

STATE OF NEW YORK

In the Matter of the Arbitration by and between

BUFFALO TEACHERS FEDERATION, INC.,  
Grievant,

-and-

THE BUFFALO CITY SCHOOL DISTRICT,

Employer.

BTF Grievance: 17-072

OPINION  
and  
AWARD

FYI  
17/1  
!!!

Before: Timothy S. Taylor, Esq., Arbitrator

Appearances:

For the Buffalo Teachers Federation, Inc.  
Robert T. Reilly, Esq., General Counsel, NYSUT  
Timothy Connick, Esq., Of Counsel

For the Buffalo City School District  
Nathaniel J. Kuzma, Esq., General Counsel

### PRELIMINARY STATEMENT

The Buffalo Teachers Federation, (hereinafter, the "BTF" and "Union") and the Buffalo City School District (hereinafter, the "District," "The Employer, " or "BCSD") are parties to a collective bargaining agreement (hereinafter "CBA")(J.1).<sup>1</sup>This agreement was ratified on or about October 17, 2016, and covers the period between July 1, 2004, through June 30, 2019. The BTF filed grievance BTF 17-072 on February 2, 2018 (J.3). The grievance alleges the District violated Articles I B., V E. (2), XIV and XXXVII when it decided to reduce 5.5 teaching

<sup>1</sup> Exhibits are referenced as A. for Arbitrator, J. for Joint, D. for District, and U. for Union.

positions from City Honors School after it was forced to comply with an arbitration award ordering the District to relieve teachers at City Honors of supervisory, non-teaching duties (J. 3,6). As relief, the BTF is requesting a prohibition against the reduction of the 5.5 teaching positions and the improper transfer of those teachers. The BTF is also asking that the teachers be made whole.

On March 16, 2018, the BTF amended its grievance to include alleged violations of Articles II B. and XXIV of the Contract (J. 4.). On April 24, 2018, the parties agreed to waive the remainder of the grievance process and proceed directly to arbitration and selected Timothy Taylor to preside over the arbitration (A.1). Arbitration hearings were conducted in Buffalo, NY on May 17, June 18, July 16 and July 20, 2018.

### **ISSUE**

The parties stipulated to the following issues (A.2):

1. Does the action proposed by the District in its letters dated January 31, 2018, to Andrew McDermott, Matthew Frank, Elizabeth Newton, Cassandra Cammarata, Jennifer Dobmeier, and Sabrinia Tanevski violate Articles V E.(2), I B., XIV, XXXVII, II B., and/or XXIV of the collective bargaining agreement?
2. If so, what shall be the remedy?

### **Remedy Sought**

The Union seeks an award ordering the District to cease and desist from future retaliation and make whole BTF unit members affected by the contract violations and other and further relief if any as deemed just and appropriate.

## **RELEVANT CONTRACT PROVISIONS**

### **Article I B.**

#### **Statement of Recognition**

The Board of Education and the Buffalo Teachers Federation agree that they shall give highest priority to the task of meeting their individual and joint responsibilities for making available to the children, youth and adults enrolled in the Buffalo Public Schools the finest educational programs possible. Both parties recognize and agree that teachers are the most critical component in the educational system. The successful and competent performance by teachers of their duties in the classroom is indispensable to the providing of quality education for students. The ability of teachers to perform their duties successfully is also dependent in part on a number of conditions beyond their control, such as the availability to teachers of adequate supplies and services. The Federation and the Board through its representatives shall make appropriate efforts to ensure full, faithful and prompt compliance with the foregoing.

### **Article II B.**

#### **Definitions**

The Board agrees to continue its policy of not discriminating against any employee on the basis of race, creed, color, national origin, sex, marital status, personal or political activity, or membership in or association with the activities of any employee organization.

### **Article V D.(4) (c)**

#### **Grievance Procedure**

Arbitrators shall limit their decisions strictly to the application and interpretation of the provisions of this contract and shall be without power or authority to modify or amend it or make a decision contrary to law. Arbitrators shall render their decisions in writing and set forth their findings and conclusions on the issues submitted.

### **Article V E.(2)**

#### **Grievance Procedure**

No reprisal of any kind shall be taken by or against any participant in the grievance procedure by reason of such participation.

### **Article XIV**

#### **Teacher Transfers**

G. It is desirable that transfers and changes in assignments be on a whenever possible. In making involuntary transfers and/ or changes in assignments, the preference of the individual teachers shall be honored whenever feasible. When a transfer results from a school closing, teachers

from the closed school will have: first, preference in order of their seniority to openings in their license area at the school being attended by students previously assigned to the closed school, and second, in order of their seniority for openings in their license area in other schools and teachers returning from leaves. When a transfer results from a reduction-in-force at a school which remains open, after canvassing for volunteers, teachers will be transferred involuntarily in order of least seniority and shall have preference in order of their seniority for openings in their license area in other schools. Except for transfers and/or changes in assignments to take effect in the first six weeks of school, notice of involuntary transfers and/or changes in assignments and the reasons therefor shall be given to the affected teacher as far in advance as practicable which shall be at least fifteen (15) days prior to the effective date of the transfer and/or change in assignment. With respect to involuntary transfers which take effect during the school year after the first two weeks of school, the teacher shall be allowed up to two days in which to make the move to the new building and to become acquainted with the new position.

## **Article XXIV**

### **Teacher Aides**

The Board agrees to employ teacher aides. Such aides are to be used for the purpose of providing the preparation time provided in Article X and for the regularly scheduled assignment of duties which have as their primary purpose helping teachers and relieving teachers of non-teaching duties. It is recognized that teacher aides do perform and shall perform other functions.

## **Article XXXVII**

### **Maintenance of Benefits**

A. All terms and condition of employment, including teaching hours, extra compensation for work outside regular teaching hours, relief periods, leaves, and general working conditions, shall be maintained at not less than the highest minimum standards in effect in the system at the time this Contract is signed, provided that such conditions shall be improved for the benefit of teachers as required by the express provisions of this Contract. This Contract shall not be interpreted or applied to deprive teachers of professional advantages which constitute terms and conditions of employment heretofore enjoyed unless expressly stated herein.

B. No existing Board policies, Instructions, or handbooks shall in any way limit the rights granted teachers in this Contract. Any portion of existing documents that is inconsistent with this Contract shall be ineffective.

