BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between ELCHO TEACHERS ASSOCIATION and SCHOOL DISTRICT OF ELCHO	Case 23 No. 50207 MA-8184

Appearances:

Ruder, Ware & Michler, S.C., Post Office Box 8050, Wausau, WI 54402-8050 by **Mr. Dean R. Dietrich**, Attorney at Law appearing on behalf of the School District of Elcho.

Wisconsin Education Association Council, Post Office Box 8003, Madison, WI 53708 by **Ms. Chris Galinat**, Attorney at Law, appearing on behalf of the Elcho Teachers Association.

ARBITRATION AWARD

Pursuant to the grievance procedure contained in their collective bargaining agreement, the Elcho Teachers Association (hereinafter referred to as the Association) and the School District of Elcho (hereinafter referred to as the District) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute concerning changes in the teaching assignments for certain teachers during the 1993-94 school year. The undersigned was designated and a hearing was held on April 8, 1994 in Elcho, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs and reply briefs which were exchanged on June 28, 1994, whereupon the record was closed. Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

I. ISSUE

The parties were unable to agree on a framing of the issue, and stipulated that the arbitrator should frame the issue in his Award. The Association believes that the issue is:

> "Did the District violate the Collective Bargaining Agreement when it reassigned the grievants to new classes after May 15 and, if so, what is the appropriate

remedy?"

The District asserts that the issue is:

> "Did the School District violate Article IV, Paragraph B, of the 1991-94 Collective Bargaining Agreement existing between the parties by changing the teaching assignments of several teachers for the 1993-94 school year? If so, what is the appropriate remedy?"

There is no substantive difference between the proposed issues. Inasmuch as the District raises other portions of the contract for consideration in its written argument, the arbitrator believes that the Association's less restrictive framing of the issue most accurately reflects the dispute.

II. RELEVANT CONTRACT PROVISIONS

***

ARTICLE IV

INDIVIDUAL TEACHER'S CONTRACT

A. The individual teacher's contract as negotiated for the term of this agreement shall be as set forth in Appendix D. Contracts shall be issued by March 15 for the following year and must be returned by the teachers by April 15.

B. In any case, specific grade, subject, and extra-curricular duties for the following year shall be assigned in writing by May 15. A separate contract for extracurricular duties, binding on both parties, must accompany those assignments voluntarily assumed by a teacher. The teacher must sign and return this contract within five (5) working days after receiving it. If negotiations have not been completed by contract issuance time, the amount of salary inserted on the individual contact shall include earned lane and step increments on the prior year's salary schedule. The Association agrees to include the earned increment as part of the total package costs of the settlement.

***

ARTICLE VIII

MANAGEMENT RIGHTS

A. Management retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions during the term of the collective bargaining agreement except to the extent such functions and rights are restricted by the terms of this agreement. These rights include, but are not limited by enumeration to, the following rights:

1. To direct all operations of the school system.
2. To establish and require observance of reasonable work rules.
3. To hire, promote, transfer, schedule and assign employees in positions with the school system.
4. To suspend, discharge and take other disciplinary action towards employees.
5. To maintain efficiency of school system operations.
6. To take whatever action is necessary to comply with State and Federal law.
7. To introduce new or improved methods or facilities.
8. To select employees, establish quality standards and evaluate employee performance.
9. To determine the methods, means and personnel by which school system operations are to be conducted.
10. To take whatever action is necessary to carry out the function of the school system in situations of emergency.
11. To determine the educational policies of the school district.
12. To determine non-teaching activities.
13. To determine the means and methods of instruction, the selection of textbooks and other teaching materials and the use of teaching aids, class schedules and hours of instruction.

B. It is understood that the Association retains the right to negotiate during the contract any proposed changes that may occur within the scope of wages, hours or conditions of employment.

***

ARTICLE XX

PROFESSIONAL COMPENSATION

***

I. Teachers involved in special curriculum writing requested by the Board, and approved by the District Administrator, shall be paid at an hourly rate of $9.00.

