

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BARNEVELD EDUCATION ASSOCIATION

and

BARNEVELD SCHOOL DISTRICT

Case 8

No. 67415

MA-13874

(Overload Pay Grievance)

Appearances:

Mr. Thomas Fineran, Executive Director, South West Education Association, 960 Washington Street, Platteville, Wisconsin, appearing on behalf of Barneveld Education Association.

Mr. David R. Friedman, Friedman Law Firm, 30 West Mifflin Street, Suite 1001, Madison, Wisconsin, appearing on behalf of Barneveld School District.

ARBITRATION AWARD

Southwest Education Association and Barneveld Education Association, hereinafter "Association" and Barneveld School District, hereinafter "District," mutually requested that the Wisconsin Employment Relations Commission provide them a list of arbitrators from which to select assign an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. From said list, the parties selected Lauri A. Millot to hear the dispute. The hearing was held before the undersigned on April 22, 2008 in Barneveld, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on July 7, 2008, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues, but were unable to agree as to the substantive issues.

The Association framed the substantive issues as:

1. Did the District violate the terms of the 2007-2009 master agreement between the Barneveld School District and the Barneveld Education when it denied overload pay to six teachers that were assigned to homeroom duty above and beyond the master agreement's definition of a normal teaching load?
2. If so, what is the appropriate remedy?

The District framed the substantive issues as:

1. Does Article VII of the 2007-2009 collective bargaining agreement authorize overload pay for anything other than assigned teaching periods?
2. If so, what is the appropriate remedy?

After considering the arguments of the parties and the evidence, I conclude that the Association's framing of the dispute assumes factual and legal findings and the District's framing of the issues is too broad in that it extends beyond stimulus for this dispute, namely homeroom assignment. Therefore, I frame the issues as:

1. Did the District violate Article VII of the 2007-2009 collective bargaining agreement when it denied overload pay to six teachers that were assigned to homeroom duty?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

...

ARTICLE V – TEACHER RIGHTS

...

- C. All rules and regulations that are appropriate for and govern all teacher activities and conduct shall be interpreted and applied uniformly.

...

ARTICLE V – BOARD RIGHTS

Subject to the provisions of this Agreement, the Board retains the rights and functions of management, which are specifically granted by law and the regulations of the Department of Public instruction.

The Board's functions shall include, but not be limited to the following:

1. Management and administrative control of the school system and its properties and facilities.
2. Determination of the locations of schools and other facilities.
3. Employment of professional personnel and subject to the provisions of the law, State Department of Public Instruction regulation, and the provisions of this Agreement, the determination of their qualifications and their work assignments.
4. Providing a quality program of instruction for the students of the Barneveld Public Schools.
5. Evaluation of the instructional, teaching performance and efficiency of the processes, techniques and methods of instruction.

...

The foregoing enumeration of functions shall not exclude other functions of the Board not specifically set forth, and the Board retains the right to act in other areas not specifically covered by the Agreement. Nether shall the foregoing enumeration of Board functions be interpreted to prevent the Association from bargaining on any subject relating to wages, hours and conditions of employment.

...

ARTICLE VI – GRIEVANCE PROCEDURE

A. Purpose

The purpose of this procedure is to secure, at the lowest possible administrative level, an equitable resolution of grievances.

Because this procedure provides for an orderly, final method of resolving differences, the Association agrees that it will not authorize, encourage, call or condone a work stoppage, slowdown, or the withholding, in full or part, of any services normally performed by members of the bargaining unit so long as the dispute involves matters covered under the terms of this Agreement.

. . .

D.4. Binding Arbitration

If the grievance is not resolved satisfactorily, the Association may within thirty (30) days, request, in writing, a solution through arbitration. The request shall be made to the Wisconsin Employment Relations Commission for a panel of five (5) arbitrators. Within ten (10) days of receipt of such list, the parties shall alternately strike a name from the list until one remains. The name remaining shall be the arbitrator. A coin toss shall determine which party strikes the first name. Upon notification of his/her selection, the arbitrator shall schedule a hearing.

The parties shall share equally the cost and expenses of the arbitration proceeding, including any transcript fees and the arbitrator fee. Each party shall bear its own costs for witnesses and all other out-of-pocket expenses including possible legal fees. Testimony or other participation of employees shall not be paid by the Board unless an employee's participation is requested by the Board.

The arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement. Findings of the arbitrator shall be final and binding upon both parties.

Processing of grievances, arbitration, and bargaining, which can only be done during the working day, will not result in loss of pay for the employee(s) participating in the proceedings.

ARTICLE VII – WORKING CONDITIONS

A. Workload

1. Teachers in grades 9-12 teaching in the 4 period block schedule assigned any of the following shall be compensated according to the salary schedule (Appendix A):
 - a. Three (3) teaching periods and one (1) prep period.

- b. Two (2) teaching periods, one (1) supervision, and one (1) prep period.
 - c. Any combination of 45 minute periods equivalent to a or b above.
- 2. Each additional assigned teaching period over three (3) shall be paid at an additional \$2000 per semester for a ninety (90) minute period, \$1000 per semester for a forty-five minute (45) period. Compensation for less than full-time positions will be determined as a proportion of the normal teaching load.
- 3. Teachers in grades 6-8 assigned to six (6) 45 minute teaching periods or five (5) teaching periods and up to two (2) non-teaching periods shall be compensated according to the salary schedule (Appendix A). Each additional assigned teaching period over six (6) shall be paid at an additional \$1000 per semester. Compensation for less than full-time positions will be determined as a proportion of the normal teaching load of six (6) periods per day.
- 4. Teachers in grades K-5 shall be compensated one hundred ten dollars (\$110) per student per semester for each student over twenty-six (26) in their primary class assignments.
- 5. Teachers, other than music, phys. ed., and art teachers, whose assignments encompass 6-8 and 9-12 levels shall have their overloads determined according to Article VII.A.2 (above) only if they teach a majority of the time in grades 6-8.
- 6. Music, Phys. Ed, and art teachers who are assigned twenty-five (25) to thirty (30) 45 minute teaching periods per week shall be compensated according to the salary schedule (Appendix A). Each additional assigned period over thirty (30) shall be paid at \$160 per semester. Compensation for less than full-time positions shall be determined as a proportion of the normal teaching load of thirty (30) periods per week. Each "block scheduling" teaching period of 85 minutes or more will count as a two teaching periods in this computation.
- 7. IMC Directors, guidance counselors and school psychologists shall be compensated according to the salary schedule (Appendix A) for a work week consisting of 40 periods. Duties shall include implementing the board approved curriculum and the

fulfillment of the duties as described in the current job description.

8. Overloads shall be determined the third Monday of September for the first semester and the first Monday of February for the second semester.
9. A teacher shall be required to supervise an extra-curricular activity or be a class advisor only after the Administration has attempted to solicit qualified volunteers for such an assignment and has not been able to fill these assignments on a voluntary basis.

BACKGROUND AND FACTS

The facts giving rise to this grievance relate to overload pay at the high school (grades 9-12) level.

During 1996, the District formed an advisory committee to investigate the implementation of block scheduling at the high school level. The Association was an integral member of the study group. In 1997, the Committee recommended and the District ultimately implemented a four period block schedule. Inherent in the approved 4 period block schedule was a 32 minute homeroom at the end of each day. Homeroom was designed as time for student to have lessons, class meetings and work with individual teachers.

At the time the block schedule was implemented, the District assigned homeroom coverage to teaching staff members as a part of their normal teaching load. As staff decreased (from 42 full-time teachers in 1997 to 35 full-time teachers in 2003), homeroom coverage was assigned to teachers in addition to their normal teaching load.

In 2003, the Association brought the issue of homeroom assignments to the bargaining table and discussed compensation for those teachers supervising homerooms in addition teaching a normal teaching load. No change was made to the labor agreement and the District continued to assign staff members homeroom responsibility in addition to their normal teaching load.

The issue of homerooms and overloads was again discussed by the Association and the District during the 2005-2007 and 2007-2009 negotiations. Association bargaining proposal hand-dated November 2, 2005 included "homeroom is a supervision overload" in item #3, entitled, "Overloads". Association bargaining proposal hand-dated April 16, 2006 included item #3, "Workload language (attachment)" and the attachment contained the following definition of supervisory duty, "Supervisory duty includes, but is not limited to, homeroom supervision, study hall supervision, lunch room supervision, commons supervision, gym supervision, playground supervision, and IMC supervision". A May 26, 2006 document

entitled “Barneveld School Board 2005-2007 and 2007-2009 Teacher Contracts” contained item number five:

Overload concerns will be sent to a joint committee of 3 B.E.A. members and 3 Board Members to be discussed. If settled, it will be implemented in the 2009-11 contract.

