

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**MADISON TEACHERS, INC.**

and

**MADISON METROPOLITAN SCHOOL DISTRICT**

Case 296  
No. 64902  
MA-13045

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**Appearances:**

**Attorney Malina Piontek**, Labor Attorney, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin 53703, with **Attorney Heidi S. Tepp**, on brief, appearing on behalf of the Employer.

Cullen, Weston, Pines & Bach, LLP, by **Attorney Lester Pines**, 122 West Washington Avenue, Suite 900, Madison, Wisconsin 53703, appearing on behalf of the Union.

**ARBITRATION AWARD**

Madison Teachers, Inc., herein referred to as the "Union," and Madison Metropolitan School District, herein referred to as the "Employer," having jointly selected the undersigned from a panel of arbitrators provided by the Wisconsin Employment Relations Commission and, upon the undersigned's employment with the WERC, having consented to have the undersigned continue to serve as the impartial arbitrator to hear and decide the dispute specified below; and the undersigned having held a hearing on September 15, 2005, in Madison, Wisconsin; and each party having filed post-hearing briefs, the last of which was received December 5, 2005. <sup>1</sup>

**ISSUE**

1. Did the District violate Section B(2) of the March 17, 2004, Memorandum of Understanding by scheduling a release day for the fourth term on June 9, 2004 (which was a final exam day)?

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<sup>1</sup> The parties stipulated that I could reserve jurisdiction over the calculation of back pay, if any, if either party requested in writing that I do so, copy to opposing party, within sixty (60) days of the date the award is issued.

2. If so, what is the appropriate remedy?

**RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS**

July 1, 2003 - June 30, 2005 Collective Bargaining Agreement

“ . . .

V. Factors Relating to Employment

. . .

K. SCHOOL CALENDAR

3. The distribution and identification of the required attendance days is outlined in the calendar. Special inservice days, parent teacher conferences, exam schedules, recording days, and/or other special days are included in the 192 days total and are announced by building principals acting under guidelines established by the Superintendent of Schools.

. . .

- b. The last afternoon of the first semester and the last afternoon of the final calendar day of the second semester are utilized for recording and reporting days by the teacher. Students are not present during these sessions. On the final calendar day of the year students are present for an hour and one-half, which time will not end later than 10:30 a.m.

- 1) The last afternoon of the third quarter is utilized for recording and reporting by teachers at the elementary schools. Students are not present during this session. On this day students will be dismissed 180 minutes after the start of the school day.

. . . ”

MEMORANDUM OF UNDERSTANDING

” . . .

**"Release days** - School will be released one-half day per term to enable each teacher to have two additional school days per school year to engage in curriculum development, program coordination, and collaboration with their

colleagues. Said time shall be scheduled within two weeks of the last day of each term."

. . . " <sup>2</sup>

### FACTS

The District operates a large public school district in Madison, Wisconsin. LaFollette High School (herein "LaFollette") is one of the District's four high schools. The Union represents the professional teachers employed by the District, among other employees. The above-referenced 2003-2005 collective bargaining agreement was in effect at all material times. LaFollette has a unique student schedule among the District's high schools. Other high schools operate on a two-semester, seven class period schedule of 50-60 minute instructional periods. LaFollette operates on what is termed a "four block schedule." The purpose of the four block schedule is to permit students to receive more intensive instruction in a fewer number of subjects per term. The school year is divided into four essentially equal terms. The school day in the four block schedule is normally divided into four ninety-minute instructional periods.

The District made the change to the LaFollette four block schedule in the 1998-1999, school year, after negotiating with the Union concerning the impact of the change upon the working conditions of unit employees. The parties' total agreement on the subject was first memorialized in a Memorandum of Understanding (herein "MOU") dated June 16, 1998. The parties negotiated successor MOU's dated May 10, 2000, and March 17, 2004. The MOU's ran concurrently with the parties' comprehensive collective bargaining agreements (herein "Agreement.") The nature of the MOU's was to provide for variations from the Agreement's terms. The remainder of the provisions of the comprehensive collective bargaining agreement otherwise continued in effect for LaFollette teachers.

All of the MOU's provided for a total of two days of early release (herein "B-2 days") Under the B-2 day provision, students are released a half-day early on what is otherwise a regular school day, once each term within two weeks of the last day of each term. Teachers

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<sup>2</sup> There were three MOU's relating to the LaFollette High School. They were signed, June 16, 1998, May 10, 2000, and March 17, 2004. The provision from the June 16, 1998, MOU reads as follows:

In addition to other time currently available, school will be released one-half day per term to enable each teacher to have two additional days per school year for the exclusive purpose of developing curriculum and materials related to their assignment.. Said time shall be scheduled within two (2) weeks of the last day of each term. Additionally, teaches at LaFollette High School, at the option of each, may use the two District inservice days for this purpose. It is understood that teachers who elect to absent themselves from the District-wide inservice days shall be responsible for knowing he content of the inservice.

The provision of May 10, 2000, MOU applies to this dispute. Its terms are listed in the body of the decision. The terms of the March 17, 2004, are substantively the same.

use the B-2 days, as provided in the MOU, to engage in curriculum development, program coordination, and collaboration with their colleagues. They meet with colleagues, prepare for the next class, gather teaching materials, make necessary photocopies and update and alter teaching materials to take account changes in the field.

The teachers' portion of exam days have similar and different uses. Teachers under the old system and the four block system use the portion of exam days when students are not present to complete the work of the term, grade papers, figure grades, and record grades. They may, if time permits, meet with colleagues or take students on post-term field trips.

Wis. Admin. Code § PI8.01(2)(f)2 requires that that each student received set number of hours of instruction per year.<sup>3</sup> The four block schedule at LaFollette inadvertently resulted in the District not meeting the requirement of the foregoing DPI rule. The District first discovered this fact during the 2001-2 school year. District administrators held a series of meetings and determined that they could not meet the minimum instructional time standard under the current terms of the collective bargaining agreement and the fact that the District had already published the school calendar for that year. The District concluded that one of the problems preventing them from meeting the requirement was that LaFollette had more release days where students were not present than other high schools. LaFollette had about 25 "early release" days scheduled by comparison to the other three high schools, which had about 13 early release days per year. However, that was not the only reason the District was not able to meet the DPI requirement. The main other reason was the District's desire to have a uniform starting and ending time for all of the high schools of the District.

The school calendar for the 2003-4 school year was unilaterally set by the District before negotiations leading to 2003-5 collective bargaining agreement and the associated LaFollette MOU (Jt. Ex. 4). The District determined that there were too many early release days at LaFollette. It noted that while it was required to provide the B-2 days by the May 10, 2000, MOU (Jt. Ex. 3), it had the unilateral right to schedule the teachers' time on the afternoon of exam days. Accordingly, the District set the last B-2 release day of that school year on the afternoon of June 9 which was also an exam days in which students would otherwise have been released at about noon. It had never done this before. This was not the final school day of the year. The Union filed a grievance alleging that the District's action in

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<sup>3</sup> Wis. Admin. Code § 8.01(2)(f)2 provides:

Each school district board shall annually schedule and hold at least 437 hours of direct pupil instruction in kindergarten, at least 1,050 hours of direct pupil instruction in grades 1 through 6, and at least 1,137 hours of direct pupil instruction in grades 7 through 12. The school hours are computed as the period from the start to the close of each pupil's daily instructional schedule. Scheduled hours under this subdivision include recess and time for pupils to transfer between classes but do not include the lunch period. No more than 30 minutes per day may be counted for recess. In computing the minimum number of instructional hours under this subdivision, days and parts of days on which parent and teacher conferences are held, staff development or inservice programs are held, schools are closed for inclement weather, or when classes are not held may not be counted.

doing so violated the MOU (Jt. Ex. 3) and the same was properly processed to arbitration.

In the negotiations leading to the 2003-5 collective bargaining agreement, the District made a number of proposals to implement a number of changes it had made for cost efficiency with respect to bus routes and to insure LaFollette would meet the requirements of PI8.01 for the 2003-4 school year and in the future. The Union sought to add two additional days of B-2 time. The Union responded to the District's concern that the District should seek a deferment from DPI. The District did not think it was wise to do so or likely to be successful. Specifically, it believed that the difference between LaFollette's number of instruction minutes and the other three high schools was too great. The parties reached agreement on a replacement MOU, however, the LaFollette staff failed to ratify the same. The parties again meet in about December. The Union made another proposal on December 3, 2003 (ex D-3). This included a reference to exam days. The main agreement does not specifically mention exam days, but does restrict the use of the last day of the term. It was the position of the District that exam days are not part of bargaining, but are instead unilaterally set by the District.

The District has, for as long as anyone could remember, scheduled final exams in its two semester system high schools in a manner in which exams are held in the mornings of some exam days and students are released to go home after their exams. For example, before LaFollette went to the four block schedule, it had a five block schedule. The District held three exams on Wednesday of exam week, and two on each of Thursday and Friday. Students were released at about noon on those Thursdays and Fridays. The District has used this pattern for the convenience of students and not necessarily for the convenience of teachers. The District has always jealously guarded its management right to change exam schedules and nothing in the collective bargaining agreement restricts the District's right to do so. The District has unilaterally made minor modifications to those schedules over the years. Teachers in the high schools have historically used the time after students leave for a variety of tasks. These include, but are by no means limited to, grading exams and making final grades, holding make-up exams, preparing their classroom for the next term, holding IEP meetings, and meeting with fellow teachers.

Management personnel met with department chairmen and chairwomen at LaFollette to make plans for the four block system prior to the 1998-99 school year. They decided, among many other things, to have two exam days at the end of each quarter in which students would take exams in the morning and be released at the end of the morning. They did not discuss what teachers would do when students were released. The District followed this pattern at all times thereafter. Teachers at LaFollette used the exam days there in much the same way as teachers did at the other high schools. The Employer used exam days in this manner before and after the facts of this case.

## POSITIONS OF THE PARTIES

### Union

LaFollette High School operates on a unique "four block" class schedule. The parties have addressed the unique issues of staff at this school by negotiating a number of memoranda of understanding dealing solely with LaFollette. Paragraph 8 of the May 10, 2000, MOU requires that teachers at LaFollette be given one-half day of release time per term scheduled within two weeks of the last day of each term. The District's actions clearly violate the terms of Section B(2). The benefit of B(2) is in addition to the provisions of Section V(K)(3)(b) of the comprehensive collective bargaining agreement. The benefit of Section V(K)(3)(b) is system-wide. Section B(2) states that the benefit is "additional." If there were any doubt, the practice established by the District from the adoption of the Section B(2) of the MOU to the circumstances of this case demonstrated that the District recognized that the benefit of the MOU was in addition to the provision of the contract. Further, the fact that these are separate time blocks is demonstrated in the language of the respective provisions. The stated purpose of the post-exam release time is for "recording and reporting" while the purpose of the B(2) days is "curriculum development, program coordination and collaboration with their colleagues. There would be no purpose to B(2) if the benefit were something teachers were already receiving.

The Union met the District's concern by negotiating a change in the number of minutes in a "block" so that the District could meet DPI standards for the number of minutes of instruction Wis. Admin. Code § PI 8.01(2)(f)2. The Union seeks a remedy of compensating the teachers for this time.

### District

The MOU is unambiguous. It requires that teachers be given four one-half release days. The District gave the teachers four one-half days in the 2003-4 school year. The fact that one of them falls on an exam day is irrelevant. The MOU does not preclude that result. Student exam day schedules are set by the District. The comprehensive collective bargaining agreement does not specify student exam schedules. The LaFollette Communications Council (consisting of section chairs) and District set the exam schedule at LaFollette. The term "additional" in the MOU relates only to days in addition to the early release days for all teachers contained in Section V.K.3.b.1. of the comprehensive collective bargaining agreement. It does not relate at all to exam days. The District denies that there is a binding past practice in that even though it has scheduled students off on the afternoon of exam days in the two times it has made those schedules. This is true because the alleged practice was neither "mutual," nor "long standing." The LaFollette MOU was first signed in June, 1998. The grievance was filed in June, 2004. Accordingly, the alleged "practice" could only have lasted as much as five years. This is not long enough to establish mutuality.

The District established this schedule prior to the negotiations leading to the 2004-5 Agreement. The Union responded by attempting on December 11, 2003, to add language to the LaFollette MOU expanding the number of release days and specifying that they were in addition to early release on exam days. The District rejected the proposal and explained to the Union that, among other things, the District viewed the proposal as unduly restricting its right to schedule exam days in its sole discretion. The Union dropped the proposal. Accordingly, the Arbitrator should not grant the Union in grievance arbitration what it was not able to successfully obtain at the bargaining table.

Finally, if the arbitrator finds that a violation of the MOU has occurred, he should not order a make-whole remedy. All of the teachers were compensated for June 9. Additional compensation would be a windfall.

### DISCUSSION

It is the responsibility of the arbitrator to interpret and apply the provisions of the collective bargaining agreement of the parties as it is written. When language is clear and unambiguous, the arbitrator applies the provisions as written. When language is ambiguous, the arbitrator determines what the correct interpretation of the provision is. A provision in a collective bargaining agreement is ambiguous if it is fairly susceptible to two different interpretations. The term "additional" is ambiguous in Section B. 2 of the MOU (Early Release). The Employer's argument that the term "additional" refers only to in addition to early release enjoyed by teachers at other high schools is one interpretation to which it is fairly susceptible. The Union's interpretation that it is in addition to all other forms of released time in effect at the time it was negotiated is also an interpretation to which it is fairly susceptible.

The Union's contention is largely correct, but it is incorrect as to the inferences to be drawn from that view. This is true because the parties disagree as to the effect of findings relating to "past practice" evidence. The Union's contention is supported by the long standing past practice of the parties which commenced with the adoption of the first LaFollette MOU and continued to the facts of this case. There is no dispute that the Employer had regularly set B.2 days at LaFollette on days other than exam days. A past practice exists when the conduct is: 1) unequivocal, 2) clearly elucidated and acted upon, 3) readily ascertainable over a reasonable period of time as a fixed and established past practice of the parties.<sup>4</sup> The Employer heavily relied upon the collective bargaining negotiations which occurred after it took this action and raised the issue of instructional minutes at the negotiation leading to the successor collective bargaining agreement. There is nothing in the subsequent history which affects the interpretation of the existing provision. I conclude that the parties' conduct indicates an understanding that B.2. days were to be in addition to exam days at LaFollette as they existed at the time the MOU was created.

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<sup>4</sup> Richard Mittenhal, "Past Practice and the Administration of Collective Bargaining Agreements, *Arbitration and Public Policy, Proceedings of the Fourteenth Meeting of the National Academy of Arbitrators*, (BNA, 1961)

However, the fact that the parties had a mutual interpretation of the provision does not mean that the Employer is prohibited from making changes. The Employer has correctly argued that it has the right to change the nature of the teachers' duties on exam days. The Employer has reserved the right to set its school calendar. Article V, Section K refers to the fact that school calendars are set by the Employer. The Union has been unable to point to any provision which restricts the duties which the Employer may assign to teachers on exam days when students are allowed to go home early. Accordingly, the Employer is correct that it had the right to assign teachers to perform B.2 day work on exam days.

The next issue is whether the Employer actually did schedule June 9, 2004, as a B.2 day or whether it used its attempt to do so as a sophistry to just cancel the last B.2 day of the year. I conclude it did the latter. The undisputed evidence in this case is that system-wide, the Employer scheduled and held exam days essentially just as it has done in all of the prior years. It did this in the years before the disputed incident, the year of the incident, and the year after. It is also true that at LaFollette alone it conducted exam days in the quarters immediately proceeding June, 2004, and after June 2004, in essentially the same way it had always done. Section B.2 of the MOU provides that the purpose of B.2. days, is ' . . . to engage in curriculum development, program coordination, and collaboration with their colleagues.' The historical use of exam days was to do grading of exams and end of the term activities. The evidence in this case is that the Employer did not recognize that there was a difference between the historical use of the two days and, therefore, it undertook none of the steps one would expect had it really intended that June 9 be used as a B.2. day. The MOU makes it clear that the B.2. days are not merely the activity of individual teachers, but includes group activities toward the stated primary goals. The Employer took no steps to insure that all teachers adhered to this primary purpose. For example, there is no evidence that it considered whether it would have to extend the date upon which grades were due. There is no evidence it considered how teachers should be directed to put aside other activities ordinarily done on exam days which might conflict with the primary purpose of the group activities of exam days. Accordingly, I conclude that the Employer merely cancelled the last B.2 day of 2004, in violation of the May, 2000, MOU.

The next issue is the appropriate remedy. The Association seeks pay for the lost time. The Employer's position is that the only appropriate remedy is an order that it not violate the provision again. The purpose of a remedy in a contract violation case is to put the wronged party back in the same position it would have been had the other party not violated the agreement. The difference between the parties as to remedy is whether this violation had any financial impact. The Employer's violation rearranged the assigned duties teachers had on June 9 and effectively required teachers to have student contact rather than the agreed-upon B-2 day. This violation did not increase the amount of time teachers at LaFollette were required to spend at school working for the Employer. Accordingly, a cease and desist order is appropriate, but back pay is not necessarily appropriate. The Union has failed to offer any direct testimony that the violation in question effectively caused LaFollette teachers to do B-2 functions in their off time. It has not shown any other evidence of a financial impact on those teachers. Accordingly, a backpay award is not appropriate.

**AWARD**

That since the Employer violated Section B-2 of the applicable MOU, the grievance is sustained. The Employer shall cease and desist from violating Section B-2 of the applicable MOU.

Dated at Madison, Wisconsin, this 15th day of May, 2006.

Stanley H. Michelstetter II /s/

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Stanley H. Michelstetter II, Arbitrator

