed or laid off many, if not most, of whom will have the advantage of being on the job market earlier than the Edgerton teacher, especially if the Board's 30 day notice is adopted.

7. The Union's 90 day notice does not materially inconvenience the Employer as District scheduling occurs prior to the first of the calendar year as a part of the budgeting process; therefore, enrollment figures are known and staffing needs can be determined so that the administration and Board can make layoff decisions."

In reply to arguments made by the District in its brief, the Association contends that no point made in the District's brief serves to sufficiently refute the above rationale in support of the Association's position. The Association argues that the District's "employee incentive to perform" and "effect on students" arguments are nothing more than "idle conjecture" and are unrelated in fact

or deduction to any of the evidence or testimony. Further, the Association argues that the realities of the job market are sufficient to refute the Employer's argument with regard to employee incentive. According to the Association, an employee who is on notice of possible layoff has a great incentive to perform since he or she must rely on the present employer to provide references in a job market already crowded with other applicants. As to the second argument advanced, the Association contends that there is no study or testimony substantiating the claim that such notice has an adverse impact on students.

Based on these arguments the Association asks that the undersigned find 90 days to be the more reasonable and comparable period for advance notice of layoffs or, in the alternative, find the greatest number of days possible between 90 and 30 as being the appropriate number of days of advance notice for layoff.

DISTRICT'S POSITION

At the outset of its argument, the District notes that there is little difference between the parties' positions as to which school districts are comparable. The Board believes that the schools represented by the Rock Valley athletic conference and contiguous school districts, are the districts that should be used for comparison purposes. The Association is in agreement that the Rock Valley athletic conference should be used for purposes of comparison, but would include all schools which were still included in that conference during the 1982-1983 school year. Specifically, Jefferson and Milton were included and the

District indicates that it would not object to the inclusion of Jefferson, if all of the contiguous districts (including Cambridge, Fort Atkinson, Stoughton, as well as Milton) are also included for comparison purposes. Further, the District indicates that it would not object to utilizing the Rock Valley athletic conference comparables as the prime comparison group and utilizing the contiguous school districts as a secondary grouping.

The Board acknowledges that under the statutory criteria, comparables do play a role in this case but argues that comparability should be given less weight in this case than in other cases because the issue relates to a language change which will affect the parties and the operation of the school district.

According to the District, it is important that the parties' proposals be read in light of the provisions of Section 118.22 of the Wisconsin Statutes and the interpretation of the requirements of that section of the statutes in the case of layoffs. Under that provision if the Board is considering the nonrenewal of a teacher it must give the teacher notice by February 28 that it is considering such action. The final decision to nonrenew the teacher must be made no later than March 15. On the other hand, in the case of new hires or teachers who will be rehired, the Board must issue individual contracts or give notice of intent to do so prior to March 15. The teachers then have until April 15 in order to decide whether they will accept or reject the individual employment contract offered. Under the Supreme Court's decision in the case of Mack v. Joint School District No. 3, 92 Wis. 2nd 476, 285 NW

2nd 604, 105 LRRM 2888 (1979), the Supreme Court made a clear distinction between nonrenewals and layoffs, which distinction, in the view of the District, has changed the expectations of when a notice of layoff will occur in the educational sector.

According to the District, a 30-day notice provision should be adopted for the following reasons:

1. Notice of layoff has a disrupting influence on both the teacher and the students being taught by the teacher. Employees who have been notified that they are about to lose their job understandably become upset and the resulting depression can make it difficult for such employees to perform their job up to normal capacity. Further, the incentive for doing a good job disappears, or at least decreases, when an employee knows that the future holds little in the way of job stability with his or her current employer.

Under the 90-day notice proposed by the Association the teacher would be responsible for teaching students for approximately one-third of the year after such notice has been received. Thus, according to the District, it is reasonable to expect that when a layoff notice comes two-thirds of the way through the school year, the last one-third of the school year will not be as productive for the employee, District and students as the first two-thirds of the school year were. The affect on students is extremely important since teaching has to do with influencing the minds and thought pattern of human beings. An employee's unhappiness can well be carried over into the employee's teaching performance and

such performance can not only influence how the children feel but how much they learn.

