

MINNESOTA BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

REMEDY

_____)	
IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	Case# 03-PA-652
INDEPENDENT SCHOOL DISTRICT #728)	
)	
And)	
)	John Remington,
)	Arbitrator
SERVICE EMPLOYEES INTERNATIONAL)	
UNION, LOCAL 284)	
_____)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the subcontracting of certain work and the termination of Grievant Jeanne Peabody and fourteen (14) other Grievants who performed that work, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Minnesota Bureau of Mediation Services, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on June 10, 2004 in Elk River, Minnesota at which time the parties were represented by counsel and were fully heard. An award was issued on the merits of this dispute on October 18, 2004 in which the Arbitrator held that Grievants had been discharged without cause and that the Employer had failed to bargain in good faith over its decision to subcontract the work formerly performed by Grievants.

Following a lengthy period of unsuccessful negotiation and appeal, the matter was returned to the Arbitrator for a final determination of an appropriate remedy for the above contractual violations. Hearings to consider the question of remedy were held on August 17, 2007 and September 7, 2007. Oral testimony and documentary evidence were presented; a stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file post hearing briefs and subsequently file reply briefs, which they did subsequently file on December 5, 2007. Given the magnitude of the record, the Arbitrator requested an extended period to review and prepare an award which the parties granted.

The following appearances were entered:

For the Employer School District:

Paul Engh	Attorney at Law
Ivars Krafts	Attorney at Law
Diane Koubsky	Manager of Employee Benefits and Retirement
David Lorenz	Director of Human Resources

For the Union:

Bruce Grostephan	Attorney at Law
Shane Allers	Union Executive Director
Chris Conry	Organizer

THE ISSUE

WHAT SHALL THE APPROPRIATE REMEDY BE?

PERTINENT CONTRACT PROVISIONS

ARTICLE 1: RECOGNITION

- 1.1 In accordance with the PELRA, the School Board recognizes the School Service Employees Local 284, Eden Prairie, Minnesota as the exclusive representative of employees as defined in Article II employed by the School Board.....

- 1.2 The exclusive representative recognizes the School Board's right to subcontract. The School Board recognizes Local 284 as the exclusive representative for employees driving some regular to and from school routes, some special education routes, some special circumstance routes, and some shared time routes (including work experience, music, band, physical education and speech) for the School District. In the event the School Board wishes to eliminate its bus/van fleet and subcontract the entire Independent School District 728 transportation operation, it will negotiate in good faith concerning the effects of such subcontracting consistent with Minnesota State Law.

ARTICLE III: SCHOOL BOARD RIGHTS

- 3.4 Effect of Laws, Rules and Regulations: The exclusive representative recognizes that all employees covered by this agreement shall perform the services prescribed by the School Board and shall be governed by the laws of the State of Minnesota, and by School Board rules, regulations, directives, and others, issued by properly designated officials of the School District. The exclusive representative also recognizes the right, obligation and duty of the School Board and its duly designated officials to promulgate rules, regulations, directives, and orders from time to time as deemed necessary by the School Board insofar as such rules, regulations, and directives and orders are not inconsistent with the terms of this agreement.

ARTICLE XII: DISCIPLINARY ACTIONS

An employee who has completed the probationary period may be suspended without pay or discharged only for cause. An employee who has completed the probationary

period and who is disciplined shall have access to the grievance procedure.

.....

ARTICLE XVIII: DURATION

18.1 This agreement shall remain in full force and effect for a period commencing on July 1, 2000, through June 30, 2002, and thereafter until modifications are made pursuant to the PELRA. If either party desires to modify or amend this Agreement commencing on July 1, 2002, it shall give written notice of such intent no later than May 1, 2002. Unless otherwise mutually agreed, the parties shall not commence negotiations more than ninety (90) days prior to the expiration of this Agreement.

BACKGROUND

Independent School District #728, hereinafter referred to as the “EMPLOYER” or “DISTRICT,” operates the public schools in and around Elk River, Minnesota and is a public employer within the meaning of Minnesota Statutes. Grievants Patricia Nelson, Sharon Lynas, Anne Martin, Paula Granlund, Karen Stahlman, Susan Stetler, Ellie Wrobel, Peggy King, Julie Thornton, Janice Saathoff, Jeanne Peabody, Kim Golla, Richard Mesker, Nancy Grutzmacher, and Colleen Smith, all former Special Education Bus Drivers employed by the District, are represented, by the Service Employees International Union and its School Service Employees Local 284, hereinafter referred to as the “UNION.”

