

BEFORE THE ARBITRATOR

- - - - -
In the Matter of the Arbitration :
of a Dispute Between :
: PHILLIPS EDUCATION ASSOCIATION : Case 38
: : No. 49663
and : MA-8021
: SCHOOL DISTRICT OF PHILLIPS :
: :
- - - - -

Appearances:

Mr. Gene Degner, Director, WEAC UniServ Council No. 18, appearing on behalf of the Association.
Mr. Frank Harrington, Superintendent, School District of Phillips, appearing on behalf of the District.

ARBITRATION AWARD

The Association and Employer named above are parties to a 1991-93 collective bargaining agreement which provides for binding arbitration of certain disputes. The Association requested, and the District concurred, that the Wisconsin Employment Relations Commission appoint an arbitrator to hear a dispute involving pay for summer school. The undersigned was appointed and held a hearing on October 12, 1993, in Phillips, Wisconsin, where the parties presented their evidence and arguments. The parties filed briefs by November 15, 1993.

CONTRACT LANGUAGE:

ARTICLE I

RECOGNITION

The Board recognizes the Association as the exclusive negotiating body for all certified, contracted full-time and part-time teachers in the bargaining unit including guidance counselors and librarians, and no individual teacher shall negotiate terms of his teaching contract independent of the Association. However, this shall not prevent the Board from employing teachers for extended duty beyond the actual teaching contract and shall not prevent the Board from including language in the individual contracts for replacement teachers, for regular teachers temporarily unable to teach, providing that the employment is for a limited time only.

. . .

ARTICLE VI

GRIEVANCE PROCEDURE

. . .

DEFINITION: For the purpose of this Agreement, a grievance is defined as difference of opinion regarding

the interpretation or application of a specific provision of this Agreement.

PROCEDURE REGARDING AREAS OF THIS AGREEMENT:

STEP 1 - Within 15 working days after the grievant knew, or could reasonably be expected to have known of the occurrence giving rise to the grievance, the grievant shall submit the grievance directly, in person, or, if desired, through the Association's designated representative, to the principal or the administrator with whom the grievance originated.

. . .

It is understood that the function of the arbitrator shall be to interpret and apply specific terms of this Agreement. This arbitrator shall have no power to advise on salary adjustments, except the improper application thereof nor to add to, subtract from, modify or amend any terms of this Agreement.

. . .

ARTICLE XII

PAID LEAVES

A. Illness and Physical Disability Leave

. . .

2. If a teacher is teaching summer or evening school for the District, sick leave shall be assigned as follows:

FOR FULL-DAY TEACHING ASSIGNMENTS

4 weeks taught - 1 sick day
5-8 weeks taught - 2 sick days

FOR HALF-DAY TEACHING ASSIGNMENTS

4 weeks taught - 1/2 sick day
5-8 weeks taught - 1 sick day

. . .

ARTICLE XV

PROFESSIONAL QUALIFICATIONS AND ASSIGNMENTS

. . .

E. Any assignments in addition to the normal teaching schedule, driver education, extra duties as listed on the extra-duty pay schedule enumerated in Appendix C and summer school courses, shall not be obligatory but shall be with the consent of the teacher. Preference in making such assignment will be made as much as possible on the basis of suitability for the assignment as determined by the administration.

. . .

ARTICLE XVI

SPECIAL ASSIGNMENTS

A. Drivers Education and Summer School - Assignments for the driver education and summer school programs will be made by the administration on the basis of seniority gained through the years of local experience in the assignment, and by suitability for the assignment assuming equal professional qualifications among applicants. The superintendent shall determine the suitability and qualifications. Teachers shall be compensated pro rata for additional class assignments and preparation time.

. . . .

ARTICLE XXVI

GENERAL PROVISIONS

A. Any individual contract between the Board and an individual teacher heretofore or hereafter executed shall be subject to and consistent with the terms and conditions of this Agreement. If an individual contract contains any language inconsistent with this Agreement, this Agreement shall be controlling.

BACKGROUND:

This grievance is over the rate of pay for teachers who taught summer school during the summer of 1993. The District has not run summer school in the past, except for swimming instruction in the summers of 1991 and 1992.

During the 1992-93 school year, Elementary Principal Rodger Nyberg discussed setting up summer school with teachers for the summer of 1993. On March 17, 1993, 1/ Nyberg sent the following memo to the teaching staff:

This year the School District of Phillips will be offering summer school to K-4 students in our district. Classes will be held at Phillips Elementary School and also at Kennan Elementary if we get enough students at that site.

Summer school will be held for three weeks, Monday through Friday, July 12-30. Classes will be held mornings only from 8:30 to 11:45 a.m. Three classes will be offered each day with teacher prep from 8:00 to 8:30 a.m.

Summer School '93 needs certified teachers to provide K-4 remediation in math and reading/language arts. Enrichment class offerings are also needed. Examples of enrichment offerings include: (omitted)

Summer School teachers for 1993 will be compensated at

1/ All dates refer to the year 1993 unless otherwise stated.

the rate of \$14.00 per hour.

We want Summer School '93 to be a positive experience for students and teachers. Get involved!

If you are interested in teaching Summer School '93 please complete the attached sheet and return it to me at the Phillips Elementary School by March 26. To teach summer school you must be DPI certified at the level of the class that is being offered.

Sixteen teachers expressed their interest and returned the forms to Nyberg by March 26th. One additional teacher was asked if she was interested in teaching for one week. Each teacher presented certain courses to be taught during the summer, and this was circulated among students so that the District could then determine classes.

On March 18th, the District and the Association signed a document for the ground rules for their negotiations, which would have them exchange initial proposals on April 22nd and hold subsequent meetings on May 13th and June 3rd.

The District's initial proposals to the Association are contained in a document dated April 16th, and include a proposal to change Article XVI from the pro rata language to a rate of \$12 per hour for additional class assignments and preparation time. Business Manager James Lewis explained that the District knew there was a possibility of a grievance, and put in that proposal for clarifying purposes. Contract negotiations were suspended on April 22nd and no further negotiation sessions were held.

On May 7th, Lorraine Hoster, the President of the Phillips Education Association and a teacher, sent a memo to Superintendent Frank Harrington, which expressed concern with the summer school issue as this:

It has come to our attention that the Phillips School District intends to pay summer school teachers a wage of fourteen dollars per hour. According to our Master Contract, Article XVI, certified teachers are to be paid pro rata for teaching summer school. In light of this, we will be obligated to file a grievance against the school district for breach of contract should the collective bargaining agreement be violated when our teachers are paid.

The District handed out contracts to individual teachers for summer school work on May 19th. Those contracts included the hourly rate of \$14 per hour. Hoster met with Harrington on May 24th, and two days later, Harrington asked her to put the grievance in writing. Hoster did so on June 2nd, in the following memo:

Pursuant to our initial conversation (on May 24) regarding summer school, the Phillips Education Association plans to continue with this grievance against the Phillips School District for violations of both Article I and Article XVI of the Master Contract.

On May 21, 1993, the Phillips School District issued contracts to certified teachers who agreed to teach summer school. These teachers are already subject to the provisions of the collective bargaining agreement made between the District and the Phillips Education Association. Asking them to form separate and individual contracts with the District is a direct

violation of Article I of our Master Contract.

Furthermore, when our members verbally agreed to teach summer school and refused to sign the illegal mini-contract, Mr. Nyberg responded that he would not allow them to teach if they did not sign. We object to this underhanded and coercive behavior, but we value our community and its students too much to see what many of us feel is a good program lost to poor planning on the part of the District.

The contracts themselves indicate that teachers will be compensated at the wage of \$14.00 per hour. This is a direct violation of Article XVI of our Master Contract.

The remedy we seek is as follows: As is done with extra-curricular assignments, our members' teaching contracts should list summer school as a part of their employment with the school district. Payment for summer school teaching should be pro rata. We will seek retroactive payment (with interest), and all other rights and privileges accorded under our Master Contract concerning this issue.

All correspondence to the Phillips Education Association concerning this grievance should be sent to my home address. Thank you for your attention to this matter.

Harrington denied the grievance on June 3rd in a letter stating the following reasons:

A good deal of research has been done in the undertaking of establishing a summer school program. In excess of 30 schools were contacted to obtain ideas about their program development and other organizational formats. In the past week I have returned calls to many of these districts, relative to the "contract" issue. I am yet to find a district that does not issue a separate individual contract for summer school. The contract which Mr. Nyberg developed was taken almost verbatim from that of the St. Croix Falls District, which has been in use for years.

Furthermore, the language of Article I allows the Board to employ teachers individually "...for extended duty beyond the actual teaching contract..." In my contacts with other districts I found similar language and formats. Most districts allow their own teachers to have first opportunities for such summer work and several place ads in various publications to hire non-district certified instructors when an insufficient number of local staff are available.

This brings me to the second point of contention, Article XVI, Special Assignments as it relates to compensation. The key term is "Assignment." No teacher is being "assigned." It is entirely voluntary and therefore does not fall under this article.

In my review of other districts' practices I found a variety of compensation formulas including: 100% pro rata, 90% pro rata, 85% pro rata, some that were percentages of the "base," and some flat dollar amounts. Based on those pieces of information I believe that our rate of \$14.00 per hour is well within the scope of reasonableness, especially for a first year effort and some of the uncertainties which therein exist. There are districts that pay more per hour - there are districts that pay less per hour.

The decision to establish a rate of \$14.00 for summer school teaching was made in early March. This was noted in a memo to Teaching Staff, School District of Phillips, from Mr. Nyberg on March 17, 1993. Attached to this memo was staff survey sheet to determine who would like to teach summer school along with proposed course/content. This survey was signed and returned by individuals copied at the conclusion of this letter.

If the summer school pilot is successful I will recommend to the Board that it be continued, that it be extended to other than just elementary grades, and will consider an alteration of the pay structure for future years.

As I stated above, many schools hire other than "district teachers" when there are not enough such individuals who wish to participate. Due to time limitations I will not place ads in the media for other certified individuals, but instead will cancel those courses for which we do not have summer school contracts. In the event that courses need to be cancelled due to a lack of contract, a communication will need to be sent to those parents with children enrolled, in a timely fashion, so that they may adjust their summer schedule.

Mr. Nyberg sent a memo (with contract attached) dated May 19, 1993, to those staff (copied at the end of this letter) who had been working on the development of summer school classes. That memo indicated the signed contract should be returned to him "before school is out." That date is June 3, 1993, but the date was not specified. Therefore, any contract not signed and returned by June 11, 1993, will indicate that the individual does not wish to participate in the summer school program. Letters will then be sent to those parents informing them that the specified class(es) have been cancelled. I am aware that several of the staff listed below have turned in signed summer school contracts.

On June 8th, Hoster responded to Harrington with the following letter:

On June 4, 1993, I received your response in denying the Phillips Education Association's grievance regarding summer school. The Association finds your reply to be highly unsatisfactory; therefore we intend

to continue through step two of the grievance procedure as stated in Article VI of the Master Contract.

Let us first discuss your second point of contention, the key term "assignment" as stated in Article XVI. A very clear definition of what an "assignment" is can be found in Section E, Article XV of the Master Contract: (contract language omitted)

These "assignments" are always voluntary and, quite obviously, include summer school courses.

Secondly, we need to clarify that our grievance concerns the language of the separate individual contract issued by the School District of Phillips for summer school teachers. The individual contract not only violates the letter and spirit of Article XVI; it also violates Article XII, Section A, number 2, which addresses sick leave for summer school employees. The Summer School '93 Contract denies "the benefits of sick days or payment for any other days not worked," and it proposes a wage of \$14.00 per hour. These are language issues. The act of circumventing the collective bargaining agreement with the Summer School '93 Contract is a violation of Article I.

Now to the final point in our discussion of this grievance. The language of our Master Contract is plain and direct where issues of summer school are addressed. It is also quite plain in giving direction as to how this matter should be resolved: (contract language omitted)

The remedies requested by the Phillips Education Association in our initial written grievance remain; our Master Contract is the controlling agreement and should not have been violated.

Hoster and Harrington met again about the grievance on June 15th. Harrington summarized the meeting as follows:

A summation of our meeting on June 15th relative to the summer school grievance, as required by step 3 of the process, finds the following primary points of discussion:

- 1) The PEA no longer has major issue with a separate summer school contract document.
- 2) The PEA does contest the language of that contract, in particular the rate of pay, maintaining that pro rata needs to be applied versus the rate of \$14.00 per hour.
- 3) The PEA also states that additional sick leave should be applied.
- 4) The PEA wishes to continue the grievance process to step 4, taking it to the Board of Education.

I believe the above listing are the salient points of our discussion related to the PEA grievance.

As stated in prior correspondence, it is my desire to first see just how well this first year's pilot summer school project works. If it is successful I will work with the association to establish some level (percentage) of pro rata for continuation of the program.

Hoster responded to Harrington's letter above by July 1st:

On June 22, 1993, I received your summation of our June 15th meeting. A few points need to be clarified:

1) As I stated in our last correspondence, the PEA maintains that the terms and conditions of the summer school contract were established with individual teachers. This violates Article I of the Master Contract, which recognizes the Association as the sole negotiating body for all teachers in the bargaining unit. The separate document itself would be of no consequence if upheld the terms of the Master Contract, but it does not.

2) Correctly stated in your summation, the PEA contests the terms of the Summer School '93 contract. Our Master Contract, Article XVI, should be applied until this issue can be lawfully dispatched by our respective bargaining teams. In our original written grievance, Article XII is not mentioned, and is merely used as an example in my June 10th correspondence.

3) The PEA recognizes the value of a solid summer school program taught by local teachers; however, we cannot support a precedent which pays them less than what they are, by contract, entitled to receive. The PEA must therefore continue this grievance to step 4, taking it to the Board of Education.

It is hoped that this summer school project works well. Perhaps the Association could work with the District to establish a cost-effective program, but this should be done lawfully and openly.

As noted above, the grievance was then processed through Step 4 to the Board of Education. The Board met on July 15th and denied the grievance. It sent the following letter to Hoster on July 20th:

The members of the Board of Education, by unanimous vote of those attending the July 15, 1993 Special Board meeting, have moved to deny the grievances presented by the Phillips Education Association related to the 1993 summer school teaching contracts. Specifically, the denial is as follows:

1) Step 1 of the Grievance Procedure, Article VI, was not adhered to in the timeliness set forth at that level. Specifically, a memorandum for all teaching staff was distributed on March 17, 1993, which clearly

stated that the hourly rate for summer school would be \$14.00. There was no response to this until May 7, 1993, at the earliest, well beyond the 15 working day time limit.

2) The grievant's claim that Article I, Recognition, was violated by the administration in establishing separate and individual contracts is denied based on language in Article I which does not prevent the Board from employing teachers for extended duty beyond the actual teaching contract and does not prevent the Board from including language for replacement teachers, for regular teachers temporarily unable to teach, providing that the employment is for a limited time only.

3) The grievant's claim that Article XVI, Special Assignments, was violated by the administration in establishing a wage other than pro rata is denied in that no assignment was made, all such summer teaching positions were voluntary.

Summer school was held in the summer of 1993, and 17 teachers took part in it.

Although the contract's numbering system has changed during the years, the language regarding assignments to summer school and pro rata compensation have appeared unchanged in successive contracts since at least the 1973-74 school year.

The parties agreed to submit the grievance to arbitration even though the bargaining agreement has expired.

ISSUES:

The Association frames the issue as this:

Did the District violate the collective bargaining agreement by employing summer school teachers at a salary of \$14.00 per hour instead of pro rata pay as required by contract?

The District raises two issues:

First, is the salary of summer school teachers a contractual item? Secondly, if it is, is the grievance timely?

The Arbitrator will address all of those issues.

THE PARTIES' POSITIONS:

The Association:

The Association argues that the collective bargaining agreement clearly provides for pro rata pay for summer school teachers in Article XVI, Special Assignments. The Association considers any conversations between the principal and individual teachers to be irrelevant because the parties agreed in Article XXV that the bargaining agreement cannot be modified except in writing and signed by both parties. Also, the bargaining agreement provides that if individual contracts are inconsistent with the bargaining agreement, the latter controls.

The Association contends that the parties have provided for the pay for summer school teaching in Article XVI, and further defined professional qualifications and assignments in Article XV which includes summer school courses within the definition of assignments. The parties further recognized that teaching summer school would mean modifying other provisions of the bargaining agreement, such as Article XII, Paid Leave, Section A. Therefore, the bargaining agreement as read in its entirety shows that summer school work is bargaining unit work and is covered for purposes of pay as well as paid leave. The Association maintains that the clear and concise contract language must prevail. The language regarding summer school has been in existence since at least the 1973-74 bargaining agreement, and neither party bargained for a change.

The Association discounts the District's argument that since teaching summer school was a voluntary assignment, it is excluded from the bargaining agreement. That would mean that any employee who volunteered for any teaching assignment would not be covered by the bargaining agreement. The Association further states that there is no past practice inconsistent with the language of the bargaining agreement. The District used teachers in a swimming program one year to get reimbursement from the state, but when everyone became aware that certified teachers were used in order to get such reimbursement, the District agreed to pay swimming teachers the same rate as other summer school teachers.

The grievance was timely processed, according to the Association. The March 17th memo did not trigger the time lines of the grievance procedure, since it was a proposal for summer school. The District offered a different hourly rate during contract negotiations, but those negotiations were suspended for the summer. The District handed out written contracts on May 19th, and the problem was discussed four days later and the grievance was put in writing by June 2nd, nine days after May 19th, not counting Memorial Day. The District attempted to circumvent the Association by dealing individually with employees which made it difficult for the Association to attain knowledge of this violation.

The District:

The District contends that the issue of contracting certified staff to hold a summer school program is beyond the scope of the collective bargaining agreement. The District is not required or mandated to hold such a summer program, and the District did not require, mandate or compel staff to participate in the program.

The District notes that in Article I, Recognition, the Board is not prevented from employing teachers for extended duty "beyond the actual teaching contract." The summer school program was not part of any teacher's usual contract and was for duty beyond their actual teaching contract. Recognition of summer school positions does not apply.

The District further points out that Article XVI calls for the "assignments" of driver education and summer school programs, and no teachers were assigned to any of the summer school positions. The staff participation was voluntary, and no teacher was required to take a summer school position. The District argues that since acceptance of a summer school position was above and beyond the actual teaching contract, the contention of being compensated pro rata is beyond the scope of the master bargaining agreement. The District agrees that the bargaining agreement would be controlling if teachers were required to participate in summer school.

Moreover, the District asserts that the grievance is not timely. Nyberg's memo to all staff regarding summer school, with the rate of \$14.00 per hour, was distributed on March 17th, but the earliest contact from the

Association was not before May 7th. The March 17th memo clearly stated the rate of pay to be received for volunteering to teach in the summer school program. Step 1 of grievance procedure provides for a grievance to be submitted within 15 working days from the time the grievant knew or could reasonably be expected to have known of the occurrence giving rise to the grievance.

The District further notes that for the past two summers, it hired DPI certified instructors to teach a swimming program, and those instructors were hired at an hourly rate of pay entirely apart from the master contract. One of those instructors was not a teacher within the District. There was no grievance relative to that summer swimming program, and the master bargaining agreement has no bearing on such individual contracts.

DISCUSSION:

The grievance is timely. Under Article VI, Step 1 of the grievance procedure, a grievant must submit a grievance within 15 working days after the grievant knew or could reasonably be expected to have known of the occurrence giving rise to the grievance. The "occurrence" giving rise to this grievance is the payment of \$14.00 per hour for teaching summer school. The March 17th memo from Nyberg served as notice of the District's intentions, but it was not the occurrence for purposes of applying time limits. When a party announces its intention to do one thing but does not do that thing until a later date, arbitrators often hold that the "occurrence" is at the later date. The District could have changed its position anytime up until the teachers were actually paid for summer school. For that reason, the May 19th date is also not the triggering date for filing a grievance, since the payments were not yet made at the \$14.00 per hour rate. The date that actually starts the time running is the wage payment of \$14.00 per hour. The grievance was filed before the payments for summer school teaching were made, and it is timely filed.

The District has raised a substantive arbitrability question also, and asks whether the contract even applies to summer school wages. It believes that the issue of contracting teachers for summer school is beyond the scope of the bargaining agreement. While it is true that the District is not required to hold a summer program, once it did, it falls within the language of Article XVI. The parties have recognized since 1973 that they needed some provision to cover such a contingency. The fact that the District did not require teachers to participate in the summer school program does not relieve the District of its obligations under Article XVI. The parties have long ago agreed for the provision of summer school compensation in their bargaining, as well as sick leave benefits under Article XII.

Much of this dispute centers on the term "assignment," and the parties differ on its meaning within both Article XV and Article XVI. The term "assignment" is used in several places in Article XV, such as Section A, which says: "All professional personnel shall be employed and assigned ..." (emphasis added). The term is used throughout this article in various ways. Section E, partly at issue here, states:

Any assignments in addition to the normal teaching schedule, driver education, extra duties as listed on the extra-duty pay schedule enumerated in Appendix C and summer school courses, shall not be obligatory but shall be with the consent of the teacher. Preference in making such assignment will be made as much as possible on the basis of suitability for the assignment as determined by the administration.

The parties have two different interpretations of the above language. The District believes that it may assign, without consent, a teacher to: (1) the normal teaching schedule; (2) driver education; (3) extra-duties listed on Appendix C; (4) summer school courses. Beyond that, the District must obtain the consent of the teacher.

On the other hand, the Association believes that summer school assignments should always be voluntary, as noted in Hoster's June 8th letter and in the Association's brief. The Association's reading of Article XV, Section E, would mean that all assignments -- including the normal teaching schedule, driver education, extra duties, and summer school -- could only be made with the consent of the teacher. If this interpretation were correct, there would be no need for the first sentence of Section E at all, inasmuch as all work is voluntary to the extent that one accepts work of one's own free will -- or one quits.

The phrase "in addition to" in Section E is being read differently by the parties. The District reads the phrase "any assignments in addition to..." as -- any assignments other than those listed, or assignments beyond those listed. The Association reads that same sentence as -- any assignments including, or as well as those listed. The District's interpretation is preferred. The District has the right to assign -- without a teacher's consent -- in the areas listed, and then must obtain the teacher's consent in addition to those areas. That means that the District has the right to assign teachers to summer school without first obtaining their consent.

The fact that the District obtained teachers' consent to teach summer school does not relieve the District of contractual obligations under Article XVI. The language of Section A states:

Drivers Education and Summer School - Assignments for the driver education and summer school programs will be made by the administration on the basis of seniority gained through the years of local experience in the assignment, and by suitability for the assignment assuming equal professional qualifications among applicants. The superintendent shall determine the suitability and qualifications. Teachers shall be compensated pro rata for additional class assignments and preparation time.

The first two sentences give direction as to how assignments are to be made, and it is a version of a modified seniority clause. If applicants for driver education and summer school programs were to have equal professional qualifications, the assignments for those positions would be made by seniority and suitability, with the superintendent determining suitability and qualifications. The last sentence dictates the compensation. The parties agree that summer school constitutes additional class assignments and preparation time. The contract clearly calls for pro rata pay for such work.

There is nothing that indicates that the District should not follow the pro rata compensation of Article XVI. Whether the District compels teachers to teach summer school or seeks their acquiescence to provide such a program, the compensation for additional class assignments is the pro rata pay according to Article XVI. The parties have had clear language in their contract for some period of time, and although they have not invoked it in the past, 2/ the

2/ The prior experience with swimming programs is irrelevant to this dispute. There is no past practice with respect to summer school programs based on the swimming program, given the short period of time and the lack of acquiescence, tacit or overt, in the method of paying

language of Article XVI controls this case.

AWARD

The grievance is sustained. The District violated Article XVI of the collective bargaining agreement by paying teachers an hourly rate for teaching summer school instead of the pro rata rate as provided by Article XVI.

The District is ordered to reimburse teachers who taught summer school during the summer of 1993 the difference between the hourly rate paid to them and the pro rata rate of pay, without interest, immediately upon the receipt of this Award.

The Arbitrator will retain jurisdiction over this matter until March 31, 1994, solely for the purpose of resolving any disputes over the scope and application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 4th day of February, 1994.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

swimming instructors.