BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

IOWA-GRANT EDUCATION ASSOCIATION OF PROFESSIONAL STAFF AND SUPPORT PERSONNEL

and

IOWA-GRANT SCHOOL DISTRICT

Case 24
No. 65644
MA-13281

(Janet Liska Grievance)

Appearances:

Mr. Tom Fineran, Executive Director, South West Education Association, 960 North Washington Street, P.O. Box 722, Platteville, Wisconsin 53818-0722, on behalf of the Union.

Lathrop & Clark, LLP, **by Attorney Shana R. Lewis,** 740 Regent Street Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, on behalf of the District.

ARBITRATION AWARD

At all times pertinent hereto, the Iowa-Grant Education Association of Professional Staff and Support Personnel (herein the Union) and the Iowa-Grant School District (herein the District) were parties to a collective bargaining agreement dated January 23, 2006 and covering the period from July 1, 2005 through June 30, 2007. On March 3, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a dispute concerning mandatory attendance at the District's annual December music program. The undersigned was selected from a panel of WERC staff members to hear the dispute and a hearing was conducted on September 29, 2006. The proceedings were transcribed. The parties filed their initial briefs on November 15, 2006 and reply briefs on December 13, 2006, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues. The Union frames the issues, as follows:

Did the District violate the Master Agreement when it required the Iowa-Grant K through 6 teachers to attend the 2005 Christmas program after work hours without compensation?

If so, what is the appropriate remedy?

The District frames the issues, as follows:

Did the District violate Article VIII, Section A.1 of the collective bargaining agreement when it required elementary school teachers to attend the annual Holiday program?

If so, what is the remedy?

The Arbitrator adopts the District's characterization of the issues.

PERTINENT CONTRACT LANGUAGE

IV. BOARD RIGHTS AND RESPONSIBLITIES

A. The Board of Education, on its own behalf, hereby retains and reserves unto itself without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by applicable law, rules and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:

1) To the executive management and administrative control of the school system and its properties, programs and facilities, and the professional duties of its employees

2) To employ and re-employ all personnel and, subject to the provisions of law and of the State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or their dismissal or demotion, their promotion and work assignment;

3) To establish policies for the program of instruction and to make the necessary assignments for all programs of an extra-curricular nature that in the opinion of the Board, benefits students;

4) To determine the means and methods of instruction, selection of textbooks and other teaching materials, the use of teaching aids, class schedules, hours of instruction, length of school year, and terms and conditions of employment except as otherwise express [sic] in this agreement

B. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and the Wisconsin Statutes, Sec. 111.70, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin and the Constitution and laws of the United States.

VI. GRIEVANCE PROCEDURE

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B. Definition – For the purpose of this Agreement, a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this Agreement.

VII. ARBITRATION

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E. It is understood that the function of the arbitrator shall be to provide an opinion as to the interpretation or application of specific terms of the agreement. That Arbitrator shall not have power, without specific written consent of the parties, to either advise on salary adjustments, except the improper application thereof, or to issue any opinion that would have the parties add to, subtract from, modify or amend any terms of this agreement.

VIII. TEACHING HOURS

A. Regular building hours for teachers shall be eight per day, including a duty-free lunch period of at least thirty minutes. The starting and dismissal times, which may vary from school to school, shall be determined by the district. In addition to the regular building hours, the following shall apply:

1.) Teachers are expected to spend time outside of building hours to the extent necessary for adequate preparation for instruction, pupil and parent consultation, co-curricular functions, and other activities related to instruction.

BACKGROUND

For many years the Iowa-Grant School District has presented annual music programs in December, featuring presentations from students in the District's elementary and middle schools. These concerts have been called variously Christmas programs and Holiday programs and generally feature music that is appropriate to the winter holiday season, including songs which celebrate the winter holidays of Christmas, Hanukkah and Kwanzaa. The programs are part of the regular curriculum for elementary and middle school students and they are expected to participate. For middle school students enrolled in music classes, part of their music grade is based on concert attendance. Years ago the elementary and junior high schools had a consolidated program, but in recent years, after the school district adopted a middle school format and moved to a common campus, the elementary and middle schools have had separate programs.

On the elementary level, students learn the music for the program during the music portion of their classroom instruction, which is led by the elementary school music teacher. At the time of the events leading to the grievance herein, that person was, and is presently, Richard Steele. Previously, the position had been held by Jean Slack. At the time of the events herein, the District's elementary schools had been merged into one campus and music lessons were and are taught to all students at each grade level at the same times. Classroom teachers are then typically released for preparation time while the music instruction is occurring. Just prior to the program, however, there is a dress rehearsal during the school day which classroom teachers also attend in order to facilitate the rehearsal and keep the students orderly while they are waiting their turn to practice.

On the night of the performance, which is well attended by families of the students, as well as others in the local communities, the parents are instructed to drop off the students at their classrooms before the performance, where they are supervised by their classroom teacher. The classroom teacher then leads the students to the auditorium for the performance, sits with them during the performance and leads them back to the classroom after the performance, and then stays with them until they are picked up by their parents afterward. Classroom teachers do not receive additional compensation for attending the performance, even though it occurs outside the regular work day, but traditionally have not sought to be excused from the duty unless there is a compelling reason, such as an illness or family obligation. On those occasions when teachers have been excused, they have been replaced by a substitute teacher or another staff member.

On November 16, 2005, the elementary school staff held a faculty meeting, at which Principal Claudia Quam addressed the upcoming Holiday program, scheduled to be held on December 15th. At that time she read aloud Article VIII, Section A.1 of the collective bargaining agreement, set forth above, and reminded the faculty that under its terms they were expected to attend the Holiday program as part of their extra responsibilities outside the regular work day. She also asked any teacher who was not planning to attend to advise her immediately. After the meeting, Janet Liska, a second grade teacher and the Grievant herein, told Ms. Quam that she did not plan to attend because she was not comfortable with a Christmas program being presented in a public school and was unwilling to volunteer her time outside school hours for it. Ms. Liska had also missed two previous programs while on medical leaves and was replaced in those instances by her long-term substitutes, but on this occasion her demurrer was a matter of personal preference. On December 12, 2005, Ms. Liska reiterated to Ms. Quam her intention to not attend the Holiday program. In response thereto, Ms. Quam issued Ms. Liska the following letter:

Monday, December 12, 2005

Janet Liska
Iowa-Grant Elementary Middle School
498 County IG
Livingston, Wisconsin 53544

Re: Attendance at the Annual Iowa-Grant Elementary Holiday Concert

Dear Janet,

On Wednesday, November 16 at the elementary staff meeting I verbalized to the 4-year-old through 4th grade staff that it was the District's expectation that classroom teachers would attend the IGEMS' Holiday Concert to supervise their students either in the classroom or in the gymnasium. I referred to Article VIII, Section A, Item 1. and read, "Teachers are expected to spend time outside of building hours to the extent necessary for adequate preparation for instruction, pupil and parent consultation, co-curricular functions, and other activities related to instruction." At that meeting you stated to me that you would not be attending. Today, you reiterated that you would not be attending.

Again, it is the expectation of the Iowa-Grant School District that you are in your classroom at 6:30 when students are dropped off, walk your class down to the gymnasium, sit with your students for the duration of the program and then walk your students back to your classroom and wait until parents pick them up. This expectation is based on Article VIII, Section A, Item 1 as stated in the Master Agreement, and past practice. Failure to comply with this expectation will result in disciplinary action, up to and including discharge. Thus, this letter should serve as a warning. A copy of this letter will be placed in your personal file.

Please contact me with any questions about this matter.

Sincerely,
Claudia Quam
Elementary Principal

As a result of receiving the letter, Ms. Liska did attend the program, but, on January 2, 2006, filed a grievance over the District's requirement that teachers attend the Christmas program without compensation. The grievance was denied at each stage of the grievance procedure, resulting in this arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that WERC precedents support its contention that the District could not require the Grievant to attend the Christmas program. It notes that there is no mention of the program in the contract, nor is there any District policy or directive mentioning the program or requiring staff to attend it. As evidenced by the testimony of several witnesses, the teachers reasonably believed attendance at the program was voluntary. Where such is the case, the WERC has held that there is no binding practice requiring them to attend in the absence of contractual language mandating it. In the past, the teachers have considered boycotting the Christmas program, along with other voluntary activities, such as the open house, as a job action during difficult contract negotiations. The boycott did not occur only because many teachers felt obligated to the students who had worked to prepare it.

The record shows that, while the Administrator and Principal believed the program was mandatory, they did not tell the teachers this, nor did they keep track of faculty attendance at the programs. Neither had they previously threatened a teacher with discipline for not attending. Further, the teachers were not paid for attending the program, nor is it referenced in the contract or the school calendar, unlike parent/teacher conferences. Finally, the District cannot violate the U.S. Constitution, which guarantees separation of church and state. Ms. Liska expressed her discomfort with a Christmas program in a public school as being a main reason for her reluctance to attend. As students would not be expected to attend if they or their parents objected, so a teacher should also have the option to not attend. The Arbitrator should instruct the District that it cannot mandate attendance at this voluntary program and should remove the December 12, 2005 letter from Ms. Liska's file.

The District

The District asserts that, under Article VIII. Sec. A.1, it may require teachers to attend the Holiday program. It is an activity that occurs outside regular school hours, it is

related to instruction for which students receive grades, is academic in nature, is part of the school curriculum and, thus, falls within the language of the contract. The only other event scheduled by the District which falls under this language is the annual open house and the parties have agreed that the open house is a separate issue. Under rules of contract interpretation, contracts should be interpreted to given meaning to all their terms and, in order for Article VIII, Sec. A.1 to have meaning it must be held to apply to the Holiday program.

There is also a binding past practice of teacher attendance at the program, and arbitrators have held that where such is the case attendance is mandatory. Besides the Grievant, the other elementary teachers recognize that attendance at the program is mandatory. In the past, when planning to be absent, then have requested permission in advance, which has only been granted for legitimate reasons, such as an illness or family obligation and, while the Grievant may asset a First Amendment argument as justifying her absence, arbitrators have held that such considerations are outside their jurisdiction. Admittedly, an evening program is an inconvenience for some and, in the past, the Association requested that it be scheduled during the school day, but the District declined. This decision was not grieved, nor did other teachers refuse to attend, supporting the conclusion that, whether they agreed with the time, the bargaining unit members recognized the program as a required obligation. Finally, the administration has never indicated that program attendance was voluntary, so there is no rational basis for any perception on the part of the Grievant that it was.

The Union in Reply

The Union asserts that there are numerous errors and inaccuracies in the District's argument. It disputes that elementary students were graded for the event. It also notes that there are no records of faculty attendance to support the District's argument and asserts that the District's enforcement of the claimed attendance requirement was very lax in the past. Also, teacher attendance is not the same as acknowledgement that attendance is a requirement and the record shows that other faculty members besides the Grievant believed it was a voluntary activity

The Union further asserts that the staff did comply with Article VIII, Sec. A.1 in that students were adequately prepared before the event, as the language states, so attendance at the event should not have been necessary. Further, there was no binding past practice of mandatory attendance because the elements of mutual acceptability and acknowledgement, which are required to find a binding practice, are missing. It is also the case that the record shows there are administrators who acknowledge that the event was voluntary and other administrators, who might have agreed, were not called by the District, permitting an inference that their testimony would have been harmful to the District's case.

The District in Reply

The District argues that the authorities cited by the Union are either not on point or do not support the Union's case. The Union also mischaracterizes the testimony by asserting that

the teachers thought the program was voluntary. The teachers who testified to that effect were either not elementary teachers affected by the language or provided no reasonable basis for such a belief other than their uninformed opinion. Other witnesses, some called by the Union clearly stated their belief that program attendance was required as part of their job duties. It is also irrelevant whether the teachers ever considered boycotting the program as part of a job action. Since no boycott occurred there has never been a determination of whether such would have been legal. It is also not probative that no records exist of previous letters to teachers for non-attendance because this is the first incident of its kind. In the past, teachers requesting to be absent presented legitimate excuses, so no warnings were needed. Finally, contrary to its arguments, the Union presented no evidence of any violation by the District of the Constitution, the Grievant's First Amendment rights, or any statute prohibiting religious discrimination.

DISCUSSION

As I have characterized the issues in this case, the critical inquiry is whether the District may require the members of the elementary and middle school teachers to attend the District's annual holiday music program, in which their students are participants. The parties have cited several cases in support of their respective positions, sometimes even relying on the same cases. These include RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 14308-D (WERC, June, 1977); SCHOOL DISTRICT OF ELK MOUND, A/P M-01-136 (Engmann, August, 2001); STATE OF WISCONSIN, DEC. NO 8892 (WERC, March, 1969); and BOWLER SCHOOL DISTRICT, CASE 20, NO. 62038, MA-12133 (Levitan, 12/11/03). In my view, each of these cases is distinguishable from the case before me, addressing different fact situations and/or different contract language, and thus provide limited guidance for this case.

In essence, the language of Article VIII, Sec. A.1 of the contract provides that teachers are expected to perform certain duties outside building hours, which are eight per day plus a thirty minute lunch, as long as those duties are necessary for adequate preparation for instruction, pupil and parent consultation, co-curricular functions, and other activities related to instruction. In the District's view, the holiday program is encompassed in the language of Article VIII, Sec. A.1, and Principal Quam specifically referenced that language when she told the elementary school staff on November 16, 2005 that attendance at the program was required. The Association believes that attendance at the program has historically been regarded as voluntary and that, therefore, the District cannot mandate attendance without compensation. Further, the Association appears to suggest that, even if the District may otherwise require attendance, faculty members may refuse to attend if they object to the program for religious, or irreligious, reasons. The Association's first argument is predicated on the following facts: 1) there is no written District policy requiring attendance nor is there a reference to the program in the school calendar, 2) the employees believed attendance was voluntary and no administrator had ever told them otherwise previous to Ms. Quam's directive on November 16, 3) faculty attendance at the program is apparently not recorded, 4) the program is not specifically referenced in the contract and 5) teachers are not compensated for attending it. The Association emphasizes that the contract uses the term "expected," rather

than "required," in asserting that the Association members believed such functions are optional, relying on Arbitrator Engmann's analysis in SCHOOL DISTRICT OF ELK MOUND. It further asserts that if a function is voluntary, refusal to perform it cannot be a basis for discipline, citing STATE OF WISCONSIN, *supra*. The Association's second argument is based on its assertion that the U.S. Constitution requires separation of church and state and, therefore, teachers who see such a program as violating that principal cannot be required to attend.

As to the first argument, my reading of the pertinent section of the contract is that the administration clearly may require teachers to perform certain functions outside normal school hours without compensation. Article VIII, Section A. begins by defining regular building hours for teachers as being eight per day, including a duty-free lunch period of half an hour. This defines the normal in house work day for teachers, during which they are to be in the school or otherwise engaged in educational activities, such as field trips, away from the school. The section then states:

> "In addition to the regular building hours, the following shall apply:
>
> 1) Teachers are expected to spend time outside of building hours to extent necessary for adequate preparation for instruction, pupil and parent consultation, co-curricular functions, and other activities related to instruction.

The use of the words "shall" and "necessary," to me, illuminate the word "expected" and indicate that the expectation referenced in Article VIII, Sec. A.1 is not merely advisory or desirable, but is a job requirement, as long as the particular duty falls within one of the listed categories. Additionally, if the language does not give the District the ability to require attendance at certain functions, as opposed to merely asking for it, how is one to understand the purpose of the language? As was noted by the District in its brief, contracts should, where possible, be construed to give meaning and effect to all their provisions. Here, if all the language means is that the administration can ask teachers to do certain things outside the workday, but that they may refuse at their option, then it is superfluous and gives the District no rights beyond those that would exist anyway. Further, the administrators who testified, Mr. Slack and Ms. Quam, certainly believed that the language gives the District the power to require teachers to participate in certain functions outside the regular school day and none of the teachers who testified disagreed with that view as a general proposition. There is, however, nothing in Article VIII that refers to additional compensation for performing such duties, nor is there any such reference in Article XXI, which deals directly with compensation, other than activities which are specifically listed on the Supplementary Salary Schedule appended to the contract. Hence, I conclude that the parties did not intend that staff members would be compensated for any required extra activities not specified in the Supplementary Salary Schedule. Having made that finding, the inquiry then becomes, "Is the Holiday program encompassed by the categories articulated in the section.

First, it should be noted that the contract does not specify any particular activity as fitting into the provisions of Article VIII, Sec. A.1. Testimony from the witnesses revealed that only three ongoing activities have traditionally been viewed as fitting into that rubric – the holiday program, parent-teacher conferences and an annual open house. Unlike parent-teacher conferences, however, the holiday program and open house are not referenced in Article XXII, which defines the school calendar, nor are they specifically scheduled in the calendar itself (Jt. Ex. #5) The Association regards this exclusion as being fatal to the District's argument and various witnesses testified that the Association members had considered boycotting both the open house and the holiday program at various times in the past as forms of concerted labor activity during contentious contract negotiations because they regarded those activities as voluntary. There was even testimony by Association member Richard Steele to the effect that the open house had, in fact, been boycotted on at least one occasion in the past without reprisal. I do not regard either the absence of the holiday program from the school calendar, or the possible boycott of the open house in the past as being dispositive on this point.

Key to my analysis of the applicability of Article VIII, Sec. A.1 to the holiday program is the nature of the program itself. From its inception to the present day, the elementary program has been essentially a choral concert where the students in the District perform for their parents, teachers and other interested community members. More to the point, the program is the culmination of the music curriculum for the fall term of the school year. The record reflects that middle school general music students are graded on their participation in their program and further that, while elementary students do not receive specific grades for music participation, they are required to attend their program as part of their class work. This is consistent with the Model Academic Standards for Music promulgated by the Wisconsin Department of Public Instruction, which contains standards for performance proficiency for general music students by the end of fourth grade and by the end of eighth grade. (Dist. Ex. #2). Thus, I regard the holiday program to be part of the elementary and middle school music curriculum for the District. This is buttressed by the evidence that for much of the fall term elementary music instruction centers on preparation for the program. There are no other concerts referenced in the school calendar, which leads to one of two conclusions. On the one hand, this may be the only performance opportunity the students have during the year, which would seem to enhance its importance. On the other hand, it may be there are multiple concerts, none of which are referenced in the school calendar. One assumes that is the case, since certainly the high school music organizations would have concerts during the year, which students would be required to attend, notwithstanding they are not listed in the contractual calendar. This leads to the conclusion that the fact that a concert is not included in the school calendar does not mean perforce that it is not a required activity for the students performing or the faculty responsible for the program.

On the middle school and high school levels, music students will have specific music classes taught by music faculty. The students are also at a level of maturity where they should require less individual supervision. At concerts outside of regular school hours, therefore, it would likely not be necessary for the entire faculty to attend. It is different with elementary students, however, as indicated by the record. In the first place, music is part of general

elementary instruction, and, while there may be teachers who specialize in specific subjects, such as music and art, the students stay in the same classroom with one primary teacher. Thus, in the holiday concert programs, the students are listed by classrooms, along with their classroom teachers. Also, teachers accompany their students to the dress rehearsal and are instructed to meet their students in their classrooms before the concert itself, to sit with their students during the concert and to take the students back their classrooms after the concert to meet their parents. Parents also receive instructions to drop their children off at their classrooms before the concerts and pick them up there afterward. (Dist. Ex. #6&7) Depending on what definition one uses, therefore, it is clear to me that the holiday program is either a co-curricular activity, or an activity related to instruction, as those terms are used in Article VIII. Sec. A.1. Having said that, Article VIII, Sec. A.1 does not set forth how it is to be determined whether classroom teacher attendance is deemed to be necessary. That being the case, Article IV, Sec. A.3 reserves to the Board of Education the right "To establish policies for the program of instruction and to make the necessary assignments for all programs of an extra-curricular nature that in the opinion of the Board, benefits students." Since this power has not been expressly limited elsewhere n the contract, it is within the purview of the Board, and by extension the administration, to determine whether it is necessary for the elementary teachers to attend the program. It did so, and, for the reasons set forth above, I find that such determination was not arbitrary or capricious.

The Association notes that teachers have, on occasion, been excused from attending the program. The record reflects, however, that when this has occurred it has been either because the teacher has been on sick leave or has had a scheduling conflict with another obligation. In the former cases, the teachers have been replaced at the program by their substitutes. In the latter cases, prior permission to be absent has been sought, and granted, based on a justifiable excuse, and replacements have been available. In no previous case has a teacher merely refused to attend or sought to be excused based solely on personal preference, so I find no basis in past practice for treating program attendance as optional or as a matter of personal choice. Should an elementary teacher refuse to attend without permission, therefore, he or she would be subject to discipline

The Association's other contention, that the District cannot compel teachers to attend if they feel that the program violates separation of church and state, is based on language in Article IV, Sec. B., which prohibits the District from exercising its reserved powers in a manner which contravenes the U.S. Constitution. It is asserted that the First Amendment to the Constitution establishes separation of church and state and, therefore, teachers who object to the holiday program on the basis that it violates this principle may not be required to attend. The record regarding this particular concern is remarkably spare. The Grievant's testimony on the subject was to the following effect:

> Q: Could you tell me what the reasons were for you telling Mrs. Quam that you would not be attending the 2005 Christmas program?

A: Yes. I told her that I could no longer volunteer to go to the program as I had done several times in the past. I object to the content of the Christmas program as done at Iowa-Grant. So really the idea of a Christmas program in a public school has been foreign to me until I came here. After going to many of the programs over the years, I just felt I could no longer volunteer to go to the Christmas program after school hours, and so I said I did not want to attend.

The Grievant's underlying premise, as stated in her testimony, appears to be that program attendance was voluntary. If that is so, a teacher should be able to attend or not, as they choose, for any reason. If that were the case, Ms. Liska might have a point in arguing that she should not be expected to attend the program without compensation. Her premise, however, is mistaken because, as previously stated, program attendance is not voluntary, therefore the question is moot. Further, on the record before me, and without citations to specific authorities supporting the claim, I am unwilling to hold that the District may not compel attendance of a teacher whose philosophical objections are no more specific than those presented here. Having found that the District was within its contractual authority to require attendance, I further hold that a teacher cannot refuse to attend without first obtaining permission, whatever the basis for that refusal might be. Those arguments not addressed in my discussion were considered but were deemed unnecessary to decide this matter. For the foregoing reasons, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The District did not violate Article VIII, Section A.1 of the collective bargaining agreement when it required elementary school teachers to attend the annual Holiday program. The grievance is, therefore, denied. Inasmuch as the Grievant did attend the 2005 holiday program, however, albeit under protest, the December 12, 2005 letter issued to her by Principal Quam shall be expunged from her personnel file.

Dated at Fond du Lac, Wisconsin, this 21st day of June, 2007.

John R. Emery /s/

John R. Emery, Arbitrator

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