

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLINTONVILLE EDUCATION ASSOCIATION

and

CLINTONVILLE SCHOOL DISTRICT

Case 56
No. 71323
MA-15119

(Overload Compensation)

Appearances:

David Campshure, UniServ Director, Bay Lakes United Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303-4414, appearing on behalf of the Association.

Robert Burns, Davis & Kuelthau, S.C., Attorneys at Law, 318 South Washington Street, Suite 300, Green Bay, Wisconsin 54301, appearing on behalf of the District.

ARBITRATION AWARD

The Clintonville Education Association, hereinafter referred to as the Association, and the Clintonville School District, hereinafter referred to as the District or Employer, were parties to a collective bargaining agreement that provided for final and binding arbitration of unresolved grievances. The Association appealed the above-captioned grievance to arbitration with the Wisconsin Employment Relations Commission in December, 2011. Matt Greer was the original arbitrator in the matter, but he left the WERC before the matter was scheduled for hearing. The matter was then reassigned to Danielle Carne. A hearing was held before Arbitrator Carne in Clintonville, Wisconsin on December 18, 2012. The hearing was transcribed. Thereafter, the parties filed briefs and reply briefs, whereupon the record was closed on June 3, 2013. Prior to record closing, Carne left the WERC. At that point, at the parties' request, the undersigned was appointed to decide the grievance. Having reviewed the transcript and the record evidence, and considered the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the District violate Section 7.11 of the parties' 2009-13 collective bargaining agreement when it denied overload reimbursement to the grievants? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2009-2013 collective bargaining agreement contained the following pertinent provisions:

**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 without limiting the generality of the foregoing, the right:

...

- E. To determine 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.
- F. To designate duties, responsibilities and extra and/or cocurricular assignments within the total program.

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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 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 and laws of the United States.

...

ARTICLE VII COMPENSATION

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7.10 Teachers As Occasional Substitutes

- A. Teachers (other than elementary 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 accorded first to teaching staff within respective buildings.

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7.11 Overload Reimbursement

- A. The school district must have made a good faith effort to employ a qualified teacher for the position as per 14.6 and placement office.

A full time secondary teacher (middle school and high school) is defined as teaching five (5) periods.

- B. Beginning with the 2010-11 school year, any teacher at the high school level with 110 or fewer students in five (5) classes per semester and any teacher at the middle school level with 120 or fewer students in five (5) classes per semester may be assigned an additional teaching assignment without additional compensation. If a teacher has 110 or fewer students in six (6) classes at the high school level or 120 or fewer students in six (6) classes at the middle school level, they may be assigned a seventh (7th) class without additional compensation. Teachers with seven (7) classes will not have an assigned duty.

Teachers who work in positions that include a combination of elementary, middle and/or high school classes may be assigned a sixth (6th) class if they are assigned fewer than a prorated number of students for five classes based on their percentages of time at the middle and/or high schools. Examples: A teacher with three

(3) middle school and two (2) high school classes may be assigned an additional class if he or she has fewer than 116 students (MS: 60% of 120 is 72, HS: 40% of 110 is 44, sum is 116). A teacher with two (2) middle school and elementary assignments equivalent to three (3) middle school assignments may be assigned an additional assignment if he or she has fewer than 48 students in the two (2) middle school assignments (MS: 40% of 120 is 48).

The determination of student caseload and of the district's right to assign a sixth (6th) or seventh (7th) class without additional compensation will be done in the April prior to the start of the school year when schedules are ready to be generated. If teachers assigned a sixth (6th) class are assigned additional students after that time that put them over the limits specified in this section, such teachers will receive prorated overload compensation based on the part of the year that the overload was assigned.

- C. When an additional unpaid class is assigned, based on enrollment of 110 or fewer students per semester at the high school or 120 or fewer students at the middle school, the total student enrollment may only increase by 25 additional students from the semester enrollment at the time the additional class is added. (For example if a high school teacher has 108 students in 5 classes an unpaid 6th class is assigned the final semester student enrollment cannot exceed 133. If a 6th class enrollment total for a high school teacher is 110 and an unpaid 7th class is assigned the total semester enrollment cannot exceed 135.)

Students who are in two different preparations (such as physics and chemistry taught by the same teacher) will be counted as 2 students. Students in a 2 period block course such as Construction 2 will be counted as one student.

Teachers with more than 110 students per semester in five (5) high school classes or more than 120 students per semester in five (5) middle school classes who are assigned a sixth (6th) class will be paid overload pay of 8% per semester of 10% per semester if they have a duty.

Teachers with more than 110 students per semester in six (6) high school classes or more than 120 students per semester in six (6) middle school classes who are assigned a seventh (7th) class will

be paid overload pay of 8% per semester or 10% per semester if they have a duty.

Overload compensation for teachers in Physical Education and Music will be based on a standard of 140 students and overload compensation for teachers in FACS classes will be based on a standard of 120 students.¹

¹ The section 7.11 language in the 2007-09 contract was applied during the 2009-10 school year. The full implementation of the new 7.11 Overload Reimbursement language will begin to start the 2011-2012 school year. For the 2010-2011 school year all secondary class loads established at the start of the 2010 school year using the 2007-2009 language will remain in effect; however, overloads established during the 2007-2009 language will follow the new 7.11 Overload Reimbursement language (i.e. student number caps) to determine whether or not 6th class compensation will be given.

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14.6 Duties

A. High School and Middle School Duties

1. Six (6) classes with three (3) or fewer preps per semester may be assigned one duty, no duty with four (4) or more preps.
2. Five (5) classes with three (3) preps or more per semester may be assigned one duty.
3. Five (5) classes with two (2) preps or fewer per semester may be assigned a second duty without compensation.
4. If a teacher with five (5) classes and three (3) or more preps is assigned a second duty, they will be paid overload pay of 2% per semester.
5. Preps are defined as different courses taught, for example U.S. History, World Studies, English 9-2, English 9-3, Biology, Science 9, Algebra, Geometry, etc.).

BACKGROUND

The District operates a public school system in Clintonville, Wisconsin. The Association represents the District's teachers.

Prior to and including the parties' 2007-09 collective bargaining agreement, teachers received an additional 16% of their salary schedule placement for accepting an assignment to teach a sixth class or 20% if a 6th class and supervision were assigned. The contract provision which mandated this result was Section 7.11(H). It provided thus:

7.11 Sixth Class Reimbursement

- H. The teacher accepting the 6th instructional assignment with no supervision assignment shall be compensated at the 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.

The record indicates that when the District paid teachers overload pay pursuant to that language, it based that pay on a one day count. It did not base that pay on a two day count.

In bargaining a successor collective bargaining agreement, the Board proposed to either delete or change the provision just referenced. Thereafter, the parties discussed various ways to revise the overload reimbursement language just identified. Ultimately, the parties rewrote not only Section 7.11(H), but all of Section 7.11. The new provision provided thus:

7.11 Overload Reimbursement

- A. The school district must have made a good faith effort to employ a qualified teacher for the position as per 14.6 and placement office.

A full time secondary teacher (middle school and high school) is defined as teaching five (5) periods.

- B. Beginning with the 2010-11 school year, any teacher at the high school level with 110 or fewer students in five (5) classes per semester and any teacher at the middle school level with 120 or fewer students in five (5) classes per semester may be assigned an additional teaching assignment without additional compensation. If a teacher has 110 or fewer students in six (6) classes at the high school level or 120 or fewer students in six (6) classes at the

middle school level, they may be assigned a seventh (7th) class without additional compensation. Teachers with seven (7) classes will not have an assigned duty.

Teachers who work in positions that include a combination of elementary, middle and/or high school classes may be assigned a sixth (6th) class if they are assigned fewer than a prorated number of students for five classes based on their percentages of time at the middle and/or high schools. Examples: A teacher with three (3) middle school and two (2) high school classes may be assigned an additional class if he or she has fewer than 116 students (MS: 60% of 120 is 72, HS: 40% of 110 is 44, sum is 116). A teacher with two (2) middle school and elementary assignments equivalent to three (3) middle school assignments may be assigned an additional assignment if he or she has fewer than 48 students in the two (2) middle school assignments (MS: 40% of 120 is 48).

The determination of student caseload and of the district's right to assign a sixth (6th) or seventh (7th) class without additional compensation will be done in the April prior to the start of the school year when schedules are ready to be generated. If teachers assigned a sixth (6th) class are assigned additional students after that time that put them over the limits specified in this section, such teachers will receive prorated overload compensation based on the part of the year that the overload was assigned.

- C. When an additional unpaid class is assigned, based on enrollment of 110 or fewer students per semester at the high school or 120 or fewer students at the middle school, the total student enrollment may only increase by 25 additional students from the semester enrollment at the time the additional class is added. (For example if a high school teacher has 108 students in 5 classes an unpaid 6th class is assigned the final semester student enrollment cannot exceed 133. If a 6th class enrollment total for a high school teacher is 110 and an unpaid 7th class is assigned the total semester enrollment cannot exceed 135.)

Students who are in two different preparations (such as physics and chemistry taught by the same teacher) will be counted as 2 students. Students in a 2 period block course such as Construction 2 will be counted as one student.

Teachers with more than 110 students per semester in five (5) high school classes or more than 120 students per semester in five (5) middle school classes who are assigned a sixth (6th) class will be paid overload pay of 8% per semester or 10% per semester if they have a duty.

Teachers with more than 110 students per semester in six (6) high school classes or more than 120 students per semester in six (6) middle school classes who are assigned a seventh (7th) class will be paid overload pay of 8% per semester or 10% per semester if they have a duty.

Overload compensation for teachers in Physical Education and Music will be based on a standard of 140 students and overload compensation for teachers in FACS classes will be based on a standard of 120 students.

Broadly speaking, this new language eliminated automatic additional compensation for teaching a sixth class and implemented a system in which teachers working at the middle school and high school could receive an overload reimbursement based on the number of classes taught, number of students taught, and whether or not they have been assigned a duty. The Association's initial brief in this case contains an outline which summarizes the new contract language. It provides thus:

- Teachers may be assigned a 6th class without additional compensation if:
 - 110 or fewer students per semester in 5 classes at High School
 - 120 or fewer students per semester in 5 classes at Middle School
- Teachers may be assigned a 7th class without additional compensation if:
 - 110 or fewer students per semester in 6 classes at High School
 - 120 or fewer students per semester in 6 classes at Middle School
 - If assigned a 7th class, will not be assigned a duty
- Teachers assigned a 6th class will be paid an overload reimbursement of 8% per semester (10% with an assigned duty) if:
 - more than 110 students per semester in 5 classes at High School
 - more than 120 students per semester in 5 classes at Middle School
- Teachers assigned a 7th class will be paid an overload reimbursement of 8% per semester (10% with an assigned duty) if:
 - more than 110 students per semester in 6 classes at High School
 - more than 120 students per semester in 6 classes at Middle School

The last paragraph of subsection C of the new contract language contains an exception to the above criteria for teachers in physical education (hereinafter phy-ed), music and FACS (Family and Consumer Science). That standard is 140 students for phy-ed and music teachers, and 120 students for FACS teachers.

The record indicates that when the parties' negotiators agreed on the last paragraph of subsection C (i.e. the provision just noted that deals with the overload pay for phy-ed and music teachers), they did not discuss how the A/B schedule at the middle school would affect that provision, and the counting of students.

At the middle school, there is what is known as the A/B schedule. The A/B schedule just applies to certain classes, specifically phy-ed, music and FACS. The A/B schedule works this way: those teachers teach a group of students on Day A and then see a different group of students on Day B. The schedule rotates whereby in one week, they see students on Day A three times a week and students on Day B two times a week. The following week, the schedules are flipped.

The phy-ed teachers at the high school do not operate under the A/B schedule. Instead, they see the same group of students every day of the week (i.e. five days in a row); not every other day as is the situation at the middle school. Because of these different schedules at the middle school and the high school, the phy-ed teachers at the middle school have twice as many total students as the phy-ed teachers at the high school have.

FACTS

Bob Peterman, Jim Nighbor and Lyle Trautmann all teach phy-ed at the high school and the middle school.

During the first semester of the 2011-2012 school year, Peterman taught 119 "A" schedule students (28 + 36 + 27 + 28) and 113 "B" schedule students (28 + 36 + 20 + 29) at the middle school per week. When his "A" schedule students are combined with his "B" schedule students, it totals 232 students. He also taught 30 students at the high school. Adding those 30 students to the previous number of 232 yields 262. The District designated his 7th period class to be his assigned unpaid 6th class. There were 17 students in his 7th period. Subtracting 17 from 262 yields 245. During the second semester, Peterman taught 94 "A" schedule students (29 + 38 + 27) and 84 "B" schedule students (28 + 35 + 21) at the middle school per week. When his "A" schedule students are combined with his "B" schedule students, it totals 178. He also taught 30 students at the high school. Adding those 30 students to the previous number of 178 yields 208. The District designated his 7th period class to be his assigned unpaid 6th class. There were 17 students in his 7th period class. Subtracting 17 from 208 yields 191.

During the first semester of the 2011-2012 school year, Nighbor taught 123 "A" schedule students (28 + 15 + 27 + 26 + 27) and 130 "B" schedule students (28 + 22 + 30

+21 + 29) at the middle school per week. When his “A” schedule students are combined with his “B” schedule students, it totals 253. He also taught 20 students at the high school. Adding those 20 students to the previous number of 253 yields 273. The District designated his 8th period class at the high school to be his assigned unpaid 6th class. There were 20 students in his 8th period class. Subtracting 20 from 273 yields 253. During the second semester, Nighbor taught 95 “A” schedule students (28 + 14 + 26 + 27) and 101 “B” schedule students (28 + 23 + 29 + 21) at the middle school per week. When his “A” schedule students are combined with his “B” schedule students, it totals 196. He also taught 20 students at the high school. Adding those 20 students to the previous number of 196 yields 216. The District designated his 8th period class at the high school to be his assigned unpaid 6th class. There were 20 students in his 8th period class at the high school. Subtracting 20 from 216 yields 196.

During the first semester of the 2011-2012 school year, Trautmann taught 50 “A” schedule students (28 + 22) and 58 “B” schedule students (28 + 30) at the middle school per week. When his “A” schedule students are combined with his “B” schedule students, it totals 108. He also taught 91 students at the high school. Adding those 91 students to the previous number of 108 yields 199. The District designated his 3rd period class at the high school to be his assigned unpaid 6th class. There were 26 students in his 3rd period class at the high school. Subtracting 26 from 199 yields 173. During the second semester Trautmann taught a reduced schedule. He taught a total of 134 students at the middle school and high school that semester.

Peterman, Nighbor and Trautmann thought they were entitled to overload pay for the teaching schedules referenced above. The District did not pay them overload pay for those schedules. The Association filed a grievance which alleged that middle and high school phy-ed teachers with more than 140 students in their classes were being denied overload pay. The District denied the grievance on the grounds that middle school phy-ed teachers were not teaching more than 140 students.

The grievance was processed through the steps of the contractual grievance procedure and was appealed to arbitration.

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Some additional facts will be referenced in the DISCUSSION.

POSITIONS OF THE PARTIES

Association

The Association’s position is that the grievants were contractually entitled to overload pay. Here’s an overview of the Association’s case. For background purposes, it notes that the parties’ 2009-13 agreement calls for overload pay for phy-ed teachers to be based on a standard of 140 students. The Association asserts that the record shows that during the 2011-

2012 school year, some middle school phy-ed teachers taught more than 140 students per semester. Building on that, it's the Association's view that they should have been paid overload pay. However, they were not. The Association contends that the District "selectively created its own reality" by counting each middle school phy-ed student "not as one student, but as one-half full time equivalent (FTE) student." The Association maintains that the District had no contractual basis for doing that (i.e. counting phy-ed students as less than a full student for the purpose of determining overload reimbursement). It asks the arbitrator to reject the District's attempt to "selectively read language into the Agreement that was not negotiated by the parties" and order the District to make the grievants whole. It elaborates as follows.

As the Association sees it, middle school phy-ed students should be counted on a per semester basis. Thus, the Association counts the phy-ed students on both Schedule "A" and Schedule "B" days (i.e. on both the first day and the second day of their teaching schedule) to determine whether overload pay is due. The Association disputes the District's assertion that the counting of phy-ed students should be based on the number of students taught in one day. Here's why.

First, the Association believes that the language in Section 7.11 that pertains to the overload pay for phy-ed teachers is plain, clear and unambiguous. Building on that premise, it maintains that the language is not open to interpretation so the arbitrator need not resort to any technical rules for interpreting contract language.

Second, the Association argues in the alternative that if the language in question is found to be ambiguous, then the arbitrator should read it in its overall context. It points out that the word "semester" or the phrase "per semester" is used 13 times in subsection B and C of Section 7.11. According to the Association, that means that the "student count" is to be by "semester". While the Association acknowledges that the number of classes taught is one part of determining overload pay, it asserts that "the actual trigger is the number of students taught per semester." As the Association sees it, it stands to reason that a phy-ed teacher would get to count students in both "A" and "B" schedule classes because the teacher has to evaluate and grade each student. It further opines that the fact that a phy-ed teacher has a student in class an average of 2.5 times per week (i.e. alternating weeks of 2 days one week and 3 days the following week) does not lessen the teacher's load. To the contrary, the A/B schedule results in additional work, as there are twice as many students to grade and evaluate. The Association contends that there is nothing in Section 7.11 that would support using "a daily student count" as the basis for an overload.

Third, the Association asserts that the contract language which the parties negotiated must be given effect by the arbitrator. It cites various arbitrators who have found accordingly. The Association further submits that just as there is nothing in the agreement to support using a "daily student count" for determining overload, the agreement also does not contain any language that would allow counting any student as less than full-time. Specifically, it notes that the words "full-time equivalent" are not included in the last paragraph of subsection C.

The Association sees that as significant. The Association asks the arbitrator to not read those words into that sentence.

Fourth, the Association maintains that if there is any ambiguity in Section 7.11 as it pertains to the phy-ed teachers, then that ambiguity should be construed against the District because it was the party that drafted the language in question. It cites Elkouri to support that proposition.

Fifth, the Association argues that its position would not lead to absurd results (as the District contends). It maintains that if there is an absurd interpretation of the language in question, it is the District's reading that middle school students on the A/B schedule should only be counted as essentially one-half full-time equivalent. The Association submits that not only does the District ignore the per semester student count as a factor for determining overload compensation, it also uses faulty logic and math in how it counts students. While it accuses the Association of double-dipping in counting students, in reality the District is guilty of under-counting students. It does so by ignoring that the student count is based on a per semester basis, not a per day basis. By counting students on a per day basis, the District discounts middle school students operating under the A/B schedule by counting them as less than a full student.

Finally, the Association disputes the District's assertion that it ignored the middle school music teachers in its grievance. It submits that the reason it pursued a grievance on behalf of the phy-ed teachers is because they believed they were entitled to overload pay. In contrast, none of the music teachers believed they were entitled to overload pay. According to the Association, the phy-ed teachers should not be penalized because of the inactions or views of the music teachers.

Based on the above, the Association asks the arbitrator to sustain the grievance. As a remedy, it asks that the grievants be made whole by compensating them an additional 8% of base salary for each semester in which an overload existed during the 2011-2012 and 2012-2013 school years. It also asks the arbitrator to retain jurisdiction over the remedy.

District

The District's position is that the middle school phy-ed teachers were not contractually entitled to overload pay. Here's why. The District contends that middle school phy-ed students who are under the A/B rotating schedule are not to be combined from multiple days because they only have phy-ed class three days during one week and two days a week the following week as opposed to teachers who see students every day of the week (i.e. five days in a row). Thus, it's the District's view that students are to be counted on one day – not two days, as the Association proposes. The District maintains that when the middle school phy-ed students are counted on one school day, the middle school phy-ed teachers are not teaching more than 140 students as the Association alleges. As such, overload pay is not required. The District elaborates as follows.

First, the District argues that its position of counting students on one day is supported by the clear contract language. The District interprets the last paragraph of subsection C of Section 7.11 to be in the context of a class period, which is defined in that article as one who teaches five classes per day. While the Association argues there is no basis to use a “daily student count” as the basis for an overload, that contention ignores the fact that the term “five classes” or “five periods” is used throughout the agreement, and every time it is used in the understood (but unstated) context of one day.

Second, the District argues that the Association’s proposed interpretation (of counting phy-ed students over two days) is both illogical and not supported by the contract language. To support that contention, the District notes that the collective bargaining agreement has no language that allows totaling “A” students and “B” students together from different days for purposes of determining overload pay. Additionally, the District notes that the contract language does not reference “10 periods” or any counting period spanning beyond one day when determining whether overload pay is due.

Third, the District argues that the Association’s proposed interpretation (of counting phy-ed students over two days) leads to “absurd results”. To support that contention, it points out that under the Association’s rationale, a middle school teacher who teaches five classes of phy-ed would be entitled to overload pay if he taught more than 70 students on Day A and 70 students on Day B (i.e. 140 students over two days). The District notes that that, in turn, would equate to approximately 14 students per class period. It further notes that there are other District teachers who teach 24 students per class period that do not get overload pay. The District opines that paying overload pay to a teacher who teaches 14 students per class period while not paying it to a teacher who averages 24 students per class period doesn’t make sense. The District avers that the charts contained in their initial brief demonstrate the “absurdity” of the Association’s argument, and show that counting students over a two day period is not what the parties intended. It cites Elkouri for the proposition that arbitrators try to interpret language in a way that avoids absurd and nonsensical results. It asks the arbitrator to do so here.

Fourth, the District contends that prior to the change in the contract language, it consistently paid teachers overload pay based on a one day count of students. It further asserts that the underlying method of determining overload pay was not modified when the language was changed. That’s because when the new contract language was agreed upon, the parties did not discuss any new method of counting students who operate under the A/B schedule at the middle school. The District also avers that it drafted the contract language consistent with the historic application of overload pay and had no reason to know, or even suspect, that the Association would attempt to apply a calculation method combining students over a span of two days.

Fifth, the District points out that the Association ignores the middle school music teachers in its grievance. The problem with that is that they are similarly situated (in that they are also on the A/B schedule) and covered by the same contract language as the phy-ed

teachers. According to the District, the selective manner in which the Association pursued this grievance underscores the lack of consistent application of the contract language and undermines the Association's position. In the District's view, its application of the language is more reasonable, better serves the mutual interests of the parties, and does not lead to an unintended windfall for a small group.

Finally, the District responds to the Association's contention that the language in the parties' agreement should be construed against the District because the District drafted it. The District disputes that contention. It maintains that it is unnecessary for the arbitrator to resort to this rule of contract construction because "the absurd results" created by the Association's interpretation of the language "requires the arbitrator to rule to the contrary."

The District therefore asks that the grievance be denied and dismissed.

DISCUSSION

At issue here is whether the District violated the collective bargaining agreement when it denied overload reimbursement to some middle school phy-ed teachers. I answer that question in the negative, meaning I find that the District did not violate the collective bargaining agreement by denying overload reimbursement to those phy-ed teachers. My rationale follows.

Normally in contract interpretation cases, I look at the contract language first. Then, if necessary, I look to other evidence outside the so-called four corners of the agreement such as bargaining history. In this case though, I've decided to reverse this order and address the bargaining history first. Here's why.

Bargaining history is a form of evidence commonly used by arbitrators to help them interpret contract language. Sometimes, bargaining history can be a useful guide in interpreting contract language. Here, though, it is of limited use. That's because all the bargaining history establishes in this case is how the new contract language in Section 7.11 came to be included in the parties' 2009-2013 collective bargaining agreement. One small part of Section 7.11 is the last paragraph of subsection C. That paragraph provides that overload compensation (i.e. overload pay) for phy-ed and music teachers will be based on 140 students. While I'll address the point in more detail below, what's involved in this case is how those students are counted for the phy-ed and music teachers at the middle school. While the counting of students would seem to be a relatively straightforward process, it's complicated by the alternating A/B schedule that exists at the middle school. Under that schedule, certain teachers teach one group of students on A days and a different set of students on B days. In the context of this case, we're just dealing with the middle school phy-ed and music teachers and how the alternating A/B schedule affects the counting of their students. In bargaining this new contract language, it would be one thing if the parties' negotiators had discussed, and reached a specific understanding on, how those students are counted. For example, they could have agreed that the students on both the A and B days are to be counted in reaching the 140

student threshold. Alternatively, they could have agreed that just the students on one day (i.e. either A or B) are to be counted in reaching the 140 student threshold. However, what happened in bargaining was that that topic was not discussed, and consequently the matter of how students are counted for the middle school phy-ed and music teachers simply fell through the proverbial crack. While it certainly would have been better if that had not happened, I'm not going to point the proverbial finger of blame for that miscommunication at either side. That's because such miscommunications about the meaning of new contract language happen all the time in bargaining. When such miscommunications happen at the bargaining table concerning the meaning of new contract language, it ultimately falls to the arbitrator to "sort it all out". While I'll "sort it all out" in the discussion which follows, I'm not going to rely on the parties' bargaining history to help me make my call. In this case, the parties' bargaining history simply is not helpful in assisting me in deciding how students are counted for the middle school phy-ed and music teachers.

. . .

It follows from that finding that all I've got to work with here, so to speak, is the contract language itself. Accordingly, the focus now turns to the contract language.

The contract provision at issue herein is found in the last paragraph of subsection C of Section 7.11. It provides thus: "Overload compensation for teachers in Physical Education and Music will be based on a standard of 140 students. . ."

As previously noted, what's in dispute about this sentence is how those 140 students are counted for the phy-ed and music teachers at the middle school. Given the alternating A/B schedule, are the affected students counted on a single day (i.e. either day A or day B), or are they to be counted over two days (i.e. both day A and day B)? On its face, the language does not say. It's the Association's view that the student count is to be by semester. Consequently, it proposes to count students on the middle school A/B schedule on both days A and B (meaning it wants to count the middle school phy-ed students over two days for the purpose of determining whether overload pay is owed to the middle school phy-ed teachers). The District disputes that contention. In its view, the student count for middle school students affected by the A/B schedule is to occur on one day, not two.

To help me decide which view is correct, I'm going to start by reviewing the rest of the collective bargaining agreement to see if it addresses that point.

Here's what it shows. First, the second paragraph in subsection A in Section 7.11 defines a full-time secondary teacher (middle school and high school) as one who teaches five periods. In the paragraphs which follow, class periods are not defined in terms of a week or more than one day but rather are discussed in terms of one day. Second, Section 7.10, A provides that teachers who substitute for other teachers are compensated at 1/5th of the substitute teacher rate, plus \$4 per "period". This infers that each instructional period is the equivalent of 1/5th of a full teaching load – 5 classes in one day. Third, the second paragraph

of subsection B in Section 7.11 identifies how overload pay is calculated for teachers who work in positions that include elementary, middle school and/or high school classes. It provides in pertinent part:

Teachers who work in positions that include a combination of elementary, middle and/or high school classes may be assigned a sixth (6th) class if they are assigned fewer than a prorated number of students for five classes based on their percentages of time at the middle and/or high schools. . .

This paragraph says that overload reimbursement is determined if a teacher is assigned a sixth class based upon the number of students in five classes per day. Fourth, subsections A, B and C of Section 7.11 and Section 14.6 all speak of five periods or classes. The inference that's common to all these provisions which reference "five periods" or "five classes" is that it is used in the understood (albeit unstated) context of one day.

The Association essentially ignores all the foregoing language and focuses instead on the fact that the word "semester" or the phrase "per semester" is used repeatedly throughout Section 7.11. The Association extrapolates from its usage that the student count in the last paragraph of subsection C (i.e. the language that deals with the phy-ed and music teachers) is to be by semester. However, the paragraph does not explicitly say that. While it does say "X students per semester" in several of the paragraphs which precede it, it does not say that in the last paragraph of subsection C. In the next paragraph of my discussion, I'll decide whether that meaning is implicit.

Having reviewed what the agreement explicitly says, I'm now going to address what it does not say. First, nowhere in the agreement does it reference 10 periods or a counting period beyond one day. Second, nowhere in the agreement does it require the District to count two separate days for the purpose of determining overload pay for the middle school phy-ed and music teachers on an A/B schedule. Third, the agreement has no language that allows totaling "A" students and "B" students together from different days for purposes of determining overload pay. Fourth, nothing in the last paragraph of subsection C suggests or implies that the phy-ed and music student count is to be by semester. When the foregoing matters are considered along with what the agreement explicitly says, I'm persuaded that it supports the District's proposed interpretation that every reference in the agreement to "periods" is used in the understood (albeit unstated) context of one day. Thus, the number of students in each class period of one day is the relevant factor in determining whether overload pay is warranted. It is not, as the Association contends, a matter of counting students as "one-half" but not counting them within more than one day when the reference to periods is clearly confined to one day, not two.

Under the Association's rationale, a middle school phy-ed teacher who teaches five classes of phy-ed would be entitled to overload pay if he taught more than 70 students on Day A and 70 students on Day B (i.e. 140 students over two days). Were that to happen, that would equate to approximately 14 students per class period. The record shows that there are

currently Math and English teachers who are assigned 24 students per class who are not getting overload pay. Rhetorically speaking, why would one teacher who teaches 14 students per class period be entitled to overload pay while another teacher averaging 24 students per class period not be entitled to overload pay? From an educational administrative perspective, that's illogical and doesn't make sense. Elkouri posits that "When one of two plausible interpretations of an arguably ambiguous contract would lead to a reasonable result and the other is likely to produce a harsh, absurd, or nonsensical result, case law demonstrates, unsurprisingly, that arbitrators will select the former alternative." (Elkouri and Elkouri, *How Arbitration Works*, 6th ed. p. 204). Consistent with the foregoing, I find that the District's methodology of counting phy-ed and music students covered by the middle school A/B rotating schedule over a one-day period produces a more reasonable result than does the Association's methodology of counting phy-ed and music students covered by the middle school rotating A/B schedule over a two-day period.

Next, assuming for the sake of discussion that the collective bargaining agreement is ambiguous concerning how middle school phy-ed and music students are counted, it's up to the arbitrator to interpret the ambiguous provision to determine what the parties intended or would have intended. I'm persuaded that counting phy-ed students at the middle school over a two-day period creates results that the parties never mutually intended or contemplated. The following shows why. District Exhibit 1 contains several scenarios which showed how the Association's interpretation of the overload pay language would work. I'm going to review them.

Here's the first scenario that's going to be reviewed:

- Teacher PE-A at the Middle School has 20 students daily in each of their 5 Phy Ed classes and is assigned a 6th class of 15 students. (Total of 120 students daily)
- Teacher PE-Z at the High School has 20 students daily in each of their 5 Phy Ed classes and is assigned a 6th class of 20 students. (Total of 120 students daily)

Using the Association rationale in this case – Teacher PE-A would receive \$15,013 more in compensation than Teacher PE-Z.

The class schedules for Teachers PE-A and PE-Z (in the above scenario) would look like this:

Teacher PE-A – MIDDLE SCHOOL

Assigned 5 Phy-Ed Classes &
Assigned 6th Class

	Mon	Tues	Wed	Thurs	Fri
1st	20	20	20	20	20
2nd	20	20	20	20	20
3rd	20	20	20	20	20
4th	20	20	20	20	20
5th	20	20	20	20	20
6th	20	20	20	20	20

5 Classes	100	100	100	100	100
6 Classes	120	120	120	120	120

Association Position: **Add 100 + 100 = 200**

Teacher entitled to overload because student count exceeds 140 (counting 2 days)

Teacher PE-Z – HIGH SCHOOL

Assigned 5 Phy-Ed Classes &
Assigned 6th Class

	Mon	Tues	Wed	Thurs	Fri
1st	20	20	20	20	20
2nd	20	20	20	20	20
3rd	20	20	20	20	20
4th	20	20	20	20	20
5th	20	20	20	20	20
6th	20	20	20	20	20

5 Classes	100	100	100	100	100
6 Classes	120	120	120	120	120

Teacher not entitled to overload because student count does not exceed 140 (counting 1 day)

In the above scenario, the Association’s position would be that Teacher PE-A is entitled to overload compensation because the student count exceeds 140 (counting 100 students on the first day and 100 students on the second day). Even though their schedules are the same in terms of the number of students taught in five classes, Teacher PE-Z, who teaches at the high school, would not be entitled to overload pay. That doesn’t make any sense.

Here’s the second scenario that’s going to be reviewed:

- Teacher PE-A at the Middle School has 15 students daily in each of their 5 Phy Ed classes and is assigned a 6th class of 15 students. (Total of 90 students daily)
- Teacher PE-Z at the High School has 28 students daily in each of their 5 Phy Ed classes and is assigned a 6th class of 25 students. (Total of 165 students daily)

Using the Association rationale in this case – Teacher PE-A would receive \$15,013 more in compensation than Teacher PE-Z.

Under this scenario, the high school teacher teaches a total of 140 students in 5 classes while the middle school teacher teaches a total of 75 students in five classes. The class schedule for teachers PE-A and PE-Z would look like this:

Teacher PE-A – MIDDLE SCHOOL						Teacher PE-Z – HIGH SCHOOL					
Assigned 5 Phy-Ed Classes & Assigned 6 th Class						Assigned 5 Phy-Ed Classes & Assigned 6 th Class					
	Mon	Tues	Wed	Thurs	Fri		Mon	Tues	Wed	Thurs	Fri
1st	15	15	15	15	15	1st	28	28	28	28	28
2nd	15	15	15	15	15	2nd	28	28	28	28	28
3rd	15	15	15	15	15	3rd	28	28	28	28	28
4th	15	15	15	15	15	4th	28	28	28	28	28
5th	15	15	15	15	15	5th	28	28	28	28	28
6th	15	15	15	15	15	6th	25	25	25	25	25
5 Classes	75	75	75	75	75	5 Classes	140	140	140	140	140
6 Classes	90	90	90	90	90	6 Classes	165	165	165	165	165
<u>Association Position:</u> Add 75 + 75 = 150						Teacher is entitled to overload because student count exceeds 140 (counting <u>1</u> day)					
Teacher entitled to overload because student count exceeds 140 (counting <u>2</u> days)											

In the above scenario, the Association’s position is that Teacher PE-A receives overload pay even though he would teach almost less than half of the students in a day than Teacher PE-Z. Once again, that makes little sense. That’s because teacher PE-A teaches 15 students each class period, not 30.

These scenarios show that if I were to accept the Association’s interpretation, and count middle school phy-ed students on the A/B rotating schedule over two separate days, the result would be illogical and hard to justify, particularly to people outside of labor relations who might become aware of this award. I think the common reaction to such a finding would be: “that result just doesn’t make sense.” In contrast, counting the phy-ed students at the middle school on the A/B rotating schedule on just one day – as the District proposes – is more logical and reasonable in that it avoids a windfall for a small group of employees. Moreover, that interpretation is consistent with those provisions of the agreement noted earlier in my discussion.

Finally, I believe it’s worth noting that the middle school music teachers are not part of this grievance; just the middle school phy-ed teachers are (part of this grievance). The reason that’s noteworthy is because the contract language in question (i.e. the last paragraph of subsection C of Section 7.11) applies to both the phy-ed and music teachers at the middle school. The fact that the middle school music teachers are not part of this grievance speaks volumes, and further undermines the Association’s position.

In my view, this case can be summarized as follows. The language in the agreement does not reference “10 periods” or any counting period spanning beyond one day when determining whether overload pay is due for the middle school phy-ed and music teachers. Such language would be necessary for me to accept the Association’s position that the counting period for calculating overload pay for those teachers spans two days, and is lacking here. The Association’s approach to overload pay (i.e. basing it on a two day count) not only lacks a contractual basis, but is also contrary to the existing contract language.

In light of the above, it is my

AWARD

That the District did not violate Section 7.11 of the parties' 2009-2013 collective bargaining agreement when it denied overload reimbursement to the grievants. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 9th day of August, 2013.

Raleigh Jones /s/

Raleigh Jones, Arbitrator