

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLINTONVILLE EDUCATION ASSOCIATION

and

CLINTONVILLE SCHOOL DISTRICT

Case 50
No. 67067
MA-13736

Appearances:

Mr. David A. Campshure, UniServ Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303, on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Robert W. Burns**, 318 South Washington Street, Green Bay, Wisconsin 54301, on behalf of the District.

ARBITRATION AWARD

At all times pertinent hereto, the Clintonville Education Association (herein the Association) and the Clintonville School District (herein the District) were parties to a collective bargaining agreement dated November 14, 2005 and covering the period from July 1, 2005 through June 30, 2007. On June 25, 2007, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a dispute concerning an allegation that the District had violated the collective bargaining agreement and/or past practice by offering Dawn Huber (herein the Grievant) a contract for 2007-08 based on her hours worked per week, rather than her assigned number of weekly class periods. The undersigned was selected from a panel of WERC staff members to hear the dispute and a hearing was conducted on January 17, 2008. The proceedings were transcribed. The parties filed their initial briefs by March 19, 2008 and reply briefs on May 18, 2008, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

Did the District violate the parties' collective bargaining agreement and past practice, if any, when it prorated the Grievant's contract for 2007-2008 based on an eight-hour day rather than the number of instructional periods taught?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE II – MANAGEMENT RIGHTS

2.1 Management Recognition

The Association recognizes the Board of Education, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin, and of the United States, including, but not limiting the generality of the foregoing, the right to:

- E. To determine the class schedules, hours of instruction, assignments of teachers, and use of paraprofessionals after consideration is given to any recommendation which may be volunteered by a teacher or teachers involved.

2.2 Limitation of Rights

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 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 of the United States.

. . .

ARTICLE VII – COMPENSATION

7.10 Teachers as Occasional Substitutes

Teachers who agree to substitute for another teacher shall be paid one-fifth (1/5) of the substitute teacher daily rate plus an additional \$4 per period (45-55 minutes). Opportunity for subbing shall be afforded first to teaching staff within respective buildings.

7.11 Sixth Class Reimbursement

. . .

- H. The teacher accepting the 6th instructional assignment with no supervision assignment shall be compensated at a rate of 16% of his or her current placement on the salary schedule (20% if a 6th class and supervision are assigned). The teacher may decline the supervision assignment. The salary rate will be prorated depending on length of assignment.

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ARTICLE XIV – EMPLOYMENT CONDITIONS

14.3 Teacher Day

The normal teaching day for a full-time equivalent teacher is to consist of approximately an eight (8) hour period. Teachers will be released at 3:30 p.m. on the last working day of each week, on the day before holidays, or recess. On any school days but the above, the building administrator may schedule up to five (5) meetings per year and teachers will stay up to 4:15 p.m.

14.5 Elementary Part-Time Contracts

- A. Part-time teachers who have teaching assignments in elementary (PK-5) music, art and physical education may be assigned classes based on a weekly schedule of 1300 minutes of instructional time. This 1300 minute standard does not apply and will not be applied to any elementary teacher who is currently on a full-time continuing teacher contract under §118.22.
- B. The parties also agree that the 1300 minutes of instructional time shall be used as the base for determining the percentage of a teaching contract that a part-time teacher referenced in #1 will receive and be compensated for when rounded to the nearest percent.

14.6 Part-Time Related to Duties

- A. All part-time teachers who have contracts equaling 70% or more, and do not travel between buildings, may be assigned noninstructional duty(ies) during the teacher workday on a proportional basis, using 170 weekly minutes as the means to calculate the non-instructional assignment. Example: 170 minutes

x .70 contract = 119 minutes that may be assigned weekly for noninstructional purposes.

- B. Such duty shall be contiguous to their instructional responsibilities as scheduled. Examples of such duty would be lunch, study, in-house, student breaks, etc.

BACKGROUND

Dawn Huber, the Grievant herein, has been a Special Education teacher in the Clintonville School District for seventeen years. Since the 2004-05 school year, she has worked part-time as a Cognitively Disabled – Severe teacher, and has also been part of a job sharing arrangement as a Learning Disabled teacher from 2004-07 in the Clintonville Middle School. In 2004-05 she had a .40 FTE LD job share with another teacher, working two days per week, per the language of Article XIX of the contract. In 2005-06 and 2006-07 she had a .20 FTE LD job share and worked one day per week. Contrary to her LD position, her full-time equivalent as a part-time Cognitively Disabled – Severe teacher was determined based on the number of class periods she taught per week as compared to a full middle school teaching load of 25 class periods per week. Thus, in 2004-05, she taught 7.5 periods per week, which was considered .30 FTE. In 2005-06 and 2006-07, she taught 15 periods per week, which was considered .60 FTE. The Grievant's building principal was aware and approved of this method of calculating her part-time FTE.

Early in 2007, prior to being offered a contract for 2007-08, the Grievant received an inquiry from her supervisor, Kayrene Schultz, Director of Pupil Services, as to how her FTE had been determined in the past. In late February, the Grievant gave Schultz a note explaining how her FTE was calculated and the two also met to discuss the matter. In late February or early March she also met with District Administrator Tom O'Toole and provided him with a copy of the memo explaining the calculation of her FTE. At that time, O'Toole told her that contrary to what had occurred in the past, in the future her FTE would be calculated based on her total weekly hours worked compared to a full-time teacher's 40-hour workweek, rather than on a comparison of teaching periods. For 2007-08, the Grievant's job share ended, but her CD-S assignment was increased from 15 periods per week to 25, the same number of contact periods as a full-time teacher. She did not have any preparation period or supervision duties, however, so, because she only worked 24 hours per week, compared to a full-time teacher's 40, her position was considered .60 FTE. As a result of the District's action, the Grievant filed a grievance, asserting that, contrary to the District's position, a .60 FTE position was only 15 contact periods per week and asking that her schedule be adjusted accordingly. The grievance was denied and proceeded through the contractual process to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Association

The Association asserts that there is a binding past practice between the parties of calculating a part-time teacher's full time equivalent (FTE) based on the teacher's total number of instructional periods per week. This is a practice that has existed in the middle school and high school for at least 31 years. A full-time teacher has 5 instructional periods per day, or 25 instructional periods per week, so each instructional class period per day has been considered equivalent to a .20 FTE. Therefore, when the District assigned the Grievant 25 instructional periods per week for 2007-08 she was entitled to be paid based on a 1.0 FTE. The District intentionally disregarded the past practice by calculating the Grievant's FTE based on 24 hours worked per week, compared to a full-time teacher's 40-hour workweek.

The District knew or should have known that the practice existed. The testimony established that both the Middle School Principal and the Director of Pupil Services knew how the Grievant's FTE had been calculated in the past. The knowledge of these management personnel may be imputed to the Administrator and the School Board. Indeed, the Grievant's FTE could not have been calculated as it was without the knowledge and collaboration of the District. The practice was exercised consistently over a long period of time and there was mutuality of understanding between the parties as to its application. The underlying circumstances also support the Association's position because the Administrator testified that the workloads of regular classroom teachers are prorated based on five instructional periods per day. To treat Special Education teachers differently, therefore, makes no sense and devalues their work. The Grievant had the same instructional load as a full-time middle school or high school teacher and virtually the same number of hours per week as a full-time elementary teacher. Thus the Association's position is fair and just and the grievance should be sustained.

The District

The District asserts that one cannot compare the schedule of a Special Education teacher with that of a regular classroom teacher. Testimony establishes that classroom teachers are responsible for their classes during their assigned instructional periods, for which they need to prepare, whereas Special Education teachers are responsible for particular students throughout the day. Thus, their schedules and workloads cannot be meaningfully equated. This was acknowledged by the Association Chair, Terri Schultz. It is noteworthy in this regard that Special Education teachers do not have preparation time, as regular classroom teachers do. In fact, they have no specific designated block of time in which to prepare for their classes. This is another example of how Special Education teachers cannot be compared to classroom teachers.

According to the contract, it is also a management right to schedule work. The normal workday for a full-time teacher, as spelled out in the contract, is approximately 8 hours. The

Grievant's regular workday is 4 hours and 48 minutes, with an additional ½ hour for lunch. That does not constitute a full workday according to the contract, and the Grievant admits she does not work the same number of hours as a regular teacher. Further, she has no supervisory duties, which could be assigned to her if she had at least a 70% contract. As it is, her contract is only 60%, so she has no extra duties. Even if she were deemed to have a 70% or greater contract, however, whether she had additional duties would still be discretionary with the District.

