

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEW BERLIN EDUCATION ASSOCIATION

and

NEW BERLIN SCHOOL DISTRICT

Case 20
No. 58043
MA-10824

(Study Hall Compensation Grievance)

Appearances:

Mr. Ken Krause, Lakewood UniServ Executive Directors, 13805 West Burleigh Road, Brookfield, WI 53005, appearing on behalf of the Association.

Quarles & Brady, LLP, by **Mr. Michael Aldana**, 411 East Wisconsin Avenue, Milwaukee, WI 53202, appearing on behalf of the District, with **Mr. Sean M. Scullen** on the brief.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned, Marshall L. Gratz, as arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' 1997-99 Master Agreement which was ratified by both parties in early October, 1998, and executed thereafter.

The grievance dispute was heard at New Berlin Eisenhower High School on October 11 and 12 and November 1, 1999. The proceedings were transcribed. The parties' initial post-hearing briefs were exchanged on January 29, 2000, and their reply briefs were exchanged on April 3, 2000, marking the close of the hearing.

ISSUES

At the hearing, the parties authorized the Arbitrator to frame the issues based on their proposed formulations and the record as a whole.

The Association proposed that the issues be formulated as follows:

1. Did the District violate Article VI.B of the collective bargaining agreement with the Association when it failed to pay study hall teachers who took extra classes into their study hall?
2. If so, the requested remedy is to compensate those members for subbing.

The District proposed that the issues be formulated as follows:

1. Did the District violate Article IV.B. of the parties' collective bargaining agreement when it failed to pay substitute time to regular study hall teachers when additional students were sent to their study halls?
2. If so, what is the appropriate remedy?

The Arbitrator finds it appropriate to formulate the issues as follows:

What shall be the disposition of the study hall compensation grievance dated December 5, 1997?

PERTINENT AGREEMENT PROVISIONS

ARTICLE I SCOPE AND DEFINITION OF TERMS

The provisions of this Master Agreement shall be applicable to all certified full-time and part-time (not including day-to-day substitutes employed less than twenty (20) consecutive work days) non-supervisory teaching personnel employed by the [District], including classroom teachers, substitutes employed more than twenty (20) consecutive work days, librarians, special teachers, psychologists, and guidance personnel (including school nurses when certified to teach). A long term substitute, contracted or non-contracted, will not be used to permanently replace a member of the bargaining unit. This does not prevent a regular contract from being offered to a long-term substitute if a vacancy exists.

**ARTICLE IV
SALARIES AND EXTRA PAY SCHEDULE**

. . .

B. Regular/long-term substitute teachers who take an extra class will be paid at the hourly rate of 0.085% times the following appropriate base salary:

<u>Base Salary</u>	<u>31 Minutes or More</u>	<u>30 Minutes or Less</u>
1997-98 (\$25,650)	\$23.00	\$11.50

Effective July 1, 1998 and continuing through June 30, 1999, the base salary number shall equal the step 1, class IV salary figure on the then current teacher salary schedule, all as amended from time-to-time.

Extra classes of 31 minutes or more will be compensated at the full hourly rate and classes of 30 minutes or less will be compensated at 50% of the hourly rate.

. . .

**ARTICLE V
CONDITIONS OF EMPLOYMENT**

1. Grievance Procedure

. . .

Step H. Subject to the procedural and substantive requirements set forth in this paragraph, a grievance which is not resolved in the previous steps of the grievance procedure may be appealed to arbitration

. . .

The arbitrator shall have not [sic] power to add to, subtract from, alter or amend the agreement.

. . .

BACKGROUND

The District operates a K-12 public school system serving an area southwest of Milwaukee, Wisconsin. The Association and District have been parties to collective bargaining agreements covering District professional personnel for many years. The District operates two high schools, West and Eisenhower.