The undersigned Arbitrator’s award of October 18, 2004 found, in relevant part, that:

There were many alternatives open to the Employer had they not predetermined that the Grievants would be terminated in June of 2002. For example, the Grievants could have been employed by the District and employed to drive Vision buses as had been done from time to time in the past; the Grievants could have been assigned to other duties within the District; the Employer could have assigned the Employees to Vision pursuant to a subcontract or have required Vision to recognize and bargain with the Union as a condition of the subcontract; the Employer could have negotiated a mutually acceptable severance agreement with the Union, and so forth.

As the Union has argued throughout these proceedings, the Employer could also have restored the status quo prior to termination by purchasing or leasing buses. However, the Arbitrator did not require the Employer to select any of the above alternatives because he had no authority, either within the collective bargaining agreement or by stipulation from the parties, to do so. Rather, he suggested these alternatives in the hope that the parties would devise a suitable resolution through collective bargaining. The Arbitrator reiterated this approach in his Clarification Award of January 6, 2005 in which he found:

The Employer was ordered to reinstate the Grievants and make them whole. Any other remedy that the Employer proposes to resolve the violation is subject to negotiation with the Union.

The Arbitrator is in full agreement with the Employer's contention in its post hearing brief that the original award and the above clarification stressed flexibility as opposed to rigidity. However, despite repeated attempts to bargain with the assistance of mediation, the parties were unable to reach a negotiated agreement.

The original remedy fashioned by the Arbitrator required that:

Grievants shall be reinstated with all back pay, benefits, and seniority to the date of their discharge. Back pay shall be offset by outside compensation received by Grievants during the period of their termination. Benefits due shall

be offset by the monetary value of Employer paid benefits, if any, provided to Grievants through outside employment during the period of their termination.

The Arbitrator retains jurisdiction in this matter solely with respect to the implementation of the above remedy.

This remedy was limited and ambiguous since the Arbitrator did not have sufficient authority within the meaning of the parties' collective agreement to order specific terms of reinstatement nor did the parties provide him with sufficient and credible evidence upon which to determine the back pay, benefit and seniority amounts. The question of authority was partially resolved by Minnesota District Court Judge Robert B. Varco's March 29, 2007 order which concluded:

Plaintiffs ask this Court to reinstate them to their previous bus driving positions, which they conclude is part of Arbitrator Remington's decision. The Arbitration decision, however, lacks any clarification as to the term "reinstatement." In essence, does the decision find that plaintiffs should be reinstated to the same positions they held before, or does it mean reinstatement to a similar position? At the very least, the term is ambiguous.

.....

Thus, the appropriate remedy would be to submit the matter to Arbitrator Remington for clarification. Yet, according to *All Metro Supply*, 707 N.W.2d at 5, the Court lacks jurisdiction to do so when the matter is outside the 20-day timeframe as set forth in Minn. Stat § 572.16.¹

Accordingly, Judge Varco found that the Court had no jurisdiction to submit this matter to the Arbitrator for clarification. The parties therefore jointly returned the question of reinstatement to the Arbitrator and it is properly before him as part of the determination of the remedy.

¹ Subdivision 1 concerns clarification application of a party; Subdivision 2 concerns submission for clarification by the court. Subdivision 3 limits requests for clarification of arbitration awards under Subdivision 1 or 2 to a period twenty (20) days after delivery of the arbitration award. However, there is nothing to bar the parties from jointly seeking clarification after the expiration of the 20 day period.

CONTENTIONS OF THE PARTIES

The Union takes the position that the Employer is required by the Arbitration Award of October 18, 2004 to restore the status quo and reinstate the Grievants to their previous positions as bus drivers. It argues that when the Employer instead attempted to induce Grievants to return to work in non-specified positions, first on April 6, 2005 and later on May 2, 2005, it violated the requirements of the October 18 Award and it compounded this violation and acted in bad faith and committed an Unfair Labor Practice when it attempted to settle individually with the Grievants on August 31, 2005. The Union further takes the position that the Employer failed to negotiate with the Union as directed by the Arbitrator and instead unilaterally placed Grievants in para-professional positions resulting in both loss of bargaining unit status and seniority by Grievants. Finally, the Union requests that the Arbitrator determine the Grievants' damages as of August 17, 2007 rather than May 2, 2005 as proposed by the Employer because the damages to Grievants are ongoing as long as the Employer refuses to reinstate the Grievants to bus driving positions. In this connection it disputes the back pay awards calculated by the Employer and asks that the Arbitrator accepts the calculations offered by the Union.

