BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEW HOLSTEIN EDUCATION ASSOCIATION

and

NEW HOLSTEIN SCHOOL DISTRICT

Case 28
No. 64204
MA-12835

Appearances:

James R. Carlson, UniServ Director, Kettle Moraine UniServ Council, N7778 Rangeline Road, Sheboygan, Wisconsin 53083, appearing on behalf of the Association.

Paul C. Hemmer, Attorney at Law, Davis & Kuelthau, S.C., 605 North Eighth Street, Suite 610, Sheboygan, Wisconsin 53081, appearing on behalf of the Employer.

ARBITRATION AWARD

New Holstein School District, hereafter District or Employer, and New Holstein Education Association, hereafter Association, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances by a tripartite Arbitration Panel. Upon the request of the Union and the concurrence of the District, to appoint one of its staff members as Chair of the Arbitration Panel, the Commission appointed Coleen A. Burns. The Association designated Gregory N. Spring as its representative on the Arbitration Panel and the District appointed William G. Bracken as its representative on the Arbitration Panel. Hearing was held in New Holstein, Wisconsin on February 22, 2005. The hearing was not transcribed and the record was closed on May 12, 2005, following the submission of written briefs.

ISSUES

The parties were not able to stipulate to a statement of the issues. At hearing, the Association framed the issues as follows:

> Did the District violate Article IX(E) of the collective bargaining agreement by directing teachers to substitute for a fellow teacher and, if so, what is the remedy?

At hearing, the District framed the issues as follows:

> Did the School District violate collective bargaining agreement Article IX(E) through requiring Gail Krause to substitute for another teacher on September 16, 2004?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

The Board recognizes the Association as the exclusive collective bargaining representative for all full-time and regular part-time teaching personnel, including guidance counselors and librarians, employed by the District, but excluding substitute per diem teachers, office and clerical employees, the school district administrator, principals, and other supervisory employees.

. . .

ARTICLE IV – GRIEVANCE PROCEDURE

The purpose of this grievance procedure is to provide a method for quick and binding final determination of interpretation and application of the provisions under this Agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. This procedure shall be the sole vehicle for such determinations.

. . .

FIFTH STEP

. . .

The arbitration panel shall have no authority to add to, subtract from, or modify this Agreement. The decision of the arbitration panel shall be final and binding upon the Board and the grievant. No appeal from the arbitration panel's decision shall be allowed except for causes as set forth in Section 298.10, Wisconsin Statutes.

. . .

ARTICLE IX – SALARY SCHEDULE MISCELLANY

. . .

E. PAY FOR TEACHING EXTRA CLASSES DURING A FELLOW TEACHER'S ABSENCE

When a teacher is requested by the school administration to teach an extra class, or classes, during a fellow teacher's absence, said teacher shall be paid $15.00 per hour. A portion of the hour will be paid as follows:

1. 100% pay for 40-60 minute class
2. 80% pay for 30-39 minute class
3. 60% pay for 20-29 minute class
4. 40% pay for 19 minutes or less

ARTICLE XI – TERMS OF AGREEMENT

C. MANAGEMENT RIGHTS - It is recognized by the parties to this Agreement that the Board has, and will continue, to retain the rights and responsibilities to operate and manage the school system and its programs, facilities, properties and school related activities of its employees, except as otherwise expressly nullified by the Agreement.

POSITIONS OF THE PARTIES

Association

At the School Board level, Grievance Chair Jim Flora identified the grievants as follows:

> NHEA, and this would include Ms. Kraus and any other and all other teachers so ordered to substitute.

In his denial of the grievance at the School Board level, School Board President Bosma made no reference to Ms. Kraus, but instead summarized the School Board's decision as follows:

> *Through directing teachers to serve as short-term substitutes*, the School District did not violate the terms of Article IX, Section C of the collective bargaining contract. (Emphasis added)

This recognition that multiple teachers were directed to serve as short-term substitutes, demonstrates that School Board President Bosma shared Grievance Chair Flora's understanding of the scope of the grievance. Accordingly, there is no merit to the District's

argument that the scope of the grievance is limited to the incident in which Gail Kraus was required to teach a class for Mary Langenfeld.

The parties have not achieved a successor agreement to their 2001-03 agreement and, therefore, this dispute is governed by the terms of the 2001-03 agreement. Article IX(E) of this agreement uses the word "requested." As a review of dictionary definitions reveals, the plain and ordinary meaning of the word "requested" is to ask or solicit. The act of "asking" implies that the person being asked retains the authority to respond either affirmatively or negatively. Accordingly, there was no need to include language that specifically states that a request may be declined by the teacher.

It is evident from the other provisions of the collective bargaining agreement that had the parties contemplated that the District could require teachers to substitute for a fellow teacher, then the parties would have used the word "required," rather than the word "requested." The parties' use of the word "request" establishes the voluntary nature of a teacher's decision to substitute for a fellow teacher.

The parties' practice over many years reflects the mutual intent of the parties. The evidence of this practice is consistent with the Association's assertion that teachers may decline, or accept, an administrative request to substitute and, if that request is declined, that the administration does not have contractual authority to require a teacher to do so.

As Union witness Jim Flora testified, when administration has not been able to find a teacher volunteer, administration would find an alternative, *e.g.*, have an administrator cover the class; have a teacher's aide supervise the class; place the unsupervised students in an existing study hall; or direct the students to sit on the auditorium steps so that office personnel could supervise. Principal Kops corroborated this testimony when she stated that, when substitute teachers cannot be found to supervise the students of absent teachers, the students are typically sent to a study hall or supervised by an administrator. Notwithstanding the District's assertions to the contrary, the record does not establish that a number of teachers have been required to substitute for a fellow teachers.

The discipline cases relied upon by the District are irrelevant. When the Association's bargaining unit members declined the request, they were then directed to substitute and did so. They were not insubordinate and the Arbitration Panel has not been asked to determine if teachers were insubordinate. The Association does not assert that it need not follow the lawful directives of the District. Rather, the Association seeks to apply specific contract language that clearly establishes that, in this case, the "request" is not a directive.

The District's argument that it has the right to assign work that falls within the scope of a professional educator ignores the specific contract language that limits the District's authority to assign substitute work. As does its argument that, because the parties have negotiated a salary rate for substitute teaching, administrators have authority to require teachers to substitute. The District's arguments regarding the existence of concerted action or an illegal strike are irrelevant.

The Arbitration Panel should find that the District violated Article IX(E) when it required teachers to substitute for fellow teachers; direct the District to cease and desist in requiring teachers to substitute for fellow teachers; and direct the District to reimburse each teacher for each time he/she was so required to substitute teach. Such compensation should be at the per diem rate, minus any stipend already paid.

District

A request in an employment context is different than a request in a social context. Arbitral precedent confirms that a request by a supervisor that an employee accomplish a work task is, in fact, a directive; unless the supervisor specifically communicates that a choice is afforded.

Covering an extra class or classes in the absence of a fellow faculty member is a task reasonably within the scope of the duties of a professional educator. Collective bargaining unit members may be required to perform any work task which is reasonably within the scope of the duties of a professional educator. The Association is obligated to negotiate any exemption from this requirement. Given that teachers do not have the right to direct the Board of Education, the contract language comparisons relied upon by the Association to argue that the parties would have inserted the word "required" in place of "requested" if that were the parties' intent, should be unconvincing.

There is no right to engage in collective bargaining to prevent job assignments of this character because it is not a mandatory subject of bargaining. In the absence of an entitlement to engage in collective bargaining, teachers have no authorization to refuse to perform duties which are reasonably within the scope of their position. The collective bargaining unit has acknowledged the requirement to accept short-term substitute assignments upon request, through the negotiation of the compensation schedule at subparagraphs 1-4 of Article IX(E) of the labor contract.

The overwhelming numbers of short-term absences have been for personal reasons. Article IX(E) exists for the benefit and convenience of teachers, which is why, until May 27, 2004 and in response to an apparent impasse in collective bargaining, teachers had not asserted any right to refuse to substitute.

In the absence of a contractual provision affording teachers an option, teachers are required to comply with the instructions of their administrators to teach extra classes in the absence of a fellow teacher. A long-standing past practice of accepting short-term substitute assignments without objection and receiving the rates of compensation authorized under the terms of the collective bargaining contract, confirms that, under the terms of Article IX, E, teachers are required to teach an additional class or classes in the absence of a fellow teacher.

In conformance with the provisions of Sec. 111.70(4)(L), Stats., members of the collective bargaining unit may not attempt to coerce the School District to alter its collective

bargaining position through refusing to teach in the absence of a fellow teacher, when instructed to do so by an administrator. The course and action and position adopted by the Association represent an unlawful strike.

The District has sole authority to allocate the teacher workday. There is no authorization within the labor agreement for teachers to receive additional compensation at a daily contracted rate for any task performed within the student day. The Arbitration Panel has no authority to award the additional compensation at a daily rate, requested by the Association as remedy. The grievance is without merit and should be dismissed.

DISCUSSION

Issue

On September 13, 2004, District teacher Gail Kraus was requested by District Administration to substitute one class period on September 16, 2004 for fellow teacher Mary Langenfeld. When Kraus declined, she was directed to do so by Principal Kops and, following this direction, Kraus complied with this directive by substituting for one class period on September 16, 2004.

On or about September 14, 2004, a grievance was filed, which included the following:

> The purpose of this correspondence is to file the grievance that follows: The teacher(s) were required to teach an extra class(s) at the demand of the administration under the penalty of insubordination after the request to teach that class was declined. The contract stipulates that when "a teacher is requested..." to take a class they shall be compensated. It allows the right of refusal.
>
> On Monday, September 13, 2004 Gail Kraus was required to take a class for Mary Langenfeld on September 16, 2004 after Ms. Kraus had declined the request.
>
> **Name of the Grievant: NHEA**
>
> **Statement of the grievant:** The use of the term "requested" provides for the opportunity to decline without the imposition of insubordination discipline.
>
> **Articles Violated:** (to include any other applicable articles or considerations): P.21 of Master Contract, Item E. Pay for Teaching Extra Class During a Fellow Teacher's Absence.
>
> **Remedy sought:** Cease and desist from requiring teachers to accept substitute positions if they respectfully decline the request.

By letter dated October 5, 2005, Association Grievance Chair Jim Flora processed the grievance to the District's Board of Education, at the Fourth Step of the contractual grievance procedure. This letter includes the following:

> **Name of the Grievant:** NHEA, and this would include Ms. Kraus and any other and all other teachers so ordered to substitute.
>
> **Statement of the Grievance:** That teacher(s) were required to teach an extra class(s) at the demand of the administration under the penalty of insubordination after the request to teach these classes were declined. The contract stipulates that when "a teacher is requested…" to take a class they will be compensated. This would allow the right to refusal. On Monday, September 13, 2004 Gail Kraus was required to take a class for Mary Langenfeld on September 16, 2004. The use of the term "requested" provides for the opportunity to decline without the imposition of insubordination of insubordination discipline (sic).
>
> **Articles Violated or Disputed:** (to include any other applicable articles or considerations). Page 21 of the Master Contract, Item E. Pay for Teaching Extra Class During a Fellow Teacher's Absence.
>
> **Remedy sought:** That the administration cease and desist from requiring teachers to accept substitute positions if they respectfully decline the request. Proceed to the next level of grievance for resolution. It may be prudent for the two parties to agree to omit the Board level step if no resolution appears to be imminent and proceed directly to arbitration.

By letter dated November 12, 2004, Board of Education President Robert Bosma provided the Fourth Step grievance response. This response includes the following:

. . .

> Trained and qualified substitute teachers are required on short notice several times each week. Within the scope of their duties, teachers may reasonably be required to substitute for one another during the course of the school day. A request by an administrator that one teacher substitute for another is a directive which teachers must adhere to. This construction of the collective bargaining agreement is confirmed by the compensation rates, negotiated as part of a collective bargaining contract, in consideration for teachers serving as substitutes on a short-term basis.
>
> Through directing teachers to serve as short-term substitutes, the School District did not violate the terms of Article IX, Section C.(sic) of the collective bargaining contract. Because the labor contract was not violated, the grievance is denied.

The District asserts that the Association's statement of the issue is too broad because the grievance filed on September 14, 2004 is limited to the incident involving Gail Kraus. However, the first paragraph reference to "teacher(s)" and the remedy request to cease and desist from requiring "teachers" to accept substitute positions, reasonably leads to the conclusion that the grievance is not limited to Kraus, but also includes similarly situated teachers. This conclusion is confirmed by statements contained in the Association's Fourth Step grievance, *i.e.*, in the "Name of the Grievant" and "Statement of the Grievance" sections, and the Board of Education's response, *i.e.*, most specifically the statement "Through directing teachers to serve as short-term substitutes, the School District did not violate the terms of Article IX, Section C.(sic) of the collective bargaining contract."

In summary, a review of the grievance documents reasonably leads to the conclusion that both parties understood that the grievance was not limited to Kraus, but rather included similarly situated teachers. The Association's statement of the issue more accurately reflects the grievance issue that was filed and processed through the grievance procedure and, thus, has been adopted herein.

Merits

Beginning in the Spring of 2004 and continuing into the Fall of 2005, after teachers represented by the Association declined to substitute under Article IX(E), the District directed teachers to substitute. Teachers who were directed to substitute did substitute. The Association, contrary to the District, argues that, under Article IX(E), the District does not have the contractual right to require a teacher to substitute for a fellow teacher.

As the Association argues, under dictionary definitions, the word "requested" is not synonymous with the word "required." As the District argues, however, arbitrators have recognized that, in an employment setting, when an employer "requests" an employee to perform work during the employee's normal work day that is within the scope of the employee's normal work duties, the "request" is more reasonably construed to be directory, rather than permissive.

The duties at issue are within the scope of the teacher's normal work duties and occur during the teacher's normal work day. Thus, within the realm of labor relations, an Article IX(E) "request" may be reasonably construed to be directory.

In Article IX(E), the word "requested" does not stand alone. It must be construed within the context of the provision, as well as the collective bargaining agreement as a whole.

Article IX is entitled "Salary Schedule Miscellany" and Section E is entitled "Pay for Teaching Extra Classes During a Fellow Teacher's Absence." Thus, generally and specifically, the focus of Article IX(E) is compensation. Within the context of Article IX, the most reasonable conclusion to be drawn from the use of the word "requested" is that the parties intended to address eligibility for compensation. Specifically, the parties intended to

limit eligibility for compensation to instances in which school administration, rather than an individual teacher or teachers, had determined a need to substitute. Given this context, it is not reasonable to conclude that, by using the word "requested," the parties were either expressing, or implying, that the request of school administration is not directory.

Under Article XI(C), Management Rights, the District has the right to operate and manage the school system. It follows, therefore, that when school administration determines that there is a need for a substitute teacher, it has the right to satisfy this need by assigning a teacher to substitute. Under Article XI (C), the District's right to satisfy this need is subject only to the following limitation: "except as expressly nullified by the Agreement." One may reasonably conclude, therefore, that there is no Article IX(E) right to refuse a substitute assignment unless the language of that provision expressly provides such a right.

The Association relies upon other provisions of the agreement to argue that, if the parties had not intended teachers to have the right to refuse an Article IX(E) request, then the parties would not have used the word "requested," but rather, would have used the word "required." With respect to Article V(I) and Article VIII(A), the Association argues that the language of these provisions establishes that a "request" is something that may be either granted or denied. In each of these provisions, there is contract language that specifically provides the recipient of the "request" with a right to "decide each request on its individual merits." One may reasonably conclude, therefore, that, if the parties intended the recipient of the request in Article IX(E), *i.e.*, the teacher, to have the right to "decide," it would have so stated.

The Association also relies upon Article VII, G., which states as follows:

> Where the teachers are required to use their personal automobiles for school purposes, they will be reimbursed by the School District at the IRS rate.

The fact that the parties used "required" in Article VII, G, but did not use "required" in Article IX(E), may provide a reasonable basis to infer that the parties did not intend the act of substituting for a fellow teacher to be a required service. Such an inference, however, is rebutted by the evidence of the contract language discussed *supra*.

The relevant portion of this provision has been in the parties' collective bargaining agreement since 1971. It is not evident that, during the negotiation of this language, nor in any subsequent negotiation prior to the execution of the 2001-03 agreement, that the parties had any discussion on the meaning of the word "requested."

Prior to May of 2004, on numerous occasions in each school year, individual teachers were absent under a variety of circumstances in which Article IX(E) would govern the use of a substitute teacher. On numerous occasions, the absent teacher would notify administration that he/she had found a fellow teacher that was willing to substitute and administration would authorize the necessary payroll transaction. On numerous other occasions, the administrator,

or more often a District secretarial employee acting on behalf of an administrator, would go down the list of teachers whose schedule indicated that they were available to teach during the relevant time period(s) until they found a teacher who agreed to substitute. If this approach were unsuccessful, then the secretary would try to talk one of the teachers into agreeing. This approach was generally successful. If the secretary was unable to talk one of the teachers into agreeing to substitute, she would refer the matter to an administrator, who would then discuss the matter further with these teachers. Generally, further discussion by the administrator resulted in one of the teachers agreeing to substitute. On infrequent occasions, all of the teachers approached by an administrator would decline to substitute. Generally, further discussion by the administrator resulted in one of the teachers agreeing to substitute. At times, no substitute was found and the need was met in other ways, such as an administrator subbing; combining classes; or placing affected students in the study hall.

The evidence of past practice does not clearly establish that any teacher was given a direct order to substitute. Rather, the more reasonable conclusion to be drawn from the record evidence is that teachers who had not agreed, would normally agree when confronted by an administrator that reinforced the message that the teacher was needed to substitute.

It is not evident that, prior to May 2004, any teacher told an administrator, or secretarial representative, that, under Article IX(E), he/she had a right to refuse to substitute. Nor is it evident that, prior to May 2004, any administrator, or secretarial representative, told a teacher that, under Article IX(E), the teacher did not have a right to refuse to substitute.

In May of 2004, the parties, for the first time, directly discussed and disagreed on the issue of whether or not teachers had a right to refuse a request under Article IX(E). Given that the events of May 2004 occurred after the parties had entered into their 2001-03 collective bargaining agreement, they do not provide evidence of past practice or bargaining history that is relevant to the interpretation of Article IX(E).

Given the lack of specific discussion regarding what rights were or were not being exercised in the acceptance and/or refusal of substitute assignments prior to May of 2004, the evidence of past practice is inconclusive. In other words, it cannot be reasonably determined if administrators were exercising management discretion in determining how to staff or the parties were acknowledging that a teacher can agree, but cannot be compelled, to substitute. It seems likely, however, that, if both parties had mutually agreed that teachers had an absolute right to refuse a "request" to substitute, then the "requests" would have stopped as soon as all teachers on the list had refused the "request."

In summary, the most reasonable construction of the plain language of Article X(E), on its face and in conjunction with the other provisions of the parties' collective bargaining agreement, is that the District retains the right to direct teachers to substitute. Neither the evidence of bargaining history, nor the evidence of past practice, establishes that any other construction was mutually intended by the parties. Accordingly, it has been concluded that the District did not violate Article IX(E) of the collective bargaining agreement by directing teachers to substitute for a fellow teacher.

Based upon the above and foregoing and the record as a whole, the Arbitration Panel issues the following

AWARD

1. The District did not violate Article IX(E) of the collective bargaining agreement by directing teachers to substitute for a fellow teacher.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 14th day of July, 2005.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

I CONCUR

Gregory N. Spring,
Arbitrator

Date

I DISSENT

Gregory N.
Spring /s/
Gregory N.
Spring, Arbitrator

7/26/2005
Date

I CONCUR

William G. Bracken /s/
William G. Bracken,
Arbitrator

7/16/2005
Date

I DISSENT

William G.
Bracken, Arbitrator

Date

CAB/gjc
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