BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
HOWARD-SUAMICO EDUCATION ASSOCIATION	Case 36 No. 44378 MA-6275
and	
HOWARD-SUAMICO SCHOOL DISTRICT	

Appearances:
Mr. Lawrence Gerue, Executive Director, United Northeast Educators, appearing on behalf of the Association.
Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis Rader, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and District respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on December 18, 1990 in Green Bay, Wisconsin. The hearing was transcribed and the parties filed briefs which were received by March 7, 1991. Based on the entire record, the undersigned issues the following Award.

ISSUES

The Arbitrator frames the procedural issue as follows:

> Was the grievance timely filed?

The parties stipulated to the following substantive issue:

> Does the contract require that persons be reduced from assignment of six classes to five classes in order to create more classes for a teacher being recalled to a part-time position?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-91 collective bargaining agreement contains the following pertinent provisions:

> ARTICLE IV -- GRIEVANCE PROCEDURE
>
> Purpose -- The purpose of this procedure is to provide an orderly method of resolving differences arising during the term of this agreement. A determined effort shall be made to settle any such difference through the use of the grievance procedure.
>
> For the purpose of this Agreement, a grievance is defined as any complaint by a teacher, teachers and/or the Association regarding or relating to the interpretation, application or alleged violation of the terms of this Agreement.
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> Procedure--
>
> 1. An earnest effort shall first be made to settle the matter informally between the teacher and his building principal or in the instance where there is not a building principal involved, the immediate supervisor. The supervisor should be made aware that this complaint may result in a grievance.
>
> 2. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the immediate supervisor within ten (10) days after the facts upon which the grievance is based first occurred or became known. The immediate supervisor shall give his written answer within ten (10) days of the time the grievance was presented to him in writing. Grievances shall be filed on forms set forth in Appendix "D".

. . .

ARTICLE VI -- SALARY

R. High school teachers assigned a seventh duty shall receive compensation based upon one-sixth of the pro-rata daily rate of the BA base salary.

If an 8-period day is implemented, all teachers shall be assigned to six duties and two duty-free preparation periods. Duties shall be defined as either a period of teaching class or supervision of students (homeroom excluded).

No teacher will be assigned six classes until all teachers in that department have been assigned at least five classes. This prevents assigning a 6th class to several teachers to create a layoff.

If assignment of more than five classes becomes necessary, teachers with the most seniority would be given first choice as to whether or not they are assigned additional classes.

. . .

MEMORANDUM OF AGREEMENT
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The introduction of an eight (8) period day at Bay Port High School shall not result in the layoff or reduction of contracts for any teachers who have been in the faculty bargaining unit prior to January 1, 1990.

. . .

FACTS

Bay Port High School Principal Larry Dunning began developing a plan several years ago to expand the daily schedule at the high school from a seven period day to eight-periods. Dunning discussed his ideas concerning same with staff and in doing so learned that a main concern teachers had with the idea was that they did not want an additional teaching assignment used to create a layoff of teachers. Dunning later distributed two memos concerning the topic of an eight-period day. The first was a 17-page memo dated January 16, 1989 entitled "Recommendations and Considerations for Change of the Daily Schedule at Bay Port High School" that was distributed to both staff and the school board. It provided in pertinent part:

I would like to suggest the following guidelines that address these questions:

1. Teachers in the core academic areas of English, Math, Science and Social Studies would continue to be assigned only five classes per day since those areas will probably experience the smallest growth as a result of the eight-period day.
2. Teachers in all other departments would be assigned either five or six classes depending on need. It is my estimate that about half of the teachers would have five classes and the other half would have six.

3. A. Teachers with five classes would be assigned two periods of supervision and one period for preparation.

   B. Teachers with six classes would be given two preparation periods and no periods of supervision.

4. Teachers can express a desire to teach five or six classes. Those with the most seniority would be given first choice as to whether they are assigned to five or six classes. It must be understood that it will not be likely that all such requests could be satisfied.

5. No teacher will be assigned six classes until all teachers in that department have been assigned at least five classes. This would prevent the possibility of several teachers in

one department being assigned six classes to make it possible to lay off another department member.

The above guidelines will make the eight-period day work and hopefully alleviate fears that teacher reductions or layoffs would occur. They are offered as starting points for discussion.

The second was a one-page memo dealing with options concerning an eight-period day that was distributed to the staff in February or March, 1989. It provided in pertinent part:

> In the assignment of classes at Bay Port in an 8 period day the following guidelines shall be observed:
>
> 1. Whenever a teaching load of 3 or more classes become available in a given department an additional teacher shall be hired rather than assign them as 6th classes to other teachers.
>
> 2. Teachers shall be able to express a desire to teach either 5 or 6 classes. Those with the most seniority would be given first choice as to whether they are assigned to teach 5 or 6 classes. It must be understood that it will be likely that not all such requests could be satisfied.
>
> 3. No teacher would be assigned six classes until all teachers in that department have been assigned at least 5 classes. (Prevents assigning a 6th class to several teachers to create a layoff).

Later that year the District raised the issue of an eight-period day in contract negotiations with the Association and attempted to negotiate it into the contract. This issue was withdrawn from the bargaining table in November, 1989. It rearose during a contract mediation session on January 9, 1990. During the mediation session the parties agreed that the District could implement an eight-period school day. The Association proposed that some language from Dunning's above-noted memos be incorporated into contract language, which is what happened. Specifically, the parties incorporated part of paragraphs 3 B, 4 and 5 from Dunning's January, 1989 memo and part of paragraphs 2 and 3 from Dunning's February/March, 1989 memo into the following new contractual language (Article VI, R):

> High school teachers assigned a seventh duty shall receive compensation based upon one-sixth of the pro-rata daily rate of the BA base salary.
>
> If an 8 period day is implemented, all teachers shall be assigned to six duties and two duty-free preparation periods. Duties shall be defined as either a period of teaching class or supervision of students (homeroom excluded).
>
> No teacher will be assigned six classes until all teachers in that department have been assigned to at least five classes. This prevents assigning a 6th class to several teachers to create a layoff.
>
> If assignment of more than five classes becomes necessary, teachers with the most seniority would be given first choice as to whether or not they are assigned additional classes.

In addition to the above, the following Memorandum of Agreement was also added to the contract:

> MEMORANDUM OF AGREEMENT
>
> The introduction of an eight (8) period day at Bay Port High School shall not result in the layoff or reduction of contracts for any teachers who have been in the faculty bargaining unit prior to January 1, 1990.

Following the adoption of the new contract language identified above, Dunning analyzed the impact the eight-period day would have on course enrollments in the industrial arts department at the high school and concluded that six classes would be assigned to the three then working members of that department. He also concluded that there were enough students to warrant an additional (industrial arts) class. The District decided to offer this class to Curt Boehm, an industrial arts teacher who at that time was on full layoff

status from the District. By letter dated May 14, 1990 1/ District Administrator Fred Stieg offered Boehm a part-time position with the District to teach one class. Boehm accepted the District's offer two days later.

By letter dated May 25 the Association advised the District that it was investigating the possibility that Boehm's assignment to one class constituted a contractual violation but indicated it was choosing to not grieve the matter at that time. District legal counsel Dennis Rader responded by letter dated May 31 stating that the District was not waiving any timelines as to the filing of a grievance over the issuance of a partial contract to Boehm.

About that same time, all three full-time members of the industrial arts department asked Dunning that they not be assigned a sixth class as planned but that their sixth class be assigned instead to Boehm who they knew was going to be recalled to the department. The District did not comply with their request. The Association grieved the matter on June 28 and the grievance was processed to arbitration.

Around July 15, the District formally notified teachers what classes they would be teaching in the upcoming school year. The three full-time industrial arts teachers were notified they would be teaching six classes. Teaching assignments for part-time teachers are sometimes changed over the summer months but Boehm's assignment to one class for the 1990-91 school year did not change.

The eight-period school day was implemented at Bay Port High School at the start of the 1990/91 school year.

1/ All dates hereinafter refer to 1990.

POSITIONS OF THE PARTIES

The Association initially challenges the District's assertion that the grievance was untimely. In doing so, it acknowledges that there may well have been other dates both before and after June 28 when this grievance could have been filed. For example, the Association submits that it could have waited until the start of the 1990-91 school year to file the instant grievance because up to that point in time the District could have changed its position concerning assignments in the industrial arts department. Given this flexibility concerning when the grievance arose, the Association contends that the grievance was filed in a timely fashion. With regard to the merits, it is the Association's position that Boehm should have been given the sixth teaching assignment of each of the three full-time members of the industrial arts department. Had that happened, Boehm would have had four classes while the others in the department had five. The Association contends this outcome is mandated by the first sentence of the third paragraph of Article VI, R which provides that "no teacher will be assigned six classes until all teachers in that department have been assigned at least five classes." The Association reads this sentence as not permitting any department member to be scheduled for a sixth teaching assignment until all others have five classes. Inasmuch as what happened here was that the District assigned three industrial arts teachers six classes while another department member (Boehm) taught just one class, the Association submits that the District violated this section. The Association argues that there is no need for the arbitrator to rely on other portions of Article VI, R to decide this matter, specifically the sentence which follows the aforementioned one. According to the Association, the District should not be permitted to use the conversion to an eight-period day as a means of giving some department members an overload while not giving Boehm a fuller teaching load. In order to remedy this alleged contractual breach the Association asks the arbitrator to sustain the grievance and direct the District to reduce the workload of the three industrial arts teachers from the current six teaching periods to five and that these classes be awarded to Boehm so that his contract is adjusted from 18.75% to 80% retroactive to the beginning of the 1990-91 contract year.

The District initially contends that the grievance was untimely filed. In this regard it notes that the Association was well aware of the facts that formed the basis of the grievance as early as May 14 (the date Boehm was offered a part-time contract) but the grievance was not filed until June 28, well after the ten-day limitation for filing grievances. With regard to the merits, it is the District's position that it has the contractual authority to assign teachers six classes and is not required to reduce teachers from six classes to five classes merely to appease a teacher who returns from layoff status to part-time duty. In its view, the contract language does not support the Association's position that the District is required to redistribute workloads when a part-time teacher is recalled from layoff. The District also relies on the parties' bargaining history for the proposition that it proves that the specific language in issue (Article VI, R and the Memorandum of Agreement) was entered into by the parties as a precaution to assure the Association that the newly-created eight-period school day would not be used by the District to create layoffs of teaching staff. The District further asserts that the Association's use of the handouts the members received from Principal Dunning is inappropriate in that the Association only uses a portion of the language of the handout which does not take into effect the entire meaning of the document. Finally, the District notes that if the relief requested by the Association is granted, it would be forced to eliminate all part-time teaching positions so as to have as many teachers as possible on a six-class teaching schedule. The District therefore requests that the grievance be denied.

DISCUSSION

Procedural Arbitrability

Since the District contends the grievance was untimely filed, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance is procedurally arbitrable.

The first level of the contractual grievance procedure (Article IV, C, 2) provides that "the grievance shall be presented in writing by the teacher to the immediate supervisor with ten (10) days after the facts upon which the grievance is based first occurred or became known." The facts pertinent here are as follows. Boehm was offered a part-time contract with the District to teach one class on May 14; he accepted the offer two days later. The Association responded to same by letter on May 25 indicating that it believed Boehm's assignment to one class was inappropriate but also indicating it was choosing to not file a grievance at that time. The District's counsel responded to same by letter on May 31 indicating that the District was not waiving any (procedural) timelines. The Association formally grieved the matter on June 28. Teachers were formally notified around July 15 of their assignments for the upcoming school year.

Given the foregoing facts, the question here is what occurrence triggered the running of the ten day time limitation found in the first level of the grievance procedure. For example, was the occurrence when Boehm was offered

and accepted a contract with the District, was it when the Association initially responded to same, was it when teachers were formally notified of their assignments for the upcoming year, or was it when the school year started and the teaching assignments were finalized.

In situations such as this where a party announces its intention to do a given act but does not do or culminate the act until a later date, arbitrators have held that the occurrence for purposes of applying contractual time limits is the later date. 2/ In accordance therewith, the undersigned concludes that the occurrence for purposes of applying the contractual time limits here is not when Boehm was offered and accepted a contract with the District or when the Association initially responded to same. This is because it was possible that the District could have changed its position concerning the assignment of classes in the industrial arts department after those dates. That being the case, the activity complained of (i.e. the assignment of classes in the industrial arts department) did not ripen or come to fruition until school started. Since the instant grievance was filed not only before school started but also before teachers in that department were formally notified of their assignments for the upcoming year, I find that the grievance was timely filed. As a practical matter, the grievance could have been filed at any point up to the start of the school year. The instant grievance was therefore filed earlier than was necessary, but there is nothing in the grievance procedure prohibiting such an early filing (of a grievance). In light of this finding then it is held that the grievance is procedurally arbitrable.

Merits

Attention is now turned to the substantive merits of the grievance. This case involves an interpretation of the new language concerning the eight-period school day which the parties placed in their present contract, specifically Article VI, R. The first part of the second paragraph of Article VI, R establishes a precondition that must be met before that sentence is applicable, namely "if an eight-period day is implemented . . ." (emphasis added) This precondition was met because the District has established an eight period day at Bay Port High School. Inasmuch as this precondition has been met, it follows that the remainder of that sentence is now applicable. The next part of the sentence provides: "all teachers shall be assigned to six duties and two-duty free preparation periods." This language clearly authorizes the District to assign teacher six classes (i.e. duties) and two duty free preparation periods. That is exactly what occurred here to the three full-time industrial arts teachers.

The Association essentially ignores the above-noted provision and relies instead on another provision to support its case herein. Specifically, the Association focuses attention on the first sentence of the third paragraph of Article VI, R which provides: "no teacher will be assigned six classes until all teachers in the department have been assigned five classes." This language is noteworthy because when the District made the assignment of six classes each to the three full-time members of the industrial arts department, there was another member of the department (Boehm) who was not teaching five classes. Boehm was recalled from layoff status and was assigned one class. The Association contends this assignment ran afoul of the contractual mandate that "no teacher will be assigned six classes until all teachers in that department have been assigned five classes." On its face, this language seemingly precludes the District from making the assignment it made (i.e. giving three teachers six classes when another in the department was only assigned one class).

Having said that though, it is a well established arbitral principle that the meaning of each contract provision must be determined in relation to the contract as a whole. Thus, the above-noted sentence cannot be isolated from the rest of the agreement as proposed by the Association. Instead, it must be reviewed in its overall context. That being so, a review of the totality of the pertinent language follows.

As previously noted, the first sentence of the third paragraph of Article VI, R sets forth the following general principle: "no teacher will be assigned six classes until all teachers in that department have been assigned at least five classes." This sentence does not contain any limitations or exceptions. At first glance then it would certainly appear that this general principle applies to every factual situation that could be envisioned. However, a limitation is found in the very next sentence. There it provides: "this prevents assigning a 6th class to several teachers to create a layoff." This (second) sentence establishes that the general principle of the first sentence is not completely open ended in it scope but rather is limited to a particular set of circumstances, namely where a layoff arises after a sixth class is added. Consequently, I read the two sentences together as meaning that no layoffs are to occur as a result of assigning a sixth class.

Having so found, attention is now turned to the question of whether a

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2/ Elkouri and Elkouri, How Arbitration Works, 4th Ed., p. 196.

layoff occurred as a result of the District's assigning a sixth class to the three industrial arts teachers. I find it did not. Foremost in reaching this conclusion is the fact that the District's implementation of the eight-period school day resulted in additional staff being used in the industrial arts department, namely Boehm who was recalled from layoff status. Inasmuch as the industrial arts department at the high school ended up with more staff after the eight-period day was implemented than it had before that occurred, it logically follows that no one in the department suffered a layoff or a reduction in hours. Finally it cannot be said that Boehm suffered a layoff or had his hours reduced. This is because he did not go from full-time to part-time status. Instead, the converse is true; he went from a complete layoff to part-time employment, albeit 18.75%. While the District could have chosen to employ Boehm on more than a part-time basis or assign him more than one class, that was their call to make. In light of the foregoing then, it is held that no layoff occurred as a result of the District's assigning a sixth class to the three full-time members of the industrial arts department.

As a practical matter, this holding means that the general principle established in the first sentence of the third paragraph of Article VI, R is inapplicable here because no layoff was shown to exist after the District assigned the three full-time members of the industrial arts department a sixth class. As a result, no contractual violation of Article VI, R has been found. 3/

This finding is further supported by the parties' bargaining history. The record shows that the parties negotiated the language found in Article VI, R and the Memorandum of Agreement to assure the Association that the newly created eight-period school day would not be used by the District to create layoffs. Thus, their mutual intent was to protect teachers (particularly the present staff) from layoffs. That being the case, the purpose of Article VI, R was simply to implement an eight-period day and provide layoff protection to current teachers.

What the Association essentially proposes to do here is to extend the aforementioned language to also provide for a de facto work load distribution system. As seen above, the first sentence of the third paragraph of Article VI, R could be applied to the instant facts to require that the sixth class assigned to the three full-time members of the industrial arts department be taken from them and given to Boehm. Thus, it is apparent that this sentence could be used to build up the workload of a part-time employe. Be that as it may, the problem with this proposition is that nothing was said at the bargaining table that this is what the Association, let alone the District, intended this language to cover. As noted above, the only mutual intent the parties had concerning this language was to prevent layoffs; no other purpose was ever even discussed. Had the parties intended this sentence to be used as a mechanism to build up the workload of part-time teachers, it is logical to assume that they would have discussed that possibility. Since they did not, it can be said with absolute certainty that the parties did not mutually contemplate that this sentence would be used as a work distribution clause to assure more classes for part-time teachers. Consequently, the undersigned believes it would be a circumvention of the bargaining process to allow the first sentence of the third paragraph of Article VI, R to be used as a mechanism to create additional work for part-time teachers.

Attention is now turned to the representations Dunning made to teachers concerning the eight-period day concept. 4/ Dunning wrote two memos to staff pertinent here that addressed the topic of a proposed eight-period day. Included in these two memos were the following two paragraphs:

> 1. Teachers in the core academic areas of English, Math, Science and Social Studies would continue to be assigned only five classes per day since those areas will probably experience the smallest growth as a result of the eight-period day. (From Dunning's January, 1989 memo).
>
> . . .
>
> 1. Whenever a teaching load of three or more classes become available in a given department an additional teacher shall be hired rather than assign them as sixth classes to other teachers.

3/ In so finding, it is noted that although the parties also addressed the question of whether Boehm was or was not a member of the bargaining unit while on layoff status, this question has not been addressed because it has no bearing whatsoever on the ultimate outcome herein.

4/ While this theory was not explicitly raised by the Association in their brief, it was interwoven into their case at the hearing and was specifically addressed by the District in their brief. As a result, the undersigned has decided to address it.

(From Dunning's February/March, 1989 memo).

The Association believes that inasmuch as Dunning made these particular statements in writing, the District should be bound to them. The problem with this contention though is that while some statements from Dunning's memos were incorporated into actual contract language (specifically paragraphs 3 B, 4 and 5 from the January, 1989 memo and paragraphs 2 and 3 from the February/March 1989 memo ended up in Article VI, R), that is not true of the two above-noted paragraphs. These paragraphs were not incorporated into the contract. Said another way, these particular paragraphs from Dunning's memos never saw the light of day as contract language. That being the case, the undersigned cannot simply overlook this point as implicitly suggested by the Association and consider these statements as obligations which the District is now required to implement. Contractually speaking, they are not. As a result, the District is not contractually obligated to implement the two above noted paragraphs which were part of Dunning's 1989 memos concerning the eight-period day.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the grievance was timely filed; and

2. That the contract does not require that persons be reduced from assignment of six classes to five classes in order to create more classes for a teacher being recalled to a part-time position. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 8th day of May, 1991.

By _____
Raleigh Jones, Arbitrator