The Employer takes the position that, based upon the October 18, 2004 Award it was entitled to reinstate the Grievants to non-driving jobs with equal pay and benefits. The Employer therefore maintains that it made a good faith offer to reinstate Grievants and mitigate damages effective May 2, 2005. At the same time that it offered re-employment, the Employer attempted to compute back pay and benefits to make the Grievants whole. The Employer further takes the position that its back pay liability

ceased to accrue when it offered each Grievant a comparable job at their prior pay and benefit levels. Finally, the Employer contends that the settlement agreements which were initially signed by four of the Grievants on August 31, 2005, are valid and enforceable.² The Employer also maintains that its back pay calculations, as amended following the hearing, are correct and should be accepted by the Arbitrator.

DISCUSSION, OPINION AND AWARD

The Settlement Agreements

Three Grievants, Kim Golla, Richard Mesker and Janice Saathoff, met with the Employer on August 31, 2005 and received settlement checks that were based on the District's estimate of back pay and benefits due. Although the Union was not invited to participate in this meeting, the Union's attorney did attend and each of the Grievants had an opportunity to consult with him before accepting the settlement agreement and check. As part of the settlement, each Grievant signed a release that stated, in relevant part:

By accepting this sum, I hereby release Independent School District 728 from any future obligations arising out of Arbitrator Remington's decisions..... I further agree that, by accepting the attached check, my interest in the grievance and related litigation is concluded..... That is, I cannot and will not undo this agreement. Also by accepting the check, I am no longer a party to the grievance and withdraw from it.

The record reflects that Kim Golla accepted the Employer's offer of reinstatement in May of 2005 and returned to work as a para-professional employee in a bargaining unit represented by a different union. She continued to be employed by the District in this capacity until the date of the instant hearing. Richard Mesker accepted a check and signed the settlement release. He did not return to work with the District and instead

² One of these Grievants, Peggy King, rescinded her agreement and returned the settlement check two weeks later.

accepted a position as a bus driver with Vision Transportation from which he subsequently resigned. Despite his contention that he was never offered re-employment by the District, the evidence shows that Mesker declined a position offered to him by the District in May of 2005. Janice Saathoff also accepted a settlement check and signed the release on August 31, 2005. Like Golla, she accepted re-employment with the District as a para-professional in May of 2005 and continued to be employed in that capacity until the date of the instant hearing. All three of these Grievants maintain that the back pay amount was incorrectly calculated by the Employer.

As noted above, Grievant Peggy King also reached a settlement agreement with the District but rescinded that settlement two weeks later and returned the check. She testified that she had no opportunity to consult with the Union prior to signing the agreement, was confused, and after looking over the back pay calculations concluded that they were inaccurate and unacceptable. King did accept the Employer's offer of reinstatement to a para-professional position in May of 2005 but, after performing her new duties for a period of time, felt that she was not fully qualified to perform the work and resigned.

The Employer makes a strong argument in favor of enforcing these settlement agreements and notes that under Minnesota law settlements should not be lightly set aside absent compelling evidence to do so. The Arbitrator finds that such compelling evidence exists here. It is undisputed that the Employer made no attempt to involve the Union, the exclusive representative of the Grievants in this matter, in the settlement negotiations. The Union had no opportunity to review the proposal in advance, to negotiate the terms of the settlement and release, to contest the accuracy and appropriateness of the back pay

amounts calculated by the Employer, or to advise the Grievants at the time the settlement was offered. While it is true that the Union attorney was allowed to be present at the August 31, 2005 meeting, he was afforded no meaningful involvement in the process. The Employer's conduct in this matter can only be deemed direct dealing, an action incompatible with the requirement of exclusive representation. Indeed, the Employer may well have committed an Unfair Labor Practice within the meaning of Minnesota Statutes § 179A.13 by refusing to meet and negotiate in good faith with the exclusive representative of its employees. Accordingly, the settlement agreements with Kim Golla, Richard Mesker, Janice Saathoff and Peggy King signed on August 31, 2005 must be rejected and ignored in determining the Employer's full obligation to make those Grievants whole. It would appear that no further remedy for this Unfair Labor Practice is warranted.