## **FACTUAL BACKGROUND**

The District has approximately 34,000 students, 3,700 teachers, and 68 schools. It has an annual budget of approximately 1.1 billion dollars. New York State and the City of Buffalo

underfund the District. The District is currently in a deficit budget and is using substantial reserve funds to cover the deficit. Chief Financial Officer (“CFO”) Geoffrey Pritchard testified that the District’s four- year plan is projecting deficits in each of the next four years that will require the use of resources.

The BTF and the District are parties to a collective bargaining agreement. Teachers employed by the District, including those at City Honors, were and are members of the collective bargaining unit represented by BTF.

City Honors is a District “magnet” school. It is nationally recognized for its excellence. City Honors is operated by the District. Its school-based budget for 2017-2018 is \$9,803,957. The student enrollment is 1,068. There are 109 full-time staff members (D.3). At City Honors, from the time of its creation in 1975 until the 1995-96 school year, teachers were not assigned to perform supervisory, non-instructional duties. These duties were not assigned to teachers because the founders of the school believed that students would benefit from greater independence and less supervision (Testimony of City Honors’ Principal Dr. William A. Kresse, U.7). After the assignment of supervisory, non-instructional duties during the 1995-1996 school year, a grievance was filed. As a result of a settlement of that grievance, teachers were not assigned supervisory, non-instructional duties (U.1).

In 2010, the District issued a written directive to Principal Kresse, directing him to assign the teachers supervisory, non-instructional duties for the 2010-2011 school year. Following the assignment of supervisory, non-instructional duties to City Honors' teachers during the 2010-2011 school year, BTF filed a grievance regarding those assignments. The grievance was processed through the grievance process contained in the CBA and the matter was ultimately arbitrated pursuant to that process.

On April 9, 2016, Arbitrator Douglas Bantle issued his opinion and award (Award in PERB Case Number A2011-142) (J.6) finding that the District violated the CBA. He ruled that the District was to immediately discontinue the practice of assigning supervisory, non-instructional duties to teachers at City Honors. Arbitrator Bantle ordered the District to return to the parties' previous practice (J.6).

The District thereafter moved to vacate that award. The BTF opposed the application and requested court confirmation of the same. The New York State Supreme Court, Erie County, Honorable John F. O'Donnell, subsequently issued a decision that denied the District's application to vacate and confirmed the award (J.7). The award was confirmed on February 27, 2017. Notice of entry was served March 9, 2017. On June 14, 2017, BTF served a "demand for compliance with order prior to enforcement by contempt proceedings" upon the District.

At the start of the 2017-2018 school year, City Honors' teachers were still performing supervisory, non-instructional duties. On September 5, 2017, BTF filed contempt proceedings against the District. On September 26, 2017, the District's counsel advised BTF's counsel that the District intended to comply. The parties appeared before Judge O'Donnell several times with the District advising the court that it was making arrangements for compliance. The District decided to hire 16 teacher aides to perform the supervisory, non-instructional duties previously assigned to the teachers.

On December 13, 2017, Principal Kresse held a meeting of City Honors' faculty members. At that meeting, he read a statement saying in part,

A few weeks ago, I was directed to drop everything and conduct interviews with 38 teacher aide applicants. Those interviews were conducted November 20-22 and acceptable candidates were identified and forwarded to HR. A number of our teachers will soon be notified that their positions at this school are being eliminated.

Following Reduction in Force rules, some will be placed in other buildings with unfilled positions or eliminating jobs for other more junior teachers, and some will be laid off based on seniority. Due to the fact that we cannot strand students halfway through courses required for graduation, the District can only make maximum cuts mid-year totaling just over \$519,000, which is equivalent of 5.5 teaching positions. More cuts would need to come this summer (U.7).

At the December 13, 2017, meeting, Principal Kresse outlined numerous changes at City Honors. He stated in part,

Obviously, with less staff, class sizes grow. We have carefully invested in teaching staff over the past few years to reduce class sizes in certain subjects and expanded course offerings. All of this is eliminated, and we return to contractual limits and graduation requirements as the goals of scheduling.

- Some electives will need to be eliminated, causing more students to be in study halls, which would in turn increase the number of teacher aides required to staff the study halls. Some study halls will also have to be returned to classrooms from the library, reducing teacher access to their rooms during prep or lunch times.
- Every child in grades 5-12 will need to be rescheduled during the month of January to be ready for the start of second semester. Students will see their teachers change, periods of the day change and, in some cases, might not be able to complete full year courses they have started, if they are not mandatory.
- It means that some programs considered non-essential to graduation will be eliminated, such as the instrumental music program that we have fought so hard to increase at our school (U.7).

On January 31, 2018, the District notified five teachers that their positions at City Honors would be eliminated effective February 27, 2018,(J.2). The District also notified the guidance counselor that her half position was to be eliminated at the school. The District made no other cost reductions to comply with the court confirmed arbitration award. The cost of compliance was solely funded by the elimination of the BTF unit positions at City Honors.

On January 31, 2018, the same day that the District notified the teachers that their positions were being eliminated effective February 27, 2018, City Honors Principal Kresse sent

out a letter to parents. Principal Kresse's letter stated

The school district has hired sixteen teacher aides to perform the work for the teachers. In order to fund the new aides, a reduction of 5.5 teachers is necessary. The positions to be eliminated are English, Math, Orchestra, the school's instructional coach, and half of a school counselor position" (U.3).

On February 2, 2018, BTF filed a grievance against the District's action. On February 13, 2018, BTF filed an action in the New York State Supreme Court, Erie County seeking an injunction in aid of arbitration to prevent the District's action until the grievance in this matter was resolved by an arbitrator. A temporary restraining order ("TRO") was issued in connection therewith, that case remains pending. The TRO was lifted on July 23, 2018. On March 16, 2018, BTF amended the aforesaid grievance.

On March 29, 2018, Judge Diane Devlin dismissed the BTF's contempt motion as she found that the District had substantially complied with the arbitration decision that ordered the District to cease and desist from assigning supervisory, non-instructional duties to teachers at City Honors.

On April 24, 2018, the parties agreed to waive the remaining lower steps of the grievance process and move the aforesaid grievance as amended directly to arbitration.

