BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BIG FOOT EDUCATORS/SLUE

and

BIG FOOT SCHOOL DISTRICT

Case 10
No. 60807
MA-11731

(Elizabeth Lochner Grievance)

Appearances:

Ms. Debbie Syer, Executive Director, Southern Lakes United Educators, on behalf of Big Foot Educators.

Davis & Kuelthau, S.C., Attorneys at Law, by **Mr. Joel S. Aziere**, on behalf of Big Foot School District.

ARBITRATION AWARD

Big Foot Educators/SLUE, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the Big Foot School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on April 9, 2002 in Walworth, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by May 28, 2002. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The Association states the issues as follows:

Did the Big Foot School District violate the collective bargaining agreement when it refused to pay the Grievant, Elizabeth Lochner, for teaching a 7th class?

If so, what is the remedy?

The District states the issues as being:

Did the Big Foot School District violate the collective bargaining agreement when it refused to pay the grievant, Elizabeth Lochner, additional compensation for teaching a seventh class? If so, what is the remedy?

The parties agreed the Arbitrator would frame the issues; however, I find no substantive differences between the parties' statements of the issues, and that both accurately state the issues to be decided.

RELEVANT CONTRACT PROVISIONS

ARTICLE VII – PROFESSIONAL ASSIGNMENT TIME

A. Class Size

The BOE will make an effort to keep the class load at approximately 125 students per teacher and the teacher's average class size at approximately 25 students. The administration will consult with a teacher whose class load exceeds these standards by more than ten (10) percent and will consider teacher and/or department head recommendations for lower limits where special circumstances exist before finalizing the schedule.

B. Assignment

The BOE will make an effort to have teacher's classroom time limited to 30 standard periods per week. If more than 30 periods are scheduled, the District Administrator may grant the teacher additional compensation of one-eighth (1/8th) of a teacher's contracted salary from the current salary schedule or a reduction of other duties subject to approval of the BOE. Teachers should expect to be assigned to classes, study halls, library, hall monitoring, and other supervisory duties approximately 75% of their work day.

C. Work Day

The teachers work day shall be eight (8) hours less thirty (30) minutes for lunch. The starting and ending times shall be established by the BOE at the beginning of the school year. The administration is empowered to vary the starting and ending time (flex-time) at the request of individual teachers should circumstances warrant.

. . .

BACKGROUND

The Grievant, Elizabeth Lochner, has been employed by the District as a teacher in its high school for the past nineteen years. Prior to the 2001-2002 school year, the Grievant taught mostly English classes.

Early in the 2000-2001 school year, the Directed Reading Teacher, Ron DeVine, informed the District that he would be retiring at the end of that school year. The Directed Reading Program at the high school is offered for high school students whose reading level is significantly below their grade level. The teacher works one-on-one with the students to improve their reading level to that which would be acceptable for a high school student. The typical class size for the Directed Reading Teacher is five students, with a total of 33 or 34 students. The average class size at the high school is 18 to 20, with teachers having up to 125 total students. The normal workload is six teaching periods per day out of an eight-period day. DeVine's predecessor in the Directed Reading position had taught eight class periods a day. When DeVine took the position, he requested that the teaching periods be reduced to seven with one preparation period. DeVine's request was granted and for the 12 years he held the position he taught seven periods per day with one preparation period.

The Association President testified that the Association informed DeVine of what it felt were his rights under Article VII, Section B, of the parties' Agreement, and that DeVine initially requested that he be paid additional compensation. However, his request was denied and no grievance was ever filed in that regard. DeVine was never paid additional compensation for teaching seven periods per day for the 12 years he was the Directed Reading Teacher.

After DeVine informed the District that he was retiring, the District posted the Directed Reading Teacher position. The posting did not state that the position required teaching seven periods per day without additional compensation. The Grievant posted for the position and sat in with DeVine to familiarize herself with the program. The Grievant was aware that DeVine was teaching seven periods a day in the position with no additional compensation. The

Grievant was offered, and accepted, the Directed Reading Teacher position for the 2001-2002 school year.

In August of 2001, the Grievant received a memo from the High School Principal, Lawrence Black, which indicated that the teaching schedule would be eight teaching periods per day with no preparation period. According to the Grievant, it had been her intent to reduce the Directed Reading program schedule to six teaching periods and she did not believe the schedule would actually be eight teaching periods per day.

During the first few weeks of the 2001-2002 school year, the Grievant attempted to have her students' schedules arranged such that she would only be teaching six periods per day, but that turned out to not be possible. The Grievant taught seven periods per day with one preparation period. Her class size averaged five students, with a total of 33 students taught per day for both semesters.

The Grievant requested that she be paid additional compensation, but her request was denied. A grievance was filed on her behalf and processed through the grievance procedure. The parties proceeded to arbitrate their dispute before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association takes the position that the District violated the parties' Agreement when it did not pay the Grievant the additional 1/8th of her contracted salary for teaching a seventh period. The Association asserts that Article VII, B, makes several references to the expected workload for teachers covered by the Agreement. While the language does not reflect the new block schedule that has been implemented, it is applicable to the Grievant's situation since her reading classes are the standard 45 minute periods. The first sentence of Section B references having the "teacher's classroom time limited to 30 standard periods per week." The normal workload is six periods per day (or its equivalent – three blocks a day). This is consistent with the language in the last sentence of the paragraph which states that "Teachers should expect to be assigned. . . approximately 75% of their work day." Six classes out of eight periods per day is 75 percent. The other two periods are typically planning time. Most importantly, the language determines how teachers will be paid for teaching more than the standard 30 periods a week, specifying "additional compensation of one-eighth (1/8th) of the teacher's contracted salary from the current salary schedule."

The language of Section B refers to all teachers covered under the Agreement, and does not permit for any exceptions for a particular teacher, department or subject. It also does not state that the teacher being compensated must have a minimum number of students, nor that all

teachers except the Reading Teacher can expect to be compensated for more than 30 periods a week. There is no reason to single out the Grievant and deny her the additional compensation when the language of the agreement implies that extra work deserves extra pay.

The District claims that management rights permit it to decide whether or not a teacher receives compensation; however, the exercise of management rights are subject to the implied obligation that those rights not be exercised in a manner that is arbitrary, capricious or in bad faith. Refusing to pay the Grievant when 13 other teachers have been paid in a similar situation, demonstrates that the District has acted in an arbitrary and capricious manner.

Contrary to the District's assertions regarding past practice, the past practice in the District is to provide additional compensation to teachers who teach more than six classes a day. While the District argues that the language of the Agreement is discretionary and allows it to pay or not pay for teaching more than six periods a day, the language does not say how that discretion is to be exercised. One must look at how that language has been interpreted and implemented over the years, and how that discretion has been utilized. To the best of the Association's knowledge, all teachers who have taught more than six classes per day have been compensated an additional $1/8^{th}$ of their contracted salary, with only one exception. The evidence shows that 13 teachers in the past eight years have been paid for teaching overloads. The District claims the one exception as establishing the past practice, i.e. that because the previous Reading teacher taught seven classes and did not receive an additional compensation, that is the practice. One instance does not constitute a practice. The evidence clearly demonstrates that the practice has been to provide extra pay for teaching extra classes. A practice is generally accepted if it is (1) consistent; (2) uniformly applied; and (3) done on a regular basis. The practice of providing additional compensation for teaching more than six classes a day has been uniformly and consistently applied on a regular basis over the last eight years.

The claim that the Grievant should not be entitled to additional compensation because she has a relatively small class load, and by implication, needs less preparation time, is contrary to the evidence, which shows that she must prepare 35 individual lesson plans. While the number of students in Reading may be relatively small, the workload and responsibilities of the Reading teacher are equivalent to that of the other teachers. Thus, there is no convincing reason to distinguish the Grievant from the 13 teachers who have received extra compensation for teaching a seventh period in the past.

The District's claim that because the Association knew about DeVine's situation it permitted the establishment of a practice concerning the Reading teacher, is erroneous. Association President, Anne Addie, testified that the Association did take action to remedy the contractual violation. The Association informed DeVine of his rights and took the grievance to the first step, where it was denied. For political reasons, DeVine chose not to go any further,

and the Association respected his wishes. The District also claims that there is another teacher, Lueck, who teaches seven classes without additional compensation. While that may be true, the Association had no knowledge of this claim until the Board-level hearing on this grievance.

Finally, the District implies that timeliness is an issue in that the Grievant should have begun her grievance before accepting the Reading position. The Grievant believed that she would be able to consolidate all of her students into a standard six-class period workday and attempted to do so. When she realized that it could not be done, she immediately contacted the District. It was only when the District denied her request, i.e. took final action on the matter, that the contractual timeline for filing a grievance began to toll. Any attempt to file a grievance before that time would have been inappropriate and premature. Thus, the grievance was filed in accord with the procedures and timelines of the Agreement.

District

The District asserts that the primary role of the Arbitrator is to determine and carry out the mutual intent of the parties. Here, the contract language is clear and unambiguous and must be given its plain meaning. However, should any ambiguity be found in the language, the past practice of the parties clearly supports the District's interpretation.

The District first asserts that the language of Article VII, paragraph B, is clear and unambiguous. The first sentence states that the Board "will make an effort to have teacher's classroom time limited to thirty standard periods per week." (Emphasis added). It is clear from that language that the Board is not obligated to insure that classroom time is limited to six periods a day, rather the six periods is a goal, which the Board will "make an effort" to achieve. Recognizing that situations may arise where a teacher is called upon to teach more than six periods per day, the parties chose not to bind the Board to a mandate. It is clearly the intent of the paragraph to set forth guidelines which the parties would strive to achieve, rather than mandates under which they would be obligated. The paragraph continues by stating that if more than thirty standard periods per week are scheduled, "the District Administrator may grant the teacher additional compensation of one-eighth ($1/8^{th}$) of a teacher's contracted salary from the current salary schedule or a reduction of other duties subject to approval of the BOE." (Emphasis added). Again, the parties deliberately used permissive language, expressly leaving the determination of whether additional compensation was warranted to the discretion of the District Administrator. Further, even if the District Administrator decides to grant additional compensation, the parties conditioned that decision on the approval of the Board. Thus, the matter of granting additional compensation for a seventh taught class period is twice discretionary. The discretionary nature of the language is not in dispute. At hearing, both the Association President and the Grievant conceded that the language is discretionary, and not mandatory.

Thus, on its face, the language of the Agreement is clear and unambiguous that the District has expressly reserved the power and right to determine when additional compensation is warranted, just as it did in this case. Based on a rational, well-justified set of criteria, the District exercised its clearly-delineated right to determine whether additional compensation for the Grievant was warranted. Weighing all of those factors, the District Administrator decided to follow the 12 years of established practice and not grant additional compensation.

The District asserts that the Arbitrator must interpret Article VII to reflect the mutual intent of the parties. Here, the intent of the parties is easy to identify, as Article VII uses very clear, discretionary language to clearly convey the parties' intent to allow discretion in granting additional compensation for teaching a seventh period. Further, the entire Article VII must be considered. Paragraph A further clarifies the parties' intent in that it states that the Board will "make an effort to keep classload at approximately 125 students per teacher and the teacher's average class size at approximately 25 students." (Emphasis added). The parties again used discretionary language, e.g. "make an effort" and "approximately", thus, establishing at the beginning of the Article that certain issues contained therein will be discretionary. Also, the parties identify that the average class size will be 25 students with a total class load of 125, establishing the "norm" with regard to teaching assignments. This then segues into classroom time and the provision for additional compensation. It is clear that when the parties were considering additional compensation, they were also contemplating a normal class load of 25 students per class and 125 students total. However, they afforded the District discretion in granting additional compensation based upon the particular circumstances of the request at issue. In this case, the Grievant only carries 33 total students and has an average class size of five; exactly the type of circumstance giving rise to the need for the District's discretion. In addition, paragraph C clearly demonstrates that the parties knew how to utilize mandatory language when they intended for a party to be bound by the particular provision. Paragraph C states that "the teacher's work day shall be eight (8) hours." (Emphasis added). Thus, the language of the Article as a whole demonstrates that the parties intended that the language in paragraph B was to provide the District discretion in determining when to grant additional compensation. The language of the Article as a whole also further illustrates the parties' understanding that the normal class size will be 25 students, but that there would be variations.

Even assuming *arguendo* that the contract language is not plain and unambiguous, the District's interpretation is consistent with the practice of the District for the past 12 years. To be binding, a practice must be used and accepted by the parties over time, must be clearly enunciated and acted upon, unequivocal, and readily ascertainable as a fixed, well-established practice that has been accepted by both parties. Citing, CITY OF FITCHBURG (Arbitrator Greco). There is no question as to the past practice of the parties with respect to additional compensation for teaching a seventh class period. For 12 years, DeVine taught the Directed

Reading Program, teaching seven periods per day, and received no additional compensation. During that same 12-year period, neither the Association nor any individual teacher filed a grievance over the decision not to pay additional compensation to the Reading teacher for teaching a seventh period.

Association President Addie attempted to negate the Association's acquiescence to the Reading Teacher compensation issue, testifying that when DeVine assumed the position, he approached the Association to negotiate additional compensation for him teaching a seventh period. She claimed further that the request was denied, but that at DeVine's request, a grievance was not filed. However, Addie's recollection of what transpired during the hiring of DeVine is at odds with DeVine's own memory. DeVine spoke with Principal Larry Black on the morning of the hearing, and according to DeVine, when he was hired for the Reading Teacher position, he negotiated a reduction from eight teaching periods to seven. After receiving that adjustment, DeVine taught seven periods without additional compensation for the next 12 years.

Further, Addie testified that the Association can bring a grievance on its own behalf for a violation of the Agreement and that the individually-harmed teacher need not consent to a grievance being filed. Thus, DeVine's consent was irrelevant, and assuming *arguendo*, that he had in fact inquired about additional compensation, the Association could have filed a grievance on its own if it truly believed the District had violated the terms of the Agreement. Despite this, the Association never filed a grievance with regard to compensation for the Reading Teacher position, thus acquiescing to the District's determination and creating a practice.

Additionally, the Association had the opportunity to negotiate at least five agreements during Addie's tenure as President. Had the Association disagreed with the compensation policy for the Reading Teacher, it could have addressed the issue during negotiations, but did not do so. The Association's failure to address the practice at the bargaining table is again a clear example of their acquiescence to the well-established past practice.

The past practice is not only established by the compensation history of the Reading Teacher. Evidence also demonstrates that the "Back-On-Track" Teacher also teaches seven periods per day and receives no additional compensation. The "Back-On-Track" program is another remedial program that relies on one-to-one interaction between teacher and student in an effort to assist students unable to perform at the assigned grade level. The classes are much smaller than normal, and are comparable to the Grievant's. The "Back-On-Track" program has existed for the past four or five years, and during that time the teacher has always been required to teach seven periods per day, with no additional compensation. The Association has never objected to this practice. While the Association argued that the Grievant could not be compared to the "Back-On-Track" teacher because the latter utilizes an aide in the classroom,

the presence of an aide is completely irrelevant. The argument is actually self-defeating to the Association's position, as it has asserted that Article VII, paragraph B, applies to all teachers, regardless of the classroom setting. Thus, for the Association's position to have merit, every teacher, even with an aide, would receive additional compensation for teaching a seventh class. The evidence demonstrates that is not the case. The practice of the District has been to look at class size, not teaching aides, in determining whether additional compensation is warranted.

The Association never questioned at hearing the District's decision not to compensate the "Back-On-Track" teacher for teaching a seventh period; rather, it argued that the District could not justify denying the Grievant additional compensation by relying on its practice with regard to the "Back-On-Track" teacher, due to the fact that the latter has an aide. In essence, the Association is arguing that the District is justified in denying additional compensation to the "Back-On-Track" teacher because the teacher has a teaching aide, but cannot do so with regard to the Grievant because she does not have a teaching aide. This argument only validates the District's position. If it is permissible to deny the "Back-On-Track" teacher additional compensation, then the Association must be conceding that granting additional compensation is within the discretion of the District. That being the case, the District could not have violated the Agreement by doing nothing more than exercising its legitimate discretion.

The District concedes that there have been teachers who received additional compensation for teaching a seventh period. This school year, three teachers received additional compensation for teaching a seventh period, however, two of them had average class sizes of 18 students, and the third had an average class size of 20. Joint Exhibit 14 lists all the teachers since 1994-95 who have received overload assignments for which they were paid additional compensation. None of those teachers had class sizes as small as the reading program or "Back-On-Track". Rather, each of the teachers who received additional compensation carried a full class load of 18 to 20 students per class. Thus, the practice is clear and consistent that only those teachers who with full class sizes in this range receive additional compensation. The Grievant was not in this range, and following the practice of the District, the Grievant's request for additional compensation was denied. Thus, the Association's claim is without merit, and the grievance must be denied.

DISCUSSION

Article VII – Professional Assignment Time, Sections A and B, of the parties' Agreement, establish work load levels as to class size, class load, and teaching time which the Board is to "make an effort" not to exceed. However, the wording used by the parties also indicates that they recognized that there can be circumstances that require exceeding those levels. There is no dispute that this was the case with regard to the Grievant's teaching schedule for the 2001-2002 school year.

The wording of Article VII, Section B, the applicable provision in this case, states that in the case that more than 30 teaching periods per week are scheduled, "the District Administrator may grant the teacher additional compensation. . ." As the District asserts, on its face that wording permits, but does not require, the District Administrator to grant a teacher with more than 30 teaching periods per week the additional compensation subject to the approval of the Board. As the Association asserts, the exercise of management rights, or in this case management discretion, is subject to the obligation that it be exercised in a manner that is not arbitrary or capricious or in bad faith.

The record establishes that at least since the 1994-1995 school year there have been 13 teachers who taught more than 30 teaching periods per week and were paid the additional compensation. Three of those teachers were granted additional compensation on that basis in the 2001-2002 school year, unlike the Grievant. However, the District Administrator testified that those teachers had approximately the normal class size of 18 to 20 students to teach in each of those periods, while the Grievant had approximately five students each period, and that this was part of his basis for treating the Grievant differently from them. The evidence establishes that this was also the manner in which the Grievant's predecessor in the Directed Reading Teacher position had been treated under the same conditions, a situation of which the Association was admittedly aware for the past 12 years. Further, the evidence establishes that the District Administrator has been consistent in this regard with respect to other teachers as well. The Back-On-Track teacher, who has taught seven periods per week in that program for the past four or five years with class sizes of approximately five students, has also not been granted additional compensation for the same reason. 1/

1/ The Special Education teachers, not being employees of the District and not covered by the parties' Agreement, are not relevant.

Contrary to the Association's assertion, denying the Grievant additional compensation for teaching more than 30 periods per week, while granting it to other teachers, on the basis that the average size of the Grievant's classes is approximately 1/4th of the average size of the other teachers' classes, constitutes a reasonable basis for distinguishing between the Grievant and those other teachers. It is concluded that, having a reasonable basis for not granting the Grievant additional compensation for teaching more than 30 periods per week, and having treated the Grievant consistent with how it has treated other teachers in similar circumstances, the District did not exercise its discretion in an arbitrary or capricious manner, or in bad faith. Therefore, its actions did not violate Article VII, Section B, of the parties' Agreement.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 13th day of August, 2002.

David E. Shaw /s/
David E. Shaw, Arbitrator

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