The language contained in item five above is reiterated in BEA Proposal dated August 9, 2006, but modified for implementation in the 2007-2009 contract. And finally, the February 26, 2007 notes from the Association’s ratification meeting establish that the membership was aware that there was “no wording for teachers working homeroom” and questioned what would happen if they refused to supervise homerooms.

The Association and District reached voluntary agreements for the 2005-2007 and 2007-2009 time periods in April 2007 and no change was made to Article VII or the language addressing overloads.

Prior to the beginning of the 2007-2008 school-year, Association leadership met with District Administrator Joe Bertone and informed Bertone that the teaching staff would no longer “volunteer” to supervise homeroom periods. Disregarding the Association’s position, the District assigned homeroom periods as it had in the past.

On September 20, 2007 the Association submitted the following spreadsheet to Principal Ken Knudsen: ¹

NAME	TEACHING/SUPERVISION	HOMEROOM	TOTAL
Dyreson	\$500.00		\$500.00
Elfering	\$377.78	\$411.11	\$788.89
Hanson	\$112.00		\$112.00
Larson	\$634.00		\$634.00
Neuroth	\$122.00		\$122.00
Storlie	\$1,000.00		\$1,000.00
Vieau	\$500.00		\$500.00
Zell	\$946.00		\$946.00
Draper		\$822.22	\$822.22
R. Fritz		\$822.22	\$822.22
Kress-Just		\$822.22	\$822.22
Ryan		\$822.22	\$822.22
Wood		\$411.11	\$411.11
TOTALS	\$4,191.78	\$4,111.10	\$8,302.88

¹ The Association presented two spreadsheets to the District for payment. The first requested homeroom overload pay for 10 teachers. The Association amended that spreadsheet and reduced their request.

Knudsen approved the payments for “teaching/supervision”, but denied the homeroom payments for Elfering, Draper, R. Fritz, Kress-Just, Ryan and Wood on September 24, 2007.

On September 25, 2007 the Association filed this grievance on behalf of six teacher bargaining unit members who were assigned homeroom duty during the first semester of the 2007-2008 school-year.

The six teachers and their teaching schedules for the first semester of the 2007-2008 school-year are as follows:

- **Duane Elfering** is a 9-12 technology education teacher with academic classes scheduled during blocks one, two and three with his preparation during blocks 4A and 4B. During middle school hour nine which is the same time period as 9-12 homeroom, Elfering was assigned to teach technology education on Mondays, Wednesdays and Fridays to grade 8 and on Tuesdays, Thursdays and alternating Fridays he directed Homeroom at the 9-12 level.
- **Duane Draper** is 9-12 social studies teacher with 19 years experience in the District. Draper was assigned to teach academic classes during blocks one, two and three with his preparation during blocks 4A and 4B. During the 9-12 Homeroom, Draper served as Homeroom Monitor with responsibility to monitor student movement between all -12 homerooms.
- **Rachel Fritz** is a 9-12 science teacher assigned teach academic classes during blocks one, two and three with her preparation during blocks 4A and 4B. Fritz directed the 11th grade Homeroom.
- **Mary Kress-Just** is a EEN teacher. Kress-Just was assigned her preparation period during block one and EEN teaching for blocks two, three and four. Kress-Just directed EEN Homeroom.
- **Mark Ryan** is a 6-8 and 9 -12 teacher with 12 years experience with the District. During block one, which coincides with middle school period one, Ryan alternated an eighth grade social studies class with his preparation. Ryan was assigned academic classes during blocks two and four, and alternated mentoring and preparation time during block three. Ryan taught eighth social studies during middle school period eight and then directed 10th grade Homeroom. Ryan’s teaching responsibilities included three 90 minute periods, two 45 minute periods and one homeroom.
- **Nate Wood** is a K-12 physical education teacher with four years experience in the District. Woods was assigned a combination of 9-12, 6-8, K-5 and adaptive physical education academic classes which calculate to between 29 and 30

teaching periods. In addition, Woods directed a grade 9 Homeroom responsibility on Mondays, Wednesdays and Fridays.

