

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**CHIPPEWA FALLS FEDERATION OF TEACHERS,
LOCAL 1907, WFT, AFT, AFL-CIO**

and

CHIPPEWA FALLS AREA UNIFIED SCHOOL DISTRICT

Case 128
No. 60242
MA-11564

(Summer School Grievance)

Appearances:

Shneidman, Hawks & Ehlke, by **Attorney Timothy E. Hawks**, 700 West Michigan Avenue, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney James M. Ward**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the District.

ARBITRATION AWARD

At all times pertinent hereto, Chippewa Falls Federation of Teachers, Local 1907, WFT, AFT, AFL-CIO (herein the Union) and Chippewa Falls Area Unified School District (herein the District) were parties to a collective bargaining agreement covering the period July 1, 1999, to June 30, 2001, and providing for binding arbitration of certain disputes between the parties. On August 16, 2001, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding the District's posting and compensation of summer school positions for the 2001 summer session, and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on November 12 and 13, 2001. The proceedings were transcribed and the transcript was filed on December 11, 2001. The parties files briefs on January 31, 2002. On February 15, 2002, the parties informed the Arbitrator that they would not be filing reply briefs, whereupon the record was closed.

ISSUES

The parties stipulated to the following framing of the issues:

Did the District violate Article VIII, Section C., Paragraph 2 of the collective bargaining agreement when it employed members of the bargaining unit as teaching assistants at the rate of \$15 per hour during the summer school program in the summer of 2001?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE VIII

Salary and Teacher Welfare

. . .

Section C. – Extended Employment

. . .

2. Summer School

- a. Teachers on the staff shall be given first preference for summer teaching based on their training and experience in the areas offered. In the event of equal training and experience, system seniority prevails. Staff for summer school shall be offered a contract for such employment as early as commitments can be made. Contracts shall be written and state salary, teaching assignments, duration and the number of hours taught daily.
- b. Teachers employed to teach summer school shall be paid a minimum amount according to the following formula: The fraction of the normal teaching day times 1/188 of the contracted salary for the previous semester times the number of summer school days. (The above formula shall be applied to teachers not under contract; i.e., experience, degree and additional credits shall determine the position on the salary schedule). Each approximately 50 minute period taught shall constitute 1/6 of a day. The Fourth of July shall be considered as a paid legal holiday.
- c. Teachers shall be notified of existing and expected vacancies in the summer school program by May 1 of each year and of appointment to the summer school no later than June 1.

- d. Appointment to summer school positions shall be made for a period of one (1) summer.

BACKGROUND

The Chippewa Falls Area Unified School District operates a summer school program, offering a remedial education course to low achieving students in the elementary grades. According to the terms of Article VIII, Section C, of the collective bargaining agreement, summer school teachers are to be paid a per diem rate based upon 1/188 of their salary. Further, summer school teaching positions are to be allocated among applicants based upon training and experience, with seniority serving as the tie-breaker between equally qualified applicants. In the past, the District has hired a number of teachers at the contract rate to teach summer school at the different elementary grade levels. During the summer of 2000, the District employed 15 teachers to teach elementary summer school and compensated them according to the terms of the contract. The District also hired a number of tutors, several of whom were bargaining unit members, who were paid an hourly wage of \$10.50.

During the 2000-2001 school year, the parties were engaged in bargaining over a successor agreement. One of the proposals proffered by the District sought a change in the pay structure for summer school teaching by eliminating the per diem formula and replacing it with a \$25.00 per hour rate for summer school teaching. The Union rejected this proposal. In February, 2001, concurrent with the contract negotiations, the District established a curriculum team to review the summer school program and to make recommendations for modifications. This team included James Dimock, Assistant Superintendent for Curriculum and Staff Development, and Beth Schultz, Principal at Jim Falls Elementary School, as well as the District's Summer School program. The curriculum team determined that the current summer school program was not adequately fulfilling the District's objectives and began looking at alternative models. In early February or early March, 2001, the curriculum team recommended modifying the summer school faculty composition, ostensibly to lower the faculty to student ratio from years past. In April, 2001, it recommended a summer school curriculum package produced by Houghton Mifflin Company. The District adopted the team's recommendation and employed the Houghton Mifflin program in the summer of 2001.

Under the new summer school staffing structure, each grade level had one faculty member designated as a "lead teacher" and several other faculty members designated as "teaching assistants," a new classification within the District. As envisioned, lead teachers were to be responsible for planning the summer school program, overseeing delivery of the curriculum and evaluating the progress of the students. Teaching assistants were to assist the lead teachers in implementing the curriculum in a small group environment and communicate with the lead teachers regarding student performance and needs, as well as handling other tasks as assigned by the lead teachers. On April 18, 2001, the District posted the summer school lead teaching positions for the elementary program, indicating there was one available position

per grade and that the salary for the positions would be according to the contract formula. On April 19, 2001, the District posted the teaching assistant positions, indicating there were several openings available and also that the rate of compensation for the positions would be \$15.00 per hour. Lead teachers were required to be certified to teach grades 1-5, whereas teaching assistants were required to have a baccalaureate degree, but certification was only preferred, not required. The District ultimately hired 5 lead teachers and 13 teaching assistants for the 2001 summer school program, all of whom were certified elementary teachers in the bargaining unit.

The Union filed a grievance on June 6, 2001, alleging that the teaching assistants were, in effect, hired to be teachers and that the District's establishment of a pay rate for the position other than as specified by the agreement was a violation of the contract. The District denied the grievance and the matter proceeded through the steps of the grievance procedure to arbitration, but not until after the summer session had been completed. Additional facts will be referenced, as needed, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Union

The Union contends that during the 2001 summer school program the bargaining unit employees hired as teaching assistants were actually performing the duties of teachers and, therefore, should have been compensated according to the formula set forth in Article VIII, Section C, of the contract. Using the modular Houghton Mifflin summer school curriculum, the District designed the program so that students in at each grade level would be rotating from one classroom to another at 30 minute intervals for the first 1½ hours each day to receive instruction in different language skills from either a lead teacher or teaching assistant. Following a 15 minute break, the students then received an hour of math instruction from either a lead teacher or teaching assistant. During these periods, the teaching assistants had sole responsibility for the children in their classrooms and were performing the same functions as the lead teacher. They were responsible for control of their classrooms, they planned and delivered the curriculum to meet the individual needs of their students, and they evaluated the progress of the students.

The teaching assistants were not in any way comparable to instructional assistants employed during the school year, as the District contends. Instructional assistants work with small groups of students for short periods of time under the supervision of a classroom teacher to accomplish teacher-determined goals. They are not certified teachers and do not function independently. The summer school teaching assistants were functioning independently and even the lead teachers acknowledged that they were functioning as teachers, rather than as assistants. The District did not communicate to the staff that the assistants were not to teach, leaving them little guidance or alternative to do otherwise. Further, the District sent out

literature about the summer school program to the students and their parents identifying the “assistants” as teachers, leaving the parents and students with that clear impression. That the District also had this intent is made clear by the fact that the testimony shows that the newly adopted model was intended to reduce the teacher/student ratio, which means, since there were only 5 lead teachers, that the teaching assistants were to be considered teachers, as well. At the end of the summer, the District confirmed this by the fact that the summer school report submitted to the Department of Public Instruction identified the teaching assistants as “certified teachers.” The only point in classifying the teachers as teaching assistants, therefore, was to justify the District’s attempt to restructure summer school compensation, which it had been unable to achieve in bargaining.

The District

The District maintains that the creation and filling of the position of summer school teaching assistant at a pay rate other than that specified in Article VIII, Section C, Paragraph 2 of the collective bargaining agreement did not constitute a breach of the agreement. First, the cited contract provision is inapplicable, because it applies only to bargaining unit members hired to teach summer school. The teaching assistants were not hired to teach, but to assist the lead teachers. This is reflected in the posting for the position, which states that applicants need not be certified as teachers, but require only a bachelor’s degree. The curriculum tightly scripted and outlined, so that, with lead teacher supervision, the materials and information could be delivered by a teaching assistant without teacher certification. The fact that those hired as teaching assistants were certified gave the lead teachers more latitude to let them operate autonomously, but that does not alter the fact that the District could have hired non-certified personnel if it chose to do so.

The Houghton Mifflin curriculum permitted the restructuring of staff because it eliminated the need for lesson plans or curriculum modification. Any necessary planning was to be handled by the lead teachers, therefore the teaching assistants had only to present the material that they were provided. The consistency and uniformity of the program recommended it over models used in the past because it was believed that such a program would improve the performance of the students, but it also reduced the need for teachers to self-design their curricula. The teaching assistants, therefore, operated more in the manner of paraprofessionals, or instructional assistants, than they did in the manner of lead teachers or school year teachers. They did not need to do advance planning, curriculum modification, or deliver new material. They merely presented the “canned” material, which was designed to reinforce what had been presented during the school year. Teaching assistants were also more analogous to tutors than they were to lead teachers, in that their function was to work under the lead teachers and reinforce learning rather than present new material. In fact, the position of tutor had existed prior to 2001, but was eliminated in favor of the teaching assistant position. It is also noteworthy that in the past certified teachers had been hired to serve as tutors without objection from the Union. There is precedent, therefore, for certified teachers being hired to perform non-teaching tasks in the summer school program at something other than the contract wage rate.

In sum, the teaching assistants were not required to be certified and did not perform the functions of certified teachers. The fact that those hired for the positions were certified is, therefore, irrelevant. The teaching assistants were functioning in a paraprofessional capacity and, as such, were not subject to the contract language governing summer school teachers. The grievance should be denied.

DISCUSSION

The net effect of the District's decision to modify the staffing structure and adopt the Houghton Mifflin curriculum in the summer of 2001 was that it reduced the number of teachers hired for the summer session from 15 to 5 and added 13 teaching assistants, which positions were all filled by certified teachers within the bargaining unit. The teaching assistants were not paid according to the formula set forth in Article VIII, Section C. of the contract because, the District maintains, they were not required to be certified teachers and they did not, in fact, teach, but rather assisted the lead teachers in a manner more consistent with the role of instructional aides. Thus, one part of the District's argument is that since the position of teaching assistant did not require a certified teacher, it was by definition not bargaining unit work. The other prong of the argument is that the position of teaching assistant did not involve teaching as that term is to be understood under the language of the contract and, therefore, Article VIII does not apply. In this sense, the teaching assistant position is likened to that of tutor, a position filled by certified teachers in past summers which did not qualify for the wage formula set forth in Article VIII, Section C.

Article VIII, Section C. of the contract applies to bargaining unit members who are hired to teach summer school. Clearly, had the District hired non-certified personnel from outside the bargaining unit it would not have had to pay them according to the contract formula because they would not have been covered by the provisions of the contract. On the other hand, it is not a sufficient argument to say that because the District could have hired non-certified personnel, the certified bargaining unit members who were hired cannot invoke the wage formula set forth in the contract. In my view, according to the terms of the contract if the duties the bargaining unit members are hired to perform constitute teaching, and if they fulfill those duties, they are entitled to be paid according to the formula set forth in Article VIII, Section C., Paragraph 2(b). Whether they are referred to as teachers or teaching assistants is merely a matter of semantics. The dispositive point is what they, in fact, do.

The District asserts that the key distinction between the 2001 summer session and previous years was the adoption of the Houghton Mifflin curriculum. It contends that this "canned" curriculum provided a uniform delivery model, which eliminated much of the need for advance planning and preparation, thus reducing the need for teachers to one per grade level. The teaching assistants then operated more in the manner of instructional assistants, providing support to the lead teachers. Beth Schultz, Principal of the summer school program, testified to the effect that the curriculum was designed in such a way that it could be presented

by a non-teacher, as long as there was a qualified teacher planning the presentation and monitoring the program. Those acting as teaching assistants, therefore, performed in the capacity of paraprofessionals, notwithstanding the fact that they were certified teachers.

The evidence on this point is conflicting. To support its position, the Union solicited written statements and testimony from the teaching assistants and lead teachers about their duties and also had them fill out a checklist comparing the lead teacher and teacher assistant functions with those of a classroom teacher during the school year. Each of the Grade 1-5 lead teachers provided a written statement (Union Ex. #7). Generally, the lead teachers described a situation wherein they did more advance planning for the summer program than the teaching assistants and had more involvement in student assessment, but that in delivery of the curriculum itself the lead teachers and assistants functioned essentially alike. Further, inasmuch as the Houghton Mifflin curriculum was pre-packaged, the planning role of the lead teachers was largely limited to tailoring the amount of material provided to the time available for presentation. In this determination, however, the assistants often had a large degree of autonomy. Statements were also provided by 5 teaching assistants (Union Ex. #8), all of whom had worked in previous summers either as teachers or tutors. Those who had previously served as summer school teachers described their roles as teaching assistants as being essentially equivalent. Those who had previously been tutors described that role as being similar to an instructional aide and stated that being a teaching assistant was much more comparable to being a teacher.

The checklists were created by the Union grievance committee and listed the duties of classroom teachers, as they are set forth in the District's job description, along with columns for lead teachers and teaching assistants. These were distributed to the lead teacher and teacher assistants and they were asked, for each position, to check the duties that applied to the position. Five completed checklists were offered into evidence from faculty members, one lead teacher and four teaching assistants. These universally indicated that in virtually every respect, the duties of lead teacher and teaching assistant were identical. The checklist was also completed by the summer school principal, Beth Schultz, who indicated a wide disparity between the duties of the two positions. In her view, lead teachers performed virtually all the functions of a classroom teacher. Teaching assistants, on the other hand, had essentially no role in curriculum development, planning, instruction, evaluation and budgeting, limited involvement in communication and discipline and a few other responsibilities, consistent with what would be expected from an instructional aide.

Judy Monarski, the 4th Grade lead teacher in 2001, testified that her duties were 95% the same as those of the teaching assistants assigned to work with her. The lead teacher and assistants met with students in separate classrooms and performed the same functions in delivering the curriculum, maintaining classroom order and evaluating performance. She described the duties of the assistants as being comparable to those of teachers during the 2000 summer session and not equivalent to instructional assistants during the school year. Sara Daniels, 2nd grade lead teacher, testified that she was much more involved in planning the

curriculum and overseeing the organization of the 2nd Grade program than the assistants, but that their respective roles vis-à-vis the students were very similar. Lead teacher and assistants, alike, met with and instructed individual groups of students. Some students spent as much as 80% of the day with assistants, a situation dissimilar to what an instructional aide would do during the school year. Additionally, testimony was elicited from teaching assistants Cindy Olson, Linda Sallow, Pat Sneen and Vicki Hopkins, who all testified that their roles, as they experienced them, were comparable to the roles of the lead teachers and comparable to the duties they had performed in the past as summer school teachers.

The testimony from Principal Schultz contradicted that of the faculty members as to the expectations of a teaching assistant versus a lead teacher. She testified that lead teachers were to provide consistency in instruction throughout each grade level, by acting in essentially a supervisory capacity vis-à-vis the teaching assistants. This role included doing comprehensive grade level planning, tailoring the curriculum to the time allowed and the needs of the students, handling disciplinary problems and taking the lead role in evaluating student progress. Principal Schultz was aware that some lead teachers allowed teaching assistants wide latitude to structure the curriculum as they saw fit, but testified that that was not the District's expectation, nor were the respective roles presented to the faculty in that way. This testimony was buttressed by that of Superintendent Larry Annett, who likened the role of the teaching assistants to that of instructional aides during the school year. Dr. Annett observed that all staff members "teach" in some fashion, but that those designated as teachers have specific responsibilities for planning, evaluation and discipline that paraprofessionals, including summer school teaching assistants, do not.

Additionally, there was instructive testimony from James Dimock, Assistant Superintendent for Curriculum and Staff Development about the genesis of the curriculum plan for the 2001 summer session. Specifically, Mr. Dimock testified that the lead teacher/teaching assistant concept was adopted in February or March, 2001, and that the major reasons behind it were to lower the student/faculty ratio from previous summers and to allow the teaching assistants to specialize within the 4-block model of literacy instruction the District was adopting. Mr. Dimock further testified that the Houghton Mifflin curriculum was selected for summer school in April, 2001, after extensive research into various programs, by primarily by himself and Principal Schultz, because it was user and student friendly and offered a different approach to instruction than the traditional model used during the school year, which was considered an advantage in a remedial program. The curriculum was thus selected subsequent to the decision to modify the summer school staff structure.

For a number of reasons, I cannot adopt the view advanced by the District. First, and most importantly, it seems clear that the teaching assistants were, in fact, teaching. The evidence reveals that at all grade levels the students were, in some fashion, divided up between the lead teachers and teacher assistants on a more or less equitable basis to accommodate the modular structure of the program. Thus, the students rotated through the different blocks being presented by the lead teachers and assistants and the assistants were solely responsible

for conveying curriculum to specific groups of students in the same fashion as the lead teachers. Further, in many cases the teaching assistants were required to modify the curriculum to meet the needs of the students assigned to them and played a central role in administering and interpreting the evaluation tools used to measure student progress. Given the nature of the District's approach to the 4-block literacy program, which gave the teaching assistants sole responsibility for the delivery of the curriculum to specific groups of students, I cannot see how it could be otherwise. The lead teacher was not in the classroom with the teaching assistants, did not present the curriculum beyond his or her own classroom of students, and thus could not effectively monitor the progress of the students in the teaching assistants' classrooms, handle disciplinary issues, or make modifications of curriculum based on individual needs. This would have to be done by the teaching assistant, who, according to Mr. Dimock, was supposed to be a "specialist" with regard to his or her particular block of material.

There is no functional equivalence between the duties of a summer school teaching assistant and an instructional aide during the school year. The evidence reveals that instructional aides fill a support role, wherein they work with students, either in the classroom or in breakout groups for short intervals, to help reinforce the incorporation of the material presented by the classroom teacher. They do not operate independently, nor are they the primary source of the educational material for the students. Their role is entirely supportive of the classroom teacher. Consequently, they need only have a two-year associate degree, with a bachelor's degree preferred. The summer school assistants, however, were required to have at least a bachelor's degree, with certification preferred. They had their own classrooms and, as aforementioned, were solely responsible for presenting their own blocks of material. Indeed, this element of specialization was, in Mr. Dimock's opinion, one of the prime factors that led to the adoption of the lead teacher/teaching assistant format.

It is clear from the chronology, that the District's decision to adopt the lead teacher/teaching assistant format had no connection to the selection of the Houghton Mifflin curriculum, and Mr. Dimock admitted as much. This is because the desire to reduce the student/faculty ratio and the use of the 4-block literacy model, which ostensibly underlay the staffing decision, predated the curriculum selection. While the change did result in a reduced ratio, and the assistants did successfully operate the 4-block model, it is not clear why it was necessary to classify them as something other than teachers in order to accomplish these ends. Dr. Annett testified that the decision was not based upon budgetary considerations and Mr. Dimock professed not to know what the summer school budget was for 2001. One may assume, therefore, that the distinction was drawn based upon the assumption that the lead teachers would be coordinating the program for the entire grade level and, thus, should be set apart from the teaching assistants in terms of compensation. The distinction, however, appears to be not so much based upon the fact that less was expected from teaching assistants than from regular teachers, but that in the case of the lead teachers, the District expected more, in the sense that the job entailed an oversight/coordination component that is atypical of a regular classroom teacher. The fact that lead teachers were called upon to perform duties beyond

those of a regular classroom teacher, however, does not obviate the District's responsibility to compensate the teaching assistants according to the terms of the contract. Consequently, inasmuch as I have concluded that the bargaining unit members hired as teaching assistants in the summer of 2001 were, in fact, hired to teach, regardless of the title given them, the grievance is sustained.

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

AWARD

The District violated Article VIII, Section C., Paragraph 2 of the collective bargaining agreement when it employed members of the bargaining unit as teaching assistants at the rate of \$15 per hour during the summer school program in the summer of 2001. Therefore, the District shall make all such employees whole according to the provisions of Article VIII, Section C., Paragraph 2.

The undersigned will retain jurisdiction over this matter for a period of 30 days after entry of the Award to address any issues arising regarding the implementation of the remedy.

Dated at Fond du Lac, Wisconsin, this 20th day of June, 2002.

John R. Emery /s/

John R. Emery, Arbitrator