

2. GBCI has not had juvenile inmates since 1972. Since that time, the education program at GBCI has undergone a gradual de-emphasis of the high school diploma program and an increased emphasis of the vocation, GED, and adult basic education programs.

3. Early in 1980, certain officials at GBCI, including in particular, Superintendent Clusen and Education Director Slinger, had been made aware of the fact that there would probably be a cutback in the number of teachers at GBCI either as part of the next biennial budget or as part of a modification of the then current budget. These officials began to plan for the cutback of two or three teaching positions and had made a tentative decision as early as June, 1980, that, if necessary, one position in the auto mechanics area and one position in social studies would be cut.

4. In August of 1980, a 4.4% state budget reduction was ordered. On August 8, 1980, Superintendent Clusen received a call from staff of the Division of Corrections in Madison to the effect that, as part of the 4.4% reduction, GBCI would have to lay off four teachers and that Superintendent Clusen should submit a preliminary layoff plan by 4:30 that afternoon.

5. Superintendent Clusen, after consultation with Education Director Slinger among others, submitted this preliminary layoff plan which called for the layoff of one teacher in each of four subject areas: auto mechanics, social studies, mathematics, and physical education.

6. The bargaining agreement between the State of Wisconsin and the Wisconsin Federation of Teachers which covered the bargaining unit of which the teachers at GBCI were a part provided that layoffs were to be governed by teacher certification (paragraph 228) and seniority (paragraph 235).

7. The layoffs precipitated by the 4.4% budget reduction were the first layoffs under a bargaining agreement between the State and the Wisconsin Federation of Teachers.

8. This bargaining agreement also provided (paragraph 230) that "the Employer may elect to exercise the exemption option as stated in either Section 2B1 or Section 3A." Section 2B1 (paragraph 234) provided that "The Employer shall be permitted to exempt up to two employees or 5 percent of the employees (whichever is greater) in the identified layoff group from the layoff process." Section 3A (paragraphs 239, 240, and 241) governed the bumping process and provided, inter alia, that "the Employer may exempt employees in the class in order to maintain a reasonable affirmative action program and/or employees with special skills which are necessary for the maintenance of an existing program being bumped."

9. The language of paragraph 230 was interpreted by the respondent, by the Department of Employment Relations and by the Wisconsin Federation of Teachers to allow the layoff exemption (paragraph 234) or the bumping exemption (paragraph 240) but not both to be exercised in any one layoff instance. In addition, respondent was of the opinion at that time that they were allowed only one exemption.

10. Respondent, upon the advice of the Department of Employment Relations, used a "50% rule" in applying the language of the bargaining agreement. This rule provided that a teacher would be regarded as certified in a particular subject area, for layoff purposes, only if teaching classes in that particular subject area more than 50% of his or her time. This 50% rule was not to be applied to bumping; a teacher certified in a particular subject area could be bumped by another teacher

certified in that area regardless of the percentage of time the bumped teacher taught classes in that subject area.

12. Under the preliminary layoff plan, the least senior teachers certified in each subject area targeted for cutback (without applying the 50% rule) were:

auto mechanics -- Robert Woelfel
social studies -- Nancy Hutchison
math -- Anita Cowie
physical education -- Gene Ament

13. Respondent, in submitting its preliminary layoff plan, provided that the math teacher targeted for layoff was Anthony Schlude. Since complainant was less senior than Mr. Schlude, respondent must have intended to exempt complainant from layoff at that time.

14. GBCI submitted a final layoff plan on August 19, 1980, which called for the layoff of the following teachers in the following subject areas:

auto mechanics -- Robert Woelfel
social studies -- Nancy Hutchison
business education -- Beth Decker
guidance counseling -- Gene Slavik

15. Respondent offered the following reasons to explain why the preliminary layoff plan called for cutbacks in the math and physical education subject areas and the final layoff plan did not:

a. GBCI had been allocated special funds to hire four limited term employees as physical education teachers, who could also serve as dormitory counselors. GBCI felt that if they had identified the physical education subject area for layoff, it would have been necessary to have laid off the four LTE's first as required by the bargaining agreement, and this was considered undesirable because of the resulting overall depletion of GBCI's staff resources.

b. Math was a basic and valuable background course for vocational students. An additional math teacher position had been added within the last three years for this reason.

16. In both the social studies and guidance counseling subject areas, the least senior teacher, as identified by GBCI on August 19, 1980, was Eleanore Larsen. GBCI chose to exempt Ms. Larsen (a female over the age of 40) from layoff.

17. This final layoff plan was reviewed by DHSS officials in Madison and, upon application of the 50% rule, was modified to designate Richard Hearden for layoff instead of Nancy Hutchison since only Mr. Hearden was teaching social studies classes more than 50% of the time. Mr. Hearden ultimately bumped Ms. Hutchison.

18. After notification that he was in the layoff group, Gene Slavik submitted a prioritized list of subject areas he would like to bump into. The four top areas were: guidance counseling, social studies, hobby crafts (art), and math.

19. Mr. Slavik was certified in the following areas by the Department of Public Instruction (DPI) or the Board of Vocational, Technical, and Adult Education (VTAE) at the time of the layoffs:

guidance counselor -- DPI
guidance counselor -- VTAE
secretarial science -- VTAE
sociology -- DPI
upper elementary (4th through 8th grade) -- DPI
high school and junior high school principal -- DPI

20. Mr. Slavik could not bump into the guidance counselor area because the less senior teacher certified in that area (Eleanore Larsen) had already been exempted.

21. Mr. Slavik could not bump into the social studies area because one of the less senior teachers certified in that area (Eleanore Larsen) had already been exempted and the other less senior teacher certified in that area (Nancy Hutchison) had already been bumped.

22. At the time of the layoff, there was one art teacher, Robert Goynes. None of Mr. Goynes' students were taking the art courses for credit. The reason offered by respondent for not approving Mr. Slavik's bump of Mr. Goynes was that Mr. Slavik was not certified in art.

23. Respondent approved Mr. Slavik's bump into the math area. The least senior math teacher was complainant and she was bumped by Mr. Slavik.

24. Section 3A (paragraph 240) of the bargaining agreement provided, in pertinent part, that any employee "may bump the least senior employee in the same class or lower class in the same series for which the bumping employee is certified or eligible for a provisional certification or a

3-year license (teachers), qualified and capable of performing without any trial period, as determined by the Employer, in accordance with the most recent training and experience description advertisement to fill the position and/or the most recent class specifications..."

25. Education Director Slinger contacted VTAE and was informed that Mr. Slavik was not certified in math and was not eligible for a provisional VTAE certification in math. Mr. Hable, the Director of Career Services in the Bureau of Program Resources of the Division of Corrections who was responsible for the Division's education and job training programs, was contacted by Education Director Slinger as to Mr. Slavik's eligibility for DPI certification. Mr. Hable, after consulting DPI, advised Mr. Slinger that Mr. Slavik was not certified in math and could not get a special DPI certification in math because a qualified math teacher (complainant) was available. However, Mr. Hable was of the opinion that Mr. Slavik could bump complainant because his upper elementary education certification would enable him to teach math students for no credit.

26. Respondent's September 15, 1980, layoff letter to complainant stated that complainant was being bumped by a more senior teacher with a math certification. However, Mr. Slavik was not certified in math.

27. The last math teacher hired at GBCI was complainant so the advertisement for her position would have been the most recent training and experience description advertisement for a math teacher position. This advertisement required both DPI and VTAE certification in math.

28. During the entire period of her employment at GBCI, complainant taught math students for both DPI and VTAE credit. To do so, a teacher must have DPI and VTAE certification in math. After Mr. Slavik bumped complainant, the students taking math for credit had to be assigned to other math teachers since they couldn't earn credit in Mr. Slavik's classes.

29. Complainant is a female. At the time of her layoff, she was 63 years and 8 months old.

30. Ultimately, four teachers at GBCI were laid off: three women over the age of 40 and one male. The male was on medical leave at the time of the layoff and has since been hired by Wisconsin Correction Industries and works on the grounds of GBCI.

31. Respondent did not comply with the bargaining agreement in allowing Mr. Slavik to bump complainant, as indicated in finding 24.

32. The Wisconsin Federation of Teachers was of the opinion that respondent did not violate the bargaining agreement. However, this opinion was based on WFT's acceptance of respondent's assertion that Mr. Slavik was certified in math.

33. Respondent has offered no convincing justification for allowing Mr. Slavik to bump complainant but not allowing Mr. Slavik to bump Mr. Goynes, a male.

34. Respondent's layoff of complainant was intentionally discriminatory on the basis of sex.

CONCLUSIONS OF THE LAW

1. This matter is properly before the Commission pursuant to s.230.45(1)(b) and 111.33(2), stats.
2. The respondent is an employer within the meaning of s.111.32(3), stats..
3. The complainant has the burden of proving by a preponderance of the evidence that, with respect to her layoff, the respondent discriminated against her on the basis of her age or sex.
4. The complainant has sustained her burden of proof that she was discriminated against on the basis of her sex but has not sustained her burden of proof that she was discriminated against on the basis of her age.

OPINION

In an employment discrimination case, the burden is on the complainant to establish a prima facie case. McDonnell/Douglas Corp. v. Green, 411 U.S. 792 (1973). Where the complaint is one of sex discrimination in layoff, the complainant must establish, by a preponderance of the evidence, that she is a member of a protected class, that she had adequately performed the work previously assigned to her, and that she was selected for layoff instead of a male with less seniority. Nellis v. Sunshine Dairy, 21 FEP Cases 327 (1979). In the present case, it is undisputed that complainant is a female, that she had adequately performed her teaching duties at GBCI, and that she was selected for layoff instead of two male teachers with less seniority, Mr. Slavik and Mr. Goynes. Thus, complainant has established a prima facie case of sex discrimination.

Where the complaint is one of age discrimination in layoff, the complainant must establish, by a preponderance of the evidence, that he or she was a member of a protected class and that he or she was selected for layoff instead of a younger employee. Hays v. Republic Steel Corp., 12 FEP Cases 1640 (1974). In the present case, complainant has established that she was over the age of 40 at the time of her layoff and, thus, a member of a protected class on the basis of her age. However, the record does not indicate the ages of the two teachers who were not selected for layoff, Mr. Slavik and Mr. Goynes. Thus, a conclusion can not be drawn as to whether complainant was selected for layoff instead of a younger employee and complainant has failed to establish a prima facie case of age discrimination.

Once the complainant has established a prima facie case of sex discrimination, the burden shifts to the respondent to show a legitimate, nondiscriminatory basis for its actions. The complainant then has the burden of showing that the respondent's stated reason for its actions is in fact pretext. Nellis v. Sunshine Dairy, supra.

GBCI has not had juvenile inmates since 1972. As a result, the education department at GBCI has undergone since that time a gradual de-emphasis of its high school diploma program and an increased emphasis of its vocational, GED, and adult basic education programs.

Early in 1980, staff of the Division of Corrections in Madison advised officials at GBCI, including Superintendent Clusen and Education Director Slinger in particular, that they could expect the cutback of two or three teaching positions at GBCI in the next biennium or even earlier. In response to this, a tentative decision was made as early as June, 1980, that, if a reduction had to be made, the cutback of one position in the social studies area and one position in the auto mechanics area should be considered.

After the 4.4% budget reduction was ordered, Superintendent Clusen was directed at 2:00 p.m. on August 8, 1980, to prepare a plan for the layoff of four teachers at GBCI and to submit such plan by 4:30 that afternoon. Superintendent Clusen, after consultation with Education Director Slinger among others, submitted a preliminary layoff plan on August 8 which called for the layoff of the following teachers in the following four subject areas:

auto mechanics -- Robert Woelfel
social studies -- Nancy Hutchison
math -- Anthony Schlude
physical education -- Gene Ament

On August 19, 1980, GBCI submitted a final layoff plan which called for the layoff of the following teachers in the following subject areas:

auto mechanics -- Robert Woelfel
social studies -- Nancy Hutchison
business education -- Beth Decker
guidance counselor -- Gene Slavik

Respondent justified the differences between the preliminary and final layoff plans as follows:

1. The final layoff plan was submitted after the GBCI officials involved in the decision-making had had more time to study and discuss their alternatives. The preliminary layoff plan was submitted upon only two and one-half hours' advance notice. Although a cutback had been anticipated prior to the ordered 4.4% reduction, this anticipated cutback was not as large or as immediate as the actual cutback. Consequently, discussion relating to the anticipated cutback were tentative and premised on a cutback of only two or three teaching positions, not four. It is not unreasonable to conclude, therefore, that GBCI officials were unprepared, within two and one-half hours on August 8, 1980, to study and discuss all the layoff alternatives available to them and the possible ramifications of these alternatives. It should also be noted that the preliminary decisions which had been reached in preparation for the anticipated cutback were incorporated in both the preliminary and final layoff plans.

2. Upon reconsideration, it was decided that mathematics courses were necessary basic courses for vocational students and, in view of the increasing emphasis on the vocational program, should not be cut back.

3. Since the physical education teachers were already working a considerable number of overtime hours, additional cutbacks in the physical education program would exacerbate the problem. In addition, the physical education program relied on four limited term employees to assume part of the load. Since, in accordance with the governing bargaining agreement, these LTE's would have to be laid off first if the physical education program were targeted for cutback, such an action would be undesirable in view of the resulting overall depletion of GBCI's staff resources.

4. The business education program was included in the final layoff plan because it was part of the high school diploma program and not a fundamental part of the vocational programs. Guidance counseling was included in the final plan to carry out the policy of maximizing the delivery of direct (teaching) services.

The above layoff plan and justifications for cutback have not been shown to be unreasonable from a management standpoint, are consistent with both the tentative cutback decisions made before the order for the 4.4% reduction and the change in program emphasis generated by a shift to an all-adult inmate population at GBCI, and, as will be discussed below, ultimately included the exemption of a woman over the age of 40.

A great deal of discussion in this case has centered around the so-called 50% rule. This rule, which resulted from the interpretation of the applicable bargaining agreement by the Department of Employment Relations, required that a teacher be teaching 50% or more of his or her time in a particular subject area before he or she could be placed in that subject area for purposes of layoff. The rationale offered for this rule was to assure that the layoff of a teacher actually resulted in a reduction in the targeted subject area. The rule was not to be applied to the bumping procedure. Although the record shows that, in actual practice, the application of the 50% rule did not always accomplish the stated goal, the rule resulted from the interpretation of the applicable bargaining agreement by the Department of Employment Relations and it was both reasonable and appropriate for respondent to rely on the Department of Employment Relations for guidance in this area. On this record, discriminatory animus cannot be attached to the reliance by respondent on the expertise of the agency charged with assisting respondent in the interpretation of the applicable bargaining agreement.

In the final layoff plan as prepared by GBCI and as approved and modified by respondent by application of the 50% rule, the following teachers were designated for layoff in the following areas:

auto mechanics -- Robert Woelfel
social studies -- Richard Hearden
business education -- Beth Decker
guidance counselor -- Gene Slavik

Upon being so informed, Mr. Slavik submitted a prioritized list of subject areas he felt he could bump into. This list included, in pertinent part:

1. guidance counseling
2. social studies
3. hobby crafts (art)
4. math

Mr. Slavik could not bump into the guidance counseling area because the less senior teacher certified in that area (Eleanore Larsen -- a woman over the age of 40) had already been exempted. Mr. Slavik could not bump into the social studies area because Eleanore Larsen had been exempted and the other less senior teacher, Nancy Hutchison, had already been bumped by Richard Hearnden.

Section 3A of the applicable bargaining agreement provided, in pertinent part, that any employee, "may bump the least senior employee in the same class or lower class in the same series for which the bumping employee is certified or eligible for a provisional certification or a 3-year license (teachers), qualified and capable of performing without any trial period, as determined by the Employer, in accordance with the most recent training and experience description advertisement to fill the position and/or the most recent class specifications...". At the time he was targeted for layoff, Mr. Slavik was not certified in either art or math. Respondent was aware that Mr. Slavik was not certified in art and

made no effort to ascertain if he was eligible for a provisional certification in art. Mr. Slavik was not allowed by respondent to bump a less senior art teacher (Mr. Goynes). The only reason offered by respondent for not allowing this bump was that Mr. Slavik was not certified in art.

Although respondent had not investigated Mr. Slavik's eligibility for provisional certification in art, respondent did investigate Mr. Slavik's eligibility for provisional certification in math. No explanation was offered by respondent to explain this change in procedure. Respondent was advised that Mr. Slavik was clearly not eligible for a provisional VTAE certification in math and could not get a special DPI certification in math because a qualified math teacher (complainant) was available. In addition, it should have been evident to respondent that Mr. Slavik was not capable of performing in accordance with the most recent training and experience description since such description required both DPI and VTAE math certification. Despite respondent's knowledge of these facts, Mr. Slavik was allowed to bump complainant, the least senior math teacher. The explanation offered by respondent was that Mr. Slavik's upper elementary education DPI certification would enable him to teach students who were not taking math for credit. Respondent advised complainant that she was being bumped by a more senior teacher with a math certification.

In addition to reviewing Mr. Slavik's eligibility for provisional certification in math but not in art, respondent has also failed to explain why Mr. Slavik's DPI certification in upper elementary education would enable him to teach math students, but not art students. Clearly, respondent did not abide by the language of the applicable bargaining agreement in allowing Mr. Slavik to bump complainant. Respondent was aware that Mr. Slavik was not certified in math or eligible for provisional certification in math and should have been aware that he, therefore, was not capable of performing in accordance with the most recent training and experience description. Clearly, respondent misrepresented the situation to complainant when advising her that she was being bumped by a more senior teacher with a math certification.

Respondent attempts to characterize its action in this regard as simply confusion and uncertainty in the interpretation of contract requirements that it had never been necessary to apply before. It is acknowledged that this was the first time the layoff provisions of a bargaining agreement between the State of Wisconsin and the Wisconsin Federation of Teachers had to be applied. However, the key interpretations made by respondent involved determinations of teacher certifications. This was an area of ongoing responsibility in which respondent had a great deal of experience in view of the fact that certifications dictate which teachers could teach which subjects to which students.

It is arguable whether respondent has established a legitimate, nondiscriminatory basis for its actions in regard to complainant's layoff. However, if we assume that respondent has satisfied its burden in this regard, the burden then shifts to complainant to show that respondent's stated reason for its actions is in fact pretext. Respondent's inconsistencies in the review of the certifications of complainant and those of Mr. Slavik and Mr. Goynes, its misrepresentations as to these certifications, and its failure to follow the clear language of the applicable bargaining agreement, resulting in the protection and retention of two male teachers and the layoff of a female teacher, lead to the conclusion that respondent's stated reasons for complainant's layoff were pretextual and that respondent discriminated against the complainant on the basis of sex.

Respondent has also alluded to the fact that the union's failure to file and pursue a contractual grievance on behalf of complainant in regard to her layoff could be regarded as dispositive of the issue of whether or not respondent complied with the requirements of the applicable bargaining agreement by operation of the principle of res judicata. This argument has no merit in this case for the following reasons:

1. Res judicata would be applicable only if a determination of contract compliance had been made as a result of a proceeding in which certain procedural safeguards were in effect.
2. The union may have had reasons for not pursuing the grievance in addition to any relating to respondent's compliance with the requirements of the bargaining agreement.

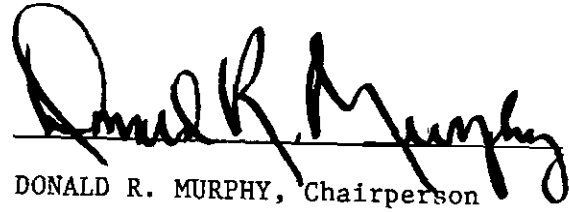
3. The union's conclusion that respondent had complied with the requirements of the contract was based on inaccurate information supplied by respondent, i.e., that complainant was bumped by a more senior teacher with a math certification.

ORDER

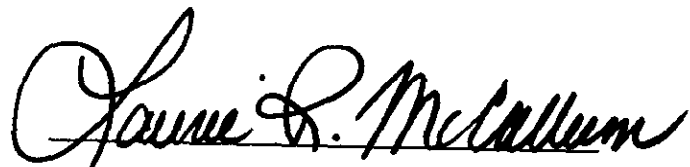
It is ordered that complainant be reinstated with back pay as of the day of layoff but that the amount of such back pay be reduced by the amount of any actual earnings or amounts earnable with reasonable diligence since the date of layoff and that any amount received by complainant since the date of layoff as unemployment benefits be paid to the unemployment reserve fund and any amounts received as welfare payments be paid to the welfare agency making the payment.

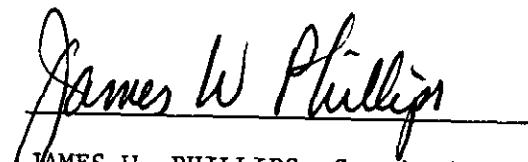
(Note: This decision contains certain changes from the proposed decision and order made after consideration of respondent's objections and consultation with the examiner. The order of findings 25 and 26 were reversed, and the following was added to finding 31: "... as indicated in finding 24." These additions were made to promote clarity. The word "intentionally" was added to finding 34 in the interests of being more explicit. On page 18, fourth line from the bottom, the words "due process" are changed to "certain procedural" in order to better reflect the law as the Commission understands it.)

Dated: April 15, 1983 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson

LRM:lmr


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

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