Extent of the Employer's Back Pay Liability

A critical issue in this proceeding is the period of time during which the Employer continued to accrue back pay liability to the Grievants. Specifically, the Employer contends that its obligation for back pay ended in May of 2005 when it unconditionally offered all fifteen Grievants positions with the District at comparable pay and benefits with those that they had been receiving when they were wrongfully terminated in 2002. The record reflects that the Employer had proposed this alternative to the Union in March and again in April of 2005, but that the Union had rejected this offer, insisting instead that the Grievants be reinstated to bus driver positions. The Arbitrator is cognizant of the inability of the parties to successfully reach a mutually acceptable solution to this problem through collective bargaining and of their apparent reluctance to engage in

candid and forthright negotiation. Further, he notes that both parties have contended that their adversaries engaged in bad faith bargaining on this issue. Rather than bad faith, the Arbitrator is persuaded that both parties maintained their positions based on what they reasonably believed to be credible interpretations of their collective agreement, relevant case law, and the original award of this Arbitrator. However, he is now compelled to find that the Employer correctly interpreted the original award and subsequent clarification when it offered Grievants reinstatement in May of 2005 to positions for which they were deemed qualified at the same pay and benefit levels they had enjoyed at the time of their termination. Specifically, the Arbitrator found on October 18, 2004 that:

There were many alternatives open to the Employer had they not predetermined that the Grievants would be terminated in June of 2002. For example, the Grievants could have been employed by the District and employed to drive Vision buses as had been done from time to time in the past; the Grievants could have been assigned to other duties within the District; and so forth.

There should be little doubt that this language at the very least implies that the Employer had the discretion to reassign Grievants to non-driving positions within the district so long as there was no loss of wages, benefits and seniority by the Grievants. This implication is clearly reinforced in the Clarification Award where the Arbitrator notes that “the buses and drivers are not inseparable.” The Grievants’ reinstatement is simply not conditional upon reassignment to bus driving positions. Further, there is nothing within the collective agreement that prohibits such reassignment. Reinstatement to equivalent jobs is an appropriate remedy in labor arbitration where the prior job has been eliminated or discontinued, or where the Employer has a legitimate business reason to reinstate Grievant to an equivalent position.³

³ See *United Paperworkers v. Misco*, 484 U.S. 29, 45 (1987)

The Employer elected to offer Grievants positions as para-professionals at pay and benefit levels comparable to those they previously enjoyed. While the parties might have negotiated other placements to positions within an SEIU bargaining unit, they failed to do so. Having reached impasse on this issue with the Union, the Employer can hardly be faulted for attempting to curtail its back pay liability by reinstating Grievants to positions that they were at least minimally qualified to perform. In light of the foregoing discussion, the Arbitrator can only find that the Employer's decision to reinstate Grievants to para-professional positions in May of 2005 satisfied the requirements of his original award, and that the Employer has no general obligation to Grievants for back pay and benefits beyond May 2, 2005. Grievants who rejected this offer of reinstatement failed to mitigate their damages. The question of seniority for those who did accept the offer of reinstatement is addressed below.

Calculation of Back Pay

Having found that the entitlement of Grievants to back pay terminated on May 2, 2005, there remains the question of an equitable and appropriate determination of back pay for all Grievants. In this connection, it is noted that the Employer erroneously offset unemployment compensation received by Grievants against back pay in its initial computations, an error it has conceded and attempted to correct in its post hearing submissions. Because the circumstances of each Grievant are unique, back pay and benefits are discussed for each individual below.

The Union requests that the back pay calculations include an adjustment for raises that Grievants would have received had their employment with the District been continuous. It therefore asks that the hourly rate used to compute back pay be increased

from the \$16.03 base rate called for in 2001-02 “based on the pattern settlements with all the other units in the School District.” However, the Union presented no evidence to substantiate this request and this Arbitrator is unwilling to speculate as to what the wage rate might have been in subsequent years had Grievants not been terminated. Rather, his authority is limited to the provisions of the 2000-2002 collective agreement which provided for a maximum hourly rate of \$16.03. He is therefore constrained to adopt the District’s back pay calculations based upon the pay rates in the most recent collective agreement through May 2, 2005. As the Employer argues, those Grievants who accepted reinstatement in 2005 have received pay raises for subsequent years.

Methodology

Probably the most difficult, and certainly the most time consuming issue presented to the Arbitrator in this dispute is the actual determination of back pay amounts due the various Grievants. This difficulty was compounded by the inability of the parties to agree upon a single approach or methodology in computing back pay. The Employer’s methodology relied on the work of its benefits manager, Diane Koubsky, who testified at length concerning her background and training. She explained how she estimated the hours that would have been worked based on Grievants’ actual time sheets and then applied the hourly rate and deducted offsets. The Union’s calculation of back pay was presented by Executive Director Shane Allers and supplemented by the testimony of the individual Grievants. There can be little doubt that the estimates provided by Allers’ calculations are less than precise and are at best approximations of the losses sustained by Grievants as a result of their terminations. On balance, it would therefore appear that the

calculations offered by the Employer, in most instances, accurately reflect the amount of the back pay due to Grievants.

Richard Mesker

Mesker's assertion that he was never offered employment by the District after his termination is not credible. He received a settlement in the amount of \$12,258 in 2005. There is no evidence that he made any significant effort thereafter to mitigate his losses. However, the District improperly offset \$ 2112 in unemployment compensation from Mesker's settlement. Accordingly, he is entitled to receive \$2112 in back pay in addition to the above \$12,258.

Kim Golla

Golla received a settlement of \$41,162 in 2005 and subsequently accepted the District's offer of re-employment and returned to work as a para-professional. Accordingly, her back pay claims for time periods after May 2, 2005 must be rejected. However, the Employer improperly deducted unemployment compensation benefits and part-time outside earnings that Golla received prior to May 2, 2005. Accordingly, she is entitled to an additional back pay amount of \$17,675.

Janice Saathoff

Like Golla, Saathoff accepted a settlement (\$41,145) from the District in 2005 and was subsequently re-employed as a para-professional. Her back pay claim for time periods after May 2, 2005 is likewise rejected. However, the District improperly deducted unemployment compensation and part-time outside earnings from 2003 through the first half of 2005. Saathoff is entitled to receive these amounts totaling \$34,035 in

additional back pay since none of her outside employment during this time was incompatible with driving a school bus.

Peggy King

King received a settlement from this District of \$58,914 in 2005 but later returned the check and rescinded her settlement. She accepted an offer of re-employment from the District and returned to work as a para-professional. King subsequently found this work to be unsuitable and resigned. Her voluntary resignation is irrelevant in computing back pay because it occurred after May 2, 2005. The Employer also improperly offset King's unemployment compensation payments for 2002 and 2003. Accordingly, she is entitled to receive \$69,639 in back pay.

Sharon Lynas

Lynas was employed by Vision Transportation as a bus driver following her termination by the District in 2002. She suffered a mild stroke while driving for Vision in February of 2003 and was off work until September of that year when she returned to work with Vision as a "Bus Aide" in Special Education. Following the stroke she was unable to obtain a medical release to drive a school bus. She was subsequently offered a position with the District in 2005 at her former pay and benefit level but declined because she "didn't know what the job was." It must be noted that, as a District employee Lynas was covered by long-term disability insurance and would have been compensated for her lost time in 2003 had she continued to be employed by the District. The Employer concedes that she is entitled to a payment of \$11,711.30 (two thirds of her wages), the amount she would have received in disability payments. In addition, she is also entitled to back pay of \$7545 for a total of \$19,256.30. The Union's request for a substantially

larger back pay amount must be rejected, in part because it appears to ignore the fact that Lynas was unable to drive a bus after February of 2003. Given this fact, her rejection of the District's offer of re-employment as a para professional in 2005 suggests that she made little effort to mitigate her wage loss.

Patricia Nelson

Following her termination as a bus driver, Nelson continued to work for the District as a part-time para-professional and accepted a full time position in that capacity in 2005. She continued to work in that job until her retirement in 2007. The Union's back pay claim on behalf of Nelson does not accurately reflect the number of hours that Grievants would have worked had they been employed as Drivers and includes a claim for summer driving. However, there is no provision in the collective agreement that guarantees summer school driving. Nelson's back pay award is therefore \$74,550 including incorrectly offset unemployment compensation from 2002-2003 of \$15,859.

Anne Martin

Martin was employed by Vision Transportation following her termination by the District. She continued to drive for Vision and declined the District's offer to return as a para-professional in 2005. Although Martin received comparable wages as a bus driver for Vision, the District improperly offset her unemployment compensation for 2002 and evening and weekend wages from Target from 2002 through 2004. Her back pay award is therefore \$5584.

Paula Grandlund

Grandlund rejected the District's offer of re-employment in 2005. However, the District improperly offset unemployment compensation benefits for 2002 and 2003 and

for part-time weekend, evening and summer employment prior to 2005. However, the District maintains that Grandlund's wages from A&M Bussing were properly offset because Grievant drove charter school buses for field trips and sports activities. The Arbitrator is here inclined to agree with the Employer since this work effectively replaced the work that she lost by reason of her termination. The District also objects to payment of back benefits to Grandlund since she never provided a benefits verification form to show that she did not receive offsetting benefits from her other employers. However, given the nature of this part-time employment it is highly unlikely that she received benefits for this work. Accordingly, the Arbitrator finds that Grandlund's back pay award should be \$77,704.

Karen Stahlman

Stahlman was employed by Vision as a bus driver following her termination by the District. She declined the District's offer of re-employment in 2005 and continued to drive for Vision. The District did improperly offset unemployment compensation benefits for Stahlman in 2002. Her back pay award is \$7700.

Susan Stetler

Stetler went to work for Vision Transportation following her termination by the District. She declined the District's offer of re-employment in 2005 and continued to drive for Vision. Like others who declined re-employment, she failed to mitigate. Since unemployment compensation benefits and part time employment earnings were improperly set off by the District, her back pay award is \$23,205. Stetler also seeks reimbursement for health insurance premiums and medical expenses of \$22,483.71. Although she was covered by her husband's health insurance at the time of her

termination, he lost his coverage in January of 2003. Grievant contends that she would have picked up coverage from the District had she not been discharged. It is difficult from the record to accurately calculate Stetler's out-of-pocket medical expenses through May of 2005 and the Employer requests that these expenses be denied or reduced because of "inadequate accounting," and notes that, even if she had obtained insurance from the Employer, its health insurance provides for an 80/20 co-pay and an unspecified deductible. In light of the foregoing discussion, the Arbitrator finds that Stetler's claimed medical expenses and health insurance premiums of \$22,483.71 must be reduced by at least 20% to reflect the 80/20 co-pay. Accordingly, her medical reimbursement must be reduced to \$17,987.

Ellie Wrobel

Wrobel was employed part-time by the District and part-time by Vision Transportation at the time she was terminated by the District. She then moved to full time employment at Vision and declined the District's offer of re-employment in 2005. Accordingly, her entitlement to back pay ended on May 2, 2005. There is a dispute between the parties over the number of days that Grievant actually worked while employed at the District. The Arbitrator finds that the 170 day figure proposed by the Employer is correct since Wrobel drove exclusively for elementary schools. However, the District's proposed back pay figure must be increased because they incorrectly deducted all of her wages from Vision Transportation as an offset while half of that time would have been compatible with Wrobel's continued employment by the District. Accordingly, her total back pay award is \$14,102.

Julie Thornton

Thornton was hired by Vision Transportation following her termination by the District and has continued to be employed there. She declined the District's offer of re-employment in May of 2005 and her right to back pay was terminated at that point. Considering the improper offset of unemployment compensation, Thornton's back pay award is \$5745.

Nancy Grutzmacher

Grutzmacher was a part-time driver when she was terminated although she contends that she would have exercised her seniority and claimed a full time job in the future. Following her termination she worked extensively for a number of employers including full time employment. In 2003 and 2004 her actual earnings appear to have exceeded the wages she would have received had she continued with the District. Grievant rejected the District's offer of re-employment in May of 2005. There is substantial disagreement between the parties over the correct computation of back pay due to this Grievant. The Arbitrator deems it unproductive to review or comment upon this dispute other than to find that the Employer's calculations are more compelling. Accordingly, Grutzmacher's back pay award is \$4789.

Colleen Smith

Smith was hired by Vision Transportation following her termination by the District in 2002 and has continued to work there. She declined the District's offer of re-employment in May of 2005 and, like the other former drivers who declined re-employment, failed to mitigate and terminated her entitlement to further back pay. The

Employer did improperly set off Workers Compensation payments to Smith prior to May of 2005. Her back pay award is therefore \$17,640.

Jeanne Peabody

Peabody was hired by Vision Transportation in 2004 but accepted re-employment with the District in May of 2005. The crux of the dispute involving this Grievant is her outside employment as a realtor, employment which commenced prior to her termination in 2002. While it cannot be denied that Grievant's income from real estate work increased substantially after her termination, and declined after her re-employment in 2005, these fluctuations are as likely attributable to changes in the real estate market as they were to the amount of time she devoted to her real estate work. Peabody credibly testified that her real estate work did not conflict with her bus driving assignment with the District. Accordingly, the District's request to offset her real estate income is rejected. Further, the District improperly offset unemployment compensation received by Grievant in 2002 and 2003. Her back pay award is therefore \$51,567.

Back Pay Award Summary

The Arbitrator has found that Grievants are entitled to back pay in remedy for their wrongful termination in 2002 as follows:

Richard Mesker	\$2,112
Kim Golla	17,675
Jan Saathoff	34,035
Peggy King	69,639
Sharon Lynas	19,256
Patricia Nelson	74,550
Anne Martin	5,584
Paula Grandlund	77,704
Karen Stahlman	7,700
Susan Stetler	41,192
Ellie Wrobel	14,102
Julie Thornton	5,745

Nancy Grutzmacher	\$4,789
Colleen Smith	17,640
Jeanne Peabody	51,567

Seniority

Grievants Jeanne Peabody, Kim Golla, Jan Saathoff, Patricia Nelson and Peggy King accepted re-employment with the District as para-professionals in May of 2005. All were assigned a new seniority date of September 1, 2005. King's voluntary resignation terminated her seniority rights. The remaining Grievants lost at least ten years of seniority each as a result of this decision by the Employer. The Union argues that given the relevant contractual language and the remedy required by the original arbitration award, "the Employer cannot destroy the members' seniority."

The Arbitrator's award clearly and unambiguously ordered the employer to reinstate the Grievants "with all back pay, benefits and seniority" (emphasis added). The above decision by the District to arbitrarily assign Grievants Peabody, Golla, Saathoff, Nelson and King seniority dates of September 1, 2005 does not comply with this order. While it cannot be denied that the assignment of Grievants to the AFSCME bargaining unit required negotiation, such negotiation required the full participation of SEIU #284. The Employer simply cannot substitute itself for the Grievants' exclusive representative. Absent some negotiated alternative arrangement between SEIU, AFSCME and the District establishing new seniority rights for the Grievants, the Employer is compelled to honor the seniority rights established by the 2000-2002 collective agreement to make Grievants whole. Accordingly, the District is hereby directed to reinstate the full seniority of Grievants, as follows:

<u>Grievant</u>	<u>Seniority Date</u>
Jan Saathoff	April 1, 1990
Jeanne Peabody	June 1, 1990
Patricia Nelson	August 12, 1992
Kim Golla	August 17, 1995

Grievants' seniority dates shall be adjusted forthwith and they shall be entitled to all current rights and benefits, including retirement rights if relevant, related to these seniority dates.

The Arbitrator has made a careful review and analysis of the record in this matter and has given full consideration to the arguments set forth by the parties in their post hearing briefs and responsive briefs. Further, he has determined that the crucial issues in this dispute have been addressed above and that certain other matters raised by the parties in these proceedings must be deemed irrelevant, immaterial or side issues, at the very most and therefore has not afforded them any significant treatment, if at all, for example: whether or not Grievant Grutzmacher would have received more hours as a bus driver after 2002; whether or not the District currently owns vans that it utilizes for other purposes; whether or not the offer of para-professional positions was agreed to by the Union; whether or not AFSCME agreed to merge Grievants into its bargaining unit with full seniority; and so forth.

Having considered the above review and analysis, together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of

original arbitration award and the parties' collective agreement, the evidence presented by the parties is sufficient to support the make whole remedies set forth above.

AWARD

GRIEVANTS SHALL RECEIVE BACK PAY IN
REMEDY FOR THEIR WRONGFULL TERMINATIONS
AS SET FORTH ABOVE ON PAGES 20 AND 21.

GRIEVANTS PEABODY, GOLLA, SAATHOFF AND
NELSON SHALL HAVE THEIR SENIORITY
RESTORED AS SET FORTH ABOVE ON PAGE 22.

JOHN REMINGTON, ARBITRATOR

February 22, 2008