

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WCEA, AFFILIATED WITH THE
NEA AND WEAC**

and

**THE BOARD OF EDUCATION OF
BOYCEVILLE COMMUNITY SCHOOL DISTRICT
BOYCEVILLE, WISCONSIN**

Case 33
No. 59758
MA-11397

Appearances:

Mr. Steven Holzhausen, Executive Director, West Central Education Association, 105 21st Street North, Menomonie, Wisconsin 54751, appearing on behalf of WCEA, affiliated with the NEA and WEAC, referred to below as the Association.

Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Board of Education of Boyceville Community School District, Boyceville, Wisconsin, referred to below as the Board or as the District.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association and the Board jointly requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of Mike Kneer. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as arbitrator. Hearing on the matter was held on May 2, 2001, in Boyceville, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs by July 30, 2001.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Did Principal Fisher violate the collective bargaining agreement by directing the Grievant to attend a pep assembly held during his tutorial preparation period?

If so, what is the appropriate remedy?

{PRIVATE }RELEVANT CONTRACT PROVISIONS

PREAMBLE

The Board of Education of Boyceville Community School District, Boyceville, Wisconsin . . . and its professional {tc "**RELEVANT CONTRACT PROVISIONS**" }employees represented by the WCEA, affiliated with the NEA and WEAC . . . agree that the educational welfare of the children in the district is paramount in the operation of the schools. The parties further agree that the development and fulfillment of educational programs of the highest quality requires harmonious working relationships among the Board, the administration staff and the teaching staff.

. . .

**ARTICLE II
BOARD FUNCTIONING**

The Board's right to operate and manage the school system is recognized, including the determination and direction of the teaching force; the right to plan, direct and control school activities, to schedule classes and assign work loads . . .

**ARTICLE IV
NEGOTIATION PROCEDURE**

. . .

The Board will make every effort to maintain all conditions of employment, wages and working conditions including . . . general working conditions at not less than the present standards in effect in the district at the time this Agreement is signed, provided that such conditions shall be improved for the benefit of students and teachers as required by the express provisions of this Agreement. This Agreement shall not be interpreted or applied to deprive teachers of professional advantages heretofore enjoyed unless expressly stated herein.

...

BINDING ARBITRATION -- ARTICLE VIII

...

- E. It is understood that the function of the Arbitrator shall be to provide an opinion as to the interpretation and application of specific terms of this existing Agreement. The Arbitrator shall not have power without specific written consent of the parties . . . to issue any opinions that would have the parties add to, subtract from, modify or amend any terms of this Agreement.

...

ARTICLE X
WORKING CONDITIONS

SCHOOL CALENDAR

...

The Board shall have the right to assign Junior High staff up to 6 assignments per day plus one tutorial preparation period and one preparation period. Any teacher with six (6) preparations per day shall not be required to have a tutorial period but shall have two preparation periods. Teachers shall be in their assigned area during the tutorial prep period. This period shall be use (sic) to:

1. Tutor students. Teachers should be aware of what students are in study hall during their prep time and be available to help them.
2. Meet with administrators, parents, teachers or others regarding school business.
3. Prepare for classes.

Within the four-period block schedule, the Board shall have the right to assign Senior High staff up to three (3) assignments per day plus one preparation period. During the preparation period, teachers shall allot a portion of time equivalent to the tutorial prep period in the Junior High School for meetings with students, parents, teachers and administrators and preparing for classes.

...

DEFINITIONS

Assignment -- A specific time period when a teacher is supervising students, including classes, study halls, noon duty, etc.

Preparations -- The number of different subjects which a teacher must prepare for each day.

Prep Period -- The designated time when a teacher is not in charge of students and may prepare for classes or take care of other matters . . .

{PRIVATE }BACKGROUND{tc "BACKGROUND"}

The written grievance, dated October 12, 2000, states the following:

. . .

The facts leading to the grievance are as follows: On October 5, 2000, I received the enclosed letter from Mr. Bill Fisher, the High School Principal. In that letter, Mr. Fisher informed me that he felt it was his prerogative to require me to attend pep assemblies during my tutorial preparation. To support his position, Mr. Fisher relies on his interpretation of the collective bargaining agreement and a letter from Attorney James Ward to Mr. James Begalke dated May 25, 1989 (also attached). Based on bargaining history, past practice, the collective bargaining agreement, and the aforementioned letter, it is my belief that Mr. Fisher cannot require me to attend pep assemblies during my tutorial preparation.

. . .

