BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WEST CENTRAL EDUCATION ASSOCIATION-DURAND

and

SCHOOL DISTRICT OF DURAND

Case 38
No. 60592
MA-11665

(Louella Simpson Grievance)

Appearances:

Mr. Fred Andrist, Executive Director, West Central Education Association, 105-21st Street North, Menomonie, Wisconsin 54751, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Christopher R. Bloom,** 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, 54702-1030.

ARBITRATION AWARD

West Central Education Association-Durand, hereinafter the Union, with the concurrence of the School District of Durand, hereinafter the District, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as Arbitrator to hear and decide the instant dispute involving Louella Simpson, hereinafter the Grievant, in accordance with the grievance and arbitration procedures contained in the parties' collective bargaining agreement, hereinafter the Agreement. The undersigned, Stephen G. Bohrer, was so designated. On February 13, 2002, a hearing was held in Durand, Wisconsin. The hearing was not transcribed. On April 3, 2002, and upon receipt of the last of the parties' written briefs, the record was closed.

ISSUES

The parties did not agree on a statement of the issues. The Union would state the issues as follows:

1. Did the District violate Article 9, Section F(2), of the 1999-2001 Agreement when it issued the Grievant an 88% contract for her workload during the 2001-2002 school year?

2. If so, what is the appropriate remedy?

The District would state the issues as follows:

1. Did the District violate the parties' 1999-2001 Agreement when it compensated the Grievant at 88% for the 2001-2002 school year?

2. If so, what is the appropriate remedy?

The Arbitrator adopts the issues as stated by the District.

PERTINENT AGREEMENT PROVISIONS

ARTICLE II – BOARD FUNCTIONS

A. The Board of Education, on its own behalf, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules, and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:

. . .

3. To employ and re-employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or their dismissal or demotion, their promotion and their work assignment. . . .

B. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance, thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of the agreement and Wisconsin Statutes; and then only to the extent such specific and express terms hereof are in conformance with the Constitution and the laws of the State of Wisconsin, and the Constitution and laws of the United States.

. . .

ARTICLE IX – CONDITIONS OF EMPLOYMENT

It is recognized that conditions of employment are based on educational requirements and subject to change as educational methods, needs and techniques change.

. . .

F. **Teaching Load:**

. . .

2. Based on an eight period day, the maximum teaching load at the junior or senior high will be 6 periods. An additional four class periods may be assigned for supervisory or other non-credit bearing activities.
   If a staff members teaching load exceeds the maximum, he/she will be compensated at the rate of $500.00 plus his/her prorated hourly salary for that portion of the load that exceeds the above-established maximum of both teaching and non-credit bearing assignments per semester.
   For teachers in the middle school/senior high with less than full contracts, workloads shall be prorated according to the percentage of a full-time contract held by such teacher.

. . .

BACKGROUND

The District operates a public school system in Durand, Wisconsin, which includes elementary, middle and high schools. The parties' 1999-2001 Agreement covers all full-time and part-time certified teaching personnel. The Grievant is a teacher at the Arkansas Middle School and, at the time of the hearing, was in her 19th school year with the District. The parties have operated under a collective bargaining agreement for many years and prior to the Grievant's tenure.

Over the years, the Grievant's workload has been increased and decreased resulting in a change in the level of her compensation. From the 1983-1984 school year through the 1993-1994 school year, the Grievant was considered full-time and was paid 100% of what she was eligible to receive under the parties' correlating collective bargaining agreement. From the 1994-1995 school year through the 1997-1998 school year, the Grievant's workload was decreased and she was compensated at the rate of 75% of what she would have received under the applicable collective bargaining agreement had she been working full-time. For the 1998-1999 school year, the Grievant's workload was decreased from the prior year and she was

compensated at the rate of 66 2/3%. For the 1999-2000 school year, the Grievant's workload was increased from the previous year and she was compensated at the rate of 75%. For the 2000-2001 school year, the Grievant's workload was increased from the previous year and that same workload continued into the 2001-2002 school year. For those two most recent school years, the Grievant has been compensated at the rate of 88%.