The annual cost of hiring teacher aides according to Chief Financial Officer ("CFO") Geoffrey Pritchard was \$500,000 to \$550,000. Principal Kresse put the number as \$571,000. For the 2017-2018 school year, the District had available an unrestricted fund balance of \$131.7 million. (Testimony of Pritchard, U.10.11). The yearly cost of hiring the aides represented 0.38% of the unrestricted fund balance.

In general, the duties of teacher aides are:

Under the direction of the Building Principal, the Teacher Aide performs duties that are clerical in nature. Serves in a support position, usually assisting many teachers in the school building. Assists teachers in the direction and supervision of students in and out of



the classroom.

Their specific duties are:

- Supervises and monitors the classroom when the teacher is out of the room;
- Relieves teacher of study hall, corridor, lunchroom, playground, and other monitorial duties;
- Helps to maintain discipline and structure in the classroom;
- Attends to the physical needs of students;
- Organizes and participates in group games and related activities;
- Assists teachers in operating and demonstrating the proper use of vocational tools and equipment; Assists with projecting slides, film strips and films, videos, DVD, etc.;
- Reads and tell stories to children;
- Assists teachers in routine classroom preparation duties such as making student folders, charts, schedules, posters and bulletin boards;
- Helps teachers to set-up classroom by distributing and gathering materials and setting-up equipment; Makes photocopies of materials for lessons;
- Maintains and files records such as attendance, recording of grades or completion of homework assignments;
- Assists in administering tests by distributing and collecting test material, proctoring, scanning test sheets for results, distribute test results to teachers and career advisors;

CFO Pritchard testified that the District uses a school-based budget process. That process is outlined in the “School Based Budget Development Guide 2017-2018”(D.2). Baseline staffing is based on the number of students assigned to the school. Schools are budgeted by departments. The process starts in December of each year and in May, the following year, the Board of Education approves the budget. Schools develop their budgets in accordance with the process set

forth in the School Based Budget Development Guide.

The School Based Budget Development Guide 2017-2018 (“Guide”) (D.2 p.11) states in part that “Principals will work with the School Based Management Team (“SBMT”) to make decisions on the use of school based budgets.”

The process for submission and approval is as follows :

- Principals will work with their School Based Management Team (SBMT) to make decisions on the use of their school-based budgets.
  - o Principals will lead the process of completing the School-Based Budget Form.
  - o Each budget expenditure request must include a correlating School Comprehensive Education Plan (SCEP) citation, supporting data and a rationale for the request written into the free write box on the form.
  - o The principal will call a SBMT meeting(s) for the purpose of developing and completing the School-based Budget Form.
    - a. Quorum must exist {Including the Parent Facilitator}.
    - b. Additional members may be part of the process (e.g., additional teachers, parents and community partners).
    - c. Data should be used during the process to make strategic decisions.
    - d. The meeting shall have an agenda, sign in sheet (included in Appendix D-SBMT Expectations) and meeting minutes.
  - o The principal must share the details of the School-based budget process prior to the meeting with the Associate Superintendent of School Leadership and subject area administrators:
    - a. The draft School-based budget form, indicating teachers input and the rationale for the decisions made (e.g., copy of SBB form placed in faculty room; faculty meetings, grade level meetings and common planning time). The draft School-based budget decisions with parents (e.g., PTO meetings, parent meetings, Newsletter s, etc.)
    - b. SBMT meeting agendas, minutes and sign in sheets.
- Each principal will submit their budget electronically to their Associate Superintendent of School Leadership and to the Director of Budget and Grant Management .
- The Associate Superintendents of School Leadership will make a decision on the budget requests :

- o Approve the Full Budget Request
- o More Information Required for Approval
- o Disapprove select Items - Principal must select another expenditure for consideration
- Once budgets are approved, there shall be no staffing request changes until September and actual enrollments are known. The anticipated cut off for staffing changes is March 31, 2017

The Guide at page 26 includes the following chart:

#### 8. SPECIALTY SCHOOLS AND PROGRAMS

There are currently several schools within BPS that require specialty funds to support their programs. Non-formula funds are included in the initial school budget allocations for these programs.

School No.	School Name	Program Name	Expenditures Related To	Approximate Amounts (w/o benefits)
195	City Honors	Middle Years and Diploma 18	1B Dues, Training, Supplies, Tests, 1.6 Coordinator, 6.8 LOTE teachers	\$680,650

CFO Pritchard testified that the cost of hiring the additional 16 teacher aides was not included in the 2017-2018 budgeting process. The cost of \$550,000-\$571,000 for the aides had to come out of the existing budgeted amount for City Honors. The 2017-2018 school base budget for City Honors is \$9,803,957 (D.3). The increased cost for teacher aides meant decreases elsewhere. The Board has to approve additional expenditures. Use of the general fund balance requires Board approval. CFO Pritchard testified that the “School Based Budget Development Guide” provides for adjustments to be made based upon student enrollment, and the need for aides, and resources. CFO Pritchard testified that the District decided to eliminate 5.5 teaching

positions to pay for the teacher aides. He stated that the court order dated February 27, 2017, to remove the supervisory, non-instructional duties was not on his radar until recently.

At the hearing, witnesses testified as to the impact of the planned elimination of the 5.5 positions. The District intended to eliminate the BTF unit position of an English teacher, a Math teacher, two Music teachers, an Instructional Coach, and a halftime Guidance Counselor (J. 2); (Testimony of Jonathan Zasowski, Kresse). The eliminated positions would involve, among other things, 2 of the 4 Music teachers at the school, 1 out of the 8 Math teachers, and .5 of the 3.0 counselors (Testimony of Zasowski, Kresse). The affected teachers would have been transferred to different schools (Testimony of Jamie Warren). The teachers and students who remained at City Honors would have been impacted.

The elimination of the English teacher position in the middle of the school year would have increased class sizes, changed class schedules, and eliminate crucial student support services (Testimony of Andrew McDermott, Zasowski; U.5, 9). Increased class sizes in writing intensive classes would have a detrimental effect on students. Students who needed assistance with writing essays for college applications would be significantly impacted.

