BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WCEA, AFFILIATED WITH THE NEA AND WEAC

and

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

Case 36
No. 62147
MA-12176

Appearances:

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

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

ARBITRATION AWARD

The Association and the Board are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Board and the Association jointly requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of Mike Kneer. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as arbitrator. Hearing on the matter was held on May 1, 2003, in Boyceville, Wisconsin. The hearing was not transcribed. The parties filed briefs by June 30, 2003.

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ISSUES

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

> Did the District violate the parties' collective bargaining agreement when it assigned the Grievant to attend a school-wide assembly on November 5, 2002?
>
> If so, what is the remedy?

{PRIVATE }RELEVANT CONTRACT PROVISIONS

ARTICLE II
BOARD FUNCTIONING

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

ARTICLE IV
NEGOTIATION PROCEDURE

. . .

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

. . .

BINDING ARBITRATION -- ARTICLE VIII

. . .

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

. . .

ARTICLE X
WORKING CONDITIONS

SCHOOL CALENDAR

. . .

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

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

Within the four-period block schedule, the Board shall have the right to assign Senior High staff up to three (3) assignments per day plus one preparation period. During the preparation period, teachers shall allot a portion of time equivalent to the tutorial prep period in the Junior High School for meetings with students, parents, teachers and administrators and preparing for classes. The standards in effect under the 1994-95 collective bargaining agreement regarding individual teaching contract percentages and the ratio of preparation to teaching time under an eight period day shall be maintained under the four period block schedule.

DEFINITIONS

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

> Preparations -- The number of different subjects which a teacher must prepare for each day.
>
> Prep Period -- The designated time when a teacher is not in charge of students and may prepare for classes or take care of other matters . . .

{PRIVATE }BACKGROUND{tc "BACKGROUND"}

The grievance questions the authority of Bill Fisher, the Board's High School Principal, to compel the Grievant's attendance at a school play conducted on November 5, 2002, during a preparation period. The Board conducts two plays during the course of the school year, one in Spring and one in Fall. Fisher has indicated at faculty meetings that he views the plays as school-wide events requiring the participation of all teachers. He testified that the participation serves two purposes. One is to provide supervision to assure safety and the other is to establish school-wide support for the events. School-wide attendance is, in Fisher's words, "an important thing for me." Fisher asked the teachers to attempt to reach a consensus on the most appropriate date and time for the school plays. The teachers met to discuss the point over a lunch hour. No District management attended the meeting. An instructor informed Fisher that the faculty determined that November 5, 2002 at 10:30 a.m. was the consensus choice. Fisher set the Fall play for that date and time.

The school calendar set the afternoon of November 5, 2002, for parent-teacher conferences. For the 2002-2003 school year, the high school instructional day consisted of four blocks. Prior to the establishment of four block scheduling, the District divided its instructional day into eight periods. Each block essentially covers what was two periods under the eight period schedule. The November 5 play split the periods within Block 2, allowing half a period for instructional use and half for the play. The 2002-2003 schedule denotes two "PREP" periods for the Grievant. The first is Block 2A, from 10:10 until 10:55 a.m., and the second is Block 4B, from 2:42 until 3:27 p.m.

Sometime after the play started, Fisher noted that the Grievant was not in attendance. He looked for the Grievant, found him in his lab and asked him if he was going to come to the play. The Grievant responded that he would be down at the end of his prep period. Fisher responded by indicating he wanted him to attend. The Grievant did so.

The Grievant testified that he viewed Block 2A as his regular prep and Block 4B as his tutorial prep. He believed the District made the initial determination as to which period would be prep and which tutorial prep, but that changes could be made as agreed upon by a teacher and a principal. Prior to the 2001-2002 school year, teaching schedules specifically noted the period that constituted regular preparation and that which constituted tutorial preparation. Starting with the 2001-2002 teaching schedule, Fisher has denoted all prep periods a "PREP". He stated that doing so reflected the flexibility needed to accomplish the purposes of tutorial

preparation. The vast bulk of prep periods is devoted to regular preparation, and the designation of a single, fixed tutorial preparation period unduly restricted its benefit. No teacher grieved Fisher's issuance of a teaching schedule that did not specifically identify regular and tutorial preparation periods.