With respect to the three most recent years, and from the 1999-2000 school year through the 2001-2002 school year, the evidence at the hearing indicated that the Grievant had signed a teacher's contract with the District. Those teacher's contracts were separate from the parties' Agreement. Those contracts included the percentage of compensation that the District would pay to the Grievant for each school year.

The underlying dispute in this matter is over the Grievant's percentage rate of pay for the 2001-2002 school year. The Union takes the position that the Grievant should be paid at the rate of 100% of what she would be eligible to receive under the 1999-2001 Agreement. (At the time of hearing, the parties had not yet resolved their negotiations for a 2001-2003 collective bargaining agreement and, consequently, were operating under the terms of the 1999-2001 Agreement.) The District takes the position that the Grievant should be paid at the rate of 88% of what she would be eligible to receive under the 1999-2001 Agreement.

Additional background information is set forth in the Positions of the Parties and in the Discussion below.

POSITIONS OF THE PARTIES

The Union

Timeliness

The issue of timeliness has not been raised other than during the District's opening argument at the hearing. The Union recognizes that the District miscalculated the Grievant's contract for the 2000-2001 school year when the Grievant asked to have it adjusted and the District made the adjustment from 75% to 88%. Grievant did not validate the District's calculations because she trusted that the District would make it right. Nevertheless, the Union does not seek lost wages for the 2000-2001 period and as a remedy for this grievance.

When the Grievant became aware that she would not receive a full-time contract, she pursued it. She discussed the matter with Principal Walters and, on August 31, 2001, she requested compensation for a full-time contract in writing. The Grievant waited for her first paycheck for the 2001-2002 school year and when that check did not reflect a full-time status, she filed a grievance. Since it is the Grievant's workload that determines her contract status, the "grievance time clock" appropriately began at the time that the Grievant's first payroll period ended. Because this case involves the Grievant's pay, District's failure to compensate the proper amount to the Grievant is a continuing violation of the Agreement.

In WONEWOC-UNION CENTER SCHOOL DISTRICT, DEC. NO. 29849-A (JONES, 10/00), it was concluded that the grievance was timely because the union was seeking a modification in pay and not a return to a previous work schedule.

District's right to assign

The Union is not contesting the District's ability to assign the Grievant duties. Rather, there were several periods during the eight-period schedule for the 2001-2002 school year where the District could have assigned duties such as the Learning Center to the Grievant. Both Walters and Dan Kvislen testified as to the purpose and need of having an instructor at the Learning Center at all times. Presently, an instructor has been missing in the Learning Center during the same periods as those which could have been assigned to the Grievant.

Six periods equals a full-time contract

Article IX, Section F(2), has gone through a transition since the 1987-1988 collective bargaining agreement. The 1987-1988 language dealt only with class sizes. Subsequently, the 1988-1990 agreement's language for that provision was expanded to include a variation of the present day maximum teaching load language. Finally, the language was changed to its present form in the 1990-1992 agreement, except for the dollar amount for exceeding the maximum teaching load.

Don Rahman, the only person at the hearing who was present during the evolution of Article IX, Section F(2), testified that the purpose of this language was to define a full-time contract and that he believed the Grievant fulfilled the requirements for a full-time contract. The District supported Rahman's expertise during its cross-examination of Rahman.

The contractual language in WONEWOC, SUPRA, parallels the language in this case. Although the facts there did not deal with an employee whose workload fell into exact periods, the Examiner recognized that the language defined full-time contracts. ID., at p. 17. That contract required that teachers be in the building for eight hours each day. In this case, the District's testimony was that the Grievant was not in the building for the full amount of the District's expectation. However, the District did not provide any document that established those times nor specific times that the Grievant was absent from the building. The Grievant testified that no one has ever told her what times she is expected to be in the building.

The Grievant testified that she works well beyond both ends of the school day and that she has attended 100% of the parent-teacher and inservice times. Although the Grievant was paid additional compensation for substitute teaching, that compensation occurred during the 2000-2001 school year, a year not in dispute and not a part of this grievance. According to Principal Walters, the Grievant did not receive any additional compensation for substitute

teaching during the 2001-2002 school year. Nevertheless, the amount of time that the Grievant works beyond her six classes is irrelevant to this grievance. Like the decision in WONEWOC, a full teaching load is six periods per day. Since the Grievant teaches six periods per day, she should have a full-time contract.

Comparable provisions within Article IX, Section F(2)

Under the Agreement, a full-time contract can be a minimum of six periods, along with one preparation period. Article IX, Section F(2), paragraph one, sentence two, states that "[a]n additional four class periods per week may be assigned for supervisory or other non-credit bearing activities." (Emphasis supplied.) According to this language, the District is not required to assign additional duties. For example, the High School uses study hall and "floating sub" as an additional duty and Rahman testified that this can amount to a very minimal work assignment. In addition, the teacher's schedule for the second semester of the 2001-2002 school year states that a teacher named "Flanagan" has "floating sub" as his sixth assignment and that every other day study hall is his additional assignment.

Article IX, Section F(2), paragraph three, defines part-time contracts. If the District elects not to assign any additional supervisory or other non-credit bearing activity, the workload of a full-time Middle School teacher could be six classes plus one preparation period. It is only when the District elects to assign additional duties that the workload gets to be eight periods. Therefore, six teaching and one preparation period is the standard for a full-time contract. The Agreement merely gives the District the ability to assign the eighth period.

Article IX, Section F(2), paragraph two, is of limited use in the Union's position because it establishes an "overload" situation. If a teacher teaches a seventh class, it would exceed the established maximum of both teaching and non-credit bearing assignments per semester. One might look at this provision as overtime pay.

Past practice

In WONEWOC, SUPRA, the Examiner used time because that contract addressed it and because that employee's schedule did not fit into class periods. In this case, the Agreement does not address the time issue, but it does have language dealing with teaching six periods. Rahman testified to the intent of that language.

Flanagan's schedule, as discussed above, is a weak example of the District's assertion that a full-time teacher must teach more than six classes. If the schedules of both High School and Middle School are examined, and putting aside the additional assignments that the District "may" assign, most full-time teachers teach six classes.

Using the class workload is the appropriate measure in this case. The only reasonable inference is that the maximum workload language must be considered full-time. The Grievant works a full day for the full school year. The District has assigned to the Grievant a full schedule of classes. The District has elected not to assign to the Grievant any other duties. Therefore, the Grievant should have a full-time contract.

The District

Right of assignment/reservation of rights

Article II, Section A, paragraph three, of the Agreement provides the District with the right to determine employees' work assignments. The Grievant was assigned six classes and one preparation period for a total of seven out of eight class periods. In addition, the Grievant signed an 88% contract (as opposed to a 100% contract). This percentage is consistent with working seven out of eight class periods. Moreover, Article II, Section A, retains the District's right to assign unless expressly restricted in the Agreement, citing The Common Law of the Workplace, St. Antoine, p. 93 (1998), and SHEBOYGAN AREA SCHOOL DIST., WERC MA-7103 (SCHIAVONI, 8/92).

One such limitation is Article IX, Section F(2), paragraph one, which restricts the number and types of assignments. It states that the District cannot schedule a teacher for more than six teaching periods and that it cannot assign more than four class periods per week for supervisory or other non-credit bearing activities. In this case, the Grievant was scheduled for six teaching periods, and no supervisory or non-credit bearing activities. Therefore, the Grievant's schedule does not violate Article IX, Section F(2), paragraph one.

Article IX, Section F(2), paragraph two, states that when teachers are scheduled for more than the maximum of teaching and non-credit bearing assignments (as dictated in paragraph one), that teacher is to be compensated $500.00, plus a prorated hourly rate for the workload above the maximum. For example, High School teacher Mike Retzloff is given additional compensation because he is assigned study hall supervision for five days per week, instead of the maximum of four days per week. Therefore, and since the Grievant was not scheduled above the maximum, the Grievant's schedule did not violate Article IX, Section F(2), paragraph two.