Other teachers, besides Special Education, have their FTEs calculated based on the total number of hours worked. These include the Band and Chorus teachers, whose contracts are based on a 40 hour week. They have Band and Chorus classes which meet regularly, but also must give individual lessons and must fit in their preparation time where they can. There is no reference in the contract to the workday of a Special Education teacher, but the contract does define the contract of a teacher as being eight hours. The District interpreted the contract correctly. If the grievance is sustained it will lead to absurd results. To interpret an FTE as the Association suggests has inherent problems. First, as noted Special Education teachers do not have set instructional periods, so their workdays cannot be compared to regular teachers. Second, it would require the contracts of current full-time Special Education teachers to be recalculated, because they work 40-hour weeks, which the Grievant does not, yet do not necessarily have 5 instructional periods per day. Others meet with more than 5 classes, and so would have to be paid for an overload.

The Association's past practice argument also fails. The record shows that from 2004-2007, the Grievant's contract was calculated based on class periods per week. Yet the evidence reveals that the Administrator was unaware of this and, further, the testimony regarding the length of the practice was from a witness whose experience was with classroom teachers, not Special Education teachers. Further, past practice has no relevance where there is clear language determining the issue. Here the language is clear that a workday is eight hours and there is no evidence of an intention by the parties to calculate FTEs for part-time Special Education teachers the same as for regular classroom teachers.

The Association in Reply

Section 7.11 of the contract clearly provides that middle school and high school teachers who take a sixth instructional assignment are entitled to additional compensation. Thus five instructional periods is considered a full-time position. It makes no sense, and is unfair, to base the compensation of Special Education teachers, who have the same amount of contact with arguably more challenging students, based on an eight-hour day. It also ignores the fact that for the previous three years, the Grievant's FTE was based on the number of contact periods, not hours worked.

The schedules of other District teachers are not relevant to this case. What has been the practice with other "non-regular" teachers has no bearing on Special Education teachers. Nor does the basis for compensating non-instructional staff such as nurses, counselors, speech

pathologists, etc. There is no evidence that in the past Special Education teachers have ever been compensated on other than a contact hours basis.

The District's argument regarding past practice also has no merit. Whether or not the Administrator knew of the practice undergirding Ms. Huber's compensation in the past, it should have known it and is bound by the practice since others in management obviously did know it and followed it. This is a practice that affects a compensation benefit. It is thus entitled to be honored under long arbitral precedent.

The District in Reply

The District asserts that the Association's past practice must fail in light of the clear language of the contract. The contract gives management reserved rights over all areas not limited by the contract and does not limit management's discretion to determine class schedules, hours of instruction and/or teaching assignments. Further, the contract specifies that the normal teaching day for a full-time equivalent teacher is approximately 8 hours. The Grievant's schedule is calculated based on a 40 hour week. The Grievant only works 24 hours per week and so is not a full-time teacher. The language is clear and past practice cannot be used to limit management's discretion under it. The Association's argument also fails because the elements of a binding practice have not been established. To be binding, a practice must be unequivocal, clearly enunciated and acted upon and readily ascertainable over time as a fixed and established practice accepted by both parties. The testimony establishes that the Administrator was unaware of how the Grievant's schedule had been calculated in the past. There is also a lack of mutuality in that there is no evidence that special education teachers have been treated the same as regular teachers for scheduling purposes. Thus, there is no past practice supporting the Association's case.

The District is also not required to bump the Grievant's position to full-time. The Association argues that she is entitled to 100% compensation and should receive other non-instructional assignments as other full-time teachers have. Adding additional non-instructional assignments is discretionary under Section 14.6 when a teacher has at least a .70 FTE position, thus the District is not bound to assign the Grievant additional duties.

This case encroaches on management's unfettered rights to determine class schedules, hours of instruction and assignment of teaching personnel. Management has in no way surrendered or compromised the rights and the Association's arguments do not change that fact. The grievance should be dismissed.

DISCUSSION

There is no dispute that from 2004-07 the Grievant was a part-time Special Education teacher for the District and that while working part-time as a Cognitively Disabled – Severe (CDS) her compensation was computed as a pro-ratio of a full-time schedule, which was 25 instructional periods per week. There is also no dispute that for the 2007-08 school year, the

basis for her compensation was altered from the number of instructional periods she taught, to her number of hours worked per week compared to a full-time teacher's workweek of approximately 40 hours. As a result, even though her number of CDS instructional periods in went from 15 in 2006-07 to 25 in 2007-08, she was still regarded as a .60 FTE employee and compensated as such.

The District asserts that under its reserved management rights it may determine class schedules, hours of instruction and/or teaching assignments. Thus, it is the District's prerogative to hire part-time employees and determine their duties and schedules. The District further argues that Special Education teachers do not have the same work schedules as regular classroom teachers, but often have more than 5 contact hours per day, so their compensation cannot be calculated in the same way as regular teachers, but should be calculated on an hours worked basis, as is done with psychologists, social workers, instructional media directors, and the like. The testimony of Special Education teachers Ingrid Coobs and Linda Pastovic supports the District's contention that the schedules of full-time Special Education teachers are, indeed different than those of regular classroom teachers and may, in fact, involve more than 25 instructional periods per week. According to District Administrator Tom O'Toole, he was unaware prior to 2007 that the Grievant's wages were computed based on the number of instructional periods she taught and that when he did learn of it he moved to correct the error.

The Association takes the view that compensating part-time teachers on the basis of the number of instructional periods they teach per week is a long-standing practice in the District and that, on that basis, the Grievant should have been compensated as a full-time teacher in 2007-08, since she taught 25 periods per week, which was a full course load. It further asserts that there is no meaningful distinction between Special Education teachers and regular teachers for purposes of determining the basis of their compensation. It gives no weight to the Administrator's claim of no knowledge of the practice, inasmuch as other administration personnel were aware of it, nor to evidence that part-time teachers in other disciplines, such as music, or other non-teaching professional staff, such as guidance counselors, have had their FTEs determined on an hours per week basis.

Article II of the contract expressly gives management the rights "to determine the class schedules, hours of instruction, assignments of teachers, and use of paraprofessionals after consideration is given to any recommendation which may be volunteered by a teacher or teachers involved." Further, these rights may only be restricted by express limitations found elsewhere in the contract. It is, therefore, subject to other provisions in the contract, management's prerogative to hire both full-time and part-time teachers and to determine their schedules and workloads. In this case, it is clear that since 2004, the Grievant has been employed by the District as a part-time Special Education teacher and that the District has determined what classes she was to teach and her schedule for doing so. These determinations were appropriately within the District's grant of authority under the management rights clause. It does not naturally flow from this, however, that the District has unfettered discretion to determine how she is to be compensated. The District relies on the language of Article IV, Section 14.3, which describes the normal teacher day as being approximately 8 hours. By

inference, the normal week is approximately 40 hours. Thus, the Grievant's workweek of 24 hours would be 60% of full-time. Further, under Section 14.5, the FTE of elementary part-time teachers is clearly based on a minutes-per-week formula, rather than on the number of instructional periods, inasmuch as elementary students do not have instructional periods, *per se*. On the other hand, it is clear that part-time teachers of core subjects in the middle school and high school have their FTEs determined based on the number of instructional periods per week, with 25, or 5 per day, being considered full-time. Further, under Article VII, Section 7.10, teachers who substitute for other teachers are entitled to compensation at 1/5 of the substitute teacher rate, plus \$4, per period. This permits an inference that each instructional period is the equivalent of 1/5 of a full teaching load. This is buttressed by the fact that Section 7.11 provides additional compensation for teachers who accept a 6th class assignment, implying that 5 instructional periods per day is a full-time load. So, it appears that the contract is ambiguous as to how the FTE of part-time middle school Special Education teachers are to be compensated. That being the case, the inquiry becomes, is there an established practice on this point that resolves the issue?

There is no dispute that from 2004-07 the Grievant worked part-time as a Special Education teacher and that her FTE for the Cognitively Disabled – Severe portion of her workload was based on instructional periods per week. This fact does not, by itself, however, constitute a binding practice such that the District was bound to honor it for 2007-08. As the parties have noted, a practice must have certain characteristics before it may be considered to be binding. In order to qualify, a practice must be 1) unequivocal, 2) clearly enunciated and acted upon and 3) readily ascertainable over a reasonable time as a fixed and established practice and 4) accepted by both parties. LINCOLN COUNTY (COURTHOUSE), WERC Case 193, No. 58373, MA-10932, (Meier, 8/22/00).

The evidence in the record shows that prior to 2007-08, the Grievant's FTE as a part-time middle school CDS teacher was always based on the number of instructional periods she taught per week. Further, there is no evidence of other part-time Special Education teachers ever being compensated on an hours-per-week basis prior to 2007-08. This practice is consistent with how the FTEs of part-time teachers of core subjects in the middle and high schools are determined. There was evidence that part-time Band and Chorus teachers have apparently had their FTEs calculated on an hours-per-week basis, but the evidence as to these positions did not in my view provide an adequate basis for comparison to the workload of a Special Education teacher and, on at least one occasion, a Chorus teacher's part-time FTE was determined pursuant to a specific memorandum of agreement addressing that circumstance. The weight of evidence, therefore, indicates that prior to the 2007-08 school year there was a consistent practice of determining the FTE of part-time Special Education teachers based on their total instructional periods per week and compensating them accordingly. The evidence also suggests that this was understood and accepted by both parties. The Grievant and Union witnesses Terri Schultz and Ed Johnson all testified to the practice. Further, the exhibits and testimony indicate that the Administration knew or should have known of the practice and acted in furtherance of it. Association Exhibit #2 shows that the District offered the Grievant a 30% CDS position for 2004-05, confirmed by letter from Administrator O'Toole. Her CDS

duties that year consisted of 7.5 instructional periods per week, or 30% of 25, but only 6 hours per week, which is only 15% of 40. Association Exhibit #3 shows that in 2005-06 the Grievant had a 60% CDS position. Her CDS duties that year consisted of 15 instructional periods per week, or 60% of 25, but only 12 hours per week, which is only 30% of 40. Association Exhibit #5 shows that in 2006-07, the Grievant had a 60% CDS position. Her CDS duties that year consisted of 15 instructional periods per week, or 30% of 25, but only 12 hours per week, which is only 30% of 40. It should also be noted that the foregoing exhibits included letters of intent from the Board of Education, indicating the District's intention to employ the Grievant for the years in question. These letters indicate that employment contracts, also from the Board of Education and presumably setting forth the Grievant's FTE for compensation purposes, would be forthcoming. Since the FTE is a matter of contract and the District sets the Grievant's schedule, it is, therefore difficult to credit a claimed lack of knowledge as a defense to the practice. Further, the Association accurately observes that arbitral precedent supports the view that it is not necessary for everyone in management to be aware of a practice for it to be mutually accepted. [See: CITY OF OSHKOSH, WERC Case 214, No. 49902, MA-8096 (Mawhinney, 8/16/95); VILAS COUNTY, WERC Case 48, No. 54540, MA-9711 (Greco, 4/22/97)] Thus, even in the event that O'Toole did not know how the Grievant's FTE had been calculated prior to 2007, others in the administration who were in a position to enter into binding agreements on the District's behalf apparently did and their knowledge and actions regarding this practice are imputed to the District.

The District asserts that a finding that the Grievant's schedule for 2007-08 is the equivalent of a 1.0 FTE would lead to absurd results because she only works 24 hours per week, compared to the 40 hours per week average worked by a regular classroom teacher. The District's position, however, would treat the Grievant's 25 period per week course load in 2007-08 as equivalent to her 15 period per week course load in 2005-06 and 2006-07, for compensation purposes. This, to my mind, is at least as absurd an outcome. Further, part of the reason the Grievant's work week was only 24 hours in 2007-08 is because she did not have a preparation period and the District chose not to assign her additional duties, which it does with other full-time teachers and could have elected to do with her. Finally, by altering the practice, as it did, in the middle of a contract, the District effectively disavowed a practice on which the Association, and Grievant, had relied in negotiating the agreement and throughout its term without giving them an opportunity to negotiate language to replace it. If the District wishes to disavow the practice as part of negotiations over a future agreement it may do so, but for the term of this agreement it must honor the practice it has followed heretofore.

For the foregoing reasons therefore, and based upon the record as a whole, I hereby issue the following

AWARD

The District violated the parties' collective bargaining agreement and past practice when it prorated the Grievant's contract for 2007-2008 based on an eight-hour day rather than the number of instructional periods taught. As and for a remedy, the District shall make the

Grievant whole by paying her back pay in the amount necessary to bring her compensation for the 2007-08 school year to the equivalent of 1.0 FTE, along with any additional benefits, such as insurance premium and pension contributions, which may have been pro-rated based on her FTE.

Dated at Fond du Lac, Wisconsin, this 14th day of August, 2008.

John R. Emery /s/

John R. Emery, Arbitrator

