

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
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HOWARD-SUAMICO EDUCATION ASSOCIATION : Case 38
 : No. 44380
and : MA-6277
 :
HOWARD-SUAMICO SCHOOL DISTRICT :
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Appearances:
Mr. Lawrence Gerue, Executive Director, United Northeast Educators,
appearing on behalf of the Association.
Godfrey and Kahn, S.C., Attorneys at Law, by Mr. Dennis Rader, appearing on beh

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

There was no stipulation of the issue(s) and the parties asked that the undersigned frame it in his Award. From a review of the record, the opening statements at hearing and the briefs, 1/ the undersigned believes the issues may be fairly stated as follows:

1. Was the grievance timely filed?
2. Did the District's assignment of a fifth class to some department heads rather than to part-time teachers violate the contract? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

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

- 1/ The Association states the issue as:
- Did the District violate Article VI, J "Department Head Release Time" when they assigned some department heads a fifth class when at least one other person in the department was employed on a part-time basis?
- While the District states the issues as:
- 1.Was the grievance timely filed?
 - 2.Is department head work one of the six duties under Article VI, R to which teachers can be assigned?

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.

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".

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ARTICLE VI -- SALARY

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- J. Department Head Release Time -- Heads of high school departments with less than four teachers will be assigned five classes, one preparation period and one period for department head activities. Said department head will not have a supervisory hour.

Heads of high school departments with four or more teachers will receive a compensation of \$500.00 per year if assigned a fifth class in lieu of supervisory period. Every attempt should be made to assign any extra class to teachers other than department heads.

. . .

- 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.

BACKGROUND

Over the last several years, department heads have been used at Bay Port High School on an on-again, off-again basis. When teachers served as department heads they had less of a teaching load than other teachers in the department as an offset for the responsibility of being a department head. For the last several years Principal Larry Dunning has served as the de facto head of the various departments. The existing contract language dealing with

department heads has not changed since 1985.

FACTS

Principal 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 wrote and distributed two memos concerning switching from a seven-period day to 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 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. It also proposed to delete Article VI, J (the department head clause) from the contract. The eight-period day issue was withdrawn from the bargaining table in November, 1989. Sometime after this issue was withdrawn, District negotiator Dennis Rader indicated that the District could live with the existing department head language found in Article VI, J. The eight-period day rearose as an explicit issue during a contract mediation session on January 9, 1990 but the department head matter did not. During that 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.

At the end of the mediation session, the parties agreed to meet later because the District wanted to review the impact of the new eight-period day language on other contract language, specifically the existing department head language which had not been changed. They met on January 12, 1990. 2/ In attendance at this meeting were Board negotiator Dennis Rader, District Administrator Fred Stieg, Association chief negotiator John Rutter and UniServ Director Ron Bacon. Rader testified without contradiction that the parties agreed at that meeting that a department head assignment would be considered a "duty" within the meaning of Article VI, R. Rader and Stieg also testified without contradiction that the parties agreed at that time that a schedule of five classes, one department head hour and two preparation periods would be consistent with Article VI, R and would not require any additional (department head) pay. Rader and Stieg further testified without contradiction that the parties agreed at that time that if a department head was assigned that schedule plus a supervisory duty, then the teacher would be paid pursuant to the first paragraph of Article VI, R because this assignment would involve seven duties.

In May Dunning posted the preliminary teaching schedule for the upcoming 1990-91 school year and appointed the department heads. Four of those teachers appointed as department heads (those in math, social studies, science and business) were also assigned a fifth class. Each of those departments has part-time teachers.

After the department head appointments became known, Association representatives met with District representatives because no teachers wanted to serve as department heads unless a stipend was paid. The outcome of this meeting was that the District offered to pay those department heads with a fifth class \$500, which it did. This payment did not resolve the matter however and the Association grieved it on July 12. The grievance was thereafter processed to arbitration.

The District formally notified teachers around July 15 what classes they would be teaching in the upcoming year. None of the teaching assignments for the four department heads who were assigned a fifth class was changed. The eight-period school day was implemented at Bay Port High School at the start of the 1990/91 school year. The four department heads who are teaching a fifth class are receiving \$500 in addition to their regular salary.

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

2/ All dates hereinafter refer to 1990.

been other dates both before and after July 12 when this grievance could have been filed. The Association submits in this regard that it could have filed the instant grievance at any time from March (when tentative schedules were drafted) until August (when school started). Given this flexibility concerning when the grievance arose, the Association contends the grievance must be considered to have been filed in a timely fashion. With regard to the merits, it is the Association's position that Article VI, J has not been superseded by Article VI, R. In its view, Article VI, J is still viable even though it was formerly applicable to a seven-period day and now there is an eight-period day.

According to the Association, the District's actions here (i.e. assigning five classes to four department heads) violated Article VI, J because the District failed to make "every attempt" to assign those extra classes to "other than department heads", namely the part-time teachers in those departments. Had it given this extra class to the part-time teachers, the Association notes that this would have given the department heads four classes and increased the percentage of classes that the part-timers were teaching. In the Association's view, the District gave the fifth class to the department head (in the affected departments) and paid them \$500 for this fifth class because this was cheaper than increasing the percentage of a part-time teacher. Next, the Association places great reliance on the fact that the District tried unsuccessfully to bargain Article VI, J out of the contract. The Association contends that since the District was not successful in deleting this contract language in negotiations, it ought not be deleted via the arbitration process. 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 four department heads with five classes to four classes. The Association further requests that these classes be awarded to the part-time teachers in each of the affected departments and that their contracts be adjusted accordingly. Although their brief is silent on this point, at hearing the Association acknowledged that this requested remedy would necessitate taking the \$500 payment away from the four department heads who were receiving it.

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 (when teachers received their preliminary teaching assignments and department heads were selected), but the grievance was not filed until July 12, well after the ten-day limitation for filing grievances. With regard to the merits, it is the District's position that Article VI, J, the provision relied upon by the Association, only applies to a seven-period day. Since there is no longer a seven-period day at Bay Port High School but rather an eight-period day, the District contends that the language that applies to the seven-period day (i.e. Article VI, J) is either obsolete or on hiatus. Thus, the District asserts that the language covering the eight-period day (i.e. Article VI, R) supersedes the language covering the seven-period day (i.e. Article VI, J). According to the District, it has not tacitly accepted the applicability of Article VI, J to an eight-period day. In this regard it acknowledges that \$500 is being paid to department heads for the 1990-91 school year, but contends this money was not paid pursuant to the contract but rather was paid simply to reach closure on the matter of the eight-period day. The District also contends that Rader's bargaining table statement that the District would "live with" the existing department head language (i.e. Article VI, J) should be reviewed in the context of the bargaining history. When this is done, it is the District's view that it (i.e. the bargaining history) proves the statement was made at a time when the proposed eight-period day was off-the-table. Next, the District further submits that the parties, through their bargaining representatives, agreed at a January 12, 1990 meeting to an interpretation of Article VI, R that does not require adherence to Article VI, J. In support thereof it cites the testimony of District negotiators Stieg and Rader for the proposition that the parties agreed at the meeting that department head work would be included as one of the six duties that a teacher could be assigned. Finally, the District contends that the relief requested by the Association of redistributing work among part-time teachers when there is a department head position and taking the \$500 away from the department heads is absurd. The District further notes that if this relief is granted, it would need to eliminate all department heads and most likely would need to eliminate part-time teachers too. 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 within ten (10) days after the facts upon which the grievance is based first occurred or became known." The facts pertinent here are as follows. Teachers knew by May what their preliminary teaching assignments would be for the next year and who the department heads were going to be. The Association formally grieved the matter July 12. 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 the department heads were selected and the preliminary teaching assignments were made, 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. 3/ In accordance therewith, the undersigned concludes that the occurrence for purposes of applying the contractual time limits here is not when the department heads were selected and the preliminary teaching assignments were made. This is because it was possible that the District could have changed its position concerning the assignment of classes in the four aforementioned departments after those dates. That being the case, the activity complained of (i.e. the assignment of classes in the four departments where the department head was assigned a fifth class) 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 those departments were formally notified of their assignments for the upcoming school year, I find that the grievance was timely filed. As a practical matter, the grievance could have been timely filed at any point up to the start of the new 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. In this case the Association challenges the teaching assignments made to four department heads. The department heads in question were assigned five classes, one department head hour and two preparation periods. The Association contends the teachers should have been assigned four classes rather than five and that the additional class should have been assigned to a part-time member of that department. In deciding whether these assignments constituted a contractual violation, the undersigned will look at two provisions relied upon by the parties, namely Articles VI, R and VI, J. The critical question is which one of these provisions applies here. The District contends Article VI, R controls while the Association disputes this and argues Article VI, J applies.

Article VI, R is new language concerning the eight-period school day which the parties placed in their present contract. The first part of the second paragraph of Article VI, R establishes a precondition or contingency 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 "all teachers" six duties and two duty-free preparation periods. On its face, this assignment of six duties and two duty-free preparation periods applies to "all teachers"; no exceptions are named. That being so, it applies to department heads, among others. The next sentence goes on to define "duties" as "either a period of teaching class or supervision of students (home room excluded)." The sentence is silent as to whether a department head assignment constitutes a "duty". Board negotiator Rader testified without contradiction that the parties agreed on January 12, 1990 that a department head assignment was to be considered a "duty." Given this uncontradicted testimony, the undersigned has no reason to find otherwise. This means then that the four affected department heads have six duties (five of which are classes and one of which is the department head hour) and two preparation periods. That being the case, the four department head assignments in question conform with Article VI, R.

Having so found, the focus now turns to Article VI, J, the department head clause. This provision has been in the contract for at least five years but has not been used for the last several years because the District chose to not have department heads at Bay Port. Although Article VI, J does not say on its face that it applies only to a seven-period day, it is apparent that such is the case when the provision is examined. For example, the first paragraph of Article VI, J lists the number of assignments that "heads of high school departments with less than four teachers will be assigned", namely "five classes, one preparation period and one period for department head activities. Said department head will not have a supervisory hour." Inasmuch as this adds

3/ Elkouri and Elkouri, How Arbitration Works, Fourth Edition, p. 196.

up to seven periods, it is apparent that this section was drafted to apply to a seven-period day.

Since Article VI, R deals with the assignment of classes under an eight-period day, while Article VI, J deals with the assignment of classes (albeit to just department heads) under a seven-period day, these two provisions can be said to conflict. Be that as it may, the seven-period day is now obsolete because the high school is operating under an eight-period day. That being the case, it is the view of the undersigned that if the seven-period day is obsolete the language that applies to a seven-period day, and particularly Article VI, J, must also be considered temporarily obsolete, at least under the present work schedule. In other words, once the eight-period day authorized by Article VI, R was implemented, it effectively superseded Article VI, J as necessary. In so finding, the undersigned emphasizes that he is not reading Article VI, J out of existence. That section still obviously exists and can again be applicable when the contingency established in Article VI, R is eliminated (i.e. the eight-period day). Until that happens though, Article VI, J is inapplicable to an eight-period day and assignments, including department head assignments, are controlled by Article VI, R.

The Association nevertheless proposes to take the last sentence of Article VI, J and apply it here. This sentence reads: "every attempt should be made to assign any extra class to teachers other than department heads." The Association interprets the reference to an "extra class" to be the fifth class and the reference to "teachers other than department heads" to be part-time teachers. It therefore reads the sentence as saying that the fifth class assigned to the four affected department heads should be assigned to part-time teachers. Since that did not happen here, the Association wants the arbitrator to take the fifth class from the department heads and give it to a part-time teacher in that department. There are several problems with this proposition. First and foremost, as noted above Article VI, J is not applicable to an eight-period day. The undersigned cannot simply overlook this point as implicitly suggested by the Association and apply that sentence from VI, J to an eight-period day. Second, even assuming I could, the fifth class that was assigned to the department heads was not an "extra class" within the meaning of the last sentence of Section VI, J. While there is no question that the "extra class" in a seven-period day use to be the fifth class, that is no longer the case in an eight-period day. Instead, in an eight-period day the "extra class" would have to be a sixth class. Of course here the District did not assign a sixth class to the department heads, but just a fifth class, so no "extra class" was assigned. Therefore, the last sentence of Section VI, J is inapplicable here.

Attention is now turned to the compensation for the department heads. Article VI, J specifically speaks to the issue of additional compensation for department heads but, as previously noted, that clause applies only to a seven-period day. As a result, it has no application here to an eight-period day. The contract language authorizing the eight-period day (i.e. Article VI, R) does not speak however to the issue of additional compensation for department heads. 4/ That being so, the District has no contractual obligation to pay those department heads in question who are assigned a sixth duty (i.e. five classes and a department head hour). Although the District is currently paying those department heads \$500, this payment is not mandated by the contract. Instead, it appears from the record that this money is being paid simply because the District could not get teachers to accept a department head position unless a stipend came with it.

A review of the parties' bargaining history supports the aforementioned findings. The record shows that the parties negotiated the language found in Article VI, R at a mediation session on January 9, 1990. At the end of that mediation session, the parties agreed to meet again because the District wanted to review the impact of the new language concerning the eight-period day on other language in the contract, specifically the department head language. This was necessary because the parties did not change the existing language dealing

4/ In so finding, the undersigned is well aware that the first paragraph of Article VI, R could apply to department heads. That paragraph provides that teachers assigned a seventh duty shall receive one-sixth of pro-rata hourly rate of the BA base salary in additional pay. Thus, a department head assigned seven duties (such as five classes, one supervisory duty, one department head hour in addition to two preparation duties) would receive this additional pay. However, the four department heads in issue here have not received a seventh duty, so this paragraph is therefore inapplicable.

with department heads (i.e. Article VI, J). 5/ The parties met on January 12, 1990 and discussed, among other things, how the eight-period day language would impact on department heads. Board negotiators Stieg and Rader testified that the parties agreed at that meeting that a schedule for a department head of five classes, one department head responsibility and two preparation periods would be considered consistent with the new language found in Article VI, R of six duties and two preparation periods and would not require any additional pay. They further testified that the parties also agreed at that meeting that if a department head was assigned the aforementioned schedule plus a supervisory duty, then the teacher would be compensated pursuant to the first paragraph of Article VI, R (i.e. one-sixth of the pro-rata daily rate of the BA base salary) because this assignment would involve seven duties (i.e. five classes, one department head hour and one supervisory period). Not only was this testimony supported by their written notes of that meeting, most importantly it was not contradicted by Association representatives Rutter and Bacon. 6/ That being the case, the undersigned has no objective basis to find otherwise. I therefore find that the parties agreed on January 12, 1990 to an interpretation of Article VI, R which allows department heads to be assigned five classes, one department head hour and two preparation periods with no additional pay. Inasmuch as that is exactly what happened here, and inasmuch as this interpretation is consistent with Article VI, R, the assignment in question has not been shown to be in violation of the contract.

Finally, the focus turns to the Association's workload distribution claim. What the Association essentially proposes to do here (i.e. take the fifth class from the department heads and give it to the part-time teachers) is to distribute work among the part-time teachers due to the fact that a department head position exists. 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 Article VI, R to cover. The parties negotiated this language to assure the Association that the newly created eight-period school day would not be used by the District to create layoffs. Thus, 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 provision 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 provision 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 Article VI, R to be used as a mechanism to create additional work for part-time teachers.

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 District's assignment of a fifth class to some department heads rather than to part-time teachers did not violate the contract. Therefore, the grievance is denied.

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

By _____
Raleigh Jones, Arbitrator

5/ While the Association makes much of the fact that the District dropped its proposal to delete Article VI, J from the contract, I do not attach great significance to this fact for the following reason. It is clear from the record that the District dropped this proposal at a time when the eight-period day issue was off-the-table. Although the eight-period day issue rearose at the mediation session, the related issue of department heads did not. As a result, it is not at all surprising that the District wanted to address this issue when it met with Association representatives on January 12, 1990, which it did.

6/ This finding is based on Rutter's testimony on pages 65-68 and Bacon's testimony in Case 37 on page 72.