2. By delaying the notice to no later than 30 days prior to the end of the school year, the District is better able to plan. Evidence introduced at the hearing related to resignations, especially during the years 1979, 1980 and 1981, indicates that resignations were tendered in April and May. Such resignations would have occurred after the 90-day notice period required by the Association's proposal. Had the notice requirement occurred closer to the end of the school year, the Board would have been able to take into account employee resignations in determining which people should be laid off and the total number of people that would be laid off.

The Board's budgeting cycle, which it has followed for 20 years, establishes that the closer to the end of the budgetary year, the greater the information provided with regard to the need to layoff employees. The superintendent testified that had there been a 30-day notice provision, layoffs which occurred in the past would not have occurred at all.

In addition, because the agreement provides for "re-assignment" in order to insure that the least senior qualified employee is laid off, a shorter time period for notice would, in many cases, avoid the need to upset "two employees," the employee being laid off and the employee being moved in order to vacate the position being eliminated.

3. Not only do the merits of the proposal support the

District's position, but the comparables also lend some support to the District's position. In particular, the Board notes that:

a. notification in Broadhead was recently moved from March 1 to April 1.

b. notification in Evansville was recently moved from March 15 to April 15.

c. notification in Stoughton has been changed from May 15 to "at least four weeks."

d. the agreements in Clinton and Parkview were changed from no provision to May 1 and 30 days prior to the effective date, respectively.

Thus, according to the District, the comparables show a trend toward moving the number of days notice required prior to layoff closer to the Board's position. The Board also argues that in those cases where the agreement is silent on the timeline for notice, it would be pure speculation to assume that the districts in question follow any particular timeline since the agreement is silent.

In response to arguments made by the Association at the hearing, the District makes the following points:

1. The Association's claim that the District is proposing a change in the status quo is undercut by the fact that the Association, by proposing 90 days instead of February 28 and agreeing that the arbitrator could modify the number of days set out in each party's final offer, has also proposed a change in

the status quo.

2. It is not correct to say that the Board has followed the timelines of Section 118.22 in laying off teachers since the Association's own exhibit reflects that the Board has, in recent years, differentiated between layoffs and nonrenewals.

3. The Association's assertion that the Board might use the layoff provision to circumvent nonrenewals is based on pure speculation and is unrealistic in view of the fact that the agreement contains a provision requiring just cause for nonrenewals. According to the District, no arbitrator would allow a school board to circumvent the nonrenewal process under the guise of a layoff. Further, even under the Association's proposal, the nonrenewal deadline will still have passed if the Board were to give 90 days notice.

4. The Association's claim that giving 30 days notice would result in the breach of an individual employment contract is without merit because of the decision of the Wisconsin Supreme Court in the Mack case. In that case, the Supreme Court clearly found that laying off a teacher once an individual employment contract has been issued is not a breach of that individual's employment contract. Further, since the decision in the Mack case, the legislature has amended Section 118.22 by the addition of Section 118.22(4) which provides that a collective bargaining agreement may modify, waive, or replace any of the provisions of Section 118.22 as they apply to teachers in the collective bargaining unit. Thus, it is clear that the legislature has empowered the parties

by means of collective bargaining, to modify the law governing individual teacher contracts and the provisions of Section 118.22(4) clearly give the parties the authority to eliminate any "breach" that would be involved in such an agreement. In summary and conclusion, the Board argues as follows:

> "Having argued for the Board's position of thirty days notice, it is now encumbent upon the Board to face a likely possibility. When the parties gave the Arbitrator the authority to modify the number of days notice, the parties did so with the realization that the Arbitrator may well decide the number of days notice to be given to be different than that of either party. If such an event is to occur, the Board would argue that the Arbitrator should choose a notice provision of forty-five days. The reason for the forty-five days notice has to do with the practice of returning individual contracts. We know that individual contracts by statute are to be returned by April 15. Picking a date after April 15th would give the Board better information on which teachers are returning and which teachers have resigned. This information may wellchange the decision as to which teacher is to be laid off. A notice requirement of forty-five days would allow the Board the flexibility of waiting for the return or nonreturn of individual employment contracts.
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> "The Board stands by its original position of thirty days notice. We believe that the facts, the law and educational concerns dictate that the Board's position be awarded."

DISCUSSION

Before discussing the merits of the parties' arguments, it should be noted that there is some actual difference between the Association's position and the current language of the parties' agreement. Thus, under the provision as it was worded in the 1981-1982 Collective Bargaining Agreement, and applied during 1983, the District is required to give notice of layoff

by February 28. Under the Association's 90-day proposal the District would be required to give such notice by March 4 (assuming a June 2 date for the end of the school year, as provided, in the absence of snow days, during the 1982-1983 year).

As noted by the District in its brief, this fact has an impact on certain Association arguments. First of all, it is not strictly true to say that the District is the only party proposing a change in the status quo. Secondly, if the District were inclined to attempt to utilize the layoff clause in order to make up for a failure to give timely notice of intent to consider for nonrenewal, it still would have additional days in which to to so under the Association's proposal. And thirdly, if the District breaches the individual teaching contract when it gives 30-days notice for purposes of layoff, it also breaches such contract if it gives 90-days notice.

Nevertheless, even though the Association is also proposing a modest change in the status quo, the undersigned believes that the District should have the burden in this case of establishing the need for a substantial change in the notice requirement, as reflected in its final offer. In doing so the undersigned does not believe that it is appropriate to speculate about the possible adverse impact on teaching performance and education which may result from the current notice requirement. As the Union points out in its brief, such speculation is not substantiated in the record and can be used to support either conclusion. Similarly,

the undersigned does not believe it is appropriate to speculate on the question of whether the District would be tempted to improperly utilize the layoff procedure if the notice requirement is changed, as suggested by the Association in its arguments. The merits of the proposed change should be evaluated based on the other arguments and evidence of record, in view of the undersigned.

The first argument which should be addressed is the legal argument raised by the Association. A review of the Mack decision cited by the District convinces the undersigned that, under current Wisconsin law, it is not improper or in violation of an individual teacher contract to lay off a teacher during the term of said contract, provided the Collective Bargaining Agreement contemplates such action in its layoff provision. Any doubt remaining because of the narrow split of the court in that case has been cured by the amendment to Section 118.22(4), relied upon by the District.

An evaluation of the arguments for and against shortening the period of notice required under the agreement discloses that there are valid arguments in favor of both parties' positions. First of all, it is difficult to argue with the humane considerations involved in giving a teacher the earliest possible notice so that he or she can seek alternative employment. However, under the status quo, the Board has been making decisions in February based on projected enrollments and class figures for the following fall and the effective date of the notice of layoff has been

approximately six months. During that period of time the Board has, in the past, received resignations from teachers, which resignations would have, in a few instances, precluded the need to lay off a teacher. In addition, the Board was in a better position, in terms of its budget-making process, to evaluate the need to lay off teachers, especially in relation to judgments about reducing class size or restoring programs. However, it is clear that all of this information would not necessarily be at the District's disposal prior to May 3, which is the date that the notice would be given under its proposal, based on a June 2 end of school date.

Undoubtedly both parties would prefer to avoid the need to give a layoff notice to a teacher if such layoff could be avoided through resignation or budgetary decisions. On one extreme, the parties could wait until all resignations have been submitted, or even until the actual enrollment figures for the fall are known. However, such a practice would place a great burden on the teachers ultimately given notice of layoff. They would be ineligible to receive unemployment compensation during the summer months and would have a greatly reduced chance of finding employment in the teaching profession. Furthermore, they could not seek alternative training during the summer months to qualify them for available positions in the fall. On the other extreme, the current language could be left effectively unchanged by adopting the Association's proposal. Under the current language, a large number of teachers have been given layoff notices, only to learn at a

later date that they would have employment in the fall.

In the view of the undersigned, the best guide as to what is reasonable is found in the comparable agreements relied upon by the parties, especially to the extent that those agreements reflect changes which are occurring. Such evidence provides guidance as to reasonable compromises which have been made in other school districts as well as guidance as to what are the labor market realities in the Edgerton area.

Before analyzing the comparables, the undersigned would note that three of the four contiguous districts relied upon by the District are actually closer in size to the Edgerton District than are some of the other conference members. Also, those districts are particularly comparable for purposes of the issue presented herein since, as contiguous districts, they reflect the conditions which exist in the same general area. For this reason the undersigned believes it is appropriate to give consideration to the evidence with regard to all of the districts included in both parties' proposed set of comparables.

Even though the only issue in dispute in this case relates to the number of days' notice which ought to be provided in the case of a layoff, the notice provision contained in comparable collective bargaining agreements is often interrelated to the question of the effective date of the layoff contemplated by said agreements, which, in many cases, is less desirable than that provided in the Edgerton agreement. Thus, in the Beloit-Turner agreement, where no period of notice is specified, both the

1981-1982 and 1982-1983 agreements state that layoffs can occur at any time during the year and that the employee who is laid off is only entitled to receive prorata pay for that portion of the year worked. The Parkview (Orfordville) agreement now provides for 30-days notice before or after the end of the school year. That same agreement does provide for liquidated damages if less than 90-days notice is given before or during the next year. Others use language similar to that found in the Milton agreement which, in providing for notice of layoff, reflects that there is no guarantee that the layoff will occur at the end of the school year. That agreement states that the Board will make "best efforts to effect such layoff at the end of the school year, with notice by March 15." Clinton uses this same language but provides for notice by May 1. In Broadhead, the agreement states that if the layoff is for the "next year" the notice should be given by April 1 (March 1 in the earlier 1981-1982 agreement). Similarly, Stoughton's 1982-1984 agreement provides for 4-weeks notice prior to the effective date of the layoff with liquidated damages in the form of health insurance for the balance of the year.

On the other hand, some agreements reflect that the notice should be given for layoffs to be effective at the end of the school year preceding the layoff. Evansville has such an agreement, which provides for a date of April 15 (March 15 in the earlier 1981-1982 agreement). Also, as noted above, Fort Atkinson's 1980-1982 agreement provided for notice by February 28, for the ensuing school year.(Fort Atkinson's 1982-1983 agreement was not available at the time of the hearing herein.)

The above review of agreements in comparable school districts establishes several things. First of all, the District, in continuing to guarantee that layoffs will take effect at the end of the school year in which notice is given continues to have a provision which is more desirable than a number of the agreements in comparable districts. Secondly, a pattern would appear to be developing, which reflects a liberalizing of the date on which notice must be given, moving that date from February 28 to the date of March 15 in the most restrictive agreements, and to the date of May 1 or even later in the least restrictive agreements. Finally, there would appear to be some trend toward bypassing the April 15 date, which has considerable appeal because it represents the date on which the District should know of all timely resignations.

Based on the above analysis, the undersigned concludes that the District has made a case under the statutory criteria, especially the criterion dealing with comparability, supporting a substantial change in the number of days notice which should be required for layoffs which are to be effective during the following school year. The Association's final offer of 90-days notice does not represent a substantial change. If the undersigned were to simply "split the difference" and require 60-days notice, notice would be required to be given on or shortly after April 3, based on the District's practice in recent years of ending the school year on or shortly after June 2. However, if only 45-days notice were required to be given, as suggested by the District as its alternative position,

the notice would be required to be given on April 18, or shortly thereafter.

As noted above, this date has considerable merit, in that it occurs after April 15, the date by which the District has received all timely resignations. For this reason, the undersigned believes that 45-days notice is the most reasonable alternative suggested by the evidence in this proceeding. It gives the District more time in which to evaluate its projections for enrollment and classes and its budgetary problems, and also insures that all timely resignations have been taken into account before any teachers are sent actual layoff notices. On the other hand, the teachers who actually receive layoff notices will not be too greatly disadvantaged in terms of the labor market considerations discussed above, unemployment compensation benefits, and the need to plan for the layoff, which will then be scheduled to occur a little more than four months thereafter.

For the above and foregoing reasons the undersigned concludes that neither party's final offer should be adopted as it is currently worded and renders the following

AWARD

Paragraph B.8 of Section 800 of the parties' 1982-1983 Collective Bargaining Agreement shall provide for 45-day notice prior to layoff but shall, in all other respects, read as agreed to in the parties' stipulation and amended final offers dated May 5, 1983.

Dated at Madison, Wisconsin this 6th day of September, 1983.

George R. Fleischli

George R. Fleischli, Arbitrator