***

ARTICLE XXI

GENERAL PROVISIONS

A. Any individual contract, heretofore or hereafter executed between the Board and an individual teacher, 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.

B. This agreement shall supersede any rules, regulations or practices of the board which shall be contrary to or inconsistent with its terms.

***

E. It is hereby agreed that should a teacher resign his/her position with less than 60 days' calendar days notice of any school year, that teacher shall pay $400.00 to the School District of Elcho as full payment of liquidated damages at the Board's request. If the contract is broken for medical reasons, the penalty shall not apply. ("Medical reasons" shall be defined in the following manner: A licensed physician shall certify that the teacher is physically incapable of performing his/her contractual duties.)

***

III. Background

The District provides general educational services to the people in the area of Elcho, in north central Wisconsin. The Association is the exclusive bargaining representative for the District's

certified teachers. The three grievants, Jean Walker, Carol Murphy and Mary Curran are teachers in the bargaining unit. During the 1992-93 school year, Walker was assigned to teach fourth grade, Murphy taught a third/fourth grade split, and Curran taught first grade.

In March of 1993, a motion was made at a Board meeting instructing the District Administrator to prepare a budget assuming that the State of Wisconsin would impose cost controls limiting levy increases to 3.2%. The motion directed the Administration to construct staffing patterns within a 3.2% parameter, leaving intact operational costs, student supplies and physical plant funding. Among the specific actions dictated by the motion were certain staffing changes, including not filling a position left vacant by the death of teacher Dee Radtke. The motion directed the Administrator to prepare projections of staffing patterns and budget reductions for the April meeting. The motion was adopted.

In April, the Spring elections resulted in three new members on the five person Board. At the May 13th meeting, the Board approved the staffing patterns proposed for the elementary school. On May 14th, each of the three grievants received notice of their teaching assignments for the 1993-94 school year. In each case, the notice said "same as last year". The District also assigned teacher Karla Miller to teach fifth/sixth grade, the assignment previously held by Radtke.

In June, Karla Miller resigned from the District. At its June 29th meeting, the Board directed the administration to advertise for a replacement. However, on July 26th, the School Board decided to reverse course and fill the position internally. One reason for this change was that the Board wanted a stronger level of discipline in the fifth/sixth grade, and felt that Ms. Walker, as an experienced teacher, would be ideal. Reassigning Walker would also allow the Board to conserve funds, a concern in light of State revenue caps. At the same time, the Board was aware that a second grade teacher, Mrs. Powell, had lost her husband over the summer and was having a difficult adjustment. Mrs. Powell had expressed a preference for teaching first grade, and working with Joyce Fasbender rather than Curran. Thus, Walker was assigned to team teach fifth/sixth grade, Curran was reassigned to teach fourth grade rather than first, and Joyce Fasbender was reassigned from second grade to first grade.

Walker was advised of her new assignment in early August. She contacted her principal, Charles Kellstrom, to ask when she should come in to make physical changes in her classroom and pick up materials for the sixth grade curriculum. Kellstrom told her not to come in until the Board had met again, since many parents were objecting to the very large second grade created by the assignment changes, and he believed it was likely that the Board would reconsider its decision.

At the time the July reassignments were made, the Board was also working on its budget for the coming year. The administration had assured the Board members that the budget was in compliance with State revenue caps and provided an adequate operating reserve and a $149,000 surplus. On August 9th, the budget was approved at the District's annual meeting. The next day, the District Administrator advised the Board that there was an error in calculating the impact of the

revenue caps, and that the District was in fact nearly $39,400 over the maximum levy. In a memo sent on August 11, after discussing the reasons for the error, he summarized a discussion he had had with Sue Freeze, a School Finance Consultant with the Department of Public Instruction:

> ***
>
> I informed Ms. Freeze that our Fund 10 Budget had an increase of $58,032 or 1.86% and there is no place to further reduce the budget. She inquired about our Fund 10 balance and I informed her as of July 31, 1993, we had a balance of $541,559. She said the D.P.I. would allow a one time over run of $39,385 and the district could use Fund 10 monies. This action would allow us to keep $97,396 in minimum aids.
>
> However, this means that the district is into deficit spending. Therefore, the district should NOT do the following:
>
> 1. Place $50,000 in a building fund
> 2. Hire a second grade teacher
> 3. Hire a second grade aide
>
> If you spend down the operating capital it will fiscally place the district in a very tenuous position.
>
> ***

On August 12th, the Board held a special meeting. The District Administrator read his memo to the Board. In addition to not making the expenditures identified in his memo, he suggested seeking a salary freeze or cut from union staff members, staff reductions or a 50% contribution by union staff members to the cost of insurance. The Board took no action on his proposals.

The Board next met on August 23, the first teacher workday of the 1993-94 school year. At that meeting the Board learned that the enrollment figures for the second grade were incorrect, and that there were more students in second grade than had been thought. The Board decided to provide smaller class size for the second grade by reassigning Murphy from a third/fourth grade split to a second/third grade split. The Board also imposed a purchasing freeze until it had an opportunity to deal with the budget shortfall, and eliminated a previously authorized second grade aide position.

On August 24th, the six teachers were all given letters formally advising them of their new assignments. Classes for the 1993-94 school year started on August 25th. The instant grievance was thereafter filed, alleging that the District had violated the contract by changing the teachers'

assignments after the May 15th deadline specified in Article IV(B) of the contract. The grievance demanded that the Board grant three months of pay for each affected teacher, cease and desist from violating the contract, and return the teachers to their 1993-94 assignments during the 1994-95 school year. Three of the affected teachers decided not to pursue the grievance, leaving Murphy, Curran and Walker as the Grievants in this case.

At some point in October of 1993, the Board discovered that the administration had failed to include approximately $45,000 in salary costs in its budget calculation, yielding a deficit of $85,000. 1/

Additional facts, as necessary, will be set forth below.

IV. POSITIONS OF THE PARTIES

A. The Position of the Association

The Association takes the position that there was a clear-cut violation of the contract. The plain meaning of Article IV(B) is that teachers must be advised of their assignments by May 15th of the preceding school year. Failure to do so denies the teachers any opportunity to write their lesson plans and make other necessary preparations over the summer months. In this case, the grievants were not advised of their assignments until the day before classes began. While the District asserts that its management right to assign teachers somehow overrides Article IV(B), such a conclusion effectively writes Article IV out of the contract. The Association points out that the usual presumption is that parties intend all of the language in their agreements to have effect, and that the District's claims conflict with this basic principle of contract construction.

The Association argues that the difficult question in this case is not whether there has been a violation, but rather what the appropriate remedy should be. The Board knowingly violated the contract, and the result of its violation was that the grievants were forced to assume preparation work outside of their normal work hours, under extraordinary time pressure. While there is no direct means of computing a monetary award, as there would be in a salary grievance, the Association urges that a monetary award is nonetheless warranted, and points to the decisions of other arbitrators in similar cases to support this proposition. Arbitrator Rothstein found in a case involving a Madison teacher whose intensity of effort was increased, although not her overall

---

1/ The Distinct's brief indicates that the additional $45,000 budget problem was discovered at the August 23rd meeting and played a part in the staffing decisions made at that meeting. This is apparently a typographical error, since the Board President testified that the $45,000 was uncovered when the budget was being typed in October (Transcript, page 54), and the minutes of the August 23rd meeting, indicate a shortfall of $39,386 (See Jt. Exhibit #19).

hours, that monetary relief in the form of time and one half was justified as compensation for her additional efforts. Likewise, Arbitrator McAlpin, in two cases involving the Racine School District, crafted creative remedies for teachers whose economic interests had been damaged in ways that were difficult to quantify. The fact that it is difficult to calculate damages should not bar a meaningful remedy for these teachers.

The Association asserts that the minimum economic remedy would be time and one half for all additional prep time worked by these teachers during the 1993-94 school year. There are enormous differences between grade levels, both in course content and teaching methods, and these teachers were required to put in substantial additional time to prepare for their new assignments. The time spent in preparation during the school year cannot be equated with time that might have been spent over the summer had the new assignments been made in a timely fashion. The arbitrator should take account of the stress and pressure faced by these teachers, who were forced to teach unfamiliar classes on one day's notice and spent the entire school year making last minute class preparations. The actions of the District created what amounts to a "speed up" for the grievants. The extra preparation time varied from teacher to teacher, with Walker spending approximately 329 more hours in preparation during the 1993-94 year than was her custom, while Murphy spent approximately 225 hours more and Curran worked 233 more hours.

As an alternative to the "overtime" remedy, and in recognition of the flagrant and deliberate nature of the violation, the Association cites precedent for the formulation of a general award designed to deter future violations. The Association suggests that the arbitrator assess three months of pay for each of the grievants, reflecting the three summer months that should have been available for preparation. While such an award might seem harsh or punitive in nature, the Association avers that the lack of a monetary remedy would encourage future violations of "language" provisions. If the arbitrator determines that three months of pay is excessive, a shorter period time might serve the same deterrent purpose.

In addition to an award of money, and a cease and desist order governing future violations, the Association argues that a make whole remedy should include a restoration of the status quo as far as teaching assignments are concerned. Thus the arbitrator should direct the School District to reassign the three grievants to the grades they taught during the 1993-94 school year.

B. The Position of the District

The District takes the position that there was no contract violation and that the grievance should be denied. The Association errs in reading Article IV(B) in isolation from the rest of the contract. The familiar rule is that the meaning of a contract provision can only be understood in the context of all other provisions of the contract. The narrow notice requirement of Article IV(B) cannot obliterate the broad rights afforded the District by its Management Rights clause. Article VIII gives the District the right, among others, to: "direct all operations of the school system", "…

schedule and assign employees in positions with the school system", "maintain efficiency of school system operations", "take whatever action is necessary to comply with state and federal law", "introduce new or improved methods or facilities", "determine the … personnel by which school system operations are to be conducted", "take whatever action is necessary to carry out the function of the school system in situations of emergency", "determine the educational policies of the school district", and "determine the means and methods of instructions".

The reassignments made by the District were clearly an exercise of the rights reserved to the District by Article VIII. The budgetary pressures on the Board were largely created by the State's decision to impose budget caps, which in combination with the error in budget formulation caused by poor administrative staff work, created a fiscal emergency. The contract authorizes the Board to take whatever action is required to comply with law and meet emergencies. In combination with the Board's right to determine its personnel, assign employees, and generally control operations, there can be no doubt that the provisions of Article VIII allowed the actions taken in preparation for the 1993-94 school year.

The District argues that the Association has misread the scope of Article IV(B). While the contract requires that teachers be given notice of their "grade, subject, and extracurricular duties" by May 15th, nothing in the language suggests that these assignments cannot be changed. The Board's rights under Article VIII can be harmonized with the notice requirement in Article IV by recognizing the right of the Board to respond flexibly to unforeseen changes by reassigning teachers. Article VIII itself gives the Association the right to demand bargaining over such changes, but that is the only remedy afforded teachers when a reassignment is required. The District notes that the contract contains standard language prohibiting an arbitrator from "adding to" the contract. Accepting the Association's theory would require the arbitrator to add far more restrictive language to Article IV than the parties negotiated.

One important principle of contract interpretation is that, faced with two plausible interpretations, an arbitrator should select the more reasonable. An arbitrator should avoid interpretations that yield harsh or absurd results. The District argues that any number of circumstances can arise between May 15th and the start of school that will require changes in a teacher's assignment. An interpretation that absolutely freezes assignments at a point more than three months before the start of school is impractical. However, accepting the District's view would allow the Board necessary flexibility while granting the Association the opportunity to demand bargaining if it objects to the proposed change.

Inasmuch as the District's interpretation recognizes the practical operational needs of the District and the legitimate interests of the teachers, while the Association's theory ignores the language of Article VIII and leads to absurd results, the arbitrator should reject the Association's arguments and deny the grievance.

C. The Association's Reply Brief

The Association rejects the District's claim that Article IV(B) has no substantive effect when read in light of Article VIII. The Management Rights clause is expressly limited, in that the rights of the Board are reserved "except to the extent such functions and rights are restricted by the terms of this agreement." Moreover, the District's argument completely ignores the principle that specific language governs over general language. Article IV(B) is quite specific in setting a deadline by which the Board must exercise its general right to make assignments. The fact that the Board finds this provision inconvenient does not allow it to rewrite the language to make this deadline the date for "initial" assignments. If the contract is read as allowing changes in assignments at any time, Article IV(B) is rendered meaningless.

The District's suggestion that the Association is somehow at fault for not asking to bargain over these reassignments is wholly misplaced. The contract does not require the Association to bargain with the District over changes in working conditions that are already prohibited by the contract.

Finally, the Association disputes the District's claim that budgetary concerns played any role in the decision to reassign Walker and Curran. As of July 26th, when these reassignments were made, the Board believed itself to be under the State budget caps. Further, the record does not demonstrate that the reassignments in August had any effect on the Board's perceived deficit. Thus the District's attempt to style this decision as a response to some type of fiscal emergency should be rejected.

D. The District's Reply Brief

The District reiterates its position that the arbitrator must harmonize the provisions of the contract to arrive at a reasonable interpretation of Articles IV and VIII. The District must as a practical matter respond to the type of contingencies that arose during the summer of 1993. On June 12th, a teacher resigned. On August 10th, the Board learned that it would exceed the State revenue caps by $39,400. On August 23rd, it learned that the deficit amount would be $85,000. The Association's interpretation simply ignores the District's need to staff the schools and keep within statutory budget guidelines. As such, it must be rejected.

The District takes issue with the Association's various proposals for some measure of monetary relief. Even if there were a violation in this case, the remedies suggested are inappropriate. Initially, the Association misstates the record by claiming that the Board intentionally violated the contract. The reassignments were made for valid budgetary reasons, and there is no evidence that the Board believed it would violate the contract by taking action.

The Association's request for compensation for preparation and stress ignores the fact that a teacher is a professional who is paid a salary that contemplates all of the time required to complete their duties. All teachers spend some time out of school in preparation, grading, improving their educations, etc. The grievants were all certified to teach the classes they were assigned to teach,

and had previous teaching experience with students at those grade levels. Given this, the Association's calculations of the extra preparation time needed for these teachers to carry out their assignments is rather clearly overstated.

Even if some type of compensation was warranted in this case, the speculative and excessive amounts put forward by the Association are not appropriate. The arbitrator should instead look to the $400 in liquidated damages already negotiated by the parties for violations of the individual teaching contracts. In calculating any monetary relief, the arbitrator should consider that the Association failed to avail itself of the opportunity to bargain, thus contributing to the amount of damages incurred by the grievants.

Finally, the District maintains that the Association's request for a change in the teaching assignments to restore the status quo is impossible for the 1993-94 school year, which is the object of this grievance.

V. Discussion

A. "Initial" Notice

Article IV of the contract requires that the District give teachers notice of their assignments for the next school year by May 15th:

> In any case, specific grade, subject, and extra-curricular duties for the following year shall be assigned in writing by May 15.

That was done in this case, when the grievants were notified on May 14, 1993 that their assignments would be the "same as last year". The question is whether the Board may subsequently change those assignments and, if so, under what circumstances.

The District's argument proceeds along two tracks. First, it argues that the right to schedule and assign employees under the Management Rights clause of Article VIII remains fully effective after May 15th, and the notification given on that date is merely the "initial" assignment for the coming year. This interpretation is necessary, according to the District, if both Articles IV and VIII are to be given meaning. Far from giving meaning to Article IV, this interpretation effectively reads it out of the contract. The word "initial" does not appear in Article IV(B). If the arbitrator amends the contract by treating the May notification as an "initial" notice, Article IV(B) serves no particular function, other than as a courtesy to teachers, letting them know the Board's current thinking at a given point in time. On its face, the provision is aimed at giving teachers adequate advance notice so that they may prepare their courses over the summer. This purpose is not served unless the notice is more than a snapshot of present intentions.

The Board's argument that treating Article IV as a substantive provision ignores rights reserved to management under Article VIII requires acceptance of those rights as being absolute. The

arbitrator may not accept that proposition, because the parties have expressly rejected it in their contract. Article VIII provides that "Management retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions during the term of the collective bargaining agreement except to the extent such functions and rights are restricted by the terms of this agreement." In agreeing to notify teachers of their assignments by May 15th, the Board has not abandoned its right to determine which employees will teach particular classes. It has the right to make such determinations, but it must exercise that right by the deadline promised in Article IV(B). 2/

The notion that the right to schedule teachers is limited by Article IV(B) is consistent with the other provisions of the contract which limit the otherwise unfettered rights granted under the Management Rights Clause. The Board has the right to impose discipline, but must do so in a manner consistent with the just cause provision of Article Vll. The Board has the right to schedule employees, but only within the confines of the negotiated calendar. The Board has the right to determine the personnel by which it will carry out its educational functions, but must honor seniority when laying off and recalling teachers. Virtually every provision of the contract in some fashion narrows the rights otherwise enjoyed by the Board by granting rights of equal weight and dignity to the teachers and/or the Association.

B . Changes in Circumstance

The second element of the District's argument is that, even if the May 15th notice is more than just an "initial" notice, it cannot be read as a final and binding commitment since circumstances beyond the Board's control may demand reassignments after that date. Denying the Board the authority to meet emergencies is, the District asserts, an absurd and unworkable interpretation of the contract.

The parties to a contract are presumed to have intended it to be a workable, living document that operates in harmony with the purpose of the enterprise. The basic guarantee of this is that the parties themselves negotiate the contract and are unlikely to agree to a provision at odds with their overall mission. The contract is, however, negotiated in light of usual experience. The negotiators cannot foresee every eventuality and by definition cannot anticipate emergencies or legislative enactments. The parties here have recognized this fact, and have made provision for this in their Management Rights clause: "These rights include, but are not limited by enumeration to, the following rights … (to) take whatever action is necessary to comply with State and Federal law … (and) … carry out the function of the school system in situations of emergency." Unlike the right to assign and schedule personnel, these rights cannot be read as having been modified or

---

2/ This conclusion is buttressed by the testimony of the District's primary witness. Board President Elsie Foreman testified that the Board understood that "staffing had to be assigned by May 15th." Transcript, page 42.

limited by Article IV(B).

By the very nature of the emergency provisions, the Board must have the right to act even if the required action cannot be harmonized with a provision of the contract. While there may be a duty to minimize the violation of contractual rights, and/or to bargain with the Association over the impact of the decision to act, the actual making of a decision to respond to an emergency or an unanticipated legislative mandate is authorized by Article VIII of the contract.

The Board has the right to act when faced by a genuine emergency or if action is required to bring the District into compliance with State or Federal law. However, there is nothing in the record to support the conclusion that these reassignments were in any way a response to a fiscal emergency or a legislative mandate.

I . The Reassignment of Curran

The Board reassigned Curran and Walker in July. Curran was reassigned as a gesture to Mrs. Powell, who expressed a desire to change over to a first grade assignment and work with Mrs. Fasbender rather than Mrs. Curran. It had no impact whatsoever on the finances of the District. While one may applaud the Board's compassionate instinct to accommodate a teacher who has suffered a personal loss, it hardly represents an emergency justifying the violation of Curran's rights.

2. The Reassignment of Walker

Walker was reassigned to fifth/sixth grade in response to the resignation of Karla Miller and the Board's reversal of its initial decision to advertise the vacancy. While the Board members who testified at the hearing attempted to color this decision as budget-driven, Board President Elsie Foreman initially attributed the assignment of Walker to a desire to have a strong disciplinarian in this job. Even assuming that the somewhat vague budgetary concerns articulated by Foreman and Board Clerk Richard Burby were the primary basis for the Board's decision, as of July 26th there was no fiscal emergency and the Board had no reason to believe that it was in danger of violating the State revenue caps. The Board was aware of the possibility of revenue caps as early as March when it directed the Administrator to prepare a budget assuming the imposition of such caps. In late June, the Board decided to advertise for a replacement for Miller. As of the annual meeting, two weeks after the reassignment of Walker, the Board believed that it had an operating reserve of over a half million dollars, and a budget "cushion" of $149,000. 3/ It was only on August 10th that the Board learned that it had been given wrong information, and at the same time it was advised that the State would not treat it as being in violation of the law if it chose to use a portion of its operating reserve to make up for the excess levy.

3/ Testimony of Board President Elsie Foreman, Transcript, page 47.

It does not appear that the District was ever in violation of State law in such a fashion as to compel the reassignment of Walker. Even if the unpalatable prospect of dipping into the operating reserve is treated as an emergency, this prospect was not raised until more than two weeks after the reassignment decision was made. In short, the record does not support the notion that the decision to assign Walker to a fifth/sixth grade split was made in the face of either a legal or a fiscal emergency. It was, as conceded by Foreman, an opportunity to use the strengths of Mrs. Walker to greater advantage. This is a legitimate goal for the Board, but it does not override the obligation to make such decisions by May 15th.

3. The Reassignment of Murphy

Murphy was reassigned on August 23rd, just less than two weeks after the error in calculating revenue caps had been discovered. The record, however, does not show how shifting Murphy from a third/fourth grade split to second/third grade split in any way affected the budget. The move was in response to parent dissatisfaction with the increased size of the second grade resulting from the July reassignments, and the realization that there were more second graders than the Board had previously been told. Board action to reduce the size of the second grade had been predicted by Principal Kellstrom at the beginning of August before any budget problem was discovered. Reassigning Murphy to reduce the size of the second grade neither added nor subtracted staff members or costs from the overall budget. After the Board voted to make the reassignment, the minutes of the meeting reflect that they received a report showing the same $39,386 shortfall described in the District Administrator's memo from two weeks before. The impact of the shift was not economic but political. It assuaged the parents of the second graders. As with the reassignment of Walker and Curran, this is a legitimate concern for the members of an elected Board, but as with the other reassignments, the basis for the decision does not fall within the emergency powers of the Board.

There is no question but that the School Board had concerns over the decisions made by the prior Board and by the District Administrator. The record shows a struggle by the new Board to assert control over District operations, including staffing, and substantial mistrust of the information being received from the administration. The reassignment of these three teachers was part of that struggle, and represented decisions that the new Board majority might well have made in May if it had been able to develop a grasp of the issues by that time. It did not do so, and with the passage of May 15th lost the right to make involuntary changes in teacher assignments for non-emergency reasons.

B. What Is The Appropriate Remedy?

The Board violated the rights of these three teachers when it involuntarily reassigned them after the May 15th deadline. There is no ready calculation available in the contract for a remedy. The teachers were paid the same salaries that they would have received had the assignments been made

in a timely fashion. The Association suggests that the teachers receive either time and one half for the extra preparation time during the school year, relative to the prior year, or three months of pay as a form of liquidated damages. The District asserts that, if a monetary award is due, it should be pegged to the liquidated damages paid by a teacher who breaches his/her individual contract.

There is no basis for time and one half or three months pay as suggested by the Association. Payment of time and one half for excess preparation time assumes that the time is entirely uncompensated in the first instance, and ignores both the fact that preparation activity is anticipated in the calculation of the annual salary and that a timely assignment to these classes would have required preparation over the summer. The use of a premium rate for the Association's calculation is apparently an effort to punish the Board rather than compensate the grievants. Punitive damages are beyond the authority of the arbitrator. Three months pay is completely unrelated to any damages suffered by these grievants and is likewise punitive and beyond the arbitrator's authority.

Still there is genuine loss to these grievants. To receive a new assignment one day before classes begin will obviously result in a much greater intensity of effort over the school year, and much greater time pressure to complete preparation for each day's classes. The parties are well aware of this. As noted above, the evident purpose of Article IV is to give teachers time over the summer months to prepare for classes. The District is correct that the salaries paid to teachers assume that there will be times when new classes must be prepared, with greater efforts expended over the summer for no additional compensation. However, those salaries also assume that there will be times when little or no additional preparations will be needed over the summer, as would have been the case with these grievants had their 1993-94 assignments not been changed. The annual salaries also assume a reasonable pace to whatever preparations are required. These teachers were required to put in a degree of effort far beyond that which is normally expected in preparing for classes, and to do so under intense time pressure. The $400 in liquidated damages for resigning without sufficient notice, like the Association's demand for three months' pay, has no rational relationship to the damages suffered by these teachers. Three months' pay is obviously punitive. $400 is obviously nominal. The use of either would be arbitrary.

The parties to this contract have considered the possibility of forms of preparatory work outside of that routinely required, and have negotiated a rate of pay for such work. Article XX(I) establishes an hourly rate for special curriculum writing:

> Teachers involved in special curriculum writing requested by the Board, and approved by the District Administrator, shall be paid at an hourly rate of $9.00.

This provision is plainly not designed for this situation, but it is the compensation level negotiated for the work which is most closely analogous to that which the teachers were forced to perform in 1993-94. As such it provides a more accurate measure of how to value the additional time

required of the grievants during the school year than the more speculative and creative amounts suggested by the litigants.

Each of the teachers gave an accounting of the amount of preparation time they spent during the 1993-94 school year in comparison with the 1992-93 school year. None of the teachers kept time sheets, and the numbers they recited are clearly estimates. Walker said that she devoted 329 more hours in 1993-94, while Murphy's estimate was 225 hours and Curran's was 233 hours. The District suggests that these hours are inflated, and that an experienced teacher should not have needed this much extra time for preparation. I cannot say that an additional hour and fifteen minutes per student day (in the cases of Murphy and Curran) or hour and forty five minutes per student day (in the case of Walker) is obviously excessive where little or no notice of the teaching assignment is given until the day before classes begin. Absent any other evidence of the extra hours needed for preparation, and given that the testimony of the grievants is not wholly implausible, I must conclude that the additional preparation time required in 1993-94, over and above the preparation time for the preceding year, was 329 hours for Walker, 225 hours for Murphy and 233 hours for Curran.

The Association has also requested a cease and desist order and a restoration of these teachers' 1992-93 teaching assignments for the 1994-95 school year. A cease and desist order is a standard remedy in contract cases. The requested order for a different assignment in 1994-95 is another matter. The contract gives the Board the right to make these assignments so long as it does so by May 15th. The fact that the Board violated the contract in 1993-94 has no bearing on the propriety of its assignments for the 1994-95 school year, and an order changing those assignments would serve absolutely no valid purpose.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The School District violated the Collective Bargaining Agreement when it reassigned the grievants to new classes after May 15, 1993.

The appropriate remedy is for the Board to:

1) Desist from making involuntary reassignments after the May 15th deadline except in those cases where such reassignments are necessitated by an emergency or an unanticipated legislative enactment; and

2) Make Jean Walker whole by paying her $2,961; and

3) Make Carol Murphy whole by paying her $2,025; and

4) Make Mary Curran whole by paying her $2,097.

Signed this 29th day of September, 1994 at Racine, Wisconsin:

/s/ Daniel Nielsen
Daniel Nielsen, Arbitrator