The grievance that prompted this proceeding is the third filed by the Grievant concerning the District's right to assign duties during preparation periods. The first resulted in a written settlement agreement dated May 25, 1989, that reads as follows:

> The purpose of this letter is to memorialize the terms of a settlement agreed upon by the parties with respect to the grievance filed by Mike Kneer over the denial of his scheduled preparation period on December 23, 1988 . . .
>
> During a recent telephone conversation, you indicated that the pending grievance arbitration proceeding relating to that issue would be dismissed if the District would accept a compromise settlement proposed by the Association. Under that compromise, teachers would give up their scheduled preparation periods whenever regular classes are suspended for two or more periods due to special events such as the Christmas-related activities involved in Mr. Kneer's grievance. Conversely, when classes are suspended for less than two full periods (e.g. a typical school assembly), teachers would be entitled to take their scheduled preparation periods. Moreover, only preparation periods falling within the time that regular classes are suspended would be affected. For instance, if afternoon classes are suspended, teachers would still be entitled to take their normal morning preparation periods if that is when they are ordinarily scheduled.
>
> On behalf of the District, I left a message with your secretary that the foregoing settlement proposal was acceptable. Inasmuch as the parties have thereby reached mutual agreement as to the manner in which preparation periods are to be handled when regular classes are suspended due to special events, it should, of course follow that this newly implemented practice shall be binding upon the parties unless and until it is superseded by some form of mutual agreement between the parties to the contrary.

James Ward, then the Board's legal counsel, and James Begalke, then the Association's Executive Director, signed the letter, thus resolving the 1989 grievance.

The second grievance resulted in BOYCEVILLE SCHOOL DISTRICT, MA-11397, (McLaughlin, 9/01).

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

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

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

The Association states the issues for decision thus:

> Did the District violate the 1999-2001 collective bargaining agreement between the West Central Education Association and the Boyceville Community School District when it required the Grievant to attend a school play performance during his regularly scheduled preparation period?
>
> If so, what is the remedy?

The Association contends that the 1989 grievance settlement and the decision in MA-11397 establish that there "is a clear difference between preparation and tutorial preparation." Beyond this, the evidence establishes an "established practice of designating when during the school day preparation and tutorial preparation will occur." The practice allows teacher input into the designation.

The contract establishes that "teachers shall allot" a portion of their prep time to tutorial preparation. Changes to this allotment are infrequent, typically District initiated, and typically incorporate teacher input. Teachers, including the Grievant, have not used their contractual authority to infringe the "District's right of assignment during both types of preparation."

With this as background, the Association notes that the Grievant's two prep periods take place at different times of the day. Even though the class schedule does not distinguish between the two prep periods, the Grievant considers the morning period his regular prep period and the afternoon period his tutorial prep. Fisher's direction that the Grievant attend the school play indicates that he "felt it was his prerogative to switch the two preparations." These facts fall squarely within the rule established in the 1989 grievance settlement. The terms of the settlement thus govern this grievance.

Any other conclusion permits the District to bootstrap its long-standing view of assignment rights onto MA-11397. Fisher's printing of the 2001-02 class schedules without clear distinction between the prep periods was the preface to an effort the District seeks to bring to completion in this arbitration. The effort, however, violates the labor agreement, overturns the 1989 settlement agreement and misreads MA-11397. The District in fact argued in that proceeding that the two types of prep are clearly distinguishable, and the decision

declined to address the assignment authority at issue here except to note that the contract set broad outside boundaries to a professional relationship between principal and teacher that must be given meaning on a case-by-case basis. Here, however, Fisher seeks only to "ensure that his stated goal of having all staff attend all school events" is implemented. His means of achieving the goal have, however, overstepped the labor agreement and evidence something other than professionalism.

The Grievant's conduct is consistent with the labor agreement, with MA-11397 and with the 1989 settlement agreement. It thus follows that the grievance should be sustained. To remedy the violation of the labor agreement, the Association requests "that the District be required to post the following notice in all places where the District posts notices to the public, including all media":

> The Boyceville Community School District violated the collective bargaining agreement with the West Central Education Association when the High School Principal assigned the Grievant to attend a school event during his scheduled preparation period.

The District adds that the notice should be sent "on District letterhead" to all Association members "at their home address" and that "the official 2003-04 class schedule be printed with a distinction between preparation and tutorial preparation periods."

{PRIVATE }The Board's Brief

After a review of the evidence, the Board contends that Article II permits it to "schedule classes and assign work loads" except as limited by the labor agreement. Article X creates tutorial preparation and does limit the Board's right to assign during that period. This limitation has been addressed in the 1989 settlement agreement and in MA-11397. The prior award did not specifically address the issues posed here except to note that the allocation between preparation and tutorial preparation was not a unilateral choice of teachers, but turned on a case-by-case basis.

Against this background, "the Arbitrator must determine whether the designation of the Grievant's first prep period (10:10 - 10:55) as the tutorial prep period was based on legitimate business reasons, and not arbitrary or capricious, based upon the specific facts of the assignment." If the period is taken to be tutorial prep, then the District had the authority to assign the Grievant to attend the play. In fact, "the assignment was determined to be the date and time selected by the teaching staff." The teachers voted to have the play set for 10:30 a.m. on November 5, 2002, "to have the least amount of disruption to classroom instruction." This establishes a "legitimate education reason for the assignment."

More specifically, the assignment did not "undermine the teachers' prep time because the teachers chose the time and date on their own." Since there were no classes set for the afternoon, it follows that "the teachers did not need a preparation period to prepare for afternoon classes." That the District specifically identified preparation and tutorial preparation periods prior to the 2001-2002 school year has no bearing on the grievance. Fisher discovered that he needed greater flexibility in scheduling the meetings appropriate to tutorial prep than that afforded in the 2000-2001 class schedules, and changed to a general "Prep" designation in the 2001-2002 and the 2002-2003 school years. The past specification of the type of prep cannot constitute a binding practice. Article II reserves to the District the right to assign, and even if it did not, the Association did not grieve the change from a specific to a generic designation of prep time.

Of the five teachers who gave up a prep period, only the Grievant challenged the assignment. Attendance at a school play is a rare occurrence and does not interfere with a teacher's ability to prepare for classes. Even if it were possible to find a violation of the agreement, the sole appropriate remedy would be to state the violation, which under the terms of the prior award, must be restricted to the facts of the case. The contract will not support an Association demand for the specific designation of regular or tutorial preparation on class schedules. Since the contract does not support this result, it "permits the District to switch the designation of tutorial and regular prep periods." To conclude a broader remedy is appropriate "would restrict the District's assignment rights under Article II" and put the arbitration award in violation of Article VIII, Section E.

The District concludes that it "acted reasonably for legitimate educational purposes when it assigned teachers to attend a school wide play based upon the time and date established by a vote among staff members." The Grievant "was not improperly deprived of a preparation period" and the grievance should be denied.

{tc "The Union's Initial Brief"}{PRIVATE }DISCUSSION

I have adopted the Board's statement of the issues as that appropriate to the record. The Association's statement presumes its own answer by questioning the Board's right to assign during the regular preparation period. As the Board points out, the issue is whether the Board had the authority to consider Block 2A as the Grievant's tutorial prep.

The Board persuasively notes that the grievance questions its right to assign under Article II. There is no reason to question whether it had the authority to assign the Grievant to attend the play under Article II standing alone. Article II does not, however, stand alone. The general assignment rights of Article II affect preparation periods specifically governed by Article X. Thus, the interpretive issue is whether the provisions of Article X specifically limit the general rights of Article II.

As the parties point out, this issue cannot be considered a clean slate. The 1989 settlement agreement and MA-11397 must be considered in the interpretation of Article X. The Association persuasively contends that if Block 2A is considered the Grievant's regular prep period, the 1989 settlement agreement governs the point. The November play suspended classes for "less than two full periods" and Block 2A falls "within the time that regular classes are suspended." If Block 2A is the Grievant's regular prep, then the 1989 settlement agreement specifies he "would still be entitled to take (his) morning preparation".

The interpretive issue posed by the Board is whether it has the ongoing authority to determine the designation of the Grievant's regular and his tutorial prep period, and thus to designate Block 2A on November 5, 2002 as the Grievant's tutorial preparation. Neither Articles II nor X unambiguously address this point. Bargaining history and past practice offer no assistance. That Fisher once specified on class schedules which period was regular and which was tutorial preparation has no binding significance here. He changed, without Association challenge, his means of designating prep periods on class schedules from the 2001-2002 school year. Whatever is said of the change, it affords no evidence that the parties share an understanding on the point. That the Grievant has openly expressed his position that he can at least affect the designation establishes something short of general Association agreement on the point, and nothing regarding Board assent to it.

On balance, the Board seeks on the facts of this grievance more than the labor agreement or the 1989 settlement agreement can offer. Article X was not drafted to address the situation questioned by the grievance. The play split the Grievant's prep period at Block 2A in half. Article X requires that "(d)uring the preparation period . . . teachers shall allot a portion of time equivalent to the tutorial prep period in the Junior High School." The use of "the preparation period" indicates that an entire block constitutes the high school prep period, but teacher schedules often split prep into halves of a block. The succeeding sentence refers to the junior high school eight period day to set "the ratio of preparation to teaching time". This reference indicates that preparation periods are distinguishable periods within an eight period day. Nothing in either sentence clearly addresses the impact of an assignment that splits a preparation period in half.

More to the point, each sentence undercuts the Board's view that tutorial preparation can occur whenever the Board chooses to assign it, without regard to a specific schedule. The litigation of MA-11397 further undercuts the Board's view. As the Association points out, the parties' arguments in that case treated preparation periods as distinct periods rather than as undistinguished spans of time. To exemplify, the award (MA-11397 AT 11) summarizes Fisher's testimony thus:

> Fisher testified that he schedules tutorial prep in the final period of the day to permit school-wide attendance at pep assemblies and similar gatherings. Fisher added that such assignments could not be made during a teacher's regular preparation period.

The Grievant has a prep period at Block 4B, at the close of the school day. As argued in the grievance underlying MA-11397, that specific time slot was the Grievant's tutorial prep period. The Board's arguments do not clarify what has changed since that litigation other than Fisher's labeling of class schedules that can account for treating a preparation period as something other than an entire period.

That the teachers voted on the time and date of the school play affords no persuasive guidance for the interpretation of Article X. If the teachers voted not to have the play, it does not follow that the vote affects the Board's authority under Articles II or X. As the Board points out, an arbitrator's authority under Article VIII, Section E is restricted to "the interpretation and application of specific terms of this existing Agreement." The parties can choose to be bound by a consensus or majority vote, but nothing in the labor agreement grants an arbitrator the ability to interpret contract language based on a vote.

In sum, Fisher's assignment of the Grievant to attend the Fall play on November 5, 2002 asserted the unrestricted District right to determine what portion of Block 2A or 4B that the Grievant would allot to tutorial prep. This undercuts the language of Article X and the provisions of the 1989 settlement agreement.

This poses the issue of remedy, which in this case effectively revisits the issue on the merits. The Association's proposed remedy seeks to redress bad faith and to establish future scheduling practices. Regarding the former point, the evidence falls far short of establishing the sort of employer conduct demanding a public reproach. The evidence indicates that Fisher desires to have District-wide attendance at certain school activities, and desired it enough to alter his scheduling practices. Neither is sufficiently remarkable, contractually or factually, to support the remedy the Association seeks.

The latter point raised by the Association is the more significant. The evidence, however, will not support the relief the Association seeks concerning the establishment of future schedules. The language of Article X is not as clear as the Association asserts. The allotment required by Article X refers to periods, but not in the blanket fashion the Association's proposed remedy would effect. The singular reference to "the preparation period" implies, at the high school level, an entire block. The related reference to the eight period junior high school day may imply no more than that the tutorial prep period should not consume more than 1/8 of an instructional day, however allocated. The language does not hermetically seal periods or preclude drawing time from either half of a prep block. In the

same way that Fisher's assignment stretched the holding of the prior arbitration, the Association's proposed remedy seeks to stretch the language of Article X.

Beyond this, the Association's remedy has something less than clear support in the stated purposes of Article X. The primary purpose of tutorial prep is to "Tutor students." This presumes sufficient regularity of schedule for both teacher and student to prepare and to meet. As noted above, this argues against the unfettered right to allot that Fisher asserts in this case. However, it falls short of demanding a rigid system by which a teaching schedule could preclude tutoring students whose schedules do not dovetail with an instructor's preordained, single period of tutorial prep. To exclude such students from the tutoring process due to a scheduling nicety has no evident basis in Article X.

This brings the analysis back to a point raised in MA-11397:

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

Here, Fisher asserted an unfettered right to assign the Grievant to the school play, without regard to the Grievant's schedule. He did not ask why the Grievant sought to protect the prep as regular prep, because he sought to assert the general authority to assign attendance at the play. Nor did the Grievant assert any reason to protect the prep as regular prep beyond his personal view that he could determine Block 2A was his regular prep. He sought to assert a general right under the 1989 settlement agreement. Each participant treated the conversation as a contest of authority. The language of MA-11397 does not support either view, because the contract language supports neither.

The contract, read with the prior award and the grievance settlement, treats preparation periods as distinguishable. On the facts of this case, this supports the Grievant's view against Fisher's. However, the contract and prior award fall short of affording the Grievant a shield against every conceivable assignment. As noted in MA-11397, Article X sets no more than the outside bounds to the allotment of tutorial prep. A teacher cannot use regular prep to defeat the purposes of tutorial prep, and an administrator cannot use tutorial prep to defeat regular prep. In my opinion, this dictates a case-by-case determination until the parties set more certain parameters through bargaining. Here, the Board's case would have been stronger if it had taken the impact of the Fall Play on prep periods into consideration prior to the assignment. If the specific impact of the allotment of tutorial prep into Block 2A on the Grievant's regular prep had been determined and addressed prior to the assignment, then the Board's case would be stronger. The simple assertion that teachers have ample regular prep even within a tutorial preparation period is insufficient, standing alone, to address Article X. If tutorial prep is to be spread across different periods, then care must be taken to assure "the ratio of preparation to teaching time" is maintained as required by Article X. The difficulty with the Board's case here is that accepting it would grant the Board the unfettered right to allot preparation and tutorial preparation. The language of Article X, as addressed in the 1989 settlement agreement and in MA-11397 will not support this unfettered authority. **{tc "DISCUSSION"}**

The Award entered below states the parties' rights on the facts of the November 5, 2002 assignment. On the facts posed here, no further relief is appropriate.

{PRIVATE }AWARD{tc "AWARD"}

The District did violate the parties' collective bargaining agreement when it assigned the Grievant to attend a school-wide assembly on November 5, 2002. The assignment allotted tutorial preparation without the Grievant's agreement and without any attempt to specifically determine or address the impact of the allotment on the ratio of preparation to teaching time as required by Article X.

Dated at Madison, Wisconsin this 19th day of August, 2003.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/gjc
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