Eliminating the math position mid-year would have, among other things, increased the size of math classes, changed class schedules, required a re-shuffling of classes with teachers getting new students, and result in teacher/advisors getting new students (Testimony of Zasowski; U. 4).

Music teacher Elizabeth Newton testified that cuts to band and orchestra would be unthinkable and devastating. As the vocal music teacher, her transfer would leave the school without a vocal teacher. Although other music teachers are certified to teach vocal, they do

not concentrate on vocals. The band teacher would have to lead the chorus.

## **POSITIONS OF THE PARTIES**

### UNION'S POSITION

The Union argues that Article V.E. (2) of the CBA prohibits reprisals against BTF for participating in the grievance system (J.1, p. 7). The BTF used the grievance and arbitration provisions of the CBA to compel the District to comply with the contract at City Honors. In retaliation, the District did not act in a neutral manner to save money for the cost of contract compliance. The District proceeded to recoup the cost of compliance only from BTF unit members. The cost of compliance was recouped by eliminating unit positions. The elimination of positions impacted the terms and conditions of the unit members. It also diminished the educational programs at City Honors. To comply with an arbitration award, the District made no other cost reductions. The cost of compliance was solely funded by the elimination of the BTF unit positions at City Honors. The Union maintains that assessing the entire cost of compliance to the BTF is plain and simple retaliation.

The Union asserts that it was improper retaliation for the District to assess all the purported costs of contract compliance against BTF unit members. The BTF contends that the retaliation was done to chill and limit the BTF unit members rights to use the grievance process. The retaliation violates the CBA.

The BTF argues that Article II B. requires the District not to discriminate on the basis of union membership and not to limit the right of BTF in its use of the grievance procedure or recourse to the courts (J.1 p. 2.).

The BTF cites *State Employees Bargaining Agent Coalition ("SEBAC") v. Rowland*, 718 F.3d 126 (2d Cir. 2013) for the proposition that the fiscal burden of hiring the 16 teacher aides

must be implemented in a neutral cost cutting manner. By only targeting union members, the District's conduct was improper discrimination in violation of the contractual rights of the BTF members to associate. See also, *Donahue v. Madison*, 2017 WL 217126 (N.D.N.Y. 2017).

The Union insists that once the District was forced to comply with the court confirmed arbitration award, it targeted BTF unit members. The Union emphasizes Dr. Kresse's testimony and his December 13, 2017, speech. The Union describes Dr. Kresse's speech as threatening. According to the Union, he essentially stated that things were going to change for the worst unless you relent.

The Union argues that even though the District has adopted a school-based budgeting system, there is no State law or rule or regulation that prevents the District from allocating resources from the general budget to pay the sixteen teacher aides.

The Union observes that the District has allocated general funds to pay the teacher aides and have been funding the positions since February 2018. The cost of hiring teacher aides is a small percentage, 0.38 %, of the unrestricted general fund balance. The minimal cost would not "break the bank."

The Union contends that even though the District has the right to eliminate teaching positions, it cannot do so for improper reasons. The employer may not eliminate positions in bad faith. The BTF asserts that the District is wrong to suggest that it has authority to implement transfers even those based upon retaliatory motives or implemented in a retaliatory manner.

The BTF relies on the Taylor Law (Article 14 of the New York State Civil Service Law) N.Y. Civil Service Law Sections 209-a (1)(a) and (c) which expressly forbids public employers from interfering with employees right to collective action and from retaliating against them. The Union argues that the District's proposed actions here are quid pro quo retaliation. For forcing

the District to comply with the CBA, 5.5 BTF unit member positions would be eliminated.

The Union asserts that the cases relied on by the District are inapplicable to this matter. *Buffalo Teachers Federation, Inc. v. Buffalo Board of Education*, 50 A.D. 3d 1503 (4<sup>th</sup> Dept. 2008), involved a remedy for alleged retaliation when the subject grievance had nothing to do with retaliation but involved a change in health insurance.

The BTF argues that the District's interpretation of *Matter of Buffalo Teachers Federation, Inc.*, 49 PERB 3028, aff'd 153 AD3d 1643 (4<sup>th</sup> Dept. 2017) (J.18,19), is wrong. The improper practice charge, in that case, failed because of a lack of evidence establishing that the decision to lay off employees was made for any reason other than economic.

The Union argues that the District's proposed action also violates the CBA by diminishing the academic programs at City Honors. CBA Article I B. requires that the District provide "the finest educational programs possible"( J.1 p. 2) and Article XXXVII (J.1 p. 92) requires the District not to deprive teachers of professional advantages. The proposed changes will negatively impact the quality of work.

As a result of the proposed cuts, class sizes would immediately increase, schedules would be changed, students would be changed, students would have new teachers, students who have been working on projects with certain teachers would be deprived of those teachers, crucial support services would disappear, and the band and orchestra program would end, all half-way through the school year.

The Union maintains that the cutting of the band and orchestral program will remove opportunities for teachers and students to prosper in the field. The Union stresses that the elimination of two music teachers will decimate the ability of the school to offer projects and productions that benefit the quality of life at City Honors. The Union argues that class size will

increase, affecting academic progress. The Union concludes that the grievance must be sustained in its entirety.

#### DISTRICT'S POSITION

The District contends that the evidence establishes it did not violate the CBA when it notified 5.5 teachers it was eliminating their positions from City Honors effective February 27, 2018. This was an appropriate use of the District's management right to make a budgetary decision at one of its schools as a result of the financial impact caused by having to hire sixteen teacher aides to perform supervisory, non-instructional duties previously performed by teachers at City Honors.

The District argues that pursuant to previous case law between the same parties, the District has the management right to make the proposed reductions in teaching staff at City Honors, and it is not within this arbitrator's authority to prohibit the District from making these reductions. **As a matter of law and public policy, the District has the responsibility and right to manage the budget and abolish positions.**

A political subdivision may terminate or lay off employees for economic reasons, *Rosenthal v. Gilroy*, 208 A.D. 2d 746 (1994). In the *Appeal of Sherman Roberts*, 41 Ed. Dept. Rep. SED No. 16, 049 (2010) the Commissioner stated "A board of education may abolish and/or consolidate positions for sound economic reasons, so long as the decision is not motivated by bad faith citing [Education Law Sections 1709 [16] and [33]: The District maintains that the Commission of Education and courts have held that boards of education have a legal, critical and non-delegable duty to formulate a school districts budget and abolish positions. The District cites *Appeal of Sherman Roberts et al.*, SED 16,049 for the proposition that a board of education cannot delegate its duty to formulate the district budget. In *Matter of Sherman Roberts* the



Commissioner held that a policy which could be interpreted to preclude the Board from exercising its responsibility to abolish a position without the agreement of the Superintendent would constitute an unlawful delegation of the Board's powers and be void as against public policy.

