

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 HURLEY SCHOOL DISTRICT : Case 28
 : No. 50174
 and : MA-8172
 :
 HURLEY EDUCATION ASSOCIATION :
 :

Appearances:

Mr. Gene Degner, Director, WEAC UniServ Council No. 18, on behalf of Hurley Education Association.
Mr. Roger A. Myron, District Administrator, on behalf of Hurley School District.

ARBITRATION AWARD

According to the terms of the 1991-93 collective bargaining agreement between Hurley School District (hereafter District) and Hurley Education Association (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving whether the District should pay Teacher Mary Tiziani to do testing work during her preparation period. The Commission appointed Sharon A. Gallagher as arbitrator and hearing was held on January 31, 1994. No stenographic transcript of the proceedings was made. The parties filed their post-hearing briefs by February 17, 1994, and because they had waived the right to file reply briefs, the record was thereupon closed.

Issues:

The parties stipulated that the following issues shall be determined herein:

Does the assigning of the Grievant to work and do testing during her preparation period constitute a violation of the collective bargaining agreement?

If so, what is the appropriate remedy?

Relevant Contract Provisions:

ARTICLE 5 - MANAGEMENT RIGHTS

It is recognized that the Employer retains rights of possession, care, control, and management that it has by law, and that the

Employer will continue to retain the rights and responsibilities to operate and manage the school system, its programs, facilities, properties, and employee activities. It is recognized that these express rights include, but are not limited to, the following operational and managerial rights:

. . .

9. To direct and arrange the teaching staff, including the right to hire, promote, transfer, schedule and assign, suspend, discharge, or discipline teachers.
10. To determine the size of the teaching staff, policies affecting the selection of teachers and standards for judging teacher performance.
11. To create, combine, modify, or eliminate teaching positions.
12. To determine methods of instruction, selection of teaching aide and textbooks and materials, class schedules, and hours of instruction.
13. To contract through CESA for goods and services.

The Employer retains the right to exercise these functions during the term of this Agreement, except when such functions and rights are inconsistent or restricted by the terms of this Agreement. It is essential that such functions and rights conform with state and federal statutes, laws, and administrative guidelines.

The Employer recognizes its obligation to bargain the impact of any changes in hours, wages, and/or conditions of employment during the terms of this Agreement.

ARTICLE 10 - CONDITIONS OF EMPLOYMENT

. . .

- D. 1. All full-time teachers of grades 7-12 shall be assigned to five (5) periods of classroom teaching or supervisory duties such as study halls, cafeteria, etc., and one (1) supervisory period and one (1)

preparation period. The employer may assign a sixth (6th) class in lieu of the supervisory period provided it does not create an additional preparation and the teacher is compensated at an additional 10% of the BA Base. The voluntary assignment shall start with the most senior certified teacher and the involuntary assignment shall be given to the least senior certified teacher.

. . .

3. A preparation period is that block of time assigned to a teacher during the school day whereby he will be outside the regular teaching or classroom situation. The time shall be used for correcting papers, preparing plans, doing research, meeting with parents and students, consulting with other teachers, supervisors and administrators, and doing a number of other things which are essential to good instruction.

. . .

Background:

The District has had a Special Education Director for the past two years, Ms. Linda Grote. Prior to this, the District contracted with CESA #12 for supervision of its Special Education Department/Teachers.

Chapter 115 of the Wisconsin Statutes and the Federal law covering Individuals with Disabilities Education Act parallel each other and establish special education procedures for referral, testing, placement, evaluation and re-evaluation of learning disabled students under the guidelines therein. Failure to follow the statutory procedures would result in the District's being in a state of non-compliance which would then result in the loss of all State and Federal funding for the District's Special Education program. Hurley School District has had a special education program for 20 years and it has followed all State and Federal mandates so that the District's costs for the program have been minimal prior to its hiring Ms. Grote as Director of the

Department.

The District has employed two teachers in its Special Education Department who are responsible for LD Special Education students in grades 7 through 12. These teachers, Grievant Mary Tiziani and Learning Disabilities Teacher Kim Kurta, are responsible to teach and evaluate LD students in grades 7 through 12 and to give them initial and re-evaluation tests. Grievant Mary Tiziani has worked as a Learning Disabilities Teacher at the Hurley School District for the past 16 years and she has performed testing of special education students as a regular part of her job, prior to filing the instant grievance.

For the past two years, the District has had the following job description for Tiziani and other Learning Disabilities Teachers:

Qualifications: Wisconsin License in Learning Disabilities

Reports to: Director of Special Education and Principal

Job Goal: To provide the services of diagnosis programming for severe and unique learning problems due to a disorder existing within the child which significantly interferes with the ability to acquire, organize, or express information. These problems are manifested in school functioning in an impaired ability to read, write, spell or arithmetically reason or calculate.

Performance Responsibilities:

1. Problem:

- A. Conduct an ongoing needs assessment to identify students needing special education. Aid teachers in making referrals.
- B. Consult with support personnel and interpreting their records.
- C. Observe student in the regular classroom, and compile information regarding student's present and past performances.

- D. Participate in a multidisciplinary staffing with appropriate members included.
- E. Interpret test results, observations, and compiled information to M-Team. Take an active part in the decision making (assure that appropriate program is designed).
- F. Administer individual diagnostic tests to determine which areas of learning need remediating.
- G. Develop behavioral objectives based on the assessment of student's learning needs.
- H. Work with parents, teachers and others concerned, to devise individualized instructional programs to be implemented in the home, classroom, or combination.
- I. Select curriculum materials and develop teaching strategies to meet the students needs.
- J. Impose changes in attitude and behavior on student to help develop a positive self-concept and social acceptance.
- K. Remediate student's learning needs, or teach the student compensating skills.
- L. Plan and implement a career education program at the secondary level.
- M. Conduct an ongoing student evaluation. Keep parents, classroom teachers, and other team members informed of the student's ongoing progress.
- N. Call a re-staffing of M-Team when it is evident that the program and/or placement is no longer appropriate.
- O. Conduct a follow-up after student is released from the SLD program.

2. Self-Improvement:

- A. Complete six (6) semester credits toward full certification in learning disabilities.
- B. Improve ability to diagnose LD

- student.
- C. Improve ability to develop appropriate programs for LD students.

Evaluation:

Performance of this job will be evaluated annually.

For the 1993-94 school year, Tiziani was contracted to teach six classes, for which the District paid her extra compensation (10% of the BA Base) pursuant to Article 10 D(1). For the 1993-94 school year, Tiziani's preparation period was to be from 2:15 to 3:05 p.m. with her duty-free lunch from 11:56 a.m. to 12:26 p.m.

An integral part of Tiziani's duties as an LD Teacher is to give initial tests to students, to prepare a report on the tests and present the results at an M Team. In addition to these duties, LD Teachers are expected to re-evaluate LD students by re-testing them every three years or upon their transfer from another school into the District. The tests, which are designed to measure spelling, reading, written language and handwriting for LD students and potential LD students, must be timed and supervised. No requests for extra pay or substitutes have been made to the District in the past because LD teachers needed to test LD students during the school day.

Facts:

In the early part of the 1993-94 school year, LD Teacher Kim Kurta went on maternity leave. At the same time, several LD students moved into the District, requiring testing and re-evaluation. As a result, Grievant Tiziani had to test one new LD student, and three students needed re-evaluation tests. At approximately the same time, the District refused Tiziani's requests to hire a substitute for one-half day so she could give the required tests. It also rejected her request to recall Kurta from pregnancy leave to help out with the testing, and it refused Tiziani's request for pay at \$15.00 per hour under Article 17 for the time spent doing the testing. 1/ Tiziani was then informed by Special Education Director Grote that she would have to test these students during her preparation period. It is undisputed that no other District Special Education teacher has made requests like Tiziani's in the past. It is also clear that the testing work involved here is considered an integral part of LD Teacher work and is included in the District's LD teacher job description.

1/ Grievant Tiziani requested four hours of Article 17 pay (\$60.00) to remedy the grievance.

The evidence also showed that the language of Article 10 D(3) has been the same as that quoted above for at least the past seven years. Although the District has never provided substitutes or paid LD Teachers the \$15.00 rate for performing LD testing work, it has provided substitutes or given compensation time for some other duties. For example, in 1989 the parties agreed that teachers who took after-school detention would receive comp time and in 1992 the parties agreed that teachers who took Saturday detention would also get comp time. The District has also provided comp time, or substitutes or it has paid the \$15.00 hourly rate to District teachers to forego their preparation or supervisory periods to substitute teach when other teachers have had to attend music or coaching programs, "Twenty standards" meetings and for Tech. Education meetings. The parties have never discussed the issue of hiring substitutes or paying Article 17 pay to LD teachers. Union President Rodghiero stated that he has not requested extra pay for the loss of an occasional prep period to test students or perform other duties so long as the loss is non-recurring and that other teachers have individually taken the same position in the past.

Positions of the Parties:

Union:

The Union asserted that District teachers' preparation periods as guaranteed by the labor agreement, are "rather sacred," such that a teacher assigned "other activities" during prep must be paid \$15.00 per hour for the loss of their prep time. The Union observed that the District's demand that the Grievant use her prep period to test LD students had never been made before, that the Grievant never volunteered to relinquish her prep period to do this State-mandated work, which the Union argued was not "within the scope of the Grievant's job duties." In addition, the Union noted that nothing in Article 10 D(3) requires teachers to perform other duties as assigned by the District. The Union also contended that the evidence at hearing showed that in the past, whenever teachers have given up their prep periods the District has paid the \$15.00 substitution rate.

The Union noted that the District waived its procedural objections in this case. The Union made clear that it was not objecting to the District's refusal to hire a one-half day substitute for the Grievant, as she had initially requested. However, the Union asserted, the clear language of Article 10 D(3), supported by evidence of past practice, showed that the District was obliged to pay the Grievant \$15.00 per hour for the loss of her prep period so long as the Grievant had not agreed to give up her prep periods. Clearly, the grievance filed herein demonstrates that the Grievant never volunteered to give up

her prep periods.

The Union contended that the LD Teacher job description must be read in conjunction with the labor agreement. That description states that LD Teachers are expected to do testing remediation, etc. and that the time frame to complete the duties should be five classes and one supervisory period or six classes and one supervisory period. The Union urged that the evidence of instances where the District has gotten substitutes in the past were for state-mandated programs, just like the testing required in the instant case. Therefore, the Union sought that the Grievant be paid for her lost prep periods.

District:

The District asserted that the requirement that LD Teachers perform diagnostic tests is mandated by State and Federal law and it implied that if such tests were not performed as a regular part of the LD Teacher's duties that the District would be in non-compliance with the law. The District further observed that the Union has never requested extra compensation in bargaining or grieved the denial of a request for extra compensation for performing such diagnostic tests. The District implied that because testing has been specifically listed among the LD Teacher job duties and because those testing duties have been performed as an integral part of the LD Teacher's duties for the past 20 years, a grievance requesting extra pay is unsupported and unprecedented.

The District noted that the language in the contract regarding prep periods has not been amended in at least the past seven years. Therefore, the District urged that the grievance should be denied and dismissed in its entirety.

Discussion:

Under Article 5 of the labor agreement, the District has retained the right "to schedule and assign . . . teachers" and "to direct and arrange the teaching staff." I note that at the start of the 1993-94 school year, LD teacher Kim Kurta was on maternity leave so that the District was "short" one LD teacher. In addition, the District contracted with the Grievant and paid her an additional 10% of the BA Base to teach an additional (sixth) class, apparently to cover the District's LD program responsibilities for 1993-94. It also appears that in the Fall of 1993, at least one potential LD student moved into the District and that several District LD students also needed re-evaluation testing. 2/

2/ No evidence was proffered to show whether more LD testing was necessary in 1993-94 than had been necessary in prior years.

The evidence also demonstrated that before 1993, the District had never received a request for a substitute, a request for comp time or for extra pay to perform necessary evaluative and re-evaluative LD tests. Clearly the conclusion that must be drawn from the record facts herein is that before 1993, these testing duties were performed by LD teachers either during their prep period, their supervisory period (if they had one) or outside the regular school day. I note in this regard, that the LD teacher job description, signed by the Grievant, specifically includes the duty to "administer individual diagnostic tests . . . ," to "conduct an ongoing student evaluation . . ." and to call and attend M-Team meetings regarding LD student status and progress. As the Union noted in its brief, the duties listed in the job description were intended to be completed during the normal teaching day -- five classes, one prep and one supervisory period or six classes and one prep period.

It is in this context that the language of Article 10 D(1) and (3) must be considered along with the Grievant's request for Article 17 "extra activities" pay of \$15.00 per hour for "staff substitution -- per class." Although Article 10 D(3) defines a prep period, it does not refer to testing. Rather, it defines such a period as a block of time "outside the regular teaching or classroom situation," to be used for ". . . correcting papers . . . meeting with parents and students . . . and doing a number of other things which are essential to good instruction." (Emphasis supplied). In my view, the activity of supervising and monitoring LD evaluation exams is similar to correcting papers and would generally fall within the broad contract definition of a preparation period. In addition, the last phrase of the definition would certainly include duties or tasks necessary to complete the duties listed in job descriptions as well as any other (unnamed) tasks which are required to deliver good instruction. Thus, Article 10 D(3) is ambiguously broad and it does not address but could conceivably encompass the evaluative testing involved herein.

Given this ambiguity, the evidence of past practice proffered by the parties becomes relevant and must be analyzed. In this regard, I note that the evidence submitted was mixed. Initially, I find that the evidence regarding the District's giving teachers who supervise after-school and Saturday detentions has no bearing on the issues in this case. On this point, I note that Articles 10 D(6) and C(1) and (2) and Article 17, Section (1) address the District's and teachers' responsibilities regarding assignments outside the regular school day. In addition, the evidence showed that the parties negotiated and reached agreement regarding detention assignments in 1989 and 1992. The evidence relating to other instances when the District has obtained

substitutes, granted comp time or granted teachers the \$15.00 substitution rate involved teachers being assigned to sub for other teachers who originally had a classroom teaching responsibility they could not perform themselves, due to other duties such as coaching or music, Twenty Standards or Tech Ed. meetings. None of the examples given involved teachers getting extra pay, comp time or a substitute for doing tasks included in their own job descriptions.

Thus, in the circumstances of this case, based on the relevant evidence and argument and especially in light of the fact that in 1993-94 Tiziani received additional pay for teaching a sixth class and because she requested additional extra pay for completing the regular duties of her own teaching position rather than for substituting for another teacher, the grievance must be denied.

AWARD

The assignment of the Grievant to work and do testing during her preparation period does not constitute a violation of the collective bargaining agreement.

The grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 4th day of April, 1994.

By Sharon A. Gallagher /s/
Sharon A. Gallagher,

Arbitrator