The grievance alleges that Fisher's conduct violates the agreement's Preamble, as well as Articles IV and X. The letter from Fisher, attached to the grievance, is dated October 4, 2000, and states:

Thank you for the letter dated May 25, 1989. I have contacted Jim Ward about the letter that you gave to me and that he wrote in 1989 addressing mutual expectations of the teacher preparation period.

I believe that the preparation period and tutorial preparation period are clearly differentiated on page 16 of the master contract. It is my opinion that the May 25, 1989 letter only addresses the preparation period and not the tutorial preparation period. It is very important to have a mutual understanding on the use of the tutorial preparation period as we both seek to meet the needs of our students and school.

The assigned area for staff who have a class or a tutorial preparation period when we have a pep assembly will be our new gymnasium unless notified otherwise. Thank you for the communication on this issue.

James Ward, who represented the Board, authored the May 25, 1989 letter and sent it to James Begalke, then a WCEA Executive Director, who represented Kneer. The letter reads thus:

The purpose of this letter is to memorialize the terms of a settlement agreed upon by the parties with respect to the grievance filed by Mike Kneer over the denial of his scheduled preparation period on December 23, 1988 . . .

During a recent telephone conversation, you indicated that the pending grievance arbitration proceeding relating to that issue would be dismissed if the District would accept a compromise settlement proposed by the Association. Under that compromise, teachers would give up their scheduled preparation periods whenever regular classes are suspended for two or more periods due to special events such as the Christmas-related activities involved in Mr. Kneer's grievance. Conversely, when classes are suspended for less than two full periods (e.g. a typical school assembly), teachers would be entitled to take their scheduled preparation periods. Moreover, only preparation periods falling within the time that regular classes are suspended would be affected. For instance, if afternoon classes are suspended, teachers would still be entitled to take their normal morning preparation periods if that is when they are ordinarily scheduled.

On behalf of the District, I left a message with your secretary that the foregoing settlement proposal was acceptable. Inasmuch as the parties have thereby reached mutual agreement as to the manner in which preparation periods are to be handled when regular classes are suspended due to special events, it should, of course follow that this newly implemented practice shall be binding upon the parties unless and until it is superseded by some form of mutual agreement between the parties to the contrary.

. . .

Begalke and Ward signed the letter, thus resolving the 1989 grievance.

Bruce Anderson is the Board's District Administrator, and responded to the grievance in a letter dated November 13, 2000. The letter denies the grievance, focusing on Item 2 of Article X. The grievance and this response set out the themes developed at hearing. The evidence focused on bargaining history, the 1989 grievance settlement, and past practice.

Bargaining History

Article X of the parties' 1984-85 agreement reads thus:

ARTICLE X
WORKING CONDITIONS
SCHOOL CALENDAR

The school calendar shall be a matter of negotiation and be made a part of this Agreement. This calendar shall include (1) the length and structure of the school day; (2) the length and structure of the school year including dates and duration of the new teacher's meeting, all staff meetings, beginning and end of quarters and semesters, paid convention days, paid vacation days, days off during the contract year without pay, inservice . . . and record-keeping days. The items mentioned in (2) above shall be assigned as indicated in Appendix "C" of this Agreement.

(1) Contractual Year. The contractual year for teachers shall be 190 calendar days of which 180 must be full face-the-pupil days. A copy of the agreed upon calendar is Appendix "C".

TEACHING HOURS

Elementary and Secondary teaching days shall be from 7:50 a.m. to 3:50 p.m.

A daily duty free lunch period of not less than thirty minutes at or near the time of the regular school lunch period shall be granted daily to each teacher.

Teacher meetings beyond school hours shall be limited to two meetings per quarter. Notification of such meetings shall be at least one week in advance.

In the bargaining for a 1985-86 labor agreement, the Board proposed extensive modifications to Article X, including changing from a seven to an eight-period day.

The proposed modification of the school day was significant for both parties. The Board and the Association bargained without outside consultants for much of the process. Terry Leverenz headed the Association's bargaining team on the local level, while two Board members, Bob Fischer and Bruce Palmer, served that role for the District. The bargaining proved contentious, and in mid-February of 1985, Leverenz started to consult with Begalke by phone concerning the course of negotiations. By the end of the month, the Board had hired outside counsel, Michael Burke, to assist in the negotiations. Leverenz responded by asking Begalke to assume a spokesperson role for the Association. The proposed change to an eight-period day posed a number of concerns for the Association. Prominent among those concerns were potential loss of prep time and potential layoffs.

Under the seven-period schedule a standard workload consisted of six assignments and one preparation period. The Association was concerned that the Board's proposed schedule would enable it to add an additional assignment to the standard workload, without additional preparation time. To avoid this, the Association took the position that changing to an eight-period day demanded two preparation periods for a standard workload. From the onset of these negotiations, the Association asserted that unilateral change to an eight-period day would violate the labor agreement. Begalke's notes indicate that the Association informed the Board it would grieve any unilateral change in the school day.

The parties' positions on the proposed change remained in dispute into May of 1985. During a bargaining session on May 21, the Association proposed to add a tutorial preparation period to the regular preparation period to make the eight period day acceptable to teachers. The Board suggested that a study hall be used as the tutorial period. Begalke testified that the Board negotiators were more receptive to the Association's proposal than the balance of the Board. During a bargaining session on May 30, 1985, the parties reached a verbal agreement that an eight period day could be implemented if it provided for two preparation periods, including a tutorial preparation period. The agreement covered a number of related issues including the hours of the school day and overload compensation.

Begalke's notes from bargaining sessions and telephone conversations in June of 1985 indicate that this verbal agreement was rough, because discussions on the school day continued. The Board proposed that the eight-period day, for a standard workload, would consist of seven assignments and one period of homeroom. The homeroom proposal sought to reduce the loss of classroom time, to permit time for teacher meetings and to permit time for teacher/student contact. The Association continued to believe that seven classroom assignments would create too heavy a teaching load for a productive student day. During the course of bargaining in June, the parties began to discuss including a tutorial period within the eight-period day to permit instructional time and independent student assistance.

These discussions produced the following written proposal:

A teacher shall have a maximum of six (6) assignments per day and a minimum of two preparation periods. One of the preparations will be designated as a tutorial preparation period except for teachers who have four or more different subjects to prepare for in a day.

It shall be at the teachers discretion to determine which preparation will be used as tutorial each day.

Teachers should be in their room or assigned area the majority of time during the tutorial prep period. This period should be used to:

1. Tutor students. Teachers should be aware of what students are in studyhall during their prep time and be available to help them.
2. Meet with administrators, parents, teachers or others regarding school business.
3. Prepare for classes

Definitions

Assignment - A specific time period when a teacher is supervising students, including classes, studyhalls, noon duty, etc.

Preparations - The number of different subjects which a teacher must prepare for each day.

Prep Period - The designated time when a teacher is not in charge of students and may prepare for classes or take care of other matters.

The parties modified this proposal twice before reaching final agreement. The first modification reduced the handwritten modifications on the typed proposal into a typed tentative agreement. That document was again modified prior to mutual agreement on the following language that was incorporated into the 1985-86 agreement:

ARTICLE X WORKING CONDITIONS

SCHOOL CALENDAR

. . .

The Board shall have the right to assign Junior High/Senior High staff up to six (6) assignments per day plus one tutorial preparation period and one preparation period. Any teacher with six (6) preparations per day shall not be required to have a tutorial period but shall have two preparation periods. Teachers shall be in their assigned area during the tutorial prep period. This period should be used to:

1. Tutor students. Teachers should be aware of what students are in study hall during their prep time and be available to help them.
2. Meet with administrators, parents, teachers or others regarding school business.
3. Prepare for classes.

DEFINITIONS

Assignment -- A specific time period when a teacher is supervising students, including classes, study halls, noon duty, etc.

Preparations -- The number of different subjects which a teacher must prepare for each day.

Prep Period -- The designated time when a teacher is not in charge of students and may prepare for classes or take care of other matters . . .

Begalke testified that unit members did not attach great significance to the distinction between preparation and tutorial preparation. From the Association's perspective, the distinction was primarily a means to permit recalcitrant Board members to agree to an eight-period day that included two preparation periods. More specifically, Begalke noted that the discussions centering on the modifications to the proposed "assigned area" language turned on the fact that not all teachers had an unused classroom to accommodate tutorial preparation. Ideally, a teacher could remain in their classroom for tutorial time with students, but for those teachers who shared classroom space, the ideal yielded to the practical, which, in Begalke's view, included the library or conference rooms. The across the table discussions reflected primarily the need for students to know where to find teachers during the tutorial preparation period.

The parties also devoted considerable discussion to the numbered paragraphs defining the use of tutorial preparation. Begalke specifically recalled that the parties discussed special education meetings and business meetings with salespeople when addressing Item 2.

Steven Holzhausen testified regarding the negotiated changes in Article X to accommodate the four-period block schedule. The parties originally agreed to a side-letter covering the 1995-96 school year to permit the schedule to be implemented on a trial basis, with each party reserving the right to opt out of the experiment. After a successful experimental period, the Association prepared the language to amend Article X to recognize the schedule. The "standards in effect" reference incorporated side letter language originally created to address Association concerns regarding prep time. The Board insisted on the references to "tutorial prep" in order to preserve the educational and administrative purposes of tutorial preparation. The four-period block schedule eliminated study halls, and the parties agreed that other time needed to be available for student/teacher contact. Holzhausen testified that he attempted to incorporate understandings dating from the 1985-86 negotiations. The amended language did not distinguish between regular and tutorial preparation.

Whether a teacher could shift between regular and tutorial preparation without supervisory approval was not specifically discussed during these negotiations.

The 1989 Grievance Settlement

In January of 1989, Kneer filed a formal grievance to protest an assignment given to him by Robert Plaehn, the High School Principal, on December 23, 1988. In the afternoon of that day, Plaehn asked Kneer to use part of his preparation period to supervise students. In Plaehn's view, the cancellation of classes on that day due to Christmas programs permitted the assignment. Kneer disagreed, and filed a grievance. Ward's letter dated May 25, 1989, which is set forth above, resolved the grievance.

Stu Waller was the Board's District Administrator at the time of the grievance. He could only vaguely recall it. He testified, however, that tutorial preparation was a very emotional issue for the Board, and that the Board would not have agreed to the grievance settlement if the grievance had questioned assignment rights affecting tutorial prep. He could not recall ever assigning a teacher to attend an assembly during tutorial prep.

Begalke and Ward each testified that the grievance settlement addressed regular preparation. Ward, unlike Begalke, saw a clear distinction between regular and tutorial prep.

Evidence of Past Practice

Kneer testified that in 1985, he taught a workload including Junior and Senior High School students. A gymnasium separated the Junior and Senior High School buildings. On a day in which Kneer's Junior High School students were attending a play in the gymnasium, Plaehn instructed Kneer to move to the Library for his tutorial prep period. This was to give High School students access to Kneer without having to walk through the gymnasium. By doing so, Plaehn did not use Kneer to supervise Junior High School students during the play.

Kneer testified that between 1989 and the grievance posed here, he had not been assigned any supervisory duties during a prep or a tutorial prep period. He felt teacher attendance at pep assemblies was voluntary. He added that he has left assemblies early to return to his classroom for prep time.

Fisher has been High School Principal for two years. During a pep assembly in September of 2000, he noted that Kneer and one other teacher, Don Austrum, had not attended. He spoke with Austrum first, advising him that he wanted him to attend. Austrum responded that he knew this, and would attend in the future. Fisher then approached Kneer, who responded that he could not be compelled to attend a pep assembly during tutorial prep.

Fisher testified that he schedules tutorial prep in the final period of the day to permit school-wide attendance at pep assemblies and similar gatherings. Fisher added that such assignments could not be made during a teacher's regular preparation period. He noted that he has assigned teachers to attend other assemblies in order to supervise students. Such assemblies included addresses by a Senator and a Circuit Judge. Fisher added that when student registration or "cabin fever days" extend beyond homeroom into a tutorial prep period, he requires teachers to continue with those activities until their completion.

Further facts will be set forth in the DISCUSSION section below.

{PRIVATE }THE PARTIES' POSITIONS{tc "THE PARTIES' POSITIONS"}

{PRIVATE }The Association's Initial Brief{tc "The County's Initial Brief"}

The Association states the issues for decision thus:

Did the District violate the 1999-2001 collective bargaining agreement between the West Central Education Association and the Boyceville Community School District when it assigned the Grievant to the gymnasium during his tutorial preparation period for the purpose of supervising students during a pep assembly?

If so, what is the remedy?

After a review of the evidence, the Association contends that bargaining history "clearly supports the Association's position." Begalke's testimony concerning the negotiations that created an eight period day and tutorial preparation stands un rebutted. A preparation period is closely related to tutorial preparation, arguably differing only in that "during a preparation period teachers do not have to be available for students." To assign a teacher to supervise students in a gym undercuts the purpose of both. More significantly, such an assignment does not fall within any of the contractually specified purposes for tutorial preparation.

Contract language defining a preparation period predates the creation of tutorial preparation in the 1985-86 labor agreement. In that agreement, the Board sought to implement an eight-period day, originally proposing to do so with a single preparation period. The Association's "position from the start of the negotiations . . . was that a change to an eight period school day needed to include two preparation periods." The creation of tutorial preparation bridged this gap. The Grievant, as the Association, did not think there was a clear distinction between the two types of prep time. The contractual language, however, specified three purposes for tutorial prep, the third being preparation for classes. The assignment challenged by the Grievant does not fit any of the three stated purposes for tutorial prep.

A pep assembly cannot be considered a “meeting with” students, parents or other individuals within the normal meaning of those terms. More significantly, the bargaining history shows no indication that the Board or the Association had anything like a pep assembly in mind when they created tutorial preparation. Nor can the reference to “assigned area” be reasonably interpreted to cover a pep assembly in a gym. The resolution of the Grievant’s 1989 grievance underscores this point. In that case, the Board assigned the Grievant to make himself available to students in a library during his tutorial preparation period. This assignment underscores the availability of a teacher to students, unlike the situation posed here. The move from the Grievant’s classroom to the library was to accommodate a junior high school play, but that move was consistent with the contractually set purpose of tutorial preparation -- “to ensure that students had access to teachers for the purpose of individualized instruction.”

Thus, analysis of the contractual language coupled with a view of bargaining history “can only lead to one conclusion: the Association’s grievance must be sustained.” This should not imply that the Grievant or the Association is unwilling to support school activities. Rather, it emphasizes the contractual and educational significance of preparation time. As the remedy appropriate to the Board’s violation, the Association requests that “the grievance be upheld and that the District be required to cease and desist from assigning teachers to attend pep assemblies during their tutorial preparation period.” Beyond this, the Association requests “that the District reimburse the Association for the costs associated in processing this grievance.”

{PRIVATE }The Board’s Initial Brief{tc "The Union’s Initial Brief"}

The Board states the issues for decision thus:

Does the District have the authority to direct staff members to attend a pep assembly during their tutorial prep period?

If not, what is the appropriate remedy?

After a review of the evidence, the Board asserts that its right to assign staff to pep assemblies that occur during a tutorial prep period “is consistent with the clear and unambiguous contract language.” A review of the contract establishes that “whether at the junior high level or at the senior high level, the District has control over the teachers’ activities during the tutorial prep period.” Under Articles II and X, the District sets a teacher’s “assigned area”, and what constitutes a “meeting”.

During a pep assembly, “students are directed/required to meet in the school gymnasium. That this constitutes a “meeting” is “beyond dispute.” The Grievant acknowledged that “he has been directed to attend various meetings during his tutorial prep period over the years and that such meetings have occurred at various locations other than his classroom.” To restrict a

teacher's "assigned area" to a classroom would create an absurd result. Thus, the clear language of Articles II and X place the authority to assign the Grievant to a pep assembly well within Fisher's discretion.

Even if the language were not clear and unambiguous, bargaining history supports this conclusion. Contrary to the Association's assertion, "the designation of the second preparation period as a tutorial preparation period was (not) merely a ruse to get the proposal past the Board." The Board drafted detailed language, and insisted on its inclusion in the agreement. More significantly, the parties specifically distinguished between the two types of preparation periods, particularly with regard to teachers having six preparations per day. Waller's testimony establishes that "the tutorial prep issue was a real emotional issue for the Board." The Board specifically demanded that the administration monitor whether the three listed purposes for tutorial prep "were being done and in that order." The only change to the language of Article X following the creation of tutorial preparation specifically incorporated past practice regarding tutorial prep. Thus, "there can be little doubt that the tutorial prep period language means exactly what it says and that during a teacher's tutorial prep period the teacher can be assigned to an area for the purpose of a student meeting."

Even if evidence of bargaining history is disregarded, evidence of past practice undercuts the grievance. Fisher testified without contradiction that he expects the attendance of all teachers at pep assemblies. The evidence confirms that this expectation has been met. One teacher who failed to attend acknowledged the impropriety of his non-attendance when confronted by Fisher. Fisher has, in any event, scheduled the student day to have tutorial preparation at the end of the day to facilitate the scheduling of meetings of school-wide importance. The District concludes that an examination of the testimony demonstrates that teachers, including the Grievant, understand and acknowledge that attendance at school-wide meetings during a tutorial prep period is within Fisher's authority to assign. Even if the testimony is insufficient to establish a binding practice, it is evident that "the Union has failed to establish any past practice which would serve to gut the District's express contractual authority to assign tutorial prep teachers to attend . . . a pep assembly."

The District concludes by requesting that "the grievance be denied in its entirety."

{PRIVATE }The Association's Reply Brief{tc "The County's Reply Brief"}

The Association contends that the evidence reveals "a fair amount of discussion about the phrase 'assigned area.'" Begalke's undisputed testimony establishes that, under normal circumstances, "a teacher's 'assigned area' was their classroom." None of the examples discussed during the bargaining preceding or following the 1985-86 agreement would support extending a teacher's "assigned area" to a gymnasium during a pep rally. the District may have the authority to define a teacher's "assigned area," but its discretion is not unlimited.

Of the purposes specified for tutorial preparation in Article X, only the second designated purpose can be considered sufficiently ambiguous to demand interpretation. More specifically, the terms needing definition are “meeting with.” A review of the District’s arguments establishes that a pep assembly is a “meeting of” students, while an instructional meeting between one or more students involving one or more teachers is a “meeting with” students.

This distinction is significant in light of bargaining history. The individual instruction contemplated by the contractual language connotes a “meeting with” not a “meeting of” students. Similar considerations govern meetings involving administrators, parents and others.

The District’s “overly broad interpretation of the contract language creates a potential conflict with the definition of assignment in the same section of the collective bargaining agreement.” A teacher in charge of students during a period has an “assignment” within the meaning of the labor agreement. This is, in fact, how Fisher uses teachers during pep assemblies.

Beyond this, the Association notes that it is not appropriate to characterize its view of bargaining history creating the tutorial prep period as a “ruse” to get the second prep period by the Board. The stated purposes of tutorial prep are the same purposes served by standard preparation time. This makes the two preps “essentially the same thing”, not a “ruse.”

Nor can Fisher’s testimony be taken to create a past practice. That a teacher knew Fisher wanted him at a pep assembly does not establish the teacher agreed Fisher could compel his attendance.

Because the District advances an interpretation of Article X never contemplated by the bargaining parties, it should be rejected.

The Board’s Reply Brief

The District views the purpose of the Association’s arguments to be the obliteration of the distinction between standard and tutorial preparation. Contrary to the Association’s point of view, the second stated purpose of tutorial preparation includes a pep assembly. That the “express language that was ultimately agreed upon by the parties” establishes two distinct forms of preparation time must guide the interpretation of the labor agreement. The contract defines standard preparation to exclude teachers from being “in charge of students.” This underscores the strength of the District’s view.

Significantly, the addition of language to Article X after the creation of tutorial preparation incorporated past practice and authorized “meetings with students.” Nor can the Association claim that the contractual definition of “assignment” supports their position. That definition clearly refers to “the regular duties assigned on a regular and daily basis to teachers as part of their regular teaching load.” If the definition is applied to the assembly at issue here, it would create the absurd situation that a teacher could be compelled to meet with a group of students during a tutorial prep period, but could not be compelled to supervise them during the meeting. Beyond this, the District contends that the Association inaccurately characterizes Begalke’s testimony. That testimony establishes that a teacher’s “assigned area” is “not fixed for purposes of meetings during their tutorial prep period.” Nor can the 1989 grievance settlement be persuasively brought into the resolution of this grievance, since it concerned preparation time, not tutorial preparation time. The Grievant’s assignment to a library during a tutorial prep period establishes only that the District chose to assign him to his senior high students rather than to his junior high students who were attending a play.

Article VIII, Section E, compels an arbitrator to honor the terms of the labor agreement. To accept the Association’s view of Article X “would be the first step toward subtracting student meetings from the types of meetings teachers may be required to attend during their tutorial prep period.” Beyond violating Article VIII, this would grant to the Association a contractual right never secured in bargaining.

{PRIVATE }DISCUSSION{tc "DISCUSSION"}

I have adopted an issue for decision that draws from, but does not mirror, the parties’ statements of the issue. The Association’s presumes that the supervision of students is the basis of Fisher’s October 4, 2000 letter. Teacher attendance at a pep assembly inevitably carries the authority of the teacher’s position within the school. However, a teacher’s attendance serves purposes beyond that, as a contractual and as a factual matter. The Board’s statement of the issue makes no reference to the facts underlying the grievance. Application of the contract to the grievance is inevitably fact-based, and my statement of the issue differs from the Board’s to highlight this.

Before addressing the issue, it is necessary to isolate the governing contract provisions. The grievance cites Articles I, IV and X. The Board adds Articles II and VIII. Each has some bearing on the grievance, but Articles II and X are the interpretive focus of the grievance. The Preamble and Article VIII state general principles relevant to the interpretation of any provision of the labor agreement, but have no specific applicability to the resolution of this grievance. The general principles support either party’s view of the grievance. Article IV has no bearing because Articles II and X address the dispute. Article II governs the Board’s general right to assign, and Article X governs preparation and tutorial preparation. The maintenance of standards stated by Article IV has a bearing on past practice, but the past

practice questioned by the grievance involves the interpretation of Articles II and X. Article IV affords no guidance on the interpretation of the express terms of the labor agreement.

Article II authorizes Board “direction of the teaching force” including “the right to plan, direct and control school activities.” Standing alone, this is sufficient to afford Fisher the authority to issue the October 4, 2000 letter. The parties acknowledge, however, that the general right to assign is limited by Article X. Thus, the interpretive issue is whether the creation of tutorial preparation in Article X limits Fisher’s right to assign the Grievant to a pep assembly that takes place during a portion of his tutorial preparation period.

On balance, the Board’s interpretation is preferable to the Association’s. More specifically, the Board’s view strains the language of Article X somewhat less than the Association’s, and is somewhat better rooted in relevant bargaining history. Beyond this, the Association’s interpretation poses potential conflicts with the provisions of Article II.

As preface to an examination of these conclusions, it is necessary to touch on some threshold points. Certain portions of Article X can be considered clear and unambiguous, but the grievance calls into question a significant portion of Article X, as well as the relationship of Articles II and X. The relationship of these provisions cannot be considered clear and unambiguous. Thus, past practice and bargaining history are relevant guides to the resolution of the grievance.

Evidence of past practice is not, however, particularly helpful. The Board notes that teacher attendance at Pep assemblies is essentially uniform during Fisher’s tenure and that Austrum’s conduct underscores staff understanding of the scope of his authority to assign. The persuasive force of past practice is rooted in the agreement manifested by the parties’ conduct. It is impossible to say on this record if the attendance pointed to by the Board reflects acknowledgement of Fisher’s authority, or manifests consensus between staff members and Fisher on the worth of Pep assemblies. Plaehn’s handling of a Junior High play in 1985 affords no more reliable guidance. He may have moved Kneer to the library in acknowledgement of his inability to assign him to supervise the play. However, it is just as likely he moved Kneer to the library to make him available as a tutor to his high school students. Nor can the resolution of the 1989 grievance be seen as the manifestation of a practice. Ward resolved the grievance for the Board because he saw a clear distinction between tutorial prep and regular prep. Begalke did not have to share this view to make the proposal that resolved the grievance. Whatever the settlement stands for regarding regular prep, it affords no evidence of agreement regarding the scope of the Board’s right to assign duties within the tutorial prep period.

Evidence of bargaining history affords some guidance regarding the interpretation of Article X. Its role is, however, subordinate to the terms of Article X and will be discussed in relation to the disputed language.

As preface to this, it is appropriate to start with matters that cannot be considered in dispute. The 1995-96 alteration of Article X addressed high school teachers affected by four-period block scheduling. The reference to “tutorial prep” calls on the three numbered purposes of tutorial prep, but does not specifically mirror their language. The reference to “meetings” for example does not include the reference to “others” from Item 3. The evidence demonstrates, however, that the parties’ agreement to the language governing high school teachers was not intended to alter the understanding traceable to the 1985 negotiations and stated in the three numbered paragraphs of Article X.

Nor will the agreement permit the conclusion that tutorial prep is identical to regular prep. The first sentence of the second paragraph of Article X (the first quoted paragraph of Article X set forth in the **RELEVANT CONTRACT PROVISIONS** section above) expressly distinguishes between “one tutorial preparation period” and “one preparation period.” The balance of the paragraph specifies rights of assignment directed to the tutorial preparation period. Article VIII, Section E specifies the generally accepted tenet of contract interpretation that each term of the agreement must be given effect. Thus, that there is a distinction between preparation and tutorial preparation is established by the labor agreement. Similarly, that the Board has broader assignment powers for tutorial preparation than for regular preparation is established by the agreement. Ignoring the assignment authority specified in its numbered paragraphs, Article X defines “Prep period” as “time when a teacher is not in charge of students”. Thus, as applied to the facts of the grievance, there is no dispute the Board has greater rights to assign a teacher to a pep assembly during a tutorial prep period than during a regular prep period. The interpretive issue is whether Fisher’s assignment of Kneer to attend a pep assembly falls within this authority.

Item 2 of Article X is the contractual focus of this issue. More specifically, the issue is whether the Grievant’s attendance at a pep assembly can be considered a meeting “with others regarding school business.” The force of the Association’s arguments regarding this paragraph must be noted.

However, the reference to “students” in Item 1 of Article X does not preclude reading “others” in Item 2 to include “students”. Item 1 governs the tutoring of students, thus linking a teacher to that group of students specifically instructed by the teacher. Reading “others” in the Item 2 to exclude students strains the normal meaning of the term, and unduly restricts a broad reference. A school-wide assembly would include students specifically instructed by a teacher and those who are instructed by other teachers. “Others” would include this group, while adopting the Association’s interpretation would not, for no evident reason in the

language of Article X. It strains the normal meaning of the terms involved to conclude that to “meet with others regarding school business” can not include a school-wide assembly.

More significantly, evidence of bargaining history and other agreement provisions support this conclusion. Begalke testified that the parties discussed meetings with salespersons as a type of “meeting with others.” This testimony highlights that the breadth of the Board’s interpretation risks straining the limits of the parties’ agreement on the creation of tutorial prep. This cannot, however, obscure that the parties agreed to a broad reference to meetings with “others regarding school business.” The parties’ arguments and witness testimony establish that the three numbered paragraphs state an order of significance for tutorial prep. The primary purpose of tutorial prep is to “Tutor students.” Meetings of the type at issue here follow that in significance, ranking ahead only of regular preparation. On balance, the right of assignment agreed to by the parties in Item 2 involves meetings with a pedagogic purpose.

Against this background, the Board’s view strains the parties’ agreement less than the Association’s. The “Definitions” section of Article X states limits to the Board’s rights of assignment under Article II. Under that section, an “Assignment” concerns those duties composing a predictable part of a teacher’s workload. “Prep period”, as noted above, denotes time “a teacher is not in charge of students.” Fisher’s direction to Kneer to attend the pep assembly does not undercut these provisions. A pep assembly is not an “assignment”, nor does Kneer’s attendance at a pep assembly demand supervision of students beyond that exercised by a teacher anytime the teacher interacts with students. Pep assemblies are few in number, and while the pedagogic value served by “school spirit” gatherings may vary in the eye of the beholder, a pedagogic purpose is served by the attempt to instill pride for and within the institution. The students Kneer tutors and prepares for attended the assembly. Thus, his attendance did not undercut any of the stated purposes of tutorial preparation, and advanced the purposes of Item 2.

In contrast, the Association’s view introduces conflict between the provisions of Articles II and X. If meetings involving students generally do not fit within Item 2, school wide meetings concerning health or safety issues could not extend into tutorial prep. Although teacher attendance, during tutorial prep, at the school-wide assemblies, student registration or “cabin fever days” may not indicate a binding practice, they highlight that such meetings do not strain the commonly accepted range of the Board’s right to assign. To exclude such meetings from Item 2 in Article X would introduce an unnecessary conflict between Articles II and X. In sum, Fisher’s assignment of the Grievant to attend a pep assembly during his tutorial prep period falls within the assignment authority specified in Articles II and X.

Before closing, it is appropriate to touch on certain arguments raised by the parties. The “assigned area” reference plays no role in the resolution of the grievance. Fisher’s October 4, 2000 letter attempts to make the pep assembly assignment by making the gym a tutorial preparation teacher’s “assigned area.” To accept this assertion expands the reference

far beyond its bargained purpose. Begalke's testimony underscores that the parties never contemplated such breadth to this reference. Nor will other agreement provisions permit this reference to acquire such breadth. "Noon duty" is an "assignment" under Article X. This reference cannot be undercut by making a cafeteria a teacher's "assigned area." Nor could a tutorial prep be made into a "study hall" by making a room set aside for that purpose a teacher's "assigned area."

The parties dispute whether a teacher or an administrator can make the allotment between preparation and tutorial preparation that is specified in the four-period block portion of Article X. There can be no answer to this issue beyond the facts of each assignment. Under Article X, tutorial and regular prep can overlap. In the absence of student demand for tutoring or the meetings denoted in Item 2, a teacher can devote tutorial prep to classroom prep. Similarly, a teacher can tutor a student during regular prep. The contract sets no more than the outside boundaries to the administrator/teacher relationship. An administrator cannot use the assignment rights granted under tutorial prep to defeat the existence or purpose of regular prep. Similarly, a teacher cannot allocate regular prep in a manner designed to undercut the Board's assignment rights during tutorial prep. The administrator/teacher relationship is one involving professionals expected to function with a high degree of independence. As a matter of contract interpretation, Article X cannot dictate that relationship beyond the facts of a specific case. In this case, granting the Grievant the right to allot tutorial prep as he deems fit would defeat the Board's rights under Articles II and X. That the parties considered and rejected a draft proposal that specified a teacher's right to make this allotment underscores this conclusion.

Ultimately, the grievance seeks to use Item 2 as a shield against the assignment to a pep assembly. The definition of "Prep period" reflects this view and supports the Association's view of the grievance. However, Item 2 governs tutorial prep specifically, and is not written as a shield against assignments. Rather, it states duties that take precedence over classroom prep during a tutorial prep period. A pep assembly falls within that range of duties.

{PRIVATE }AWARD{tc "AWARD"}

Principal Fisher did not violate the collective bargaining agreement by directing the Grievant to attend a pep assembly held during his tutorial preparation period.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin this 10th day of September, 2001.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc

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