The December 5, 1997 grievance at issue in this case states that it is a class action grievance concerning bargaining unit members employed by the District at Eisenhower High School. It further asserts that on "12/5/97 and continuing" the District has been violating Article IV.B. of the parties' expired 1995-97 agreement in that:

On frequent occasions teachers are unavailable to cover their regularly assigned classes due to absence or district-directed activities. Instead of obtaining substitute teachers on some of these occasions, the administration directs entire classes of students go to study hall. Study hall teachers are thereby required by the administration to supervise not only the students who would normally be present in study hall, but additional classes as well. The contract states, and past practice verifies, that teachers are to be paid for accepting the assignment of an additional class. Study hall teachers who have been assigned the responsibility for covering these additional classes have applied for this overload compensation. Though the district has experienced financial benefit through its failure to hire substitute teachers to cover these classes for absent staff members, the district has refused to pay the designated contractual amount [to] the study hall teachers who accept responsibility for additional entire classes of students.

. . .

Remedy Sought: The District will promptly compensate all study hall teachers who have been assigned responsibility for additional classes during the 1997-98 school year, and shall make them whole.

The District variously denied the grievance on the grounds that the Association's "position that teachers supervising study halls should be compensated according to Article IV B of the Master Agreement is inconsistent with both past practice of the District and the language of the Master Agreement."

The grievance was filed between the nominal June 30, 1997 termination date of their 1995-97 Master Agreement and the date in or about early October of 1998 when the parties ratified and later executed their 1997-99 and 1999-01 Master Agreements. The language of Article IV.B. was carried forward from the 1995-97 Master Agreement with only a rate change that is not material to this dispute. Following execution of the 1997-99 and 1999-01 agreements, various legal proceedings were initiated relating to the validity of those agreements. The parties proceeded with the instant grievance arbitration with knowledge of the pendency of those proceedings.

At the hearing, the Association presented testimony from Eisenhower Teachers Ann Koch, Dale Winkelman and Paul Dobner and from Association Vice President Joe Hanser. The District offered testimony from former Eisenhower Secretary Jacqueline Saari, current Eisenhower Secretary Georgia Sellin, current West Secretaries Helen Porter and Nancy

Thomas, former West Secretary Harriet Gallagher, current Eisenhower Secretary Cindy Gscheidmeier and former Eisenhower Secretary Marilyn McNeill. The District also offered testimony from District Director of Human Resources and Operations Douglas Straus, Eisenhower Principal Ted Oertel and West Principal David La Borde.

The record reveals that at all material times, a District high school teachers' workload typically consisted of five instructional periods, one duty period (such as study hall, lunchroom, lockerroom, bus or hallway supervision), two preparation periods plus an additional hour of time before and after the students' school day. (Ex.D-129; Tr.359)

Both high schools respond to notifications that a teacher will be absent from work by initially attempting to arrange for an external (per diem) substitute to cover for the absentee. If no external substitute is available, an effort is made to arrange for internal substitute(s), i.e., one or more bargaining unit teachers who are available and willing to cover for the absentee during the periods of the day when coverage is needed. (At least at West, administrators, clerical employees and teaching assistants have occasionally been utilized to cover for the absentee, as well, if no external or internal substitute is found. [Tr.236, 352]). As a last resort, a PA announcement is made directing the students with whom the absentee would normally meet during one or more specified periods to report instead to the study hall which is most often located in the cafeteria or auditorium. One or more study halls are supervised during each of the eight periods of the student day at each high school. At the time this grievance arose, between one and three teachers were assigned to supervise each study hall.

It is undisputed that on numerous occasions during October and November of 1997, the District denied various Eisenhower teachers' requests for Article IV.B. compensation as regards situations in which the District sent students, whose regular teacher was absent, to the study hall being supervised in whole or in part by the requesting teacher. In that regard, memos dated October 15, 1997, were issued by Oertel to Eisenhower teachers then assigned to study hall duty, which read as follows:

RE: Study Hall Supervision

It is our understanding that additional students can be added to a study hall. As is sometimes the case, we may have a teacher who is absent and we do not have a substitute for him.

Additionally, no extra compensation is paid when extra students are added to a study hall.

The above quoted grievance was thereafter filed on December 5, 1997. When settlement efforts proved unsuccessful, the matter was ultimately submitted to arbitration as noted above.

Additional factual background is set forth in the summaries of the positions of the parties and in the discussion, below. The parties' voluminous evidence and thorough arguments have been fully considered, whether specifically referenced in the text of this Award or not.

