

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BELMONT TEACHERS ASSOCIATION

and

BELMONT SCHOOL DISTRICT

Case 16
No. 52421
MA-8962

Appearances:

Ms. Joyce Bos, Executive Director, South West Education Association, appearing on behalf of the Association.

Kramer, McNamee & Brownlee, Attorneys at Law, by Ms. Eileen A. Brownlee, appearing on behalf of the District.

ARBITRATION AWARD

Belmont Teachers Association, hereinafter referred to as the Association, and the Belmont School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Association, with the concurrence of the District, requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a partial layoff. The undersigned was so designated. Hearing was held in Belmont, Wisconsin, on May 24, 1995. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on July 13, 1995.

BACKGROUND:

The basic facts underlying the grievance are not in dispute. The grievant, Judy Hawkinson, has been employed by the District since August 19, 1985. In the 1994-95 school year, she taught in the English Department and the Family and Consumer Education Department and had an 87.5% contract. The grievant was given notice that her 1995-96 contract would be reduced to 62.5% due to a decline in the Family and Consumer Education enrollment. On February 28, 1995, the grievant had a private conference with the District's Board but the Board voted to partially non-renew or layoff the grievant to a 62.5% contract for 1995-96. The grievant filed a grievance over her contract reduction which was appealed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

Did the District violate Article IX of the collective bargaining agreement when it partially non-renewed/laid off Judy Hawkinson?

If so, what is the remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE IX

REDUCTION OF STAFF AND ASSIGNMENTS

The District Board shall have the exclusive power and discretion to eliminate teaching positions or a portion of a teaching position because of decrease in enrollment, budgetary or financial limitations, educational program changes or requirements, or any other reason other than performance or conduct of the teacher.

1. In determining a reduction in staff, the following steps shall be followed in arriving at a decision as to the teacher to be eliminated.

- a. The Administration or the Board shall first identify the department in which the reduction of staff shall be made. Only teachers within the department identified shall be considered for nonrenewal.
- b. The term "department" in this section is defined as areas of the curriculum within the School District organization.
- c. Said departments are hereby identified as being the following divisions within the School District:

DIVISION 1 (Grades K-6 & Chapter I)

DIVISION 2 (Grades 7-12)

The following curricula within Division 2 shall be considered separate departments:

Social Studies	Agriculture
English	Industrial Arts
Math	Home Economics
Science	Business Education
Foreign Language	Drivers Education

. . .

d. Any teacher teaching a combination of subjects shall be considered to be completely within each department covered by each for the purpose of staff reduction, even if the teacher only teaches one class within the department.

2. After identifying the department in which the reduction of staff is to be made, the District, will determine, by years of District service, the least senior teacher in the department. The teacher with the least years of District service (lowest seniority) will be notified of possible layoff or reduction in time.

a. In cases of equal District service, the District will select a teacher(s) for layoff or reduction according to a comparison of qualifications.

b. The term "qualifications" as used herein is determined by applying the following criteria:

(1) Teaching performance in the district as previously and currently evaluated by the appropriate supervisor or supervisors.

(2) Appropriateness of training and experience with respect to the remaining assignments in said department not being eliminated.

(3) Academic achievements.

(4) Capability of teacher to fill remaining positions within the department on a part-time basis

in combination with another partial assignment or assignments in this department or other departments. (It is recognized that school boards in their management must combine some assignments within a department such as combining two grades into one class or teaching a class part time (sic) or a subject part-time in combination with other subjects. Recognizing that the particular combinations being established may affect the determination as to the particular teacher or teachers to be eliminated, it is hereby provided that the decision in making such combinations is conclusively the power of the board and entirely within the board's discretion.)

c. When layoff and/or reduction in time is necessary and accomplished by the above procedures, teachers remaining on staff must be certified or certifiable to fill the remaining assignments.

d. Any employee who is selected for a reduction in time and who is not able to retain a position with hours and compensation substantially equivalent to the hours and compensation the employee presently holds, may choose to be laid off, without loss of any rights and benefits.

. . .

ASSOCIATION'S POSITION:

The Association contends that the District has a past practice of interpreting the contract provisions when it reduced the amount of classes in one department and if the teacher was teaching in another department, the teacher, if more senior, was allowed to fill out his/her schedule in the second department so that no loss of contract time was incurred. It argues that the specific and obvious intent of Article IX, 1., d. is to retain the most senior teachers who are certified to teach the curriculum that the District decides to offer. It points out that Article IX, 2. states that the person lowest in seniority in a department "will be notified of possible layoff or reduction in time." It asserts that this article must be read in coordination with all articles in the contract because as a single statement, it would have no meaning. It notes that Article IX, 2., d. refers to the ability of the employe to retain equivalent hours and compensation and Article IX, 1., d. provides for the purpose of staff reduction, the employe is covered completely within each department he/she teaches. The Association believes that the person with the lowest seniority in a

department, who is reduced in time, should be given a notice of non-renewal/layoff

but that reduction should happen only if they are unable to retain employment of equal hours and compensation in another department in which they teach because they have greater seniority in this other department.

The Association claims that the past practice is demonstrated by assignments given to Ruth Casey. It claims that Casey's teaching assignment of German was reduced for the 1994-95 school year and she bumped a junior teacher, Emily Meixner, from an English 11 teaching assignment to maintain a full assignment. According to the Association, for the 1995-96 school year, Casey was further reduced in a German teaching assignment and bumped Meixner from another English 11 teaching assignment, so Casey retains hours and compensation equal to that she previously held because she was the senior employe and was covered within each department she taught for purposes of non-renewal. The Association observes that the District failed to offer any legitimate and rational reason for failing to round out the grievant's schedule as opposed to the schedules of junior employes. The Association submits that the grievant should not have received any non-renewal/layoff notice but should have been assigned Meixner's English Department assignments and Meixner should have been non-renewed or laid off as she was junior. The Association cites arbitral authority that a District's failure to show why a senior employe's schedule was not rounded out as were junior employes was arbitrary and capricious and the senior employe was made whole. The Association asserts that the language of the contract is clear and unambiguous and the past practice supports its interpretation. It concludes that the District improperly partially non-renewed/laid off the grievant and it seeks restoration of her contract to 87.5% for the 1995-96 school year.

DISTRICT'S POSITION:

The District contends that it did not violate Article IX of the collective bargaining agreement when it reduced the grievant's contract time. It submits her contract was reduced due to declining enrollment in the Home Economics Department. It points out that Home Economics is identified as a department and only the Home Economics program was reduced. It observes that the grievant is a teacher in the English Department but her instructional time there was not reduced nor was any instructional time in the English Department reduced. The District surmises that the Association's argument appears to be that the number of English classes in 1995-96 increased by one over 1994-95 and the assignment of this class to a junior employe violated the agreement.

The District points out that Article IX specifically provides that only teachers within a department identified for reduction will be considered for non-renewal. In this case, the District notes that the grievant was the only teacher in the department reduced and there was no reduction in the English Department. The District argues that the contract could not be clearer in its statement that staff reductions are on a department-by-department basis. It argues that although seniority is a determining factor for consideration of layoff within a department, there is no language which gives a person, who is wholly or partially laid off, the right to "bump" less senior

employees in a different department, whether or not he or she has greater seniority than persons in other departments or is teaching or certified to teach in other departments. The District recognizes that the contract states that persons who teach in more than one department are deemed entirely in each department and a teacher may be the least senior in one department and most senior in a different department, but this has no impact on the person's position in a different department from that where he or she is reduced unless there is a reduction in that different department.

The District denies that the grievant is entitled to any additional assignment in the English Department because the contract does not provide for interdepartmental bumping and interpreting the contract to contain one would interfere with the District's expressly reserved and exclusive right to transfer employees, combine or otherwise modify positions. It maintains that because there were no reductions in the English Department, the District has the absolute right to fill positions in the department by transfer of staff or modifications of schedules of current staff members. The District notes that when two teachers are on layoff status and there is a need for recall, the senior teacher is entitled to be recalled first. It alleges that no recall occurred as the District had sufficient staff to cover the additional English class. The District argues that the Association is seeking to create a seniority right where none exists under the express and unambiguous terms of the contract.

The District contends that the Association's argument, that the language governing teachers who are unable to retain substantially the same hours and compensation allows them to bump less senior teachers from positions in other departments is without merit. It insists that the obvious purpose of that language is to allow teachers to opt for total rather than partial layoff while retaining their recall rights.

The District argues that even if it is found to have violated the contract by reason of not assigning the grievant the additional hour of teaching time in the English Department, it would only be required to increase her contract by one hour.

The District concludes that it did not violate the collective bargaining agreement in reducing the grievant's contract as she was the least senior teacher in the department selected for reduction, her English Department teaching time was not affected and she was not passed over for recall by a less senior employee.

ASSOCIATION'S REPLY:

The Association alleges that the District erroneously refers to the grievant's 1994-95 contract as 82.5% of full time and it should be 87.5%. Further, it asks rejection of the District's claim that if it violated the contract, a 75% contract should be issued as the Association is seeking restoration to an 87.5% of full-time contract for 1985-86. The Association observes that the District has cited contract provisions which the Association does not object to but these do not give

the District the right to act in an arbitrary manner. The Association argues that the District uses the seniority clause only when it is convenient and ignores it when it is inconvenient, i.e., it looked at seniority when it determined to cut staff in a program area but ignored seniority when it became clear that the grievant taught in more than one department and was covered within that department for the purpose of staff reduction. It submits that the District chose to ignore the contract language as it pertained to staff reduction. The Association seeks to have the District follow the contract in a consistent manner for each employee and treat the grievant as it did Ruth Casey. It asks that the grievance be sustained and the grievant be awarded an 87.5% contract for 1995-96.

DISTRICT'S REPLY:

The District asserts that the Association is attempting to create an obligation on the part of the District to make work for employees who are laid off or reduced in time. It argues that there was no evidence that its previous transfer of employees were in lieu of layoff. It urges that Article IX, 2. which states that employees will be notified of a "possible layoff or reduction in time" is not equivalent to a bumping right. It states that the clear purpose of this language is to give notice to the employee to avoid the District taking final action before a conference occurs between the District and employee to discuss proposed layoffs. It suggests that the Association is attempting to argue that practices related to transfer constitute a binding past practice with respect to layoffs and reductions in time and is attempting to create a bumping right in the absence of any contractual language creating one. It urges dismissal of the grievance.

DISCUSSION:

Article IX, 1., a. provides that reduction of staff shall be made by department. It specifically states, "Only teachers within the department identified shall be considered for nonrenewal." Section 1., d. provides that any teacher teaching a combination of subjects shall be considered to be completely within each department covered by each for the purpose of staff reduction, even if the teacher teaches only one class within the department. Article IX, 2. provides that after the department is identified, then reduction is by seniority with the least senior laid off first. When these are read as a whole, the contract provides that the District selects a department for reduction and then the reduction in that department is by seniority with the least senior in that department laid off first. Applying this language to the facts of the instant case, the District selected the Home Economics Department for a reduction and the grievant was the only employee in that department and thus, the least senior, so she was reduced. Thus, there is no violation of these provisions.

The agreement does not provide for bumping either within a department in which a teacher is teaching or within a department a teacher is certified to teach. Therefore, a senior teacher in a department could be reduced in time or laid off and junior teachers in other departments retained

because none of those departments were reduced because the contract does not specify "bumping" junior employees.

The Association has relied on Article IX, 2., d. and past practice to provide that a teacher teaching in two departments and who is selected for reduction in one department may take equivalent hours from the least senior teacher in the second department. The plain reading of Article IX, 2., d. is that a teacher selected for reduction who is not able to retain a position with hours and compensation substantially equivalent to the hours and compensation may choose to be laid off entirely without losing any recall rights. The phrase "who is not able to retain a position with hours and compensation substantially equivalent" may mean that said teacher could take a vacant position or open classes that are offered but not assigned or ask the District if such can be scheduled. The Association claims a right to force the District to assign hours to fill out a schedule from the least senior in a department in which a teacher is teaching because of past practice. A review of the evidence presented on past practice here fails to establish any such past practice. The Association refers to the schedule of Ruth Casey. In 1993-94, Casey taught seven (7) classes and had one prep period. Of the seven classes she taught, five (5) were English classes and the other two were German I and German II. 1/ It appears that Casey was teaching an overload in 1993-94 (Article V, 6. and 7.) as the normal classroom teaching load is six classes in grades 7 - 12. In 1994-95, Casey again taught five English classes. She also taught German II and was assigned a study hall replacing the German I. 2/ Casey taught English Communication in 1993-94 and English 11 instead of English Communication in 1994-95 but this may be the normal rotation or reassignment of classes within a department which occurs regularly. There is no evidence that Casey was considered for reduction or bumped anyone. Emily Meixner, who is junior to Casey, taught two classes of English 11 in 1993-94 and only one in 1994-95 and there was no evidence that she was considered for partial nonrenewal/layoff. Meixner taught two classes in English in 1994-95. 3/ For 1995-96, Casey was assigned six (6) classes, all English. The evidence indicated that she was not sent any notice of reduction or layoff and was not reduced. She is scheduled two classes each of English 9, 10 and 11, respectively. 4/ In 1995-96, Meixner will teach two English classes, the same as the year before. 5/ In 1994-95 Meixner taught two (2) French I classes, a French II class and an Advanced French class. 6/ In 1995-96,

1/ Ex. 6.

2/ Id.

3/ Id.

4/ Id.

5/ Id.

6/ Id.

she will teach one (1) French I, two (2) French II and one (1) Advanced French class, the same number as the year before, just a slightly different sequence. Meixner has essentially the same schedule in 1995-96 as she did in 1994-95. There was no bumping and it appears to be a normal rotation of classes that occurs. It must be concluded that the evidence fails to establish a past practice that reduction in one department permits bumping in a different department. It is concluded that the past assignments do not establish that Article IX, 2., d. must be interpreted as forcing the District to rearrange schedules so that the senior employe retains substantially equivalent hours and benefits. The plain meaning of the language of Article IX, 2., d. is simply that a teacher who is reduced in time may opt to be fully laid off without losing any recall rights. It does not allow a teacher who is reduced in one department to take classes from a less senior employe in a different department.

It is unfortunate that a senior teacher who is reduced in time cannot bump a junior employe as seniority is normally a basic objective in collective bargaining negotiations as the chief purpose of seniority is to provide maximum security to employes with the longest service. However, seniority benefits exist only to the extent provided by the parties' agreement. The agreement here does not provide the benefit espoused by the Union as the agreement is silent on bumping and the evidence did not establish that the District has ever allowed anyone to bump. The evidence also failed to establish any past practice supporting the result the Association claims. The undersigned cannot read something into the contract that is not there nor create rights that are not expressed by the language of the contract or established by a clear past practice. The right to bump must be negotiated into the contract to obtain the result the Association seeks.

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned issues the following

AWARD

The District did not violate Article IX of the collective bargaining agreement when it partially non-renewed/laid off Judy Hawkinson, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 22nd day of August, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator