

BEFORE THE ARBITRATOR

In the Matter of the Arbitration :
of a Dispute Between :
HORICON EDUCATION ASSOCIATION : Case 14
and : No. 49167
HORICON SCHOOL DISTRICT : MA-7850

Appearances:

- Mr. Armin Blaufuss, UniServ Director, Winnebagoland Uniserv, appearing on behalf of the Association.
Mr. William G. Bracken, Director of Employee Relations, Wisconsin Association of School Boards, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to a request by Horicon Education Association, herein the Association, and the subsequent concurrence by Horicon School District, herein the District, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on June 22, 1993 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on November 8, 1993 at Horicon, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on November 24, 1993.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties stipulated at hearing to the following:

- 1. Did the District violate Article IV, Section K of the collective bargaining agreement when it denied Mardi Witte's request for approval of a one graduate credit course titled "Characteristics of Effective Foreign Language Programs in the Middle School: Are you ready for 1994?"
2. If so, what shall the remedy be?

FACTUAL BACKGROUND:

Mardi Witte, herein the grievant, filed a timely request for credit approval.

She sought graduate credit approval for the course, "Characteristics of Effective Foreign Language Programs in the Middle School: Are You Ready For 1994?" The conference description includes the following activities on Friday, January 22, 1993: "Keynote address, sectionals, panels of middle school foreign language teachers." On Saturday, January 23, 1993, the description shows "Large group discussions based on Friday sectionals; recommendations to be formulated."

The course in question was offered by the University of Wisconsin-Milwaukee off campus at Manchester East, Glendale, Wisconsin. At the teacher's election, the course could be taken for graduate credit, undergraduate credit, or equivalency clock hour credit (CEU's). The grievant sought approval from the District to take the course for graduate credit.

On January 8, 1993, Larry Ballwahn, District Administrator, denied the grievant's request for graduate credit approval for the following reasons:

1. It appears to be a methods course for middle school level.
2. It takes place during regular school time, in part.
3. Approval would expand the guidelines for all staff members.

The grievant's course was also denied because it was "not requested by administration" and because it did not meet a need within the curriculum.

In an unsuccessful attempt to change Ballwahn's mind, the grievant on January 19, 1993 provided the District with a detailed course syllabus and a statement from the instructor, Professor Diana Bartley.

On January 21, 1993, David Kotewa, High School Principal, approved the grievant's attendance at the course. This approval did not include graduate credit for attending the course. Later, the District offered the grievant CEU credit for "attending a conference," which she refused.

The grievant left school at approximately noon on January 22, 1993. She recruited a teacher to take her afternoon class at no expense to the District.

The grievant attended the course on January 22, 1993, from 1:30 p.m. to 8:30 p.m. and January 23, 1993, from 7:45 p.m. to 5:00 p.m. She was awarded one (1) graduate credit from UW-Milwaukee after completing a required post class research paper. She paid \$185.50 for the one graduate credit.

In attendance at the course were forty-three (43) teachers. Fourteen (14) were high school teachers.

The grievant, prior to the 1992-93 school year taught high school and middle school Spanish. During the 1992-93 school year she taught high school Spanish. During the 1993-94 school year she teaches high school and middle school Spanish.

The grievant has been employed as a Spanish teacher for twelve (12) years in the District. During this time she has been the foreign language department coordinator for grades 7-12.

As the 7-12 foreign language department coordinator the grievant is responsible for

1. helping to coordinate what is taught in the middle and high schools;
2. at the request of the administration, researching exemplary middle school programs and making recommendations to the superintendent; and
3. at the request of the administration, preparing a graduate 7-12 foreign language evaluation report for the NCA evaluation.

The grievant reported to Ballwahn on February 2, 1993 that the course was valuable. Specifically, she learned

1. things could help the foreign student transition from middle school to high school;
2. the concept of integration in the middle school;
3. about learner expectations for the middle school student; and
4. the need for monthly articulation meetings between middle school and high school teachers.

The District had previously indicated to a representative of the grievant that similar information was available "in other formats."

A Northcentral Crediting Association evaluation dated February 23, 1993 recommended "greater articulation of the middle school and high school foreign language curriculum should take place."

The District required foreign language teachers to attend an inservice program on November 3, 1993, for the express purpose of grade 7-12 departmental curriculum articulation.

The grievant has in the past discussed middle to high school transition concerns with the administration.

The grievant has previously received approval to leave school early in order to attend classes. Examples include: a three-credit graduate, off-campus AODA (alcohol & drugs) course where she was released one hour early once a week for eighteen weeks; an advanced credit Spanish course; and a three-credit undergraduate, off-campus "micro computers in the classroom" course where the grievant was released one hour early once a week for eighteen weeks. The District did not request the grievant take any of these classes. The Spanish class was approved as a "content" course because it was within the grievant's license area. The computer class was taken at a time when computers were just "coming out," and anybody who wanted to learn more about them was given the opportunity. The grievant took the AODA class as a follow-up -- she wanted "more information" -- to several other courses she had taken in the area.

The parties stipulated to the following fact situations:

Barbara Traughber is a high school English teacher. A three (3) credit graduate course from Aurora University for a computer class, "Clarise Works," was approved by you as a content course.

Paula Krueger is a high school choir/vocal music teacher. On April 26, 1993, two three (3) credit graduate courses from Silver Lake College were approved as content courses. Both of these classes, "Kodaly Concept I" and "Kodaly Concept II," were directed at primary and/or intermediate grade teachers. Your approval of these courses preceded your assignment of Krueger to elementary classes for 1993-94.

The record also indicates that Sharon Voight, Paul Heidemann, Dan Kueler, Jane Porubcan, Richard Tennie, and Joyce Nygard have each been granted graduate or undergraduate credit for courses taken in part on school time. Voight and Heidemann taught at the

5th and 6th grade levels and missed student contact time in order to attend courses. However, it was also the practice at the elementary school at the time for teachers who had student supervisory or contact responsibilities to trade responsibilities through the week with one teacher acting as the teacher supervisor while the other teacher would actually cover the class.

PERTINENT CONTRACTUAL PROVISION:

ARTICLE IV --- COMPENSATION

. . .

K. CREDIT APPROVAL

Placement on the salary schedule will be by the Superintendent on his evaluation of the teacher's credits.

As of the beginning of the second semester of the 1981-82 school year, credits for horizontal advancement on the salary schedule will be approved if the following criteria are met.

. . .

4. Courses taken off-campus shall have the prior written approval of the administration and shall meet a need within the curriculum.

PARTIES' POSITIONS:

The Association initially argues that the course, submitted for approval by the grievant, meets all contractual requirements and that the District has acted in an arbitrary and capricious manner in denying the grievant graduate credit approval. The Association concedes that past practice is not an issue in the instant dispute with respect to the District's right to approve or deny credits but only serves as a guide to the reasonableness of that action. The Association maintains that the District's action failed the "rule of reason" articulated by Arbitrator George R. Fleischli in Elkhorn Area School District, WERC No. A/P M-90-101, 8/31/90 where he determined that the Administrator's approval was not absolute but limited to determining whether a course fell within the stated area. Likewise, in this case, the Association opines the District Administrator is limited by Article IV, Section K, 4, to determining whether a course meets a need in the curriculum, not meets several or all needs, and contends the record evidence clearly demonstrates the course in question met a need in the curriculum. (Emphasis supplied.) For the foregoing

reasons and argument, the Association requests that the Arbitrator sustain the grievance and order the District to grant the grievant one (1) graduate credit.

The District, on the other hand, argues that the clear and unambiguous language of the agreement gives the District Administrator the authority to approve or deny credits for horizontal advancement on the salary schedule and prevails over any past practice as alleged by the Association citing Arbitrator Mary Jo Schiavoni in School District of New Holstein, ARB 570, 12/22/82 in support thereof. The District maintains that the record supports a finding that the District Administrator acted properly in denying the request for credit advancement, and that the Association has failed to prove that he acted in an arbitrary and capricious manner. Based on all of the above, the District requests that the Arbitrator dismiss the grievance.

DISCUSSION:

At issue is whether the District violated Article IV, Section K, 4, when it denied the grievant's request for approval of a one (1) graduate credit course titled "Characteristics of Efficient Foreign Language Programs in the Middle School: Are You Ready for 1994?"

The parties are basically in agreement that the aforesaid contractual language gives the District Administrator the authority to approve or deny courses. The parties are also in agreement over the standard to be used by the Arbitrator in reviewing the exercise of that authority: arbitrary and capricious. The Association argues that the District acted in an arbitrary and capricious manner in denying the grievant graduate credit approval while the District feels it acted properly herein. For the reasons listed below, the Arbitrator agrees with the District's position.

The first question before the Arbitrator is whether the course, submitted for approval by the grievant, met contractual requirements. As noted above, Article IV, Section K, 4, governs the instant dispute. Section K, 4, specifies:

Courses taken off campus shall have the prior written approval of the administration and shall meet a need within the curriculum.

The record is clear that the grievant did not have prior written approval from the District to take the disputed class off campus for graduate credit. Rather, the District offered her the opportunity to attend the conference despite turning down her request for graduate credit. The District later offered her CEU's

which she declined.

A question remains as to whether the grievant's course met a need in the classroom. This is the crux of the dispute.

In support of its position that the District acted in an arbitrary and capricious manner when making this determination, the Association cites the following definition of arbitrary found in Black's Law Dictionary:

". . . as fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment, . . ."
(Emphasis added).

The Association argues that Arbitrator Fleischli applied such a standard in Elkhorn Area School District, supra. wherein he stated:

For these reasons, and based on the content of the discussion which accompanied the agreement, the undersigned must agree with the Union's position that the parties intended that a "rule of reason" be applied in the case of education courses deemed to be totally unrelated, directly or indirectly, to the area in which the teacher is contracted to teach.
(Emphasis supplied).

The collective bargaining agreement in Elkorn provided for tuition reimbursement upon administrative approval of courses (1) required for a degree, (2) in an area in which the teacher is contracted to teach, and (3) education courses. The Association correctly points out that Arbitrator Fleischli held that the administrator's approval was not absolute but was limited to determining whether a course fell within the stated area. However, the Association fails to point out Arbitrator Fleischli also interpreted the disputed contractual provisions in Elkorn as implying "that the District has retained the right to approve or deny requests for the courses even if they arguably fall within the three identified areas" even though "the possible basis for doing so" were not set forth in the agreement. Elkorn, supra, pp 24-25 Arbitrator Fleischli then went on to state that the administrator could "exercise limited discretion in determining whether or not to approve requests for tuition reimbursement for courses falling within one of the three defined areas." Elkorn, supra, p 25 Arbitrator Fleischli further stated that "As a practical matter, that discretion is more limited in the case of the courses falling

within the first area," Elkorn, supra p 26 than it is in either or both of the other two areas.

Based on the above, therefore, the Association is wrong when it claims that the administrator's approval herein is narrowly limited to simply determining whether a course meets a need in the curriculum. (Emphasis supplied). Like Elkorn, and contrary to the Association's assertion, the District Administrator at Horicon has the authority to evaluate a teacher's credits in order to determine matters like credit approval and placement on the salary schedule. 1/ The Horicon District Administrator, like the administrator in Elkorn, has some discretion in making such determinations. Consequently, he can consider other factors, which he did, rather than limiting himself to determining whether a course meets a need in the curriculum as argued by the Association. (Emphasis supplied).

The Administrator herein considered a number of factors in denying the grievant's request for graduate credit. These factors included the following: one, the primary focus of the conference was at the middle school level and the grievant was teaching in the high school at the time; secondly, part of the conference, held Friday afternoon, meant the grievant would not be present to teach her Spanish class during regular school hours and three, approval of this course would expand the criteria by which courses had been approved in the past. In addition, Dr. Ballwahn testified persuasively that there were other opportunities better suited for promoting improved coordination between the middle school and high school foreign language departments, and that any such offering should be attended by other foreign language teachers instead of just one teacher. The Arbitrator finds no basis in the record or the Association's arguments for concluding that the District acted in an arbitrary or capricious manner in making this determination. 2/

1/ Article IV, Section K states "Placement on the salary schedule will be by the Superintendent on his evaluation of the teacher's credits." Section K, 4, requires courses taken off-campus to have prior written approval of the administration.

2/ For example, contrary to the Association's assertion, the primary focus of the conference was at the middle school level which lends credibility to the District's assertion that since the grievant taught at the high school level this was not an appropriate course for the grievant to take for graduate credit. In addition, if one of the primary reasons for attending the course was related to the grievant's responsibilities as foreign language department coordinator, then it makes some sense, as argued by the District, to have

The Association also argues that past practice "underlies the limitations on administrative approval." However, the record evidence does not support a finding regarding same. For example, the Association maintains that the District had a practice of releasing teachers from instructional responsibilities and granting them credit. (Emphasis supplied). The examples relied upon by the Association to support this contention, however, do not stand up to close scrutiny. Carol Geddes, Association grievance chairperson, gave several examples of courses that she took off campus for graduate credit but did not testify that she missed actual instructional time. Both Geddes and Dick West, Association President, testified that several people, including Sharon Voight, Paul Heidemann, Dan Kueler, Jane Porubcan, Richard Tennie and Joyce Nygard all had been granted graduate or undergraduate credit for courses taken in part on class time. However, except regarding Voight and Heidemann, no one testified that the others missed instructional time. With respect to Voight and Heidemann the record is clear that they left to attend courses while contractually obligated to have contact time with students. The District Administrator, however, testified un rebutted that it was not unusual for teachers in Voight's and Heidemann's situation to trade responsibilities during the week so that when they left to take a course another teacher had actual responsibility for the students. The District Administrator also testified that he was not aware of anyone who left early to attend courses while leaving students in a classroom setting where the teacher had instructional responsibilities.

It is true that according to a survey of bargaining unit members conducted by Geddes Don Mayo, the former superintendent, did not deny course approval. However, this is not the same as saying he approved as a matter of practice a request like the grievant's herein. There is no evidence that the aforesaid prior approvals were the result of any District concurrence or deference to a mutually established past policy or practice of the parties. Rather, the only conclusion that can be drawn from the record evidence is that those determinations were the result of the District's exercise of its managerial discretion in approving courses. Under such circumstances, there is no obligation or commitment implied for the future. As Arbitrator Schiavoni pointed out in School District of New Holstein, supra, practices which are based upon discretionary authority are, in the absence of a contractual provision to the contrary or clearly defined past practice premised upon mutual agreement, subject to change based

the other teachers involved in this effort attend too. Finally, the record supports a finding that the grievant could have learned some of the same information in other more acceptable forums.

on that same discretion citing Ford Motor Co., 19 LA 237, 242 (Shulman, 1952); Celanese Corp. of America, 24 LA 168, 172 (J. Justin 1954).

Finally, with respect to the two other fact situations stipulated to by the parties, the Arbitrator points out that there is no evidence in the record that either Traughber or Krueger missed actual class time to attend their graduate courses.

Based on all of the above, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the issue as stipulated to by the parties is NO, the District did not violate Article IV, Section K of the collective bargaining agreement when it denied Mardi Witte's request for approval of a one graduate credit course titled "Characteristics of Effective Foreign Language Programs in the Middle School: Are You Ready for 1994?" and it is my

AWARD

That the grievance is hereby denied and the matter is dismissed.

Dated at Madison, Wisconsin this 13th day of January, 1994.

By Dennis P. McGilligan /s/