POSITIONS OF THE PARTIES

The Association

Article IV.B. makes additional hourly compensation payable to "teachers who take an extra class." The dictionary defines "class" as "a body of students meeting regularly to study the same subject," and "take" as "to get into one's hands or into one's possession, power or control" When a class is sent to the study hall, the study hall teacher or teachers take(s) responsibility for the class in the absence of the regular teacher. When this occurs, the study hall teacher(s) take an extra class such that the additional hourly compensation is applicable. As Association Vice President Joe Hanser testified, it has always been his understanding that Article VI.B. "simply says if they take a class, they shall be paid." (Citing Tr.90). The language of Article IV.B. does not require the teacher to "give up a prep period" or "affirmatively volunteer" or "teach the class" or "go to the absent teacher's classroom" or "substitute" for the regular teacher. It merely requires the teacher to take the extra class. By failing and refusing to pay study hall teachers in accordance with the clear and unambiguous language of Article IV.B., the District has violated the Agreement. Because the language is clear and unambiguous, there is no need to look beyond the language of the Agreement itself to correctly interpret and apply it.

If past practice evidence is nonetheless considered, it supports the grievance. The record reveals numerous instances -- prior to the District's announcement circa October 15, 1997, that teachers who take an extra class during a study hall would not be compensated -- in which study hall teachers requested and were paid in accordance with Article IV.B. when an extra class was sent to their study hall. Those teachers utilized the procedures and forms established by the District to report instances when they took an extra class. Their requests were approved by the secretaries whom the District chose to authorize as its designees for approval purposes. The secretaries had available to them records from which they could have determined whether the teacher requesting Article IV.B. had been scheduled for study hall duty or for a preparation period during the period for which the additional compensation was being requested. Indeed, in at least some of those instances, the secretaries approved payment as regards periods which the teachers specifically identified to the secretary as having been in connection with study hall duty. The recollections of the teachers involved who remain currently employed with the District are more reliable than the contrary assertions of the secretaries, some of whom retired from the District years ago.

In any event, it is the high school principals, rather than the secretaries, who had ultimate responsibility to properly direct, train and supervise their secretarial staff as regards payments to teachers for taking an extra class. The principals had control over and access to schedules, forms, the signatures of designees and the work assignments of teachers. Their testimony (and the District's contention) in this case that they did not know that the secretaries were approving study hall teachers' Article IV.B. payment requests constitute either an attempt at deception or an admission of incompetence. Especially so when it is noted that the District has not modified the forms involved to call upon the teacher to specify whether the teacher gave up a preparation time or took the extra class during study hall duty.

If bargaining history evidence is considered, it also supports the grievance. Because the contract language in Article IV.B. has at all times clearly applied to study hall teachers, and because the District had previously been paying such teachers when extra classes were sent to their study halls, it would have been for the District rather than the Association to propose a material change in the Agreement to make study hall teachers ineligible for Article IV.B. compensation. The District did not do so and, instead, seeks through unilateral action and grievance arbitration to achieve an objective it could and should have pursued at the bargaining table, instead. The fact that the Association variously proposed and settled without obtaining additional pay for class sizes in excess of proposed thresholds is irrelevant to this dispute because the Association's claim in this case is based on entire classes of students being sent to the study hall, not merely additional numbers of students.

Contrary to the District's contentions, the absence of a provision for allocating Article IV.B. pay among multiple study hall teachers does not show that the parties did not intend that provision to apply to study hall teachers, and the Association's interpretation would not require the Arbitrator to add an allocation provision to the Agreement. Instead, the Agreement as written clearly provides the full measure of Article IV.B. pay for each of the study hall teachers to whose study hall an extra class has been sent. Moreover, it is neither illogical nor absurd for Article IV.B. to apply to a teacher who is ultimately responsible for a smaller number of students than some other study hall teacher to whose study hall no extra class was taken; indeed, that is how the District caused/allowed the Agreement language at issue to be applied for many years.

For those reasons, the Arbitrator should sustain the grievance and order that the District make whole all adversely affected members of the bargaining unit.

The District

The language of Article IV.B. requires denial of the grievance. By its terms, Article IV.B. applies only to a teacher who is a "substitute," which the dictionary defines as "a person or thing that takes the place of another." When students from a canceled class are sent to a study hall, the teacher(s) supervising that study hall are neither taking the place nor the function of the absent teacher. Article IV.B. is also limited to teachers who "take an extra class," implying an affirmative and voluntary act on the part of the teacher. Unlike an internal substitute who agrees to give up a prep period to take the place of the absent teacher, a study hall teacher is already assigned to study hall duty and is being "sent" additional students rather than taking them. Besides defining "class" as "a body of students meeting regularly to study the same subject," the dictionary offers the alternate meaning of "the period during which such a body meets" which supports the District's position that "taking an extra class" means taking an extra period of work as opposed to an extra number of students. The portion of IV.B. stating that "[E]xtra classes of 31 minutes or more will be compensated at the full hourly rate and classes of 30 minutes or less will be compensated at 50% of the hourly rate" confirms that the parties used the term "extra class" to mean an additional period of time rather than an

additional group of students. The fact that Article IV.B. makes no provision for apportioning payment where additional students were added to study halls supervised by more than one teacher further demonstrates that the parties did not intend IV.B compensation to be payable to teachers already assigned to study hall duty. The District's interpretation is reasonable in that it provides pay where a teacher gives up prep time and furthers the educational process by performing the instructional duties of the absent teacher. The Association's interpretation is unreasonable because it would lead to absurd and illogical payments to study hall supervisors such as three study hall teachers receiving pay for the addition of one class of perhaps 15 students to an existing study hall of 150 and study hall teachers receiving extra compensation because of additional students while supervisors regularly assigned a greater number of students are entitled to no extra pay.

The Association has also failed to meet its burden of proving a consistent, long-standing and mutually understood past practice of providing Article IV.B. pay when additional students from canceled classes were sent to study halls. Two of the Association's three high school teacher witnesses -- Winkelman and Dobner -- testified that they had never submitted requests for Article IV.B. compensation when students were sent to their study halls prior to the fall of 1997. Dobner began submitting substitute time sheets in the fall of 1997 as a part of the Association's job action, but he apparently had only one instance approved before the District was appraised of the actual nature of these requests and denied all subsequent requests involving students added to study halls. It may be true that the Association's third witness, Koch, and a handful of other study hall teachers turned in substitute time sheets that were approved and paid, but such approvals and payments were inadvertent and not consistent with a well understood and mutually concurred in practice of applying Article VI.B. to study hall teachers. Thus, for the most part, the secretaries to whom approval was delegated -- who unlike Koch had nothing to gain or lose in this case -- testified that they understood teachers were not entitled to Article VI.B. pay unless they covered a class by taking over the other teacher's instructional or supervisory duties; that they did not knowingly approve Article VI.B. payments to teachers already assigned to study hall duty during the period in question; and that no teacher had said he or she was requesting VI.B. pay for periods when they were already assigned to study hall duty. The testimony of District administrator witnesses demonstrated that it was their common understanding that Article IV.B. pay was not meant to compensate study hall teachers when extra students were added to their study hall.

Notably, when submitted to the secretaries, the substitute time sheets did not indicate that the requested compensation was for time when the requesting teacher was already supervising a study hall, and they were often submitted in circumstances that made it difficult for the secretary to readily check the teacher's eligibility for the requested pay. While the secretaries and District can perhaps be faulted for relying on requesting teachers' assertions that they were entitled to the pay they were requesting, it is not appropriate to bind the District to a past practice just because a few teachers may have been improperly paid under the procedures set up by the Administration. Especially so where there is evidence that at least two such requests were denied -- that of West High School teacher Ruth Arbanella for 11-14-96 (citing Ex. 1-G) and West High School teacher Al Searing for sometime after 5-12-97

(citing Tr.380-1); and where the issue only came squarely to the District's attention in the fall of 1997. At that time, as part of a job action protesting the District's Qualified Economic Offer implementation, many Eisenhower teachers refused to substitute for absent colleagues causing a marked increase in the number of times students were sent to study halls due to the absence of their regular teacher and the District's inability to secure the services of an external or internal substitute.

The bargaining history evidence provides further support for the District's position. The Association has repeatedly proposed and settled without provisions that would have provided extra pay to teachers when the number of students in their classes exceeded proposed class size levels. The Association cannot be permitted to obtain through grievance arbitration the more-students-more-pay concept that it was unable to obtain in bargaining.

Finally, general equitable considerations do not support granting the grievance, either. The Eisenhower teachers themselves have caused the numbers of students being sent to study halls to increase by refusing to substitute for one another as a part of a job action against the District. The District would prefer that absent teachers classes be covered as they usually are at all the other schools in the District, by external substitutes if available or else by internal substitutes receiving extra pay for giving up their prep period to work an extra period.

For all of those reasons, the grievance should be denied in all respects.

DISCUSSION

The grievance turns on an interpretation of Article IV.B, which provides additional compensation for "regular/long-term substitute teachers who take an extra class" The Arbitrator finds the meaning of that provision to be sufficiently clear and unambiguous to make resort to evidence beyond the language of the Agreement unnecessary.

As the Association correctly asserts, Article IV.B. does not expressly provide pay for "substituting." Rather, it provides pay to "regular . . . teachers who take an extra class" and to "long-term substitute teachers who take an extra class." The phrase "long-term substitute" also appears in Article I of the Agreement, where the parties have agreed, "[a] long term substitute, contracted or non-contracted, will not be used to permanently replace a member of the bargaining unit. This does not prevent a regular contract from being offered to a long-term substitute if a vacancy exists." Accordingly, the appearance of the term "substitute" in Article IV.B. provides no guidance as to its proper interpretation or application of Article IV.B. in this case.

Rather, it is the meaning of the term "take an extra class" that is at the heart of this case. The parties have offered competing dictionary definitions of "class," as referring either to "a body of students meeting regularly to study the same subject," or to "the period during which such a body meets." Neither of those definitions is ruled out by the first sentence of Article IV.B. standing alone.

However, Article IV.B. goes on to provide, "[E]xtra classes of 31 minutes or more will be compensated at the full hourly rate and classes of 30 minutes or less will be compensated at 50% of the hourly rate." Significantly, that sentence defines "extra classes" as periods of time, rather than as bodies of students. Reading that sentence together with the first sentence in Article VI.B., clearly and unambiguously rules out the possibility that the parties intended "take an extra class" to mean "take an extra body of students," and persuasively establishes, instead, that the parties intended "take an extra class" to mean "take an extra period of time during which a body of students meets regularly."

When a body of students is sent to a study hall for a period of time due to the absence of the teacher that regularly meets with them during that period, the study hall teacher(s) are not taking responsibility for an extra period of time because they are already assigned to study hall duty during that period. Accordingly, in those circumstances the study hall teacher(s) are not entitled to compensation under Article IV.B. Hence, the instant grievance must be denied.

As noted, the meaning of Article IV.B. is sufficiently clear and unambiguous to make it unnecessary to seek further guidance from evidence beyond the contract language itself.

Some arbitrators, including the instant Arbitrator, have used past practice in exceptional circumstances to modify or amend clear and unambiguous contract language. See NICOLET HIGH SCHOOL DISTRICT, WERC grievance award MA-10243 (GRATZ, 5/24/99) citing St. Antoine, Theodore, ed., The Common Law of the Workplace, 81 (BNA, 1998) and citing VILAS COUNTY (HIGHWAY), WERC grievance award MA-9711 (GRECO, 4/22/97). However, the instant circumstances do not warrant such an outcome.

While the past practice evidence shows that at least some teachers interpreted Article IV.B. as the Association has in this case and requested and received Article IV.B. payments in accordance with that understanding, those payments have not been shown to be a practice that was sufficiently mutually understood and accepted by both parties to overcome the clear language of the agreement. Viewing the record as a whole, it is by no means clear that the District's administrators or its approval-designee secretaries knowingly applied the Association's interpretation on a longstanding and uniform basis. It is true that the District could have avoided most or all of the unwarranted payments to study hall teachers had it, for example, required teachers to specify on the substitute time sheet form whether they were assigned to a study hall or to a prep period during the time for which they were requesting Article IV.B. compensation. However, in all of the circumstances of this case, that administrative shortcoming is not sufficient to bind the District to an interpretation of Article IV.B. that is contrary to the clear language of the Agreement.

The Association's other arguments and the record as a whole are also insufficient to bind the District to an interpretation of Article IV.B. that is contrary to the clear language of that provision.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the ISSUE in dispute in this case that:

The disposition of the study hall compensation grievance dated December 5, 1997 shall be that the grievance is denied in all respects.

Dated at Shorewood, Wisconsin this 30th day of June, 2000.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator