

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE SCHOOL DISTRICT OF REEDSBURG

and

THE REEDSBURG EDUCATION ASSOCIATION

Case 35
No. 68210
MA-14158

(Elementary Music Program Scheduling Grievance)

Appearances:

Mr. John Horn, UniServ Director, Three Rivers United Educators, P.O. Box 8003, Madison, Wisconsin 53708-8003, appeared on behalf of the Association.

Ms. Shana Lewis, Lathrop & Clark, Attorneys at Law, 740 Regent Street, Suite 400, Madison, Wisconsin 53715, appeared on behalf of the District.

ARBITRATION AWARD

On August 11, 2008 the School District of Reedsburg and the Reedsburg Education Association filed a request with the Wisconsin Employment Relations Commission requesting that the Commission appoint William C. Houlihan, a member of its staff, as the neutral Arbitrator, on a tri-partite panel, to hear and decide a grievance pending between the parties. Mr. Robert Butler of the Wisconsin Association of School Boards, was selected as the Board appointed Arbitrator. Mr. Steve Johnson of the Cedar Lake United Educators was selected as the Association appointed Arbitrator. Following appointment, a hearing was conducted on October 21, 2008, in Reedsburg, Wisconsin. A transcript was taken and distributed on November 3, 2008. Post-hearing briefs and reply briefs were filed and exchanged by December 18, 2008.

This Award addresses the question of whether or not the scheduling of the elementary music program violated the collective bargaining agreement.

BACKGROUND AND FACTS

The School District (District) operates a school system which includes a High School, a Middle School, and six Elementary Schools. The Reedsburg Education Association (Association) represents the teaching personnel employed by the District. The Association and District have been signatories to a series of Collective Bargaining Agreements, governing the terms and conditions of employment of the teaching staff. Prior to the 2003-2005 school year the Collective Bargaining Agreement contained the following provision:

ARTICLE II - Regular Contract

A. Contract Day

1. Teachers shall be available in their schools from 8 a.m. until 4 p.m. Availability should be in a classroom or other scheduled area where students, parents, or other members of the professional staff are able to locate and confer with the teacher. Requests to leave early or arrive late shall be directed to the building principal.
 - a. In order that there might be better use of school facilities, deviation from the normal workday may be scheduled after consultation with the teacher involved.
 - b. Time absent from work because of tardiness or leaving before the scheduled time without authorization will be made up or deducted from pay; method to be determined by the building principal and district administrator/designee.
2. The minimum length of the school day shall be as follows:
 - a. Kindergarten, half day - 180 minutes
 - b. Elementary, Grades 1-6 - 420 minutes
 - c. Kindergarten, full day - 420 minutes
 - d. Middle school, Grades 6-8 - 430 minutes
 - e. High school, Grades 9-12 - 435 minutes

The Association had concerns relative to the administration of the Contract Day provision and brought those concerns to the bargaining table in the negotiations leading to the 2003-2005 contract. The Association expressed the view that in some schools, notably the High School, it was difficult to schedule time away from school to attend to personal matters. It was the further view of the Association that the identification of the school day as 8 a.m. until 4 p.m. was a misnomer in that teaching staff, as professionals, put in many more hours than was reflected in the contract. It was the desire of the Association that the contract and time off practices reflect the professional hours worked by the teachers. It was the preference

of the District that the matter be handled administratively, and not through an amendment of the contract.

The parties negotiated over this provision from July – September, 2003. At the end of those negotiations, they agreed to the following language which would exist as a side agreement:

7. Article II, A, Sidebar Agreement for 2003-2005 contract period – Professional Time – THIS SECTION WILL BE A SIDEBAR AGREEMENT FOR THE REMAINDER OF THE 2003-2005 AGREEMENT. IF NOT MUTUALLY AGREED TO IN SUCCESSIVE NEGOTIATIONS THIS SIDEBAR AGREEMENT IS NO LONGER VALID. Replaces Section A, in the event this side bar is not renewed or added as a permanent addition the language in Article II, A, will revert back to the 2002-2003 version.

1. Teachers are expected to be on duty from 8 a.m. to 4 p.m. on a daily basis. This does not include their 30-minute (thirty) duty free lunch period.
2. Teachers will be allowed to sign out of their building(s) during their non-teaching time to attend to decisive personal business or crucial family matters, such as medical or legal appointments.
3. Special modifications or deviation from the time lines indicated above in items 1 and 2 can be arranged upon consultation with the teacher and his/her building principal, with the final decision resting with the principal.
4. Teachers will be expected to attend school related meetings, such as faculty meetings, IEP's, Open Houses and other events that are part of the functioning of the school.
5. The administration will make attempts to conclude meetings in a reasonable amount of time. Meetings will be kept at a minimum so as not to interfere with a teacher's need for meeting and preparation time.
6. This language will be in effect on a trial (side bar) basis for the 2003-2005 contract period. At the conclusion of that time, this provision will be re-evaluated for possible inclusion in future negotiated agreements.
7. The District and Association agree that this side bar agreement has no value as precedent and shall not be cited as a precedent by either the District or the Association in any interest arbitration proceedings or in any other disputes between the parties. The District and Association also agree that this side bar agreement will not be considered as an existing fringe benefit under sec. 111.70(1)(nc), Wis. Stats. The Association, by signing this document,

explicitly waives its right to claim that the benefits provided in side bar agreement are an existing fringe benefit under sec.111.70(1)(nc), Wis. Stats.

8. The parties agree that the implementation of this side bar agreement does not affect any of the rights the District has under §111.70, Wis. Stats. The District and the Association agree that the immediate implementation of the tentative agreements in paragraph 1, supra, does not abrogate the District's ability to implement a qualified economic offer under §111.70(4)(cm)5s, Wis. Stats., if the parties are unable to reach a voluntary settlement for the 2003-2005 contract term.

(This agreement is non-precedent setting and will not be part of future QEO calculations, etc.)

This side agreement remained as a sidebar in the parties Agreement in 2005-07. Relevant portions of the side agreement were incorporated into the body of the 2007-09 Collective Bargaining Agreement following negotiations leading to that agreement. Those provisions are set forth below.

The Reedsburg elementary schools have traditionally held musical concerts. It has been typical for the elementary school music teachers to select a date, time and place for concerts, and following approval from the Principals, to schedule the concerts. From school year 1998-99 through school year 2007-08 Westside Elementary School conducted 14 musical programs. Two were conducted in the afternoon (3/19/04 and 11/17/05). The balance were held in the evening. The two concerts held in the spring of 1999 were held in the school. Thereafter the concerts were held in the High School Auditorium, known as the CAL Center. Similarly, South Elementary has scheduled evening music programs in 2000, 2001, 2002, 2005, 2006 and 2008. Each of these were held at the CAL Center. In 2004 and 2006 South Elementary scheduled concerts during the afternoon in the School. In the Pineview Elementary School, concerts were scheduled in the evening in 1999, 2000, 2001, 2002, and 2008. Daytime concerts were scheduled in 2004, 2005, and 2007. The concerts held in 1998-99 and 2006-07 were held in the elementary school. All other concerts were held at the CAL Center. The concerts in the Loganville, Ironton-LaValle and Rock Springs Elementary Schools have always been conducted in the evening.

No faculty member has ever been paid for attendance at those concerts held after work hours. Absent exigent circumstances, school faculty members all attended the concerts. There was never a directive to attend, but there did exist an understanding that faculty would attend.

Music is a formal element of the District's curriculum. There is a comprehensive curriculum that exists and is implemented for each elementary school grade. The curriculum has a performance component at each grade level. All students are required to take music. Students are graded in their music classes.

Students and teachers rehearse for the concerts. Rehearsal is done during the regular school day, and is often done in lieu of other academic subjects. Skills reflected in the curriculum are taught throughout the year, practiced and demonstrated in the concerts. Teachers' roles during the concert include helping students with costumes and escorting children from place to place.

Barb Klang is the Music teacher at Pineview Elementary School. Ms. Klang had become aware that members of the Administration had been discussing the time and place for music concerts. Reacting to what she had heard Ms. Klang wrote a lengthy letter, dated October 6, 2006, to Tom Benson, District Administrator. Her letter expressed support for daytime concerts at the CAL center. She expressed the view that such concerts provided a greater educational experience than did evening concerts. She expressed concern that dates and venues not be changed without adequate notice, so as to permit appropriate planning and preparation.

Benson replied, on or about October 24, 2006 and indicated that a survey had been developed as to the scheduling of elementary school Music programs. He further advised that he would share the results of the survey. When the survey was returned, it reflected an overwhelming support for weekday evening concert times (75%). Weekday mornings (3%), weekday afternoons (5%), and alternating day and evenings (2%) were far less popular with parents. An "other" category, ostensibly weekends, received 15% of the vote. The CAL Center was the overwhelming favorite as a site for the concerts.

In early 2007 the parties began negotiations for a successor agreement. In September of 2007 Mr. Benson had a conversation with Dana Westedt, President of the Reedsburg Education Association, during the course of which he indicated that the elementary music programs for that academic year would be in the evening. His rationale was largely tied to the preferences expressed in the parent survey. Westedt took issue with the result and expressed her view that the decision had unintended adverse consequences.

On or about October 22, 2007 the Association made the following demand to bargain:

October 22, 2007

Mr. Thomas L. Benson, District Administrator

...

Dear Tom:

I write on behalf of the Reedsburg Education Association (REA or Association) as a follow-up to our recent conversations regarding the District's decision to hold all elementary music programs in the evening after the teachers' regular workday. Based on the District's change in policy regarding these music

programs, the Association demands to bargain over the wages, hours and working conditions of the evening elementary music programs. The Association's demand to bargain includes negotiations over an appropriate pay rate for working at all of the elementary music programs beginning with the 2007-2008 school year.

The District's decision to require that all elementary music programs be held after the regular teacher workday makes the wages, hours and conditions of the work at these evening elementary music programs mandatory subjects of bargaining. The REA demands that negotiations about these music programs begin immediately.

Correspondingly, the REA proposes that the 2007-2009 Agreement (upon ratification) be modified, in writing, by the addition of the words "Elementary Music Program" in Article XV - Extracurricular and that the Extracurricular Compensation Index include the addition of the agreed to pay rate.

Specifically, the Association proposes that a mutually agreeable system of assignment be established and that those who work the music programs will be paid \$30.00 per hour.

The Association insists that bargaining about this matter and the pay rate must be concluded with sufficient time prior to the December 2007 elementary music programs.

Please contact me immediately to complete our negotiations or if you have any questions about this letter.

Sincerely,

Dana Westedt
REA President

Benson replied on November 5:

...

You do not need to sign the letter. It is clear through your email message that you officially "demand to bargain" over this item, and I will recognize your email letter as your notice to that effect. I have to say that, frankly, it is surprising to me that this matter was not brought forth during the recently completed bargain, as there were numerous opportunities for this issue to be

brought to the table. I do not understand why it was not! (Obviously, this matter came to light months before negotiations were complete.) One option that you and I discussed was to hold a meeting with the Elementary Music Department to allow me to hear, first hand, what the concerns are and how we might be able to address these concerns. Someone must have decided that was not a good idea, and we will now place the matter in the pure negotiations arena. I don't have to know (in fact, I don't want to know) who made that decision, but - for what it's worth - I am disappointed about that.

Please know that it is my belief that the Board is not obligated to negotiate this matter at this time. However, I will bring this matter to the attention of the School Board on the 19th, and I will look forward to discussing their position with you at our meeting on the 21st.

Have a great Monday!

- Tom

Benson and Westedt exchanged correspondence relative to the concert times and bargaining. In a subsequent letter Benson notes the following:

While it may not have been intended, it looks very much like this was intentionally left off the bargaining table, so that it didn't hold up other elements of the bargain. Frankly, if the Board would have known that this was such a serious issue, it is likely that the discussions about "Professional Time" as permanent language would have been different. I am quite certain that the Board views Music programs as one of the "other events that are part of the functioning of the school" (current language). In other words, they are probably going to view it as - we already bargained that! (I know that's how I see it.) I will admit that I am frustrated by the "demand to bargain" when we could be addressing this matter in a most different way.

On November 30 Westedt sent Benson an e-mail indicating that the Demand to Bargain be set aside, in favor of a "...compromise to resolve a tense situation."

Benson thereafter scheduled a meeting of staff to engage in a conversation relative to the scheduling of Elementary Music Programs, "...In an effort to bring about some degree of resolution regarding those concerns,..."

Benson sent out the following summary and decision following the exchanges and meeting:

Good Morning!

I know that many of you have been eagerly awaiting a decision about the scheduling of future Elementary Music Programs. Clearly, the information that was shared at our meeting on December 19th (and that which came before and since) has been useful. Though, frankly, none of it was strikingly “new”, and much of it seemed to contradict other pieces, it was all very much worth sharing and worthy of consideration. Again, **thank you for your input!**

The especially compelling pieces for me include:

- * There is an expectation by this district that each school will provide Music performance opportunity(s) for its students;
- * The scheduling of these programs needs to be reflective of that which is believed to be in the best interest of students;
- * Music teachers need to be shown a proper respect and appreciation for the effort required to present a quality “show”;
- * Other teachers in the our schools need to recognize that these programs are central to the functioning of their school, and need to participate accordingly;
- * It is extremely important that each child be afforded the opportunity to participate in his/her school’s Music performance;
- * It is extremely important that each child’s parent(s) (and other supporters) have the opportunity to witness his/her participation, which is dramatically more likely to occur when the program is in the evening and in the CAL Center;
- * A significant majority of the parents who completed a survey identify a clear preference to have these programs held in the evening and in the CAL Center;
- * Significant donors who contributed to the CAL Center building project are offended when these kinds of performances are not held in the CAL Center;
- * There needs to be some room for flexibility.

Therefore . . .

Beginning with the 2008-09 school year, Elementary Music Programs will:

- * be held on an annual basis, covering all grade levels.

* be presented exclusively in the CAL Center.

* reflect a clear preference for evening programming. (Programs may be scheduled during the school day, with building administrator approval, but not in consecutive years.)

As always, your questions and/or comments are welcome.

Thank you!

-Tom

Thomas L. Benson, District Administrator

Benson solicited, and received questions about the new scheduling policy. Excerpts of the questions and answers included the following:

1.) **Questions about attendance** (sampling of questions/comments):

- Who will be required to attend evening programs?

. . .

1.) **Response(s) regarding attendance:**

. . .

- **Frankly, I am not sure why evening programs need to be handled different from the way they have been handled every year, for many, many years. These programs have been supported by staff members volunteering their time in an effort to assist children through one of the most publicly viewed experiences in the life of an elementary school child. Further, the relatively new contract language regarding “Professional Time” makes it clear that teachers are expected to participate in those events that are “part of the functioning of the school”. These programs are certainly a “part of the functioning of the school”.**

. . .

. . . **At the same time, we understand that there will be those rare instances when a staff member is unable to attend because of a more compelling and/or unavoidable event in his/her life. We certainly**

don't intend to make a case out of someone's legitimate need to be somewhere else. We just need to be sure that there is communication between that teacher and his/her administrator well in advance of the event. . .

. . .

2. **QUESTIONS about compensation** (sampling of questions/comments):

- What will the compensation be for the music teachers and the other elementary staff when the programs are held in the evening, including this school year?

. . .

2. **RESPONSES regarding compensation:**

- As much as I might wish I could, I cannot arbitrarily make a modification to the extra curricular pay schedule. If it seems right for the Music Teachers to be included in that schedule for additional compensation associated with these programs, it can certainly be a topic for the next round of negotiations.

. . .

- For what it's worth, I would like to share with you that I have some concerns about paying people to attend these events. Let it be clear that my concern isn't about the money. **If the REA wants teachers to be paid we'll find a way for teachers to get paid.**

The Association reacted with a proposal, dated March 13, 2008, to compensate those elementary teachers who would be in attendance at the evening music concerts. The Board responded, by memo dated April 21, 2008 indicating that the matter should have been raised in the preceding negotiations, and declining to bargain during the term of the agreement.

A grievance was filed on May 27, 2008, and appealed to the School Board. It was ultimately denied on July 10, 2008.

ISSUE

The parties stipulated to the following issue:

Did the District's actions during the 2007-2008 school year related to the scheduling of the elementary music programs violate the collective bargaining agreement.

If so, what is the remedy?

**RELEVANT PROVISIONS OF THE
COLLECTIVE BARGAINING AGREEMENT**

ARTICLE II – Regular Contract

- A. Professional Time
1. Teachers are expected to be on duty from 8 a.m. to 4 p.m. on a daily basis. This does not include their 30 (thirty)-minute duty free lunch period.
 2. Teachers will be allowed to sign out of their building(s) during their non-teaching time to attend to decisive personal business, essential school business, or crucial family matters, such as medical or legal appointments.
 3. Special modifications or deviation from the time lines indicated above in items 1 and 2 can be arranged upon consultation with the teacher and his/her building principal, with the final decision resting with the principal.
 4. Teachers will be expected to attend school related meetings, such as faculty meetings, IEP's, open houses and other events that are part of the functioning of the school.
 5. The administration will make attempts to conclude meetings in a reasonable amount of time. Meetings will be kept at a minimum so as not to interfere with a teacher's need for meeting and preparation time.

. . .

ARTICLE VI - DEFINITION OF GRIEVANCE

- A. Definition

1. A “grievance” shall mean a complaint by a teacher, group of teachers, or the Reedsburg Education Association based on an event, condition, or circumstance under which a teacher works, allegedly caused by a violation or misinterpretation of any provision of the Agreement.

• • •

f. Sixth Step

In case of any dispute or misunderstanding concerning the application or interpretation of the provisions of this agreement which cannot be adjusted by the parties to this agreement the same shall be referred by either party hereto within five (5) days to a Board of Arbitration in accordance with the following procedures.

- 1) Either party shall notify the other party of its desire for the appointment of a Board of Arbitration and within five (5) days the Board of Education and the REA shall each select one (1) member who shall act on the Board of Arbitration and the two (2) so-selected shall select a third member. No grievance may be submitted to arbitration without the consent of the Association.¹
- 2) If the two (2) members cannot agree upon a third member within five (5) days, either party may request that the Wisconsin Employment Relations Commission appoint as the third arbitrator and chairperson of the Board of Arbitration, one (1) of its commissioners or staff members.
- 3) The Board of Arbitration, consisting of three (3) members, shall meet and render its finding as soon as possible.
- 4) The decision of the Board shall be final and binding on both parties to this agreement. The Board of Arbitration shall not have the authority to change, alter, or modify any of the terms or provisions of this agreement.

• • •

ARTICLE XIII – SALARY SCHEDULE APPLICATION

¹ The parties stipulated that the Association-selected arbitrator and the Board of Education-selected arbitrator are non-neutral arbitrators within the meaning of the collective bargaining agreement.

...

J. Summer School Salary

1. Computation

- a. Salary for summer teaching will be computed using the following formula: (Present base salary/191 contract days) ÷ (7.5 hours in normal teaching day X (number of summer school teaching hours)).

2. Payment

- a. Salary payments for summer school teaching shall be made on August 1 or the last day of summer school, if it is after August 1. Payments will be made on a per-day basis. Leave policies will not apply to summer school teaching. Any absence will require pay deductions of full salary for time lost.

POSITIONS OF THE PARTIES

It is the view of the District that the Association bears the burden of proving that the District violated the collective bargaining agreement. The District contends that the Association has failed to do so. The District asserts that it has the authority to direct the scheduling of the elementary music programs, and has always had that authority. Notwithstanding the discretion exercised by building music teachers, each building administrator has final authority to determine scheduling of the elementary music programs. The fact that building administrators typically approved the scheduling does not preclude the administration from overruling a selected date in a later year.

The fact that the District's administration chose to exercise its authority in 2007, to direct all music programs to be in the evening is no different than in certain other years when all music programs occurred in the evening.

It is the view of the District that the Association could have raised this matter in negotiations, and did not. This issue was swirling around as the parties negotiated their successor agreement. No proposal for music program scheduling or compensation was forthcoming. It is the view of the District that the Association is now attempting to secure through arbitration what it did not achieve in bargaining.

It is the view of the District that the Association's demand to bargain in October, 2007 acknowledges that the current contract does permit the District to direct the particular scheduling of the elementary music program.

In its initial brief, the District contends that it has never expressly required teachers to attend the evening programs. The District contends that the matter before the Arbitration Board is the scheduling of the concerts, but that the scheduling directive does not require the teachers to attend the programs. It is the further view of the District that while it has not as yet required the teachers to attend evening music programs, it has the authority to do so, since the music programs are “part of the functioning of the school”. The district contends that the plain reading of Article II, Sec. A. authorizes the District to require that the elementary teachers attend the annual elementary music programs.

It is the view of the District that Article II, Sec. A of the agreement would be stripped of meaning if the Association’s construction of the words is affirmed. The contract sets forth the hours of work as 8:00-4:00. It goes on to provide that teachers are expected to attend “other events that are part of the functioning of the school”. If the Board may only compel attendance during the school day, the “other events” provision has no meaning.

It is the view of the District that the parties entered into a bargain where the District freed up time during the work day for teachers to attend to certain business, in exchange for a commitment from the Association that teachers would attend certain events outside of the regular work day. The District believes the Association should live up to its end of the bargain. Nothing in the contract obligates the District to compensate teachers for attendance at the evening music programs.

It is the position of the Association that the contract language applicable to this dispute has remained unchanged since the 2003-05 Agreement. Article II, Sec. A. existed as a side bar to the Collective Bargaining Agreement since 2003. There is a history of interpreting that provision to have building music teachers plan the time for a concert. During the negotiations for a 2007-2009 contract the District never informed the Association that it intended to change the administration of the agreement. It is the view of the Association that the programs went from a voluntary program based on building level need and input to programs that were being directed by the administration.

The Association notes that there is a consistent practice of compensating bargaining unit employees for Middle and High School Music Programs.

It is the view of the Association that the plain language of Article II, Sec. A. establishes the teacher day from 8:00 a.m. to 4:00 p.m. It is the view of the Association that the duty day language is clear and unambiguous. The language which follows is alleged to be ambiguous. The attendance at school related events provision does not clearly identify music programs as falling within its sweep. Testimony from Association negotiators indicated that the intent of the provision was to provide teacher attendance for meetings that extend beyond 4:00 p.m. According to Association witnesses there was never discussion about the provision authorizing supervision or special duty beyond 4:00 p.m. The Association points to Article II, Sec. A-5 as support for its construction of the Agreement.

It is the view of the Association that if the District's view of the language is sustained, it would lead to a harsh and nonsensical result in that it would open the floodgates to District mandated attendance at a whole host of evening functions.

It is the view of the Association that the District's change in policy violates the intent of the parties initial sidebar agreement on professional time. In that regard the Association points to Association witness testimony that it was the intent of the Association to give teachers a more flexible method of leaving the building during the school day. William Klang, the Association's chief negotiator testified that the Association gathered information as to the numerous hours teachers worked beyond the 8:00-4:00 day, and offered that as the quid pro quo for the language changes.

It is the view of the Association that since it is the District that sought to change the application of the professional time contract provision, it is the District that should have raised the matter in negotiations.

It is the view of the Association that music concerts are not similar to the events enumerated in the professional time language. The Association applies the principle of *ejusdem generis* to urge a construction of the agreement to include only those functions which are similar to those listed in the contractual provision.

The Association notes that Middle School and High School teachers are paid for supervision of after school music concerts. If the grievance is denied, an inequity would be created.

It is the view of the Association that the elementary music program's connection to the curriculum is irrelevant to the scheduling process.

It is the view of the Association that the summer school salary provision of the contract is the appropriate rate to use in calculating the remedy in this matter. The supervisory aspects of summer school are argued to be analogous to the evening music supervision.

DISCUSSION

I agree with the contention of the Association that the District changed the nature of the scheduling of Music programs. Historically, music teachers recommended dates and times and those recommendations were effective. It is true that most concerts were in the evening. However, Pineview had exercised the scheduling freedom to schedule day music programs from 2004-2007, and would likely have continued that schedule but for the directive. The directive seeks to balance the competing concerns expressed in the exchange of correspondence and may achieve some success in that regard. The directive will not permit the Pineview experience of exclusively day concerts.

The exchange of correspondence reflects a philosophical disagreement as to whether day or evening concerts are educationally superior. The threshold question raised in this proceeding is who has the authority to resolve this dispute. The scheduling of concerts is nowhere specifically addressed in the collective bargaining agreement. There are hours of work provisions, but no hours of operation article. Traditionally, an employer sets the hours his business is open. Bargaining surrounds the impact those hours have on the employees.

As a practical matter, both parties acknowledge this reality. The music teacher's discretion was always subject to supervisory approval. The Association's proposal was an "impact" proposal. It demanded that the District pay teachers for night work. It did not demand that concerts be held during the work day, nor did it contend that music teachers had the authority to set the time of the music concerts. The grievance goes a step further, and seeks "... To remedy this grievance the District must cease and desist from assigning teachers beyond the duty time of 8:00 a.m. to 4:00 p.m. for elementary music programs and make all affected teachers whole in every way..." While the cease and desist portion of the requested remedy goes beyond the impact pay of the proposals, even this requested remedy does not challenge the District's decision to schedule the concerts per the directive. It goes to the assignment of teachers to those programs and the pay they should receive.

I believe the District had the authority to set scheduling guidelines for the elementary music concerts. The real dispute underlying this grievance is whether or not the District could direct teacher participation and attendance at the concerts, and if so, whether teachers are entitled to pay for such attendance.

Article II, Sec. A, pars. 1 and 4 control the question as to whether or not the district could direct teacher participation in those concerts conducted in the evening.

The background giving rise to this question is that historically, the majority of music concerts were conducted in the evening. Teachers attended and their attendance was understood. There was no formal directive given, but attendance was expected and occurred. The parties have danced around the question of whether or not teachers are or were required to attend, but that question never had to be answered, because of the understanding of all parties. This understanding existed during the years prior to the 2003-2005 contract amendments.

It is in that context that the negotiations which led to the side letter and subsequent contract language occurred. The current contract language is structured to have a general rule, with exceptions. Article II, A. Professional Time, par. 1 sets the work day as 8 a.m. to 4 p.m. Paragraphs 2-5 contain exceptions to the work day.

The first sentence of par. 1 is a strong parallel to the first sentence of the contract that preceded the amended agreement. Both sentences set 8-4 as the expected duty or work day. As noted by the Association, the work day is defined with a precision not found in the balance of the Article. Paragraphs 2, 3, 4, and 5 are relatively subjective in comparison to paragraph 1. Par. 2 allows teachers to sign out of their building during the duty day to attend

to “decisive personal business, essential school business, or crucial family matters”. Use of the terms “decisive”, “essential”, and “crucial” open the provision to interpretation. Par. 3 speaks to, but does not define what a “Special modification(s)” would be. Par. 4 talks to the expectation that teachers attend certain “meetings” and “events” that impliedly fall outside the defined work day. Par. 5 commits to conclude “meetings” in a “reasonable” amount of time. It does not specify which meetings. It leaves to the parties to construe the practical meaning of “reasonable”.

The Association contends that the clarity of the duty day as set forth in par. 1 should prevail over the more ambiguous “other events” provision of par. 4. While it is tempting to apply this interpretive doctrine, doing so runs the risk of undoing the entirety of the bargain that led to the expansion of what these parties regard as “Professional Time”.

The Association reads par. 5 as referring to meetings that occur within or contiguous to the school day. In such a light, the Association urges a reading of the clause as a whole as referring to meetings or events that fall within or contiguous to the school day. While I think the clause could be more precisely drafted, I do not agree that such a reading is appropriate. Par. 4 refers specifically to open houses, which do not typically fall within or extend the school day. Many open houses are conducted in the evening. The reference to open houses and other events fall within the same clause.

The Association points to the intent of the parties in negotiating the language in dispute. I believe that Mr. Klang’s testimony reflects the intent of the Association in the negotiations. He indicated that the Association wanted relief from the strictures of the school day to attend to certain personal matters. Par. 2 reflects that perspective. However, Mr. Klang’s testimony is silent on what the School Board believed it was getting from the deal. In essence, the School Board secured par. 4. This dispute centers on what that means. Specifically does the evening music concert fall within the meaning of “other events”. Mr. Klang testified that the Association documented the time teachers put in away from school and presented the results of that survey to the Board negotiating team. It was Mr. Klang’s testimony that teachers were already making up more than the time they sought under par. 2. In essence, it was the view of the Association that teachers were already putting in the hours that would provide the quid pro quo for the relief sought in par. 2. On cross-examination, Mr. Klang acknowledged that the hours worked by elementary school teachers in the evening music program were “very likely” included in the hours count.

Mr. Klang’s testimony represents the Association perspective on this bargain. If one were to accept the Association’s perspective, the hours worked by elementary teachers at evening music concerts were represented to be a part of the quid pro quo for the sign out privilege reflected in par. 2. Par. 4 is the codification of that quid pro quo. It represents what the Board got out of the deal. It is hard to conclude that Par. 4 does not apply to music concerts in the context of Klang’s assertion that his view of the quid was hours already worked by teachers outside the work day, including the music concert hours.

While it is true that music teachers had a voice in the timing of the event, it is equally true that not all teachers had such a voice. All elementary teachers did attend the music concerts. It was understood by all that Principals had to approve the schedule.

If the Association is right, and the words “other events” do not include the elementary music concerts, the School Board entered into an agreement where it agreed to free up time during the work day for teachers to take care of personal business, in exchange for language which resulted in it losing significant amounts of teacher time previously worked. This seems to be an unlikely result.

The Association contends that the music concerts are not like the other enumerated events. The others are alleged to be related to academic progress or achievement. The enumerated events are meetings. The music concert is not a meeting, but it is a part of the academic experience of the child, and it is an event, as the term is conventionally used. The provision refers to “other events that are part of the functioning of the school.” Music is an integrated part of the school academic curriculum. The concert is a culmination and extension of the curriculum to a performance that seeks to demonstrate aptitude. It is not unlike a test in another discipline.

The concert brings together students, teachers and parents. It, like an open house, is more than a meeting. Both are traditional aspects of the functioning of the school. I believe the evening music concert is an event that is a part of the functioning of the school. I believe the School Board has the authority to direct teachers attendance at evening music programs.

The last matter for consideration is whether or not the District must pay the teachers it directs to attend elementary evening music programs.

The fact that the collective bargaining agreement has no provision applicable to the elementary music program is essentially dispositive of the Association’s contention that the District should have raised the matter in bargaining. There is no provision in the contract that provides for pay for attendance at elementary school music concerts. There is no practice of paying for such attendance. To the contrary, there is a practice of teachers attending the program without compensation. The Association turns to the hourly summer school rate of pay to fashion a remedy in this proceeding. Nothing in the contract authorizes the application of the summer school rate to teachers who attend the elementary music concert.

I do not regard the other argument raised to be persuasive. The Association is concerned that a decision favoring the Board would create an inequity. This is asserted to be the case because Middle School and High School teachers are paid for certain evening music programs. The collective bargaining agreement determines who is paid and who is not. If there is an inequity, it is because the contract declares it to be so.

The Association has expressed a concern that an Award adverse to its position would result in a harsh and absurd result, in that it would open the floodgates to unlimited off hours assignments. That is not the case presented in this proceeding, and is therefore not addressed in the Award.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 26th day of May, 2009.

William C. Houlihan /s/

William C. Houlihan, Neutral Arbitrator

I concur

I dissent

Robert Butler /s/

Robert Butler, Management selected Arbitrator

Steve Johnson /s/

Steve Johnson, Association
selected Arbitrator