BEFORE THE ARBITRATION PANEL

In the Matter of the Arbitration of a Dispute Between

NEW HOLSTEIN EDUCATION ASSOCIATION

and

NEW HOLSTEIN SCHOOL DISTRICT

Case #29
No. 64206
MA-12837

(Sneak Peek)

Members of the Arbitration Panel

Daniel Nielsen, Neutral Chair.
William Bracken, District appointed arbitrator.
Gregory Spring, Association appointed arbitrator.

Appearances:

Tony Renning, Attorney at Law, Davis & Kuelthau, Post Office Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the New Holstein School District.

James Carlson, UniServ Director, Kettle Moraine UniServ Council, N7778 Rangeline Road, Sheboygan, WI 53083, appearing on behalf of the New Holstein Education Association.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the New Holstein School District (hereinafter referred to as either the District or the Employer) and the New Holstein Education Association (hereinafter referred to as the Association) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as the Chair of an Arbitration Panel to resolve a dispute over the

District's decision to require teachers to be present for the Sneak Peek meetings with parents at the beginning of the 2004-2005 school year. Daniel Nielsen was so designated. A hearing was held on March 18, 2005, at the District offices, at which time the parties submitted such exhibits, testimony and other evidence as was relevant to the dispute. No stenographic record was made. The parties submitted post-hearing briefs, which were exchanged through the undersigned on May 18, whereupon the record was closed.

Drafts of the Award were circulated among the panel members by the Chair, and by October 31, 2005, a majority of the Arbitration panel had joined in the Award.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the majority of the Arbitration panel makes the following Arbitration Award.

ISSUE

There was little substantive dispute about the issue before the arbitrator, and the parties agreed that the arbitrator should frame the issue in his award. The issue may be fairly stated as:

> Did the District violate the collective bargaining agreement, and/or a binding past practice, when it required NHEA members to attend Sneak Peek in the Fall of 2004? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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.
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ARTICLE V - CONDITIONS OF EMPLOYMENT

A. CONTRACT PERIOD FOR SCHEDULED SALARIES

The salaries shown in the schedule appended to this Agreement are the salaries to be paid to a teacher for a contract period of 189 school days.

The normal teacher day shall begin at 7:50 a.m. and end at 3:45 p.m. No permanent change from this schedule shall be made without prior agreement of the Association and the Board. This shall not preclude the temporary changes necessitated by emergency conditions.

B. SCHOOL CALENDAR

The school calendar shall consist of 180 student contact days as designated by the Department of Public Instruction, six (6) inservice days and three (3) holidays.

Should the school term consist of 190 school days - 180 shall be teaching days. The remaining nine (10) days shall consist of five (5) inservice days, two (2) parent teacher conference days and three (3) holidays. Teachers will be paid at their average daily rate of pay for each additional school day over 189.

Teachers shall be employed by the school year as set forth in the calendar adopted annually by the Board. Said calendar will be mutually agreed to by the Administration and the Association and will be presented to the Board at its regular meeting in December. Should the Board object to the proposed calendar, the Administration and the Association will attempt to reach agreement on an amended calendar and if they fail to do so, the Association will be given an opportunity to consult and mutually agree with the Board if the Association requests. The final calendar will be adopted by the Board at its regular February meeting. Copies of the final calendar will be made available to all teachers. No changes shall be made in the adopted calendar without consultation and mutual agreement with the Association.

Beginning with the 1984-85 calendar, one of the three beginning inservice days will be taken and used for one-half day inservice in

October and February. Students will attend school for the other portion of these half day inservice sessions.

Two inservice days are scheduled at the beginning of the school year. Each teacher may choose to take the year end inservice day on the workday prior to the beginning of the school year or on the day following the last day with students. A request to do so must be submitted to the principal prior to the beginning of the school year.

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ARTICLE XI - TERMS OF AGREEMENT

A. This Agreement shall become effective July 1, 2001 and shall remain in effect through June 30, 2003.

B. This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties and supersedes all previous Agreements between the parties. It is agreed that any matters relating to this current contract term, whether or not referred to in this Agreement, shall not be open for negotiations except as the parties may specifically agree.

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.

D. NO STRIKE - The Association agrees that neither it, nor any of the employees in the bargaining unit, will authorize, participate in, assist or support any strike, slow-down, sanction, work stoppage or any concerted group activity within the School District of New Holstein which has the effect of withholding in full, or in part, any services during the term of this Agreement.

In the event of any violation of the preceding clause, the Board may take whatever disciplinary action it deems appropriate, and

such action shall not be reviewable except on the basis that the employee did not violate this article.

E. PERMISSIVE ITEMS - The School Board reserves the right to give notice to evaporate any sections or subsections of this Agreement determined by the WERC permissive effective the day before any legislation changing present permissive subjects to mandatory subjects is enacted and becomes a law.

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BACKGROUND

The facts of this case are fairly straightforward. For decades, the District conducted evening open houses early in the school year. The open houses were opportunities for parents to meet the teachers and discuss the coming year. They were held after the beginning of instruction, generally about the third week of September. In the 2002-2003, teachers at the elementary and middle schools agreed to an administration proposal to substitute a "Sneak Peek" for the open houses. The Sneak Peek was held after normal school hours on an in-service day in late August, before instruction started for the year. In return for their participation in the Sneak Peek, teachers were allowed to leave early or arrive late on another in-service day.

In 2004, the parties became embroiled in a dispute over contract negotiations. As a consequence of this dispute, the Association advised teachers not to participate in the Sneak Peek in 2004. The District responded that participation was not optional, and that all elementary and middle school teachers would be required to participate. In return, as in the prior two years, they would be given offsetting time on another in-service day. The instant grievance was filed, protesting the District's position that attendance at the Sneak Peek was mandatory. It was not resolved in the lower steps of the grievance procedure, and was referred to arbitration.

At the hearing, the Association presented testimony to the effect that teachers believed the open houses and the Sneak Peek were optional events, since neither was ever bargained and neither was mentioned in the collective bargaining agreement or the agreed upon calendar. While teachers normally attended the open houses and the Sneak Peek, the Association witnesses stated their belief that this was a matter of cooperation, rather than a requirement. When teachers have had to miss an open house, they have usually advised their principal as a matter of courtesy, but there has not been a case in

which a teacher said he or she could not attend, and the principal told them it was a mandatory event. When Sneak Peek was introduced, teachers were told that if they participated, they could leave early on an in-service day. The implication, the teachers said, was that they had the option of attending Sneak Peek, or working the full in-service day. Indeed, according to physical education teacher Therese Wilk, there was a specific discussion of this option of swapping off the Sneak Peek and the in-service day at a Middle School staff meeting in the Spring of 2002 when the Sneak Peek concept was introduced, and Principal Richard Amundson was present for the discussion. Wilk also testified that she had skipped the Sneak Peek in 2003 without permission, in order to attend the last game of a golf league she competed in. No one ever challenged her on this, and she did not suffer any disciplinary consequences.

The District presented evidence that the administration had always understood the open houses and the Sneak Peek to be required events for the faculty. Administrator Joseph Wieser stated that he had participated in every open house since 1966, first as a teacher, then as a principal, then as Administrator, and had always treated them as mandatory events. He stated that he was not aware of any teacher failing to attend without first seeking and obtaining permission from the principal. He agreed that there were times when he noted classrooms without teachers in them, but said he would check with the principal for the reason. He stated that teachers were professional employees, and thus were expected to perform work outside of the student day and the student year. Richard Amundson echoed Wieser's testimony, asserting that he had granted teachers permission to miss the Sneak Peek, but knew of no instance of a teacher simply not attending without permission. Amundson stated that Sneak Peek was introduced in part because of teacher complaints about parents interrupting them during the in-service day before school started, and that substituting it for the open house was an enormously popular decision with teachers. Amudson denied ever suggesting that teachers had the option of not attending Sneak Peek if they wanted to work the full in-service day instead. He agreed that he had discussed the use of the late arrival / early release on in-service days as a form of comp-time, but claimed he never suggested it was optional. He said that he had been unaware of Wilk's absence until he heard her testimony at the arbitration hearing, explaining that as a physical education teacher, she had several locations where she might be stationed, and her absence would not be noted as easily as would a classroom teacher's.

ARGUMENTS OF THE PARTIES

The Position of the Association

The Association takes the position that this is a simple case of a District retaliating against teachers for engaging in concerted action. The order requiring

teachers to attend the 2004 Sneak Peek came in response to the Association's decision to boycott the event in protest of the imposition of a QEO. Teachers have the right to work to contract, including refusing to perform duties that fall outside of their bargained obligations. The Sneak Peek is precisely such a duty. The Association analogizes to the refusal of the Mequon-Thiensville art faculty to participate in an after hours art fair in 2002. Permanent Umpire Gerald Boyle noted that the after hours art fairs had been going on for years, and that teachers had always participated before, but found nothing to contractually obligate them to participate, noting that requiring extra work generally requires extra pay. A similar result was reached in Elk Mound Schools, where Arbitrator James Engmann determined that a walkout from an open house could not yield discipline, because the contract did not expressly require teachers to attend the open house.

As in Elk Mound and Thiensville, the Sneak Peek is an event that is held well after the work day is concluded, and there is nothing in the collective bargaining agreement requiring teachers to participate in the event or suggesting that it is a required duty. The contract is absolutely clear that the work day ends at 3:45 p.m. The Sneak Peek begins at 6:00 p.m. The District cannot unilaterally redefine the teacher work day. The fact that teachers may have agreed to this in the past is not proof that they amended the contract, or waived their right to insist on the letter of the bargaining agreement.

If the parties had mutually intended to make the Sneak Peek a required part of the teacher's work year or work day, they could have done so easily by negotiating such a provision in the contract. There are only four evening events listed in the negotiated agreement – the parent-teacher conferences in the Fall and the Spring. Those are obviously exceptions to the rule that the work day ends at 3:45 p.m., and the District is free to insist that teachers participate in those events. The District made no such provision for the Sneak Peek session, and the logical conclusion is that it has no right to make the session mandatory.

The persuasive evidence in the record is that teachers have cooperated in the open houses and the Sneak Peek in the past, but have never treated them as mandatory events. Teachers have missed the sessions when they had some other commitment, even though those commitments (including, in one instance, a golf league) would never justify missing class time or other mandatory duties. Certainly most of the time teachers gave their principals the courtesy of advance notice that they would not be present, but that courtesy should not be misconstrued as agreement that the District can somehow force them to work on this evening.

The Position of the District

The District takes the position that the collective bargaining agreement specifically recognizes its retained right "to operate and manage the … school related activities of its employees, except as otherwise expressly nullified by this Agreement." There is nothing in the contract that expressly nullifies the District's right to schedule the Sneak Peek sessions. The Association's theory that defining the "normal teaching day" as running from 7:50 a.m., to 3:45 p.m., in some fashion negates the District's authority is simply without merit. The provision makes no mention of Sneak Peek. Moreover, the contract recognizes the District's right to schedule in-service days, which everyone agrees are not scheduled in the same fashion as "normal teaching days." Sneak Peek is an extension of the District's right to schedule its in-service days. Work is required after hours on one day, but is offset by a reduced schedule on another.

The mandatory nature of the Sneak Peek is clarified by the practice of the parties over the years. For decades, teachers have participated in the open house sessions held in the evening hours during the third week of school. Sneak Peek takes the place of the open house. In both cases, teachers are required to devote several evening hours to meeting with parents. In both cases, attendance is mandatory, and teachers have always been required to ask permission to miss the sessions. The District administration has never known of a case in which a teacher simply failed to attend a session without excuse, until Wilk, physical education teacher, claimed to have done so in her testimony at the arbitration hearing. No District witness was aware of her absence until that moment. This is a practice of forty years duration. It has been clear, consistent, unambiguous, and plainly accepted by both parties. Indeed, the faculty at the Middle School overwhelmingly endorsed the continuation of Sneak Peek after its first year. It meets every test of a binding past practice. The District directs the arbitration panel's attention to Examiner Bellman's ruling in a 1972 Kenosha Schools dispute, wherein he concluded that a long history of uniform attendance at events observing American Education Week was evidence that participation was mandatory, even though that was never expressed by the parties. [KENOSHA SCHOOLS, DEC. NO. 10753-A (BELLMAN, 1972)]. LIKEWISE, IN RACINE UNIFIED SCHOOL DISTRICT NO. 1, DEC. NOS. 14308-D, 14389-D AND 14390-D (WERC, 1978), THE WERC and the courts determined that supposedly voluntary activities such as preparation of lesson plans, completion of questionnaires, participation in committees and development of manuals were mandatory, given the long history of teachers performing such duties without question. These cases are directly on point, as opposed to the cases cited by the Association, in which other school districts had given their teachers reason to believe that open houses were optional events.

The participation of teachers in events such as open houses and Sneak Peek is part and parcel of being a professional employee. Courts have long recognized that professional duties extend beyond the normal work day and beyond the confines of a specific listing of job responsibilities. The nature of professional work requires more than does day labor, and the Board policies recognize that throughout. Attendance at the Sneak Peek is a reasonable requirement, which is professional in nature, is not unduly burdensome, benefits the students and the community, and directly relates to the teachers' professional responsibilities. It is a professional duty, and as professionals teachers can be required to perform that duty.

The Union bears the burden of proof, and it has presented a single witness who claims to have missed a Sneak Peek session in 2003 without first obtaining permission. Weighed against forty years of mandatory, uniform attendance at open houses and Sneak Peek sessions, this one piece of testimony stands for next to nothing. If the Association wishes to be relieved of the duty to attend the Sneak Peek, it must bargain for it. It must not be allowed to secure such a benefit through grievance arbitration.

DISCUSSION

The issue in this case is the right of the District to require attendance at a "Sneak Peek" session, held on the evening of an in-service day, before the start of instruction. The Sneak Peek was introduced in 2002, as a replacement for an evening open house, which had for decades been held in late September. In return for their participation in the evening session, the teachers were allowed to leave early on another in-service day before instruction started. The proposal for a Sneak Peek was made by the administration, and the majority of teachers favored it as an alternative to the open house. It was held in 2002 and 2003 without objection by any of the faculty. In the summer of 2004, the Association took the position that teachers should not participate in Sneak Peek, as a protest to the District's imposition of a QEO after an impasse developed in contract negotiations. The District ordered the teachers to participate. The teachers complied with the order, and the instant grievance was filed.

The collective bargaining agreement defines the normal work day as ending at 3:45 p.m. Neither the contract nor the calendar make any mention of the Sneak Peek. There is a specific mention of parent-teacher conferences in the evening four days each year, but aside from that there is nothing in the contract that refers to duties after 3:45 p.m. Thus, if attendance at Sneak Peek is mandatory it must be either because some other provision of the contract requires it, or because there is an extra-contractual agreement to that effect.

The District argues that the right to require attendance at Sneak Peek is inherent in the Management Rights clause. The District specifically cites its retained right to "operate and manage the school system and … school related activities of its employees, except as otherwise expressly nullified by the Agreement," reasoning that the contract is silent about Sneak Peek, and thus does not "expressly nullify" its right to hold the session. Hours of work and the school calendar are matters that are negotiated, and the normal presumption would be that the negotiated days and hours define the teachers' obligations to the District. The District's expansive reading of the Management Rights clause would turn this on its head, to mean that it could schedule anything at any time, so long as the negotiated calendar and work hours did not directly rule out the desired activity. That is not a plausible reading of the contract.

If attendance at the Sneak Peek is mandatory, then, it is because the parties have implicitly agreed to it. The parties agree that an after hours session with parents has been a feature of the District's schedule for decades, in the form of an open house held in the evening hours in the first month of school. The parties also agree that teacher participation in the open house has been pretty much universal over time. There has never been an explicit discussion of whether attendance at the open house was a required duty of teachers. The Association argues that this has been a matter of professional courtesy by teachers, who need not have participated but chose to anyway. The District asserts that it has always been mandatory. The Association argues that teachers have advised administrators when they were going to miss the open house, again as a matter of courtesy rather than as a matter of needing permission. The District argues that it has always had the right to refuse permission.

There is no evidence of a teacher missing an open house without prior notice to the administration. Neither is there any evidence of a teacher requesting permission to miss an open house and being denied. This is not surprising. Assuming that all parties have treated the open house as a serious element of school-parent relations, and have treated one another as professionals, one would assume that teachers would not seek to skip the sessions for frivolous reasons, and that administrators would not reject requests to be absent where the teacher had a substantial basis for the request. There was no explicit discussion of rights or obligations. Now that a dispute has developed, each party looks back on this cooperative arrangement as having functioned well only because of its forbearance.

Just as an extra-contractual fringe benefit may become a binding feature of a collective bargaining relationship, so too an extra-contractual professional duty can be established through past practice. For at least thirty-six years, the open house was treated as a regular feature of the school year. It has uniformly been held after the

normal work day and teachers uniformly participated in it, or received prior permission to miss it. They did so without receiving additional salary, comp-time or other consideration. There was never any protest or grievance. Notwithstanding the lack of express discussions about the nature of the event, or direct orders to be present, I conclude that the most reasonable interpretation of this history is that attendance at the open house was understood to be a normal part of the teachers' duties in New Holstein. If it had been widely considered to be a voluntary event, one would expect some instances over such a long span of time of teachers not reporting for the open house, or otherwise demonstrating that it was an optional activity. There are none. Participation in the open house meets every one of the criterion for a binding, extra-contractual past practice, and I therefore conclude that a once a year, mandatory after hours session has been a condition of employment for teachers in New Holstein.[1]

The open house is, of course, not the direct issue in this case. The open house was replaced in 2002 by the Sneak Peek, and the question then is whether the difference between the two sessions represents a substantial change from the prior practice, sufficient to defeat the obligation imposed on the teachers. On the face of it, there is little difference between the two events. The duties performed in each are the same. The Sneak Peek does not demand more time than did the open house. Each is held after the normal work day is completed, but within the 189 contracted days of the faculty. The open house was held after the end of an instructional day, while the Sneak Peek is held after the end of an in-service day.

The only material difference between the open house and the Sneak Peek is that teachers have been afforded comp-time for the Sneak Peek, in that they are allowed to offset the two hours on another in-service day. The Association argues that this trade off was presented to teachers as an option – that they could either put in two hours at the Sneak Peek or they could attend the full day on the other in-service day.

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[1] This decision is facially at odds with the results reached by Arbitrator Boyle in Mequon-Thiensville, and Arbitrator Engmann in Elk Mound. The existence or non-existence of a binding past practice is a determination that in each case depends upon the record evidence. In Mequon-Thiensville, the umpire accepted the Association's argument that the offer of a separate contract providing extra pay for attending an art fair suggested that teachers choosing not to accept the separate contract could skip the fair and forego the compensation. Here there is no separate contract for attendance at the open house or the Sneak Peek. It has been part and parcel of the teaching contract.

In Elk Mound, Arbitrator Engmann determined that teachers who walked out of an open house could not be disciplined because, on the record of that case, attendance at the open house was not an assigned duty. In a discipline case, the Employer bears the burden of proof, including proof that the employees knowingly chose to ignore a clear and valid duty or order. The Elk Mound District's apparent failure to carry that burden does not establish some over-arching principle that in all cases an open house is not understood to be a mandatory duty of teachers.

Principal Richard Amundson agreed that the comp-time was offered, but denied ever telling teachers that they could choose one or the other. As with the open house, in the two years that the Sneak Peek operated, the vast majority of teachers participated and, with the exception of Therese Wilk, those who did not participate received permission to be absent. Wilk testified that she skipped the Sneak Peek in 2003, but the administrators credibly claimed to have been unaware of her absence. As with the open house, it is likely that the question of whether the Sneak Peek was mandatory or optional was not expressly discussed because there was no controversy, and thus no occasion to discuss it. As with the open house, in retrospect, the District views the teachers' participation as the result of the mandatory nature of the event, and teachers believe it to have been a matter of choice, driven by professionalism and a spirit of cooperation.

Based on the record before me, I cannot conclude that the District intended the Sneak Peek to be an optional event. In every practical respect, the Sneak Peek is simply the open house, held a few weeks earlier. As the open house was, for forty years, treated as a required after hours duty to be performed without additional compensation, it is unlikely that the District unilaterally transformed it into an optional event when the Sneak Peek format was introduced. There is no reason for the District to have done so.

The addition of a comp-time component to the Sneak Peek does not distinguish that event from the open house. Inasmuch as the once yearly evening open house is a practice of long standing, clearly understood to each party as a required event that does not involve additional compensation, and since the Sneak Peek is materially indistinguishable from the open house, I conclude that the order for teachers to attend the Sneak Peek was consistent with a binding past practice, and therefore did not violate the collective bargaining agreement.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The District did not violate the collective bargaining agreement, and/or a binding past practice, when it required NHEA members to attend Sneak Peek in the Fall of 2004. The grievance is denied.

Dated at Racine, Wisconsin, this 24th day of October, 2005.

Dan Nielsen /s/
Daniel Nielsen, Chair of the Arbitration Panel

I concur:__

Dated at Oshkosh, Wisconsin, this 31st day of October, 2005.

William Bracken /s/
William Bracken, Arbitrator

I dissent:__

Dated at Madison, Wisconsin, this 28th day of November, 2005.

Gregory Spring /s/
Gregory Spring, Arbitrator

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