Article IX, Section F(2), paragraph three, restricts the workload of teachers with less than full contracts such that part-time teachers can only be assigned a workload up to the percentage of their contract. The Grievant's contract was as a part-time (88%) employee. Hence, she was scheduled for 88%, i.e., seven out of eight class periods, and no duties during the eighth period of the day. In addition, the Grievant was not required to be at school for the eighth period. If she was asked to perform duties, such as substituting for a class, she was paid for that work at the substitute rate. Therefore, the Grievant's schedule does not violate Article IX, Section F(2), paragraph three.

The Union incorrectly requests that this Arbitrator read restrictions into Article IX, Section F(2), paragraph one. It would like to interpret that provision to mean that teaching six periods constitutes a full load. The Union bears the burden of proof, and the Agreement does not support this assertion.

No provision in the Agreement limits the District's right to include supervisory and non-credit bearing activity in determining what constitutes a full-time (100%) teacher. Conversely, Article IX, Section F(2), paragraph one, specifically permits the District to schedule full-time teachers for up to four class periods per week for such activity. That provision does not restrict the District's right to determine that such scheduled duties constitute a full workload.

Moreover, Article IX, Section F(2), paragraph two, clearly implies that a full contract (100%) consists of six teaching periods and four class periods of supervisory or other non-credit bearing activity by defining the maximum workload to include both teaching and supervisory activities. Since the Agreement does not contain the Union's above described and alleged restriction, the District retains the right under Article II to determine that a full (100%) workload constitutes eight periods. Therefore, the District did not violate Article II, Section F(2), by assigning the Grievant to seven periods based upon an 88% percent contract.

Other provisions within Article IX, Section F(2)

The District's interpretation is consistent with other provisions in Article IX, Section F(2) of the Agreement. An interpretation which construes an agreement as a whole is preferred over an interpretation of an agreement's provision in isolation, citing The Common Law of the Workplace, SUPRA, p. 72.

As stated above, Article IX, Section F(2), paragraph one, permits the District to schedule full-time teachers for six teaching periods and one supervisory activity. The additional compensation referred to in Article IX, Section F(2), paragraph two, only applies after the limit of both teaching and non-credit bearing activities is exceeded. Thus, a full-time teacher's schedule is consistent with the contractually defined maximum.

Moreover, Article IX, Section F(2), paragraph three, lends support to the interpretation that an 88% contract means that the Grievant's workload is seven out of eight class periods. In addition, the Grievant pays a proportionate amount of the health insurance contribution based upon her 88% workload under Appendix A, paragraph C(5) of the Agreement.

Interpretations of contract language should be consistent with notions of common sense and a common sense interpretation is favored over one that produces an unreasonable, harsh, absurd, or nonsensical result, citing The Common Law of the Workplace, SUPRA, p. 74. In this case, the result of the Union's interpretation is that full-time teachers would not have to

perform supervisory or non-credit bearing activities. Thus, a full-time teacher could not be scheduled for playground supervision, team core curriculum planning, or for supervising a study hall. In addition, and under this interpretation, full-time teachers would be free to leave school during the eighth and last period of the day. Not only was this not the intended result of Article IX, Section F(2), but this is contrary to common sense in operating the District.

Past practice

The District's past practice is that a full-time (100%) teacher is scheduled for eight full periods: six teaching periods, one prep period, and one supervisory activity. Full-time employees are scheduled full-time, for the whole day. In contrast, a part-time employee is scheduled for the proportion of the full class periods based upon the percentage of his or her contract.

In addition, it has been the District's practice that no full-time (100%) employee is required to work or is allowed to leave for a scheduled class period without an excuse or without incurring discipline.

Estoppel

For the past two school years, the Grievant's contract has been at 88% with a schedule of seven out not eight periods, including prep time. The Grievant's 2000-2001 contract was amended based upon her request to go from 75% in 1999-2000 to 88% in 2000-2001, and based upon her 2000-2001 schedule of seven out of eight class periods. The second year of this period, i.e., 2001-2002, was based upon the same schedule as the first year. Thus, and at a minimum, the Grievant requested and agreed with the District's interpretation for a full school year.

The failure to act upon a contractual right may be considered, along with other evidence, to establish the parties' intent in agreeing to certain language, citing How Arbitration Works, Elkouri and Elkouri, 5th Edition, p. 577 (1997). As applied to this case, the Grievant's request that her contract be increased from 75% to 88% for the 2000-2001 school year is evidence that the parties intended that a teacher scheduled for seven out of eight class periods is an 88% teacher, and not full-time (100%). Moreover, the Grievant accepted the benefits of a part-time (88%) contract in not having to be scheduled for duties during the last portion of the day and being able to leave the District for that last portion. The Union cannot have it both ways.

The Union's Reply

Substitute teaching

The fact that the Grievant was paid for substitute teaching during the eighth period does not make the Grievant a part-time teacher. First, any such substitution occurred during the 2000-2001 school year and not during the 2001-2002 school year, the latter being the year in question. There has been no substituting this year; however, if there was, the District would have improperly compensated the Grievant given the meaning of Article IX, Section F(2). Paying the Grievant a substitute rate for the eighth hour does nothing to prove the meaning of the language. It shows that the District consistently applied it incorrectly.

Grievant's amended teacher's contract for 2000-2001

The Union disputes the District's claim that "the Grievant's contract was amended based upon her own request from 75% to 88% based upon the fact she is now scheduled for seven of eight class periods." The Grievant requested that her contract be reviewed and that the District make the necessary corrections. However, the District's determination of 88% was based upon non-contract assumptions. The Grievant's lack of follow through for the 2000-2001 school year should not prevent her from correcting the mistake for the 2001-2002 school year. The Grievant cannot forfeit the rights of all teachers because she trusted that the District would do the right thing. Further, when the Union found out about the District's mistake, the Union acted judiciously.

Insurance benefits

The District uses the insurance for part-time employees as an affirmation that the Grievant is a part-time teacher. Furthermore, it asserts that the Agreement should be viewed as a whole rather than the language in isolation. In the example of part-time insurance, the District incorrectly suggests that the Grievant be paid 90% so she is at the next nearest 10%. The Union asserts that it is improper for the District to use this language in this manner and in the context of Article IX, Section F(2).

The District's formula

The Union disagrees with the District's assertion that a full-time contract is defined as situations where teachers are assigned six hours of teaching, one hour of supervisory or non-credit bearing activities, and one prep period for a total of eight class periods. That formula is not the standard. This is because the language states that supervisory or other non-credit bearing activities "may" be assigned. The Grievant teaches six classes and one prep period. The District has simply failed to assign her any duties during the eighth class period.

Implied meaning

The Union disputes the District's assertion that there is any implied meaning. If there is ambiguity, focus should be turned to what the parties meant by the language when it was written, citing How Arbitration Works, Elkouri and Elkouri, 4th Edition, p. 348 (1985). In this case, Rahman testified that the intent of that language was that a full-time contract is six classes and one preparation period. The rest of the language merely satisfied the District's concern at the time over the ability to assign additional supervisory or other non-credit bearing activities. If Article IX, Section F(2), meant that duties would have to be assigned by the District during an eighth period in order to have a full-time contract, then the language would not have included the word "may."

Offer of settlement

In the District's introductory portion of its brief, it states that it offered to the Grievant, and at the conclusion of the hearing, the assignment of Webmaster for the second semester of the 2001-2002 school year in return for the Union dropping its grievance. According to the District, such an assignment would result in the Grievant attaining full-time status. The Union recognizes the District's right to assign this duty to the Grievant at any time. However, this right should not be at the expense of not meeting the District's prior contractual obligations.

