BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

HUSTISFORD EDUCATION ASSOCIATION

and

HUSTISFORD SCHOOL DISTRICT

Case 25
No. 51697
MA-8700

Appearances:

Mr. Armin Blaufuss, UniServ Director, Winnebagoland UniServ, appearing on behalf of the Association.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Clifford Buelow, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the District or Employer, respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on January 18, 1995, in Hustisford, Wisconsin. Afterwards, the parties filed briefs and reply briefs which were received by March 8, 1995. Based on the entire record, the undersigned issues the following Award.

ISSUE

At the commencement of the hearing, each side gave its version of the issue involved here. The Association frames the issue as:

> *Has the Hustisford School District violated the collective bargaining agreement with the Hustisford Education Association by unilaterally reducing elementary teacher preparation time through the assignment of an additional duty? If so, what shall the remedy be?*

The District frames the issue as:

> *Did the District violate either Article 9, Section F or Article 10 by assigning a second teacher to lunchtime recess supervision? If so, what is the remedy?*

Since the parties were unable to agree on a framing of the issue, the arbitrator has framed it. From a review of the record and the briefs, the undersigned has framed the issue as follows:

> *Did the District action involved herein violate the collective bargaining agreement? If so, what is the appropriate remedy?*

PERTINENT CONTRACT PROVISIONS

The parties' 1992-95 collective bargaining agreement contains the following pertinent provisions:

> ARTICLE 5 MANAGEMENT RIGHTS
>
> The Board, on its own behalf, hereby retains and reserves unto itself without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules and regulations to establish the framework of school policies and projects including, but without limitations because of enumeration, the right:
>
> 1. To the executive management and administrative control of the school system and its properties, programs and activities.
>
> 2. To employ and re-employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications, or their dismissal or demotion, their promotion.
>
> 3. To establish and supervise the program of instruction and the extra-curricular program that in the opinion of the Board benefits the students.
>
> 4. To determine means and methods of instruction, authorization to purchase textbooks and other teaching materials, the use of teaching aids, and class schedules.

5. The parties hereto recognize that the Board is legally charged with the responsibility of, and the legal right to, the establishment and enacting of policies governing the operation of the school district.

6. To determine the management organization of the district and the selection of persons for appointment to supervisory and management positions.

7. To determine the size of the working force, the allocation to employees, the determination of policies affecting the selection of employees and establishment of quality standards and judgement of employee performance.

8. To create, combine or modify teaching positions deemed necessary by the Board.

9. To establish reasonable work rules and schedules of work.

10. Take whatever reasonable action that is necessary to carry out the functions of the district in situations of emergency.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only (sic) the specific and express terms of this Agreement.

Foregoing rights shall be subject to the laws of the state of Wisconsin and the Constitution of the United States of America.

The Association does not waive its right to bargain the impact of changes in wages, hours, and conditions of employment resulting from the Board's exercise of the aforementioned rights.

. . .

ARTICLE 9 COMPENSATION

. . .

F. Greater Work Load

Any teacher scheduled to teach over the normal load will have the prerogative to accept or refuse without penalty to his contract.

. . .

ARTICLE 10 WORKING CONDITIONS

A. School Calendar

1. There will be 180 student days and seven (7) inservice days for a total of 187 teacher contract days in the school calendar.
2. The school calendar shall be a matter of negotiations.
3. The calendar shall be the first item on the agenda for negotiations.
4. The calendar shall be made part of this Agreement and indicated as Appendix C.
5. On days on which inservice activities are held, teachers shall have one-half of the day for clerical and upgrading purposes.

B. School Day

The school day is defined as follows:

Monday through Friday: 7:45 to 3:45.

Teachers may leave on Friday and any day before a scheduled vacation day 30 minutes prior to the end of the normal school day provided that student busses have left.

C. Emergency School Closings

1. On days when school is released early due to an emergency, teachers shall be allowed to leave as soon as practical after the students are dismissed.
2. Snow days will be made up according to Article 10, Section A unless mutually agreed to by both parties.

The educational welfare of the students will be the prime consideration.

3. On days when school is held and a teacher fails to report for work solely due to inclement weather, loss of salary will result on the basis of 1/187 of the teacher's base contract per day missed or a pro-rated basis for a teacher on less than a 187-day contract.