In *Appeal of Kastberg*, 35 Ed. Dept. Rep 208, SED No. 13, 518 (1995) the Commissioner held that Education Law 1709, 1716 and 1804 require the board of education to formulate the school district budget. That obligation is not delegable to a shared decision-making team. In *Appeal of Osten*, 35 Ed. Dept. Rep. 160, SED No. 13,500 (1995), the Commissioner held that a board of education has the exclusive statutory authority to decide whether to adopt a contingency budget.

The District contends that even if the District is found to have violated the CBA, the Arbitrator would exceed his powers if he were to grant the BTF the relief requested, prohibiting the transfer of teachers from City Honors. The District relies on the 4<sup>th</sup> Dept's decision in *Buffalo Teachers Federation, Inc. v. Buffalo Board of Education*, 50 A.D. 3d 1503 (4<sup>th</sup> Dept. 2008).

In *Buffalo*, 50 A.D. 3d 1503, the issue was a claimed violation of contract Article XXVI (2), Employee Benefits, health insurance. The District laid off 88 teachers in anticipation of losing a grievance that was wholly unrelated to teachers' duties and work.

Here, the District has already lost a grievance and was ordered to relieve teachers of non-instructional duties at City Honors and compensate them for duties they did perform over a seven-year period (A.1, J.6). The District was ordered to relieve the teachers at City Honors of non-teaching duties. The District hired sixteen teacher aides to perform the work at a cost of over \$500,000 per year. In order to pay for the financial consequence of losing the teacher duty arbitration, that included the hiring of aides and the back-pay liability, the District notified 5.5

teachers at City Honors that their positions were being reduced from City Honors effective February 27, 2018.

The District argues that since none of the teachers were transferred during the 2017-2018 school year, there is no evidence in the record to establish any harm or damages. There is absolutely no basis for a make-whole remedy in this case if a violation is found. Thus, the District insists that even if the arbitrator finds a violation, there is no remedy requested by the BTF that can be awarded by the arbitrator.

The current CBA does not include a “job security clause.” The District contends that the Arbitrator must follow *Buffalo Teachers Federation, Inc. v. Buffalo Board of Education*, 50 A.D. 3d 1503 (4<sup>th</sup> Dept. 2008). This Arbitrator cannot prohibit the transfer of District employees.

The District maintains that it has not retaliated against the teachers that are the subject of the reductions and the District's decision to eliminate the teachers from City Honors was made for sound economic reasons and in good faith. The District argues that as a matter of law and public policy the District has the right to manage the budget and abolish positions.

The District argues that it would be an improper infringement of the Board's authority for the Arbitrator to prohibit the District from eliminating the 5.5 positions. The District contends that the BTF is attempting to persuade the Arbitrator that he should prevent the Board from exercising its lawful authority to reduce 5.5 teaching positions. The District asserts that the CBA does not prohibit the reduction of positions. Indeed, Article XIV permits reductions.

The District maintains that the BTF has not met its burden of proof to demonstrate that the District retaliated against the teachers. As a result of a prior arbitration award, the District was ordered to stop assigning supervisory, non-teaching duties to teachers at City Honors. The

District hired sixteen teacher aides to perform the work the teachers had previously been performing at a cost of \$571,000 per year. The District utilizes school-based budgets to ensure that equitable resources are provided to each school throughout the District. The teacher aides were hired to perform work that only teachers were previously doing. Therefore, the cost of hiring the teacher aides was offset by eliminating teaching positions.

The District maintains that the amount saved by cutting the 5.5 positions does not equal the cost of hiring the aides, and the District did not factor in the potential liability of having to pay teachers the “make whole remedy” ordered by Arbitrator Bantle.

The District asserts that it does not have the financial resources to absorb the additional expenditures incurred by hiring sixteen aides. NYS and the City of Buffalo seriously underfund the District. The District is currently in a deficit budget and is using substantial reserve funds to cover the deficit. CFO Pritchard testified that the District’s four- year plan is projecting deficits in each of the next four years that will require the use of resources. There is nothing in the CBA which requires the District to absorb the cost of grievances it loses.

The District argues that there is no proof of retaliation. Testimony of Dr. Kresse and Jonathan Zasowski supports the fact that Dr. Kresse did not make threats to the faculty. The communication between Dr. Kresse and the BTF reflect his courage and leadership in addressing the impact of hiring aides. The BTF did not file a grievance alleging an improper practice charge against the District after Dr. Kresse gave his address.

The District maintains that there is nothing in the record establishing that the District violated the contract by failing to provide the “finest educational programs possible”, diminishing the high minimum standards or depriving teacher of professional advantage. The District contends that there has been no proof put forward by the BTF that these proposed

reductions caused a diminution in educational programming at City Honors. The BTF failed to meet its burden of proof establishing that the District did not provide the "finest educational programs possible" as a result of the proposed reductions.

The District argues that BTF's position would actually cause the District to spend more resources at City Honors to the detriment of other schools in the District. The evidence establishes that the cuts will not have a negative impact on educational programs at City Honors. Class size does not play an important role in academic performance at the high school level. The District emphasizes that the statements (U.4, 8, and 9) from teachers at City Honors noting the impact of the cuts should be given little weight. The statements were prepared in anticipation of litigation and speculative.

The District request that the Arbitrator dismisses the BTF's allegations that Article I B. has been violated as a result of the proposed reductions at City Honors. The District insists that there has been no proof put forward by the BTF that these proposed reductions caused any damages or loss of professional advantages to the teachers.

The District maintains that the BTF's request that the affected teachers be "made whole" should be denied. As a result of the TRO, the intended 5.5 cuts did not take effect during the 2017-2018 school year. The record establishes that teachers would not have been reduced from City Honors. They would have been placed in other vacant positions at other schools in the District. None of the teachers would have suffered any loss in salary. The evidence did not establish any harm. No teacher at City Honors would have to teach more than the five, forty-five-minute period maximum permitted by the CBA. No City Honors' teacher would have to teach courses for which they were not certified. There's no "make whole" remedy to provide the BTF.

The District insists that any remedy which prohibits the elimination of positions would be

contrary to well-settled law that an arbitrator's decision may be vacated if it exceeds his or her authority by granting a benefit not recognized under a collective bargaining agreement, citing *Matter of Kocsis*, 41 A.D. 3d 1017.

The District argues that the “District Plan for School Based Planning and Shared Decision Making” is not relevant to the issue in this case. Commissioner's Regulation § 100.11 requires the District to develop a plan "for the participation by teachers and parents with administrators and board members in school-based planning and shared decision making." The District's plan establishes a school-based management team (“SBMT”). SBMT's at each school *may* (emphasis added) discuss many issues related to school performance. One of the issues that may be discussed is "budget and resource allocation.” It is not required to discuss this issue.

However, to the extent the SBMT does discuss this issue, these discussions must be within the parameters of existing laws, regulations and contractual regulations. While the SBMT may make recommendations to the Board of Education as part of the budget process, it does not usurp the Board's unfettered, non-delegable legal authority to adopt a budget and abolish positions, Education Law § 1709(16) and (33). It is the Board that ultimately has the authority to pass the budget and abolish positions if it so chooses regardless of what the shared decision-making team recommends. The District submits that since the BTF did not put on any proof regarding the relevance of the SBMT that the arbitrator should not give it any weight.

## OPINION

This contract grievance centers on the issue of whether the action proposed by the District in its letters dated January 31, 2018, to Andrew McDermott, Matthew Frank, Elizabeth Newton, Cassandra Cammarata, Jennifer Dobmeier, and Sabrinia Tanevski violate Articles V E.(2), I B., XIV, XXXVII, II B., and/or XXIV of the collective bargaining agreement. If so, what shall be the remedy?

The BTF has the burden of establishing that the District violated the CBA. I find that the BTF has established by a preponderance of the credible evidence that the District has violated Article V E.(2), Article II B., and Article I B. of the Contract. I find for the BTF because the District's decision to eliminate 5.5 teaching positions to finance the hiring of the sixteen teacher aides was not narrowly tailored to meet its economic needs and was not applied in a union membership neutral manner. I find that the District's decision to eliminate 5.5 BTF positions affected the quality of the City Honors' Music program and English department.

The remedy is for the District to cease and desist from future acts of reprisals of any kind against the BTF for the implementation of the Award in PERB Case number A2011-142. The District shall also rescind its decision to eliminate 5.5 teaching positions at City Honors. Those cuts affected the quality of educational programs afforded to students and violate Article I B. which guarantees the "finest educational programs possible."

In a grievance alleging retaliation or bad faith, the BTF has the initial burden of proving retaliation and bad faith in violation of CBA Article V E.(2), which states, "No reprisal of any kind shall be taken by or against any participant in the grievance procedure by reason of such participation." If the BTF establishes a prima facie case of retaliation or bad faith, then the burden of proof shifts to the District to establish that the elimination of 5.5 teaching

positions was economic and narrowly tailored in a union membership neutral manner. If the District meets its burden, then the burden shifts back to the BTF to establish that the District's economic reasons are not valid but are a pretext for its retaliatory or discriminatory action.

Retaliation may be established, in part, by when the alleged retaliation occurred. See *Matter of Colabella v. Town of Eastchester et al.*, 132 A.D. 3d 864, 18 N.Y.S. 3d 165, (2d Dept. 2015); *Matter of Rosenthal v. Gilroy et al.*, 208 A.D. 2d 748 (2d Dept. 1994). Retaliation may also be established if threats were made to the effect that if concessions were not made terminations would take place. See, *Matter of Genesee Community College and Genesee Community College Faculty Association*, 9 PERB 3005 (1976). Showing a history of animosity toward the union may also be used to establish improper motivation. See, *Matter of Communication Workers of America, Local 1170, and the Town of Henrietta*, 28 PERB 4605 (1995). Retaliation may also be established by proving that only union members were targeted for layoffs. *State Employees Bargaining Agent Coalition ("SEBAC") v. Rowland*, 718 F.3d 126 (2d Cir. 2013).

I find that the BTF has established a prima facie case of retaliation or bad faith. The BTF and the District were parties to a very contentious arbitration regarding the assignment of supervisory, non-instructional duties to teachers at City Honors. Arbitrator Douglas J. Bantle, Esq. decided in favor of the BTF, finding that the District violated the CBA when it assigned those duties to the teachers at City Honors (J.6). The District sought vacatur of that award. The BTF cross-moved to confirm. The award was confirmed on February 27, 2017.

At the start of the 2017-2018 school year, City Honors' teachers were still performing supervisory, non-instructional duties. On September 5, 2017, BTF filed contempt

proceedings against the District. Thereafter the District hired 16 teacher aides to perform supervisory, non-instructional duties previously assigned to the teachers.

On December 13, 2017, Principal Kresse held a meeting of City Honor's faculty members. At that meeting, he said, "A number of teachers will soon be notified that their position will be eliminated." On January 31, 2018, the District notified five teachers that their positions at City Honors School would be eliminated effective February 27, 2018. The District also notified a guidance counselor that her half position was to be eliminated at the school.

② I find that the timing of the elimination of the 5.5 positions and the history of animosity supports a finding of retaliation. The District's decision to make no other cost reductions also supports a claim of retaliation. The elimination of the BTF unit positions at City Honors solely funded the cost of compliance. Other than eliminating the BTF unit member positions at City Honors, no additional cost reductions were made anywhere in the District or City Honors.]

Lastly, Principal Kresse's statements on December 13, 2017, and his January 31, 2018, letter (U.3), sent on the same day that the District notified the teachers that their positions were being eliminated, strongly link the successful grievance with the elimination of 5.5 positions. Dr. Kreese's statements imply tit-for-tat behavior. Simply stated his comments indicated that the Union's right to grieve and arbitrate would come at a cost to be paid by BTF membership. I find that the BTF has established a prima facie case of retaliation and bad faith.]

The burden now shifts to the District to establish that its reasons for eliminating the 5.5 positions were narrowly tailored to meet its economic needs and applied in a union membership neutral manner. On February 27, 2017, the District was ordered to relieve the teachers at City



Honors of non-instructional duties. In December 2017, the District hired sixteen teacher aides to perform the work the teachers had previously been performing at the cost of \$571,000 per year. To pay for the financial consequence of losing the teacher duty arbitration, that included the hiring of aides and the back-pay liability, the District notified 5.5 teachers at City Honors that their positions were being reduced from City Honors effective February 27, 2018.

The District utilizes school-based budgets to ensure that equitable resources are provided to each school throughout the District. Here to balance the cost and benefit of hiring the teacher aides and because the aides were hired to perform work that only teachers were previously doing, the District targeted only the 5.5 BTF positions. The District saved \$550,000 by eliminating the 5.5 positions. The 16 aides cost \$571,000. ~~Thus, 96% of the cost of implementing the prior arbitration award fell on members of the BTF.~~ 7

I find that in making a unilateral decision to eliminate 5.5 positions, the District did not follow the policies and procedures outlined in the “School Based Budget Development Guide 2017-2018” (D.2). The Guide in Section 5. provides for a staffing and budget process. The District’s policies state that principals will work with SBMT to make decisions on the use of their budgets. Once budgets are requested the Associate Superintendents of School Leadership will decide on the budget request. The Guide also includes steps for the addition or removal of programs. The District and BTF have established SBMT for each school. The SBMT make decisions regarding budget and resource allocation (U.6 p.8). The ultimate decision of budget approval remains with the Board of Education (“BOE”). However, the process of developing budgets and allocations must be done in consultation with the SBMT.

The school-based budget development process for 2017- 2018 started in December 2016. In February 2017, the District was aware that teachers at City Honors could not be assigned

certain non-instructional duties. The BOE approved school-based budgets for 2017-2018 in May 2017. At the time the BOE was approving the school-based budget for City Honors, they were aware of the arbitration award prohibiting the assignment of certain duties to teachers. CFO Pritchard testified that the "School Based Budget Development Guide" provides for adjustments to be made based upon student enrollment, and the need for aides, and resources. Indeed, the Guide states, "Once budgets are approved, there shall be no staffing request changes until September and actual enrollments are known. The anticipated cut off for staffing changes is March 31, 2017."

There is no evidence that between March 2017 and December 2017, the City Honors SBMT considered the impact of hiring 16 teacher aides. There is no evidence that a request for additional funding due to a staffing change was made. Although the SBMT's role is advisory, the SBMT is a vital part of the District's process for submission of school-based budgets. The Guide states that "Principals will work with their SBMT to make recommendations to remove or add a program, (D.2.p12) [There is a process for requesting additional funding for staffing changes. In reaching the significant decision to hire 16 teacher aides and eliminate 5.5 teaching positions at City Honors, the District did not follow its policies and procedures. The failure to comply with its policies causes me to believe that the decision to eliminate 5.5 teaching positions was not legitimately economic.]

In *Donohue v. Madison*, 2017 WL 2171276, 2017 L.R.R.M.(BNA) 123,464 (N.D. N.Y. 2017), plaintiffs alleged that defendants' action in terminating union-represented employees violated those employees' right to associate with their union in violation of the First Amendment to the United States Constitution by retaliating against plaintiffs for engaging in union activity and by targeting plaintiffs for layoffs because of their union affiliation. The Court in *Donohue*

applied the framework for analysis outlined in *State Employees Bargaining Agent Coalition* (“SEBAC”) v. *Rowland*, 718 F.3d 126 (2d Cir. 2013). In *Rowland*, 2800 state employees were fired after their union refused to agree to proposed concessions. The Court in *Rowland* emphasized that

[n]o non-union employees were fired. While the fired workers were told that they were being laid off for economic reasons their firing had minimal effect on the state's fiscal year expenses and were ordered as a means of trying to compel the plaintiff unions to agree to the concessions demanded.

The Second Circuit stated that First Amendment associational rights extend to labor unions. In applying a strict scrutiny standard of review the Court framed the issue as whether the terminations in *Rowland* were “narrowly tailored to further vital governmental interest.” *Id.* at 135 (quoting *Rutan v. Republican Party of Illinois*, 497 U.S. at 74, 110 S.Ct. 272).

The defendants in *Rowland* conceded that they intentionally fired only union members, *Id.* at 134-135. In *Rowland*, the Second Circuit found that the firing was not tailored to reduce the cost of the workforce but instead “had minimal effect on the State’s [fiscal year 2003] expenses.” *Id.* (quotation omitted). The savings realized from the firings did not correlate to the concessions required from the union. More importantly, the defendant did not show “why the State’s fiscal health required firing only union members, rather than implementing membership-neutral layoffs.” In *Rowland*, “All employees received the same health care and pension benefits.” Rather than target the most expensive, or least valuable employees, the layoffs were predicated on union membership alone.

The Second Circuit recognized that reducing the long-term cost of state government was arguably a “vital governmental interest” however the defendant failed to offer any evidence of “narrow tailoring.” The defendants penalized only union members. The Second Circuit required defendants to implement a “neutral plan.” The Court in *Donohue* adopted the *Rowland* test, for

defendants to prevail, they must show that the layoffs were not meant to penalize union employees but were instead narrowly tailored to reduce the long-term cost of state government.

I find that the District has failed to establish that the elimination of 5.5 positions was not meant to penalize the BTF. The elimination of the 5.5 positions was not narrowly tailored to fund the cost of hiring the 16 teacher aides. By not following the "School Based Budget Guide," the District failed to explore all of the options available to absorb the \$571,000.00 cost of hiring the 16 aides.



The District's conduct violated Article V E.(2). The District also violated Article II B. It targeted BTF members for retaliation because of their association with the union. But for the TRO, the District's elimination of the positions would have diminished the English department and Music programs in violation of Article I B. which requires the District to provide the "finest educational programs possible." I found the testimony of Music teacher Elizabeth Newton credible. She testified that the chorus and spring concert would have suffered significantly because of her departure. Music is specialized, and a vocal teacher cannot be replaced with a band instructor. I also find that that the English department would have been unable to meet the rigorous standards at City Honors. The grievance is sustained.