Right to assign

The Union does not contest the District's right to make work assignments, except as modified by the Agreement. However, if the parties agreed to six classes, one preparation period and the ability to assign additional work assignments as a maximum workload, then the District can make those assignments within that context. The District cannot bargain that right with the Union on one hand and then retain the right with the other.

The District's brief points to Article IX, Section F(2), paragraph two, as justification for its interpretation of Article IX, Section F(2), paragraph one. However, paragraph two is the standard for which proration is measured. Again, if the District decides not to assign additional supervisory or other non-credit bearing activities, that decision does not detract from the existence of a full-time contract. Further, a teacher who has six classes, one preparation period and an additional supervisory or other non-credit bearing activities would not have time to teach an overload.

The District incorrectly asserts that under the Union's interpretation, full-time teachers would not have to perform supervisory or non-credit bearing activities. However, if a full-time employee is required to perform supervisory or non-credit bearing activities, then the parties would have not chosen the word "may" in Article IX, Section F(2), paragraph one.

To rule in favor of the District would dramatically change the intent and meaning of Article IX, Section F(2).

The District's reply

Arbitrator's authority

An arbitrator's authority is confined to the interpretation of the parties' collective bargaining agreement, citing STEEL WORKERS V. ENTERPRISE WHEEL & CAR CORP., 80 S.CT. 1358 (1960), WEST COMPANY, INC., 103 LA 452 (MURPHY, 1994), and ABTCO., 104 LA 551 (KANNER, 1995). In this case, the Grievant entered into an individual contract with the District as a part-time (88%) employee. Nonetheless, the Union's requested remedy is to award to the Grievant full-time status. Awarding such a remedy, however, would require that this Arbitrator impose a modification of the Grievant's individual contract with the District and without the parties' consent. Therefore, such a remedial award would be outside of this Arbitrator's authority.

Express terms/inherent rights

Article II, Section B, of the Agreement states that the District's rights, including the right to schedule employees, are limited only by the specific and express terms of the Agreement. This concept is supported in ST. REGIS PAPER CO., 51 LA 1102 (SOLOMON, 1968). Based on the above, the Union bears the burden of proof that a specific and express term of the agreement does not permit the District to determine that a full-time (100%) employee's schedule includes a supervisory schedule, citing The Common Law of the Workplace, St. Antoine, p. 49 (BNA, 1998). In this case, no such contractual provision exists in the Agreement. Rather, and as the Union concedes, Article IX, Section F(2), specifically and expressly permits the District to schedule an employee for a supervisory activity.

If the employer can determine an employee's schedule, then, inherently, an employer can determine what constitutes a maximum schedule. Management has the right to schedule work with a view to optimum efficiency, except where expressly limited in the agreement, citing KIMBERLY-CLARK CORP., 42 LA 982 (SEMBOWER, 1964). Similarly, and in this case, the right to schedule for optimum efficiency necessitates the right to determine what constitutes a full schedule. The District has determined that scheduling full-time (100%) employees for the full eight class periods (6 teaching, 1 supervisory, 1 preparation) ensures that it is providing a learning environment for students at optimum efficiency. No contractual provision restricts this. Other arbitral decisions have upheld the employer's right to determine an employee's schedule, citing NEW JERSEY BREWERS' ASSN., 33 LA 320 (HILL, 1959), and BELCOR, INC., 77 LA 23 (MCKAY, 1981).

The Union seems to argue that the Agreement implies the maximum schedule for a full-time (100%) teacher does not include a supervisory assignment. Even if such an implication were enough to impose a restriction under Article II, Section B, the Union has not offered anything which would support such an inference. Article IX, Section F(2), paragraph one, specifically permits the District to schedule supervisory activities. As for Article IX, Section F(2), paragraph two, Rahman's testimony confirmed that the intent of paragraph two was to define a full workload, which includes a supervisory assignment. Further, even if the Agreement were silent or ambiguous, past practice supports the District's interpretation.

Contrary to the Union's assertions, if the Grievant had disagreed with the District's interpretation that teaching six courses and a supervisory assignment (and prep time) constitutes a full (100%) workload, she would have objected several years ago. Prior to the 2000-2001 school year, when the Grievant's contract was mutually adjusted, she had been teaching five classes. If the Union is correct that under the Agreement six classes alone constitutes a full (100%) workload, then during those prior years the Grievant was assigned an 83.3% (5/6 classes) course load, not a 75% course load. However, neither the Union or the Grievant objected or grieved the assignments. Thus, the Grievant and the Union agreed with the District's interpretation for every year except the current 2001-2002 school year.

WONEWOC is not applicable

In the WONEWOC case, the issue was whether a speech therapist had been paid an appropriate percentage for her work schedule during the school year. The collective bargaining agreement provided only that the position be paid on 50% status. The Examiner determined that the agreement was silent as to the speech therapist's schedule and, as a result, past practice was examined to determine how 50% employment was defined. The issue for the Examiner was whether the lunch period constituted hours worked. For other full-time employees, the lunch period was part of the eight hour work day. On this basis, the Examiner determined that the lunch break constituted hours worked and that she should be compensated.

The decision in WONEWOC is not applicable in this case. In WONEWOC, the contract was silent as to the employee's schedule and, thus, past practice was determinative. In this case, and with regard to employees' schedules, the Agreement is not silent. It permits the District to assign a supervisory activity. In addition, the parties' past practice shows that full-time teachers are assigned for eight class periods. Part-time teachers are scheduled for an equivalent percentage of class periods based upon their percentage contract.

DISCUSSION

The issues as proposed by the parties at the hearing are similar. However, the District's issues were selected because they included an analysis of the parties' entire Agreement and because the alleged aggrieved act is more appropriately viewed as the District's

decision to compensate the Grievant at 88% for the 2001-2002 school year, as opposed to the District's decision to extend an 88% contract for that year. The District's individual contract with the Grievant is separate and apart from the Agreement. Since my jurisdiction arises from the Agreement, it is more appropriate that the issues which I will determine emanate from there rather than from an individual teacher's contract.

With respect to timeliness, the Union argues in its brief that its grievance is timely. This assertion was in response to the District's opening arguments at the hearing. However, the District has not addressed this issue in its briefs. Because the District has not renewed this argument, I conclude that timeliness of the grievance is not at issue.

Turning towards the merits, both parties agree that under the Agreement, the District has the right to assign work to the Grievant. For the 2001-2002 school year, the Grievant was assigned to teach six class periods, plus one preparation period, out of an eight period day. The parties diverge in how much compensation should be paid based upon this assignment. The Union takes the position that under Article IX, Section F(2), the Grievant is a full-time employee because she teaches six class periods, the maximum teaching load, and that she is eligible for 100% of what she would receive under the Agreement. The District counters that the Grievant does not work a full work day because she works seven out of eight periods and is appropriately paid at the 88% level.

Article IX, Section F(2), in full, states as follows:

. . .

> 2. Based on an eight period day, the maximum teaching load at the junior or senior high will be 6 periods. An additional four class periods may be assigned for supervisory or other non-credit bearing activities.
> If a staff members teaching load exceeds the maximum, he/she will be compensated at the rate of $500.00 plus his/her prorated hourly salary for that portion of the load that exceeds the above-established maximum of both teaching and non-credit bearing assignments per semester.
> For teachers in the middle school/senior high with less than full contracts, workloads shall be prorated according to the percentage of a full-time contract held by such teacher.

. . .

I find the Union's position on interpretation to be more persuasive. I interpret the term "maximum teaching load" in paragraph one of the above language in its plain meaning such that six classroom periods is the most, or the greatest quantity or amount possible, that the District is permitted to assign in classroom periods to a teacher in an eight period day. Thus, if a teacher reaches the "maximum" of classroom periods, then it follows that the teacher's

workload, and under this Agreement, is full-time. I agree with the essence of the Union's argument that where additional duties "may" be assigned by the District, the clear inference is that those additional duties do not change the nature of what is considered a full-time teacher workload.

Paragraph two and three of Article IX, Section F(2), does not alter the above interpretation. Paragraph two is one sentence and begins "[i]f a staff member teaching load exceeds the maximum, . . ." Thus, that language is entirely predicated upon a teacher exceeding the maximum teaching load. In this case, the Grievant's teaching load does not exceed the maximum. Therefore, paragraph two does not apply. Paragraph three deals with proration and references "full contracts." However, it does not define or otherwise interpret that term in paragraph three or in relation to paragraph one. Therefore, it also does not apply to this question of interpretation.

I disagree with the Union that its evidence of the parties' bargaining history supports its position. It is not clear to me what the parties intended when they added the present equivalent of paragraph one of Article IX, Section F(2), and following the parties' 1987-1988 agreement. Further, Rahman's testimony in that regard was based upon his opinion of how to interpret that language and not based upon how the parties decided on those terms. I also disagree with the Union that the WONEWOC decision is applicable. The contractual language there stated that "[t]eaching five (5) classes will be used as a basis in determining full-time status." WONEWOC, SUPRA, p. 4. In this case, there is no such explicit standard in determining full-time status. Therefore, that case is distinguishable.

I agree with the District that Article II, Sections A and B, provide it with management rights, but such rights do not override the specific rights in Article IX, Section F(2), paragraph one. See generally, The Common Law of the Workplace, St. Antoine, p. 97 (1998); Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 660 (1997). Therefore, the District's argument in this regard is not persuasive. Furthermore, and contrary to the District's suggestion, an interpretation favoring the Union's position does not mean that a full-time teacher is permitted to refuse to perform additional "supervisory or other non-credit bearing activities." As I interpret Article IX, Section F(2), the District maintains its right to assign these to whomever it deems most appropriate, including the Grievant. However, where a teacher is assigned the maximum six class periods, that teacher is a full-time employee.

With regard to the District's argument of past practice, its position is summed up in Joint Exhibit 2(e) where it states that "while [the Grievant's] teaching load equals that of full-time teachers, [her] workday is not consistent with that of full-time teachers . . ." I understand this inconsistency and that other full-time teachers were working more than a full seven periods, in varying fractional amounts, while the Grievant's schedule for the 2001-2002 school year was seven out of eight periods. However, where the terms of the Agreement are clear, arbitrators will generally not consider evidence of past practice. Elkouri and Elkouri, SUPRA, at 482. Therefore, I do not consider it.

I disagree with the District's assertion regarding arbitral authority. My authority is with regard to the interpretation and application of the parties' Agreement, and not over a contract between a teacher and the District. Although my ruling may have an impact upon the Grievant's 2001-2002 contract with the District, I make no ruling with respect to that document.

Finally, the District asserts that the Grievant should be estopped from asserting that she was not properly paid at the rate of 88% for the 2001-2002 school year because she failed to dispute that same rate for the 2000-2001 school year. I also question the Grievant's failure to raise this issue during the prior school year. However, since the issue before me is tied to compensation, and because I agree with the Union that the aggrieved act is a continuing violation and that the Grievant brought the issue to the attention of her superiors at the beginning of the 2001-2002 compensation period, I do not find that the Union is estopped or otherwise barred from advancing its grievance.

AWARD

Based upon the foregoing and the record as a whole, it is the decision and award of the undersigned Arbitrator that the District violated the parties' 1999-2001 Agreement when it compensated the Grievant at 88% for the 2001-2002 school year. The Grievant should have been compensated at 100% for the 2001-2002 school year. Therefore, the grievance is sustained.

The District is directed to make the Grievant whole for any compensation and benefits that the Grievant would have received as a full-time employee under the parties' 1999-2001 Agreement and during the 2001-2002 school year. I shall retain jurisdiction for ninety days following the issuance of this Award.

Dated at Eau Claire, Wisconsin, this 1st day of July, 2002.

Stephen G. Bohrer

Stephen G. Bohrer, Arbitrator

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