The grievance was denied at all steps placing it properly before the Arbitrator.

Additional facts are contained in the **DISCUSSION** section below.

ARGUMENTS OF THE PARTIES

Association

The District has violated the collective bargaining agreement by denying six teachers overload pay when they were assigned a homeroom duty.

Six teachers were assigned homeroom duty on top of a full workload. The provisions of the collective bargaining agreement provide that they are entitled to additional compensation dependent upon the amount of the overload. The exhibits and testimony show a consistent pattern of teachers being compensated when they are assigned duties beyond what the master agreement defines as a normal teaching load.

The plain language of the collective bargaining agreement provides that teachers who are assigned an additional teaching assignment above and beyond the normal teaching load are entitled to overload pay. The six teachers involved in this grievance had normal teaching loads and then were assigned an additional teaching assignment. Study halls and commons supervision assignments are assigned on top of a normal teaching load and are compensated as overload pay. Similarly, homeroom supervision is assigned on top of a normal teaching load and is entitled to overload pay.

Beginning with the 1988-1990 through the 2007-2009 master agreement, the language referencing study halls and homerooms no longer existed. A reasonable person would infer that since the language was dropped, study halls and homeroom assignments are considered classes. Study hall is the same type of supervision duty as homeroom, but teachers that are assigned this duty, in addition to a full teaching load, receive overload compensation. If the arbitrator concludes that additional assigned homeroom duty on top of a normal teaching load does not qualify for overload pay, then the language of Article VII, Section A.1., A.2., and A.5. would be rendered meaningless.

A past practice of administering the overload provision does not exist. Mr. Draper informed the District that the Association was not in agreement as to how the District was interpreting the overload pay language. Lacking mutual acceptance, no past practice exists. Moreover, the Association informed the District that its members were no longer willing to volunteer for homeroom assignments unless they were paid since the duty was above and beyond the normal teaching load.

The Association was not trying to bargain for overload pay for homeroom during the last round of negotiations, but rather, tried to clarify the language through negotiations.

Association in Reply

The District has misconstrued the facts when it asserts the Association was trying to bargain for something they did not already have in the language of the collective bargaining agreement. The fact that there was discussion during negotiations regarding overloads was nothing more than an additional attempt by the Association to clarify what it believes is the clear language of the master agreement.

The parties agree that study halls and homerooms were deleted from the master agreement as duties that were otherwise compensated as overloads. As the District stated, “[d]eleted from this language in any reference to Study Halls and Home room, but the language does indicate that each additional assigned teaching period over six is entitled to additional compensation.” (Dr. Br. P. 5) This is exactly what the Association is arguing. By deleting both study halls and home rooms, it implies that the two assignments are meant to be included as part of the assigned teaching period. It defies logic for the District to **pay** for study halls and not homerooms.

The District attempts to differentiate teaching duties from homeroom due to textbooks, curriculum, grades and lesson plans. The District’s argument must fail because it does not take into account that overload payments are made for commons duty, elementary playground supervision, lunchroom supervision, gym supervision and other duties. Homeroom should be no different.

Finally, the District’s hearsay challenge to Mr. Draper’s testimony is just wrong. The Association presented the District’s teaching schedule which was created and approved by the District. The District knew who the Association was calling as witnesses because it was required to find substitutes. Had the District wanted to question the other three teachers, it needed only to call them. If there was a question as to the schedule, the District should have called its own principal to clarify.

The grievance should be sustained and the six teachers should be compensated for lost financial benefits.

District

The current contract language contains no reference to teachers in grades 9-12 having a homeroom assignment and counting that assignment for overload pay purposes. The language of the collective bargaining agreement, bargaining history and the parties practice establish that the grievance should be denied.

Moreover, there is no language in the current agreement that deals with homeroom teachers. There is no record of notes that warrant an interpretation that homeroom is to be paid like a study hall. When the parties' agreement referred to "class periods," there was an exclusion for study halls and homerooms. This is likely so because a class period could well be a study hall, therefore the parties needed to make clear that study hall and homeroom assignments were not considered classes. Where the parties used the phrase "teaching periods", there was no need to exclude study hall and homeroom since they are not teaching periods.

There is no proof that the District violated the labor agreement. Mr. Draper testified on behalf of Mr. Elfering, Ms. Fritz and Ms. Kress-Just and the District was denied the opportunity to cross-examine these teachers. The District recognizes the relaxed standards of evidence in arbitration cases, but asserts a decision cannot be supported by hearsay evidence alone. There is nothing in the record, excluding Mr. Draper's testimony, regarding these three teacher's schedules and why they claim they are entitled to reimbursement for supervising a homeroom or study hall. The Association has not met its burden with these three teachers.

Mr. Ryan is a grades 6-12 social studies teacher. As a result of his working at both the middle and high school, his overload status shall be determined by VII.A.2. The Association's argument that Ryan is entitled to overload pay must fail.

Mr. Woods is a K-12 physical education and health teacher. The language of the agreement specific to Woods is Article VII.A.5. which grants overload pay after a teacher is assigned over 30 teaching periods a week. Mr. Draper confirmed that Woods worked 29 2/3 or between 29 and 30 periods. Woods did not teach greater than 30 periods and therefore is not entitled to overload pay.

Bargaining history supports the District's position that home room is excluded from the overload pay provisions for teachers in grades 9-12. The parties have bargained language addressing the normal teaching load and overloads. Home room was not specifically excluded from overload calculations until the 1983-84 agreement when the parties clarified that "study halls and home room assignments are not considered classes" four purposes of determining overloads. No change was made to these provisions of the agreement for grades 9-12 until the 1989-1991 agreement where "class period" was changed to "teaching period" and all references to study halls and home rooms was deleted.

In 1997, the District moved to block scheduling at the high school. When the move occurred, the parties fully discussed teaching assignments, including how homeroom would be handled, and modified the collective bargaining agreement.

Finally, the Association is attempting to obtain in arbitration what it failed to achieve in negotiations. During the bargaining of the last two contracts, the parties had numerous discussions regarding overload pay and homework assignments, but did not agree to change the contract language. The Association is attempting to show that because other teachers receive

overload pay, the teachers in grades 9-12 should also receive overload pay. The parties have specifically differentiated overload pay between the various grade levels and it would upset the balance already achieved through bargaining for the arbitrator to read overload pay for a homeroom assignment for teachers in grades 9-12.

District in Reply

The District assigned teachers homeroom duty, they did not volunteer. As such, it is irrelevant if they ever received compensation for that duty.

The District's decision to assign teachers to homeroom duty without overload compensation is a binding past practice. The arbitrator will find a binding past practice exists, regardless of which methodology she chooses. The practice has taken place over a sustained period of time, the parties were aware of the practice and until recently, no one objected to the practice.

The Association negotiated regarding overload pay for homeroom assignments in both the 2005-2007 and 2007-2009 collective bargaining agreements. Testimony from Association witnesses, negotiation notes and the Association's bargaining proposals establish that the Association unsuccessfully negotiated the issue of overload pay for homeroom assignments.

Ultimately, the Association has asserted through negotiations, during the grievance procedure and in its arguments that this is an equity/fairness issue. The problem with such an argument is who defines fairness? The Board disagrees with the Association as to overload pay for homeroom assignments. The parties bargained in good faith resulting in the current labor agreement. That agreement does not contain language dealing with overload pay and homeroom assignments. As such, there has been no violation of the collective bargaining agreement and the grievance must be denied.

DISCUSSION

This grievance challenges the District implementation of Article VII of the collective bargaining agreement specific to the recognition of homeroom assignments when calculating of overload pay. The Association asserts that homeroom assignments are covered by the language and the District rejects such an assertion.

This is a contract interpretation case. If the language in question is "plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation". Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. (2002) p. 470. If ambiguous, extrinsic evidence such as the parties bargaining history, past practice, industry standards and the parties' course of dealings, is used to clarify the contractual intent. St. Antoine, *The Common Law of the Workplace*, (1999) p. 68.

Looking to Article VII, Section A, sub-section 1, the parties have negotiated three standard schedules for teachers in grades 9-12. Any of these standards constitutes a “normal teaching load” which entitles the teacher to full-time compensation pursuant to the negotiated salary schedule. The section goes on to state that “additional assigned teaching periods” (also referred to as “overloads” in sub-section 7) are entitled to more compensation dependent upon the number of additional assigned minutes. Nowhere in sub-section 1 does it define a “teaching period” nor is there any mention of compensation for responsibilities like commons duty, elementary playground supervision, lunchroom supervision, and gym supervision even though these are paid obligations.

The Association asserts that the language of Article VII is clear and unambiguous in that it authorizes additional compensation when a teacher is working an overload. The District similarly finds the language to be clear in that there is no mention of homeroom assignments nor does the language specify that homeroom assignments are to be counted when determining overloads. Looking just to the language of the parties agreement, I find the District’s argument more persuasive, but given the circumstances giving rise to this grievance and the parties’ arguments relating to extrinsic evidence, I will consider the parties’ bargaining history and past practice, if any, to ascertain the intended meaning of Article VII as it relates to overloads and homeroom assignments.

Starting with bargaining history, there are two facets to the parties’ bargaining history relevant to this discussion. The first deals with the phrase “teaching load” and the parties’ intent when it modified the language of Article VII in 1997. The second deals with the parties discussions regarding homeroom and overloads since 2003.

The parties have recognized overload compensation since at least their 1974-75 collective bargaining agreement.² At that time, a normal teaching load was teaching five class periods, directing one study hall or activity and one planning period. If a teacher was assigned to teach six class periods, then he or she was eligible for additional compensation. Nowhere in the 1974-75 agreement did the parties indicate that a homeroom or study halls assignment entitled the teacher to additional compensation nor did it indicate that homeroom or study halls were excluded from overload calculation.

In 1978-79, the parties modified the normal teaching load to six classes and one study hall or activity or five classes and two study halls or activities. The parties added language which provided that a 7-12 teacher that was assigned to teach a class above the then normal teaching load was entitled to overload monies for teaching a seventh class. Specifically excluded from that provision were study hall, music, art and physical education assignments.

In 1983-84, the language was changed and teachers in grades 9-12 that were assigned greater than six classes per semester were entitled to overload pay for each additional class

² Interestingly, the monthly insurance premium payment for teachers in 1974-75 was \$35 for family and \$15 for single coverage.

assigned. The parties continued to exclude “study halls and home room assignments” from overload compensation. The new language not only added home rooms as an exclusion (and removed music, art and physical education), but also removed the term “teaching” from the previously negotiated “assigned to teach” language.

Article VII, sub-section A changed again in 1988-1990. A normal teaching load for teachers in grades 6-12 became six teaching periods, or five teaching periods and two non-teaching periods. The parties went on to state that additional assigned “teaching” periods would be paid additional monies. Thus, the term “classes” from the prior agreement was changed to “teaching periods” and “teaching periods” was differentiated from “non-teaching periods”. Also removed was the language that excluded study halls and homerooms from the definition of a class. This removal is telling, but not definitive in as much as there was a return to “teaching” versus “non-teaching” rather than just an assigned responsibility.

Application of the interpretive maxim, *expressio unius est exclusion alterius* establishes that when the 1988 language was changed, the parties intended to removed the specific language that excluded study halls and homerooms. Had the parties not also modified the language by removing “assigned classes” and inserting “teaching” and “non-teaching” periods as the mechanism to differentiate those obligations that are entitled to overload compensation from the obligations that are not, then I would have found the Union’s position more appealing. The problem with this conclusion is that “non-teaching period” was added and given that it is a broader term that the specifically enumerated study hall and homeroom assignments, it not only included study halls and home rooms, but it could also include a host of other obligations that could not be viewed as non-teaching.

Moving next to 1997-1999, the block schedule was implemented and Article VII, Working Conditions, of the labor agreement was changed to read as follows:

1. Teachers in grades 9-12 teaching in the 4 period block schedule assigned any of the following shall be compensated according to the salary schedule (Appendix A):
 - a. Three (3) teaching periods and one (1) prep period.
 - b. Two (2) teaching periods, one (1) supervision, and one (1) prep period.
 - c. Any combination of 45 minute periods equivalent to a or b above.

Each additional assigned teaching period over three (3) shall be paid at an additional \$2000 per semester for a ninety (90) minute period, \$1000 per semester for a forty-five minute (45) period. Compensation for less than full-time positions will be determined as a proportion of the normal teaching load.

New to this section was the term “supervision” although “non-teaching period” remained in the overload language. Thus, in addition to the categories of “teaching period” and “non-teaching” period, the parties added a third category of teacher assignment, “supervision”, although the labor agreement did not specifically define what actual teacher assignments were considered “supervision”.

The parties offered a document entitled “Official Proposal Regarding Block Scheduling” which includes a sample four period day schedule and a section specifically addressing homerooms. In looking at the schedule, it indicated that homeroom is a 33 minute period of time that was to occur at the end of the school day for most students.³ The document included the following statement with regard to homeroom supervision, “we as a staff will need to agree upon rules and procedures for homeroom”. Union representatives testified that when the block schedule was implemented, the parties were not able to reach consensus as to the issue of homerooms.

The record establishes that the Association proposed for homerooms to be recognized as a “supervision overload” in first the 2003-2005 labor agreement and most recently in the 2005-2009 concurrent labor agreements. In all instances, that proposal was not accepted by the District. Generally, when a party attempts and is unsuccessful at the bargaining table to include a specific provision in the bargaining agreement is an admission that the current language does not provide the benefit for which the attempting party desired. See Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. (2006) p. 44-456.

Bargaining history establishes that the parties specifically excluded homeroom from overload compensation until 1997 when the exclusionary language was removed. The Association places great emphasis on the removal of the exclusionary language, but the record establishes that although the specific exclusion was removed, it was replaced by language that differentiated between teaching and non-teaching responsibilities. As the language of Article VII was modified over the years, there is no evidence to indicate that the parties agreed to pay teachers for an overload due to a homeroom assignment. When the four block day was implemented at the 9-12 level in 1997, the parties engaged in prolonged discussions and negotiations which did not result in any language in the labor agreement addressing homerooms. Moreover, the Association has unsuccessfully sought “supervision” recognition in its most recent two rounds of negotiations.

The District maintains that non-payment for homeroom assignment is an implied term to the parties’ contract since it is the parties’ past practice. A past practice is binding on the parties when it is 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time and accepted by the parties. Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. (2002) p. 608. Looking to these criteria, the evidence establishes that, without deviation, the District has not paid any teachers for homeroom

³ An alternate schedule for seniors was created which placed homeroom from 1:22 p.m. to 1:55 p.m. with block four following. The current schedule is for homeroom to begin at 2:51 p.m. and end at 3:28 p.m.

assignments at the 9-12 level since the implementation of the block schedule in 1997. Moreover, no evidence was presented indicating that the District paid for homeroom assignments prior to the block schedule at the high school. The Association maintains that it has not agreed to the non-payment for homerooms and therefore acceptability is lacking. While the evidence confirms that the issue of homeroom assignment compensation was discussed during implementation of the block schedule and again in the 2003-2005 and 2005-2009 labor negotiations, this does not diminish the fact that for at least 11 years, and likely many more, the District has not compensated 9-12 teachers for homeroom assignments. I conclude that the parties' have a binding past practice of not paying 9-12 teachers for homeroom assignments.

Moving next to the parties' course of dealing, the District does not currently compensated 9-12 teachers for homeroom assignments, but it provides overload pay to teachers that are assigned study hall at the middle school when that assignment results in a greater than full teaching load. The record establishes that teachers with homeroom assignments at the 9-12 level and teachers with study hall assignments at the 6-8 level perform essentially the same functions, with approximately the same number of students and in the same locations. The Association challenges the equity of paying at the middle school level, but not at the high school level, maintaining that since neither study hall or homeroom is addressed in the labor agreement and teachers receive compensation for study halls, then the language must incorporate homeroom assignments. While I can certainly understand the Association's dissatisfaction, my authority is limited to the interpreting the language of the parties' labor agreement and to find as the Association requests would exceed that authority.

In conclusion, extrinsic evidence establishes that the intent to exclude homerooms as negotiated into the 1972 agreement continued, undeterred by language changes over the subsequent 30 years. The parties' practice of not compensating 9-12 teachers for homerooms supports this finding. A dichotomy exists in that while study halls were addressed initially in the same manner as homerooms, they are now compensated. My charge is limited to interpreting the parties' collective bargaining agreement in light of the grievance challenging the failure to calculate overloads recognizing homeroom as compensable. The evidence does not allow me to address the equity issues presented.

AWARD

No, the District did not violate Article VII of the 2007-2009 collective bargaining agreement when it denied overload pay to six teachers that were assigned to homeroom duty. As such, the grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 17th day of October, 2008.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

LAM/gjc
7359