The BTF failed to establish that the District violated Article XIV and Article XXXVII. The BTF failed to establish that the transfers as proposed were not in accord with the CBA or that its members were professionally disadvantaged by the District's elimination of 5.5 positions.

#### REMEDY

Having found a contract violation, I must address the issue of remedy. The District contends that even if the District is found to have violated the CBA, the Arbitrator would exceed his powers if he were to grant the BTF the relief requested, prohibiting the transfer of teachers

from City Honors. The District relies on the 4<sup>th</sup> Dept's decision in *Buffalo Teachers Federation, Inc. v. Buffalo Board of Education*, 50 A.D. 3d 1503 (4<sup>th</sup> Dept. 2008). There the grievance alleged a violation of Article XXVI, health insurance. The arbitrator's remedy was to reinstate 88 teachers. The court found that the arbitrator exceeded his authority by imposing this remedy because it granted rights not bargained for to union members, i.e., a no lay off provision or a job security clause.

  I find *Buffalo Teachers Federation, Inc. v. Buffalo Board of Education*, 50 A.D. 3d 1503, distinguishable. Here the District violated Article V E. (2) which prohibits reprisals for participation in the grievance procedure. The remedy must address the violation. In fashioning a remedy, I have reviewed the numerous cases submitted by the parties. Those cases are instructive. Where defendants were found to have retaliated against union members for engaging in union protected activities or acted in bad faith in ordering layoffs, the courts and the Public Employment Relations Board ("PERB") have ordered rescission, reinstatement, cease and desist and make whole remedies. Courts have also required school districts to follow their internal policies and procedures even in areas where the board of education retains final and ultimate decision-making authority.

I find that the District did not establish a sound economic explanation for eliminating 5.5 teaching positions. The retaliation was in violation of Article V E. (2) which states, "No reprisal of any kind shall be taken by or against any participant in the grievance procedure by reason of such participation."

Article V D.(4)(c) states,

Arbitrators shall limit their decisions strictly to the application and interpretation of the provisions of this contract and shall be without power or authority to modify or amend it or make a decision contrary to law. Arbitrators shall render their decisions in writing and set forth their findings and conclusions

on the issues submitted.

In *Cohoes City School District v. Cohoes Teachers Association*, 40 NY2d 774 (1976), the Court of Appeals upheld the arbitrator's award granting the petitioner an additional probationary year. The arbitrator found that the district failed to follow a more structured evaluation procedure for probationary teachers. Even though the alternate decision to grant tenure was non-delegable, the parties had bargained for the right to supplemental procedural steps preliminary to the board's final action to grant or to withhold tenure.

In the *Matter of Town of Erwin*, 19 PERB 4599 (1986), the Town was found to have violated Section 209-a.1 (a) and (c) of the Taylor Law by reducing the size of the police department due to the participation of its police officer in union activities. PERB ordered the Town to reinstate the affected officers and to make them whole for any loss of pay and benefits. The Town was also ordered to cease and desist from interfering with, restraining, coercing or discriminating against its employees for the exercise of rights protected by the Taylor Law.

In the *Matter of Triborough Bridge and Tunnel Authority*, 19 PERB 4621 (1986), the Administrative Law Judge ("ALJ") found that the Authority had violated the Taylor Law by threatening to delay or not to reach contract settlement if the local filed an improper practice charge. The ALJ ordered the Authority to cease and desist, to negotiate in good faith and to sign and post a notice.

In the *Matter of Communication Workers of America*, 28 PERB 4605 (1995), the ALJ found that the Town violated the Taylor Law when it laid off two employees and transferred another in retaliation for union activities. The ALJ ordered reestablishment of the abolished positions and reinstatement of the laid-off employees. The ALJ also ordered the Town to rescind the transfer. All affected employees were to be made whole for any loss due to the retaliation.

Article V D. (4)(c) permits the Arbitrator to apply and interpret the provisions of the CBA. Having found that the District violated Article I B. and Article II B., and Article V E.(2), the appropriate remedy is to order the District to rescind the elimination of 5.5 teaching positions from City Honors for the 2017-2018 school year. The District shall cease and desist from retaliating against the BTF and its members, and the District must narrowly tailor the implementation of the hiring of the sixteen aides. Any school-based budgeting at City Honors must be in accordance with the School Based Budget Development Guide and the District Plan for the School Based Planning and Shared Decision Making.

The TRO issued in February 2018 prohibited the implementation of the elimination of the 5.5 positions. That TRO was lifted on July 23, 2018. The teachers at City Honors were not affected during the 2017-2018 school year. Therefore, there is no make whole remedy available.

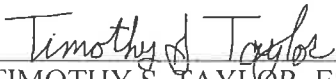
Accordingly, and based on the foregoing, the Arbitrator finds and makes the following;

AWARD



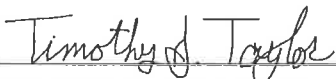
1. The action proposed by the District in its letters dated January 31, 2018, to Andrew McDermott, Matthew Frank, Elizabeth Newton, Cassandra Cammarata, Jennifer Dobmeier, and Sabrinia Tanevski did violate Articles V E.(2), I(B), and II(B) of the collective bargaining agreement.
2. The District shall rescind its decision to eliminate 5.5 teaching positions at City Honors for the 2017-2018 school year.
3. The District shall cease and desist from reprisals of any kind against members of the BTF for the implementation of the Award in PERB Case Number A2011-142.
4. Any future elimination of teaching positions at City Honors as a result of hiring teacher aides must be narrowly tailored to meet the economic needs of the District and be applied in a BTF membership neutral manner. The elimination of teaching positions at City Honors must be done in accordance with the policies set forth in the School Based Development Guide.
5. The Arbitrator retains jurisdiction for any unresolved issues regarding the remedy in this matter.

DATED: September 24, 2018

  
TIMOTHY S. TAYLOR, ESQ.  
ARBITRATOR

STATE OF NEW YORK )  
COUNTY OF ALBANY ) ss:

I, Timothy S. Taylor, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this Instrument, which is my Award.

  
TIMOTHY S. TAYLOR, ESQ.  
ARBITRATOR

DATED: September 24, 2018