BACKGROUND

Time allotted to teachers to prepare lesson plans is known as preparation time. Hereinafter, it will be referred to as prep time or prep periods. During the 1990-91 school year, and for a number of years before that, elementary teachers were provided three prep periods per week when students had physical education classes. A physical education specialist taught these classes. First through fourth grade teachers had three 30-minute prep periods per week and fifth and sixth grade teachers had three 45-minute prep periods. This prep time was provided within the student instructional day.

At the start of the 1991-92 school year, the District assigned elementary teachers to teach one of the three weekly physical education classes that had previously been taught by a physical education specialist. This action resulted in elementary teachers losing preparation time. Specifically, first through fourth grade teachers lost 1,080 minutes of prep time annually and fifth and sixth grade teachers lost 1,620 minutes of prep time annually. Simultaneous with this action, the District relieved the elementary teachers of their existing lunchroom supervision duty. Thus, the District reduced their duty time by no longer assigning them lunchroom supervision. This duty (lunchroom supervision) amounted to about 850 minutes annually. Overall then, as a result of being assigned to teach a physical education class and being relieved of lunchroom supervision duty, the first through fourth grade teachers lost about 225 prep minutes annually, and the fifth and sixth grade teachers lost about 765 prep minutes annually. The Association did not grieve this reduction in prep time.

The record indicates that the parties' 1992-95 labor agreement contains reopeners for 1993-94 and 1994-95. As of the time of the hearing herein, the parties had not settled either reopener. In their negotiations on these reopeners, neither side made any proposals on prep time or duty time.

FACTS

In 1992, the principal of the District's elementary school, Carolyn Markson, created a committee of teachers and aides and directed it to consider options to the existing lunchroom schedule. In the fall of 1993, Markson implemented a change in the school's lunch schedule. The

change was that the school went from having two 30-minute lunch periods to three 20-minute lunch periods. While this changed lunch schedule apparently worked well inside the lunchroom, it caused problems on the playground. Specifically, student discipline problems were moved from the lunchroom to the playground.

On March 16, 1994, District Administrator David Elliott directed Principal Markson to assign a second teacher to lunchtime playground supervision in order to improve student safety. Elliott's memo to Markson regarding same stated in relevant part:

> Earlier in the school year, and also in recent weeks, we have had brief discussions about the Elementary playground and supervision. During the school year I've received many copies of incident reports from actions on the playground. After my many visits to the Elementary building this year, and visits in recent weeks and days, I've concluded that you do not have enough supervision during the noon period. I realize that students who are on the Safety Patrol assist, but do only assist. I'm very concerned for the safety of the students and the liability for the staff members as well as the school system.
>
> I would like you to put additional staff on noon time supervision as soon as possible. One additional staff member will probably be enough. This should not be a problem as you will remember that we examined the teachers' schedules last week when we were looking as Ms. Wilhelm's preparation time and indications show that they have more than enough time in their schedules. As soon as you have a schedule, please see that I get a copy of it. Thank you for your cooperation in this matter.
>
> This should not be a problem as you will remember that we examined the teachers' schedules last week when we were looking as Ms. Wilhelm's preparation time and indications show that they have more than enough time in their schedules.

Markson complied with Elliott's directive and increased lunchtime playground supervision from one to two teachers. To accomplish this, Markson assigned the elementary teachers to one additional week of lunchtime playground supervision every seven weeks. This action brought the number of teachers performing lunchtime playground supervision to the same level as performing morning playground supervision, which had been handled by two teachers for a number of years.

The assignment of a second teacher to lunchtime playground supervision duty increased the elementary teachers' overall duty time. The increased number of minutes involved annually is

disputed; the Association puts the figure at 850 while the District puts it at 750. Simultaneous with making this assignment, the District took the following action: 1) the elementary school bus pick up time was moved up five minutes. Specifically, students were picked up at 3:05 rather than 3:10 p.m.; 2) after school staff meetings, which formerly had been held weekly, were reduced by half. These two actions, which both involved time after the student instructional day ended, freed up about 1,440 minutes annually for elementary teachers.

The Association grieved the District's action. The grievance alleged a violation of Article 9, Section F; Article 10; and any other (but unspecified) provision of the parties' collective bargaining agreement. The grievance was ultimately processed to arbitration.

POSITIONS OF THE PARTIES

Association's Position

The Association's position is that the District violated the contract when it unilaterally reduced elementary teachers' prep time by assigning them an additional duty. The Association notes at the outset that the amount of duty minutes teachers have within the student instructional day impacts their prep time. The Association argues that the net effect of the District's adding a second teacher to the lunchtime playground supervision duty was to reduce elementary teachers' overall prep time during the student instructional day by about 850 minutes annually. With regard to the amount of prep time lost, the Association submits that the District never challenged the Association's figures when the instant grievance was being processed. With regard to the District's argument that the overall prep levels were not reduced because it changed the student bus schedule and had fewer staff meetings, the Association contends that the District's argument blurs the distinction between minutes during the instructional day and minutes outside the instructional day. According to the Association, the time before and after the student instructional day differs substantially from the time during the student instructional day. To support this premise, it notes that teachers attend a variety of meetings after school such as staff, team teaching, M-team, etc.

The Association views this as a past practice case. Accordingly, it makes the arguments traditionally made in such cases, namely that a binding practice exists which the District unilaterally changed. With regard to the alleged practice, the Association contends that the parties had a binding past practice with regard to elementary teacher prep and duty time. To support this premise, it cites the fact that at the start of the 1991-92 school year, the District eliminated a lunch hour duty for the elementary teachers and assigned them to teach one of the physical education classes. According to the Association, the reduction in duty time was to compensate the elementary teachers for their reduced prep time within the student instructional day. The Association asserts this arrangement continued unchanged by mutual agreement for several years. To support its contention that mutuality existed, the Association cites the fact that no grievance was ever filed over the matter. The Association therefore contends there was mutual knowledge

and acceptance by the parties of this practice governing the level of prep time minutes and that this "implied mutual agreement" regarding the amount of prep time within the student instructional day imposed on the rights reserved to management. The Association also asserts this practice of reducing elementary teacher duty time to compensate for teaching one of the physical education classes "is sufficient in its consistency and its duration to constitute a binding past practice." The Association therefore argues that when the District unilaterally changed this practice in March, 1994, it violated the parties' "implied mutual agreement", which in turn violated the parties' labor agreement.

Next, responding to the District's contention that its unilateral action is within its management rights, the Association calls the arbitrator's attention to the fact that the labor agreement does not contain any provisions which revoke or nullify past practice. For example, it notes that the contract does not contain a zipper clause, or a clause stating that the contract is the parties' complete agreement, or a waiver by the Association of its right to rely on practices established during prior contract terms. Additionally, it notes that the District has not acted to cancel, nullify or revoke the past practice involved here.

Finally, responding to the District's anticipated argument that the Association was required to negotiate the practice into the agreement as an express benefit rather than an implied benefit, the Association asserts that this argument "fails to recognize the compelling nature of the parties' implied mutual agreement." It therefore submits that it was not required to negotiate the practice into the contract.

In order to remedy this alleged contractual breach, the Association asks the arbitrator to sustain the grievance and restore the elementary prep and duty time to that which existed prior to March 16, 1994; to compensate teachers at their hourly rate for all lost prep time; and to issue a cease and desist order to the District prohibiting them from unilaterally changing elementary prep and duty time until such time as negotiations between the parties dictate a change in same. The Association further asks the arbitrator to retain jurisdiction until all compensation claims are satisfied.

District's Position

The District's position is that it did not violate the contract by assigning a second teacher to lunchtime recess supervision. At the outset, the District challenges the Association's assertion that the prep time of elementary teachers has been reduced. According to the District, the evidence does not support the essential factual premise of the Association's grievance, namely that prep time has been reduced as a result of the assignment of a second teacher to lunchtime recess supervision. The District does not dispute that by assigning a second teacher to lunchtime recess supervision, the teachers' duty time increased by 750 minutes per year. It is the District's position however that duty minutes and prep minutes are two distinct items and that an increase in one does not necessarily mean a decrease in the other, as the Association would have the arbitrator conclude.

Given the distinction between duty minutes and prep minutes, the District contends that the Association had to prove that the increase in duty minutes produced a decrease in prep minutes. The District argues that the Association failed to offer any proof as to the effect that the increase in duty minutes had on prep minutes. However, assuming arguendo that every minute of added duty time equals a lost minute of prep time, the District asserts that prep minutes were not reduced below previously established levels. The District contends that, to the contrary, it specifically increased prep minutes by more than the number of minutes added to duty time. The District submits this happened as follows. First, it notes that the elementary school bus pick up time was moved up to 3:05 p.m. from 3:10 p.m. According to the District, this five-minute reduction in student time freed up approximately 900 minutes for prep time (5 minutes per day x 180 student contact days). Second, the District notes that the District has reduced by half its number of half hour afterschool staff meetings, which formerly had been held weekly. The District asserts that this reduction in meeting time freed up approximately 540 minutes for prep time (30 minutes x 18 weeks). The District contends that these two changes (i.e., the change in student bus schedules and fewer staff meetings) freed up more minutes for use as prep time than could possibly have been lost because of increased duty minutes.

Next, the District contends that the contract does not restrict its right to change teacher duty assignments. To support this contention, it reviews the two contractual provisions cited in the Association's grievance, namely Article 9, F, and Article 10. With regard to Article 9, F, the District submits that this provision does not address duty assignments per se, but rather, as is clear from the section title itself ("Greater Work Load"), the situation where a teacher is asked to teach an extra class. With regard to Article 10, the District submits that nothing in that provision deals with teacher supervision assignments. As a result, the District contends it is also inapplicable to the instant situation.

The District argues that the Management Rights clause (Article 5) gives it the authority to make the assignment in question. To support this premise it cites the language found in that article which empowers it to supervise its programs, activities and determine the allocation of its workforce. The District asserts that within the context of this case, it exercised that management right reasonably. The District also contends it did not waive its management right to make such assignments, nor did it agree to be bound by any informal "practice" which restricted the exercise of its management rights.

Next, with regard to the Association's contention that a past practice exists, the District argues the Association failed to prove the existence of same. The District contends that if the practice is that it assigned one teacher to lunchtime recess supervision for a period of time, that does not amount to a practice which it is obligated to continue. In the Employer's view, that assignment was the product of management prerogative. The District asserts that when it made that decision in 1991, it decided on its own to have the teachers teach another physical education class and then it also decided on its own to relieve the teachers of lunchroom supervision. The District submits it did not bargain with the Association or get its permission prior to making either

of those changes. According to the District, this history shows that the District exercised its management right to change the prior work assignment schedule. The District therefore requests that the grievance be denied.

Finally, the District argues in the alternative should the arbitrator find that the District violated a binding practice, the District believes the Association's proposed remedy is inappropriate and should not be granted. According to the District, the only remedy available to the Association is to take this matter up in negotiations. The District asserts that even if the Association loses the grievance, it still has the right to bargain the impact of the District's exercise of its management prerogative to change lunchtime recess supervision. In the District's view, this proves its final point, which is that the Association is trying to obtain through this arbitration that which it should attempt to gain through negotiations.

DISCUSSION

What happened here is that the District assigned a second teacher to do lunchtime playground supervision. This action had the following relevant consequences: 1) it increased the number of duty minutes the elementary teachers had to perform; and 2) it conversely decreased the elementary teachers' prep time during the course of the student instructional day. At issue is whether this action comports with the labor agreement or violates same.

In deciding this contract dispute, the undersigned will focus first on the contract language cited in the grievance. If that language does not resolve the matter, the rest of the agreement will be reviewed. Finally, if necessary, attention will be given to evidence external to the agreement, namely an alleged past practice.

The grievance alleged that the District's action violated Article 9, F and Article 10. That being so, those provisions will be reviewed first.

Article 9, F, which is entitled "Greater Work Load", deals with a situation where a teacher is asked to teach an extra class or is asked to take on more than the normal load of classroom teaching. On its face, this provision makes no reference to anything other than teaching. Specifically, it makes no reference to "duty assignments", "supervision", "extra duty minutes", or anything of the sort. Rather, it is strictly limited to actual teaching. As a result, it is concluded here that Article 9, F does not in any way relate to the subject involved in this grievance.

Attention is now turned to Article 10. By its express terms, that provision deals with the school calendar, the school day and emergency school closings. While that provision specifies, inter alia, that there are 180 student contact days which run from 7:45 a.m. to 3:45 p.m., there is nothing in that provision which addresses the work that teachers do during that timeframe. Specifically, it makes no explicit or implicit reference to teacher work loads, prep time, or supervision duty assignments. This of course means that Article 10 does not specify certain prep

time or duty assignment levels. Accordingly, Article 10 does not relate to the subject involved in this grievance either.

Having reviewed the contractual provisions noted above, together with the rest of the agreement, the undersigned finds that no contractual language exists concerning teacher workloads, prep time, or duty assignments. While there are no doubt some teacher contracts which have contract language on teacher workloads, prep time and duty assignments, and restrictions upon the employer's ability to make changes to same, this contract is not one of them.

The Association acknowledges there is no language in this contract which expressly limits the District's right to make changes to the teachers' duty assignments and prep time. That being so, it relies on an alleged past practice concerning duty assignments and prep time which it asks the arbitrator to enforce.

Before addressing the threshold question of whether there is or is not an applicable past practice, it is noted at the outset that past practice is primarily used or applied in the following circumstances: 1) to clarify ambiguous language in the parties' agreement; 2) to implement general contract language; 3) to modify or amend apparently unambiguous language in the agreement; or 4) to establish an enforceable condition of employment where the contract is silent on the matter. Circumstances (1), (2) and (3) are inapplicable here. This is because there is no contract provision that the alleged "practice" is suggested as clarifying (#1), implementing (#2), or modifying (#3). Consequently, this is a category (4) case since the Association seeks to have the alleged "practice" supplement the contract so as to be binding on the parties and become an enforceable condition of employment. In situations such as this where a party wishes to clothe a course of conduct with contractual status, that practice must reflect as many elements of a contract as possible. Simply put, the practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement.

That said, the focus turns to whether the Association established the existence of a practice governing duty assignments and prep time. To support its contention that a practice exists, the Association relies on the following. In the 1991-92 school year, the District assigned elementary teachers to teach one of the three physical education classes. This decision had the practical effect of reducing the elementary teachers' prep time because they spent more time teaching. At the same time though, the District relieved the elementary teachers of an existing duty assignment, namely lunchroom supervision. The Association submits this action established a binding past practice concerning duty assignment and prep time levels which the District was obligated to continue. The District obviously disagrees.

Based on the rationale which follows, I find that the duty assignment and prep time level

which existed between 1991 and March, 1994, is not sufficient to establish a binding past practice which is entitled to contractual enforcement. The Association's underlying theory that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a binding past practice, particularly when the pattern of conduct arises from the exercise of a management right. That is precisely the case here. What happened in 1991 was not the result of bargaining, but rather the District's unilateral act. There the District decided on its own motion that elementary teachers would teach one of the physical education classes. The District also decided on its own motion that it would relieve the elementary teachers of an existing duty assignment, namely lunchroom supervision. Such was its contractual right. The District had the right to take this action because it had reserved to itself, via the Management Rights clause, the right to supervise its programs, activities, and to determine the allocation of its workforce. This means that the duty assignment and prep time level set in 1991 was the product of the District's management prerogative. Said another way, it arose from the exercise of a management right.

Since the duty assignment and prep time level that existed between 1991 and March, 1994, was set by the District as an exercise of its management function, the Association had the burden of showing that the District knowingly waived its management rights and agreed to be bound in the future by a "practice" concerning duty assignments and prep time levels which restricted its management rights. I find no proof in the record of same. The fact that the elementary principal created a committee in 1992 which discussed the lunchroom schedule does not constitute proof that the District waived its management rights. Instead, all it shows is that the principal attempted to maintain good relations with the staff by getting their input and building consensus before the District decided on a course of action for the lunchroom schedule. Accordingly, it is held that the Association did not prove that the District waived its management right to change the established duty assignment and prep time levels. Since the District never waived its right to change those levels, it could change same.

Having held that the District could change the established duty assignment and prep time levels, the remaining question is whether the District did so in an arbitrary or capricious manner when it changed them in March, 1994. I find it did not. The record indicates that the reason the District assigned a second teacher to lunchtime playground supervision was because the District's new lunch schedule moved student discipline problems from the lunchroom to the playground. Superintendent Elliott decided that a second teacher was needed for that duty because he was concerned about student safety and District liability. This assignment brought the level of lunchtime playground supervision to the same level as existed for the morning playground supervision, namely two teachers. In my view, the assignment was entirely understandable under the circumstances. Accordingly, it is held that the District's exercise of its management prerogatives in March, 1994, was reasonable.

Given the conclusion reached above, the undersigned believes it unnecessary to address the Employer's contention that the teachers' prep time was not reduced because the change in student bus schedules and fewer staff meetings freed up time after the school day ended which could be

used by the teachers for preparation. Consequently, no comment is made concerning same.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the District action involved herein did not violate the collective bargaining agreement. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 14th day of June, 1995.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator