

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

HOWARD-SUAMICO EDUCATION
ASSOCIATION

and

HOWARD-SUAMICO SCHOOL DISTRICT

Case 67
No. 54821
MA-9799

Appearances:

Ms. Karen D. Alexander, Executive Director, United Northeast Educators, appearing on behalf of the Association.

Godfrey & Kahn, S.C., by Mr. Dennis W. Rader, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Association above are parties to a 1995-97 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the Association's group grievance protesting a mandatory instruction to department heads to observe classroom teachers in their departments once per semester.

The undersigned was appointed and held a hearing on April 7, 1997 in Howard, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on July 8, 1997.

Issues:

The Association proposes the following:

1. May the District unilaterally require department heads (members of the teacher bargaining unit) to conduct mandatory "peer observations" and require other bargaining unit members to accept these "peer observations" when the collective bargaining agreement clearly indicates (Article XI, Section A, lines 681 through 683) that peer observations and evaluations are voluntary?

The District proposes the following:

1. Was the grievance timely filed?
2. If so, did the District violate the contract by assigning department heads the duties listed under the department head job description?
3. In the alternative, does the District violate the contract by assigning supervisory duties to department heads?
4. Are department heads insubordinate if they provide no verbal feedback to teachers upon observing them?

Relevant Contractual Provisions:

ARTICLE II -- MANAGEMENT RIGHTS

- A. The Board hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right:
 1. To executive management and administrative control of the school system and its properties and facilities, and the professional activities of its employees;
 2. To hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions for their continued employment, of their dismissal or demotion, and to promote, and transfer all such employees;
 3. To establish grades and courses of instruction, including special programs, and to provide for athletic, recreational and social events for students, all as deemed necessary or advisable by the Board;
 4. To decide upon the means and methods of instruction, the selection of textbooks and other teaching materials, and the use of teaching aids of

every kind and nature;

5. To determine class schedules, the hours of instruction, and the duties, responsibilities, and assignments of teachers and other employees with respect thereto, and with respect to administrative and extra duty activities, and the terms and conditions of employment.

B. 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 by the specific and express terms of this Agreement and Wisconsin Statutes; Section 111.70, and then only to the extent such specific and express terms thereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

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ARTICLE VI - SALARY

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J. . . . The Board reserves the right to alter the above hours at any or all schools under exigent circumstances. The Association will be notified in advance of any changes and the reasons for the change. Upon all other circumstances, no change in hours shall be made until both parties have bargained about same. Individual teachers will retain the right to work over and above these hours if they choose. In addition to these hours, teachers will be expected to attend open houses, parent conferences, commencement and a maximum of four (4) PTO and Home School meetings and will be reimbursed for attendance at these events with compensatory time. Teachers will also be compensated with compensatory time for attending other meetings or events authorized by the principal.

All teachers will be required to attend faculty meetings and expected to attend department-wide meetings which could

extend beyond the above listed hours. Teachers will be reimbursed for this with compensatory time. Mandatory inservice meetings would be applied toward the District inservice requirement of four (4) hours.

. . .

ARTICLE XI -- TEACHER EVALUATION

- A. All teachers in the system shall be carefully supervised. Teachers shall be evaluated and supervised so as to guide them in a positive helpful way.

It is recognized that classroom visitations are only a small part of the total supervisory program, the main purpose of which is to improve instruction. While classroom visitations are important, staff members should not look upon them as providing, of themselves, a good program of improving instruction.

Since at best, a supervisor can be in a teacher's classroom only a very small percentage of total teaching time, the major responsibility for improvement of instruction must rest with the teachers themselves. Therefore, staff members are encouraged to seek out assistance from their supervisor rather than depending on supervisor-initiated classroom visitations and conferences.

Secondly, teachers are encouraged to begin programs of visitation and evaluation between themselves for purposes of self-improvement.

Supervision will be an ongoing process. Formative classroom visits may occur any time before the last thirty (30) calendar days of the school year with the following exception: teachers on a Plan for Performance Improvement (PPI) may be visited any time before the last ten (10) work days.

Frequency of evaluation shall be as follows:

1. First and second year teachers in the system: at least two (2) classroom visits of no less than fifteen (15) minutes each, with a teacher evaluator conference within a reasonable time after each visitation.

2. Teachers in their third and subsequent years in the system will be supervised periodically, and will have at least one (1) evaluation conference each year with the supervisor if requested by the teacher or supervisor.

At each of the conferences specified above, the supervisor will present to the teacher a written evaluation. The teacher will sign the copy of the evaluation to be retained by the supervisor, as well as a copy to go to the District Administrator, and will have the opportunity to write comments to any or all parts of the evaluation. These comments are to be submitted within three (3) weeks and are to be filed with the teacher's copy, the supervisor's copy and the copy which goes to the District Administrator.

Discussion:

The salient facts are undisputed and can be stated succinctly. The District employs six teachers designated as department heads. These six teach seven-eighths of a full schedule, have one class period a day set aside for their department head duties, and receive a stipend for related extra-curricular work. Not all teachers are part of a department with a department head; these jobs exist only in departments which either have at least five teachers or require a significant amount of coordination.

The first job description for the department head position was developed in 1986, but the position has not always been in use since that time. Department heads have, however, been in use since at least 1990. The original job description for department head specified, in pertinent part, as follows:

- . . .
- knows the strengths/limitations of department members
- . . .
- assists teachers in developing a systematic plan for improving areas that may be weak
- . . .
- observes and assists teachers in the instructional improvement process

Also in 1986, a District proposal to introduce expanded evaluation language was first introduced into the collective bargaining agreement; the applicable language continues materially unaltered to this day.

High school principal Larry Dunning testified that by September, 1996 he and his associate principals felt that the evaluation process had not really impacted on the improvement of instruction. They concluded that with 80 teachers under three building administrators, they could not be in as close contact with what was going on in the classroom as was desirable, and decided to include department heads in that process to work with teachers. Dunning thereupon redrafted the job description for department head to include a requirement of classroom observation explicitly in the job description. The draft was shown to the department heads, who objected to some elements of it, and Dunning thereupon redrafted it further. The final version of the job description as redrafted reads as follows, in pertinent part:

POSITION TITLE - Department Chairpersons

DUTIES:

. . .

. . .

DEPARTMENT HEAD "CLASSROOM VISIT" RESPONSIBILITIES

- department heads will take an active role in instructional improvement within the department
- department heads will encourage collegial classroom visits among all teachers
- to facilitate this, department heads will conduct at least one classroom visit per semester for each member of the department
- the purpose of the classroom visits is to be positive in nature. The visit will focus on assisting teachers in their continuous self examination of their instructional procedures
- department members will be encouraged to invite department heads into their classrooms. Absent that, teachers will be informed in advance of the visits, and there will be no unannounced drop-in visits
- the results of these classroom visits will not be used in any evaluation of a teacher's performance. Department heads have never evaluated teachers at Bay Port, and that policy will remain in effect

- in the event that a teacher is having difficulties in the classroom, the responsibility for resolving those difficulties will rest with the supervising administrator and the teacher, not with the department head
- practices and promotes peer coaching
- it is understood that as a result of performing their assigned duties department heads will not be called upon by the administration to testify against a department member regarding the teacher's competence

The Association's grievance challenges the requirement that department heads engage in classroom observation and that teachers submit to that process. Teacher Richard Schadewald testified without contradiction that no one had ever been required to observe another teacher until the District's September, 1996 change. Schadewald confirmed that there had been no grievance concerning the earlier language in the job description for department chair which referred to observation. English Department chair Mark Heike testified that the department chairs were instructed by Dunning to inform Dunning when observations had been made, but not to tell him the details or the department chair's conclusions concerning the teacher's work. Heike testified that when the discussions arose about the observations, he and others were not dealing with Dunning on behalf of the Association, but merely trying to keep themselves from becoming embroiled in an awkward situation, in which they were concerned that they might be called to testify either for or against a teacher in a non-renewal process. Heike added that two teachers had objected to his writing down his observations even for private communication to the teachers involved. But he also added that he did not believe it would be responsible to conduct observations and then give no feedback at all. Heike confirmed that no management official had asked him for any details concerning his observations, but expressed a continuing concern that if he were asked, he might feel an obligation to answer.

Superintendent Frederick Stieg testified that the job description in use since 1986 for department chairs did not explicitly contain any evaluation-related duties, but did do so implicitly, and he noted that no grievances had been received concerning that job description in the many years of its existence.

Dunning testified that he had been given a copy of a letter from Karen Alexander to Schadewald suggesting, among other things that teachers

1. Provide no verbal feedback to the teacher either before, during or after the observation.
2. Make no comments to anyone, either other department chairpersons, other teachers, administrators, students or

community members regarding the observation.

3. Report and grieve any requests for information from an administrator regarding the content of observations.
4. Report only the time, date, place and subject of observations to the administration.
5. Make no reports of student misconduct which may be observed during an assigned observation.

The parties stipulated to admission of an article entitled "The Evolution of Peer Coaching" from the magazine Educational Leadership of March 1996, as explaining Alexander's reasons for writing in the terms above-quoted.

The Association contends that the grievance is timely filed because the new job description drafted by Dunning in September, 1996 represented an actual departure from prior practice. The Association points to the fact that observation was never required of department heads prior to September, 1996, and to the perceptions of the department heads, testified to by Hieke when he stated that it was not part of his expectation that formal observations were required.

The Association contends that by assigning mandatory classroom observations, the District has violated the clear and unambiguous language of lines 681 to 683 of the collective bargaining agreement, which specify that teachers are "encouraged" to engage in visitation and evaluation. The Association argues that the use of the term "encourage" is inherently devoid of any mandatory aspect, and that as Dunning himself testified, the teachers have been sensitive on the topic of mutual observation and evaluation. The Association points to the fact that the District originated the language in question and argues that the District could have chosen more stringent language if it had intended mandatory application; therefore any ambiguity, the Association argues, should be construed against the District. The Association also argues that the department head job description is not a bargained document, and is therefore not binding on the parties.

With respect to the management rights clause, the Association argues that a claim by the District that it acted within the management rights clause is a tacit admission that it acted unilaterally, and contends that in this instance, the use of the word "encourage" in another article clearly modifies any right the District might have to act unilaterally under the management rights clause. The Association further notes that the past practice of the parties has been consistent in not requiring such observations. The Association also contends that the District's argument that department heads are insubordinate if they do not provide feedback to the teachers they observe is an absurdity, because Heike testified, along with Dunning, that there had been no requirement that the department heads provide feedback to teachers. The Association also contends that there is absurdity in the District's use of a dire and hypothetical circumstance of an observing department head seeing one student stabbing another, as an example of reporting of student misconduct being

appropriate. The Association points out that it is hard to believe that the Association would condone such student activity by asking teachers to look the other way. The Association also contends that the claim by the District that it has the right unilaterally to assign supervisory duties to department heads is limited by the requirements of the language which the District has bargained into the contract, and that the District has stated that it has no intention of assigning supervisory work to the department heads. The Association, in conclusion, argues that if the District wishes to have department heads conduct observations, that is a change in conditions of employment, and must be bargained.

In its reply brief, the Association argues that the District's argument that this grievance is untimely because it was not filed in 1986-87 is absurd, because implementation of this new language was impossible when no department chair positions were filled. The Association further argues that even in 1990, when these positions were restored in practice, there was no requirement to observe other teachers. The Association also argues that the District ignores record testimony when it avers that the department chairs are "content" with the District's new requirements. The Association finally contends that the purpose of the language "encouraging" observation is clearly to foster collegiality, and that the District's new requirement undermines that contractual expression of intent.

The District contends first that the grievance is untimely, because the requirement in the job description for department heads has been in effect since 1986. With respect to the merits, the District contends that this grievance bears the hallmark of a personal interpretation of what is proper by the Association's representative, rather than being a fair reading of the collective bargaining agreement, and contends that following the directive of the UniServ representative would cause Association members to be insubordinate. The District argues that the management rights clause clearly gives the District the right to assign any administrative or supervisory duties to teachers, and contends that the Association's use of a different section of the Agreement which contains the word "expected" is a smokescreen, because there is no relationship between the teacher work hours clause, in which that language appears, and the present dispute. With respect to the duties of department heads, the District contends that it is under no obligation to bargain a job description, but that it has the right to determine the responsibilities assigned to teachers, and therefore has the contractual right to require classroom visits by department heads. The District further notes that department heads are compensated for the department head duties, calculating that a senior teacher would be likely to receive over \$6,000 in annual pay allocable specifically to that role. With respect to the role of the department heads in the formal evaluation process, the District claims that it has thoroughly addressed this concern by explicitly stating that the department heads would not have to testify against a bargaining unit person, and by explicitly stating that their job responsibilities do not include supervision and evaluation of staff members.

The District notes unanimous testimony to the effect that no department head has been asked to provide information to management regarding their evaluations or observations. The District requests that the grievance be denied.

In its reply brief the District contends that the Association has twisted the term "encourage" into the equivalent of "voluntary". The District further argues that even if it failed for years to exercise a right to require department heads to observe teachers, it did not abandon that right and the contractual basis of the right still exists. The District notes that it at least made reference to several related responsibilities in the original department chair job description, even if they were not then enforced.

I find that the issues can most fairly be stated in the following terms:

1. Is the grievance timely?
2. If so, did the District violate the contract by requiring department heads to observe teachers in the classroom at least once per semester?
3. If so, what remedy is appropriate?

I find the District's remaining two questions to be inappropriate at this time. The first of those questions, as to whether the District would violate the contract by assigning supervisory duties to department heads, is a nullity in a situation where all witnesses agree and the District itself avers that it has not assigned any supervisory duty to department heads. Answering the District's question would thus require me to enter into a theoretical construct well in advance of any actual potential violation of the Agreement. And the District's question concerning whether department heads would be insubordinate by providing no verbal feedback is also posed in the absence of any asserted violation of the Agreement, since not only is there no evidence that any department head has refused to provide verbal feedback to teachers, but also no management official has demanded that they do so.

I find the grievance timely. While it is clear that the job description prepared in 1986 for department heads does include the word "observations", it is also clear that that passing reference created no specific method or requirement for such observations. Its non-use by department heads for many years thereafter did not create any occasion of discipline, or other indication by management that it expected that language to be carried out in any particular form of practice. Dunning's decision that a fresh job description was necessary is eloquent as to the meaning given to the prior language by both parties. Dunning's decision to require a new job description and to make explicit a requirement of observation thus provided a fair opportunity for the Association to challenge that requirement, which it did so timely per the provisions of the Agreement. The grievance is therefore timely.

With respect to the merits, I am unpersuaded by the Association's argument that lines 681 to 683 of the Agreement should be read as setting a standard or principle for department head observations of other teachers, such as to overcome the contrary language of Section A of Article II, particularly subsection 5's references to responsibilities and assignments of teachers, and to administrative activities. This language explicitly gives the District the right to assign work. Observing teachers in the classroom is an "administrative" work assignment that has been given to department heads, and the job description in effect since 1986 at the least demonstrates that this assignment is not actually contrary to prior expectations of what that role might involve. The language relating to "encouraging" teachers to observe and evaluate each other, meanwhile, is by its own terms directed to all teachers. There is nothing in the record to indicate that either

party, in adopting (apparently with little discussion) management's initial proposal in that respect, might reasonably have expected that this should operate as a limitation on work assignments to department heads. The same distinction answers the Association's argument that the purpose of encouraging classroom visits is to foster collegiality: While this is not without some merit, it does not outweigh the District's Article II right to assign the department chairs work, especially work which is clearly not inconsistent with their position's job description since 1986.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the grievance is timely.
2. That the District did not violate the collective bargaining agreement by requiring department heads to engage in periodic observation of teachers in the classroom.
3. That the grievance is denied.

Dated at Madison, Wisconsin this 22nd day of July, 1997.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator