STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of

ALTOONA SCHOOL DISTRICT

To Initiate Mediation-Arbitration Between Said Petitioner and

ALTOONA EDUCATION ASSOCIATION

Case 20
No. 37339 MED/ARB-3992
Decision No. 24398-A

Appearances:

Mr. R. F. Gilligan, Executive Director, West Central Education Association, appearing on behalf of the Association.

Mulcahy & Wherry, S. C., Attorneys at Law, by Mr. Stephen L. Weld, appearing on behalf of the Employer.

ARBITRATION AWARD:

On April 22, 1987, the Wisconsin Employment Relations Commission appointed the undersigned Mediator-Arbitrator, pursuant to 111.70 (4) (cm) 6. b. of the Municipal Employment Relations Act, in the matter of a dispute existing between Altoona School District, referred to herein as the Employer, and Altoona Education Association, referred to herein as the Association, with respect to certain issues as specified below. Pursuant to the statutory responsibilities, the undersigned conducted mediation proceedings between the Employer and the Association on June 23, 1987, at Altoona, Wisconsin. Mediation efforts failed to resolve the dispute, and pursuant to prior notice to the parties, after the parties had executed a waiver of the statutory provisions of 111.70 (4) (cm) 6.c., which require the Arbitrator to provide written notice of his intent to arbitrate, and that the Arbitrator provide the opportunity for each party to withdraw its final offer, the undersigned conducted arbitration proceedings over the issues remaining in dispute between the parties on June 23, 1987, at Altoona, Wisconsin. During the arbitration proceedings, the parties were present and given full opportunity to present oral and written evidence, and to make relevant argument. The proceedings were not transcribed, however, briefs and reply briefs were filed in the matter. Final briefs were exchanged by the Arbitrator on August 24, 1987.

THE ISSUE:

The sole issue in this dispute deals with the amount of overload pay to be paid teachers when the Employer establishes an eight period school day in its school system. The predecessor Collective Bargaining Agreement contained the following provision:

ARTICLE IX SALARY AND BENEFITS

Section 1. Salary

D. Acceptance of voluntary additional assignment of a sixth teaching period each day will be cause for additional compensation as listed on the additional assignment schedule. Where the assignment is for less than one (1) year this additional compensation will be pro-rated.

The Employer proposes the following language at Article VIII, Section 3:

All teachers shall receive a one-half hour unpaid lunch. In addition, all teachers in the middle and senior high schools shall have one preparation period per day. In the elementary school, all teachers shall have the equivalent of five senior high school periods per week for preparation purposes. In the event a middle or senior high teacher voluntarily accepts or is assigned a sixth period of teaching (if the school is operating on a seven period day) or a seventh period of teaching (if the school is operating on an eight period day), the teacher shall be compensated for that assignment pursuant to Article IX, Section 2, 'Additional Teaching Assignments'. Supervisory assignments are not considered teaching assignments for purposes of this article.

Article IX, Section 2, Paragraph A, a new position:

Additional Teaching Assignment $2000 **

** Where the additional teaching assignment is for less than one (1) year, this additional compensation will be prorated.

The Association final offer provides the following at Article VIII, Section 3:

ARTICLE VIII - SECTION 3 - TEACHING LOAD

All teachers shall receive a thirty minute duty free lunch. In addition, all teachers shall receive a minimum of 250 minutes of unassigned time each week during the student's day for preparation purposes. In the event a Senior High or Middle School teacher voluntarily accepts or is assigned a sixth period of teaching, the teacher shall be compensated for that assignment pursuant to Article IX, Section 2. Supervisory assignments are not considered teaching assignments for the purpose of this Article.

It is understood with the incorporation of the above into the 1986-87 Collective Bargaining Agreement that Article IX - Salary and Benefits, Section 1. Salary - D. would be deleted from the Collective Bargaining Agreement as per the District's Initial Proposal.

DISCUSSION:

The Arbitrator is directed by Wisconsin Statutes at 111.70 (4) (cm) 7, a through h, to consider certain criteria in evaluating which final offer should be selected for the purposes of resolving the dispute. The undersigned, therefore, will evaluate the evidentiary submissions of the parties, and consider the parties' arguments in light of the foregoing statutory criteria.

The Association argues as follows:

1. The prevailing arbitral precedent expresses that changes in the status quo require a moving party to sustain the burden of proof by clear and satisfactory preponderance of the evidence.

2. The Employer, as the moving party, has not met its burden of showing a need to change the locally negotiated status quo.

3. The Employer's final offer also modifies the status quo as regards elementary school preparation time.

4. The Employer has provided no quid pro quo for its proposed modification.

5. While the offers at issue in the instant matter involve the 1986-87 Collective Bargaining Agreement, the Employer is attempting to "dip the playing field" in its favor for the 1987-88 school year before negotiations for that successor Agreement have even commenced.

6. The Association's final offer maintains the status quo relative to the teacher day, whereas, the Employer's final offer creates a problem and/or serious potential legal conflict between the negotiated teacher day and the commencement of the student day.

7. Although agreeing that educational policy is within management's responsibility, the Association has demonstrated any alleged need for changing the status quo solely based on a need to meet the state's graduation requirements and/or flexibility to meet vocational/elective offerings is wholely without merit.

The Employer argues as follows:

1. 11 of the 19 comparable schools have an eight period day and two more have a nine period day.

2. No comparable school pays for a sixth teaching period in an eight period day.

3. 14 schools require their teachers to work 480 minutes. Altoona's requirement will remain at 465 minutes.

4. 10 schools have 45 minutes or less class periods.

5. 11 schools teach 270 minutes or more a day. Altoona teachers will teach 270 minutes a day under the Board's eight period proposal.

6. 8 schools have 45 minutes or less a day alloted for preparation time.

7. Only 6 schools have at least 50 minutes a day for preparation time.

8. Altoona teachers rank at the top of the benchmarks in compensation.

9. Altoona teachers have the best fringe benefit package among 19 comparable schools.

10. Altoona had one of the highest settlements in the comparable schools for 1986-87.

11. Another factor which must be considered is that, under the Association's proposal, all secondary teachers who absorb the normal load of six periods, will be receiving a premium over their colleagues teaching at the elementary or middle school levels.

12. The Association is requesting that the Contract language remain stating extra pay for six teaching periods. This status quo language going into the 1987-88 school year will result in every teacher receiving an extra $1,608 on top of their current salary. There is no support for this request.

The question before the Arbitrator is: at what point should overload pay come into play between these parties. The record is clear that the Employer will change from a seven period student day at its high school, which was in effect in 1986-87, to an eight period day in 1987-88. There is no issue before this Arbitrator as to whether the Employer may make that change, since the Association does not contest the Employer's right to establish an eight period day. For example, at page 22 of its brief, the Association states: "Although it may question the Employer's wisdom in doing so, the Association does not challenge the District's right to move unilaterally to an eight period day." Again, at page 40 of the Association brief, it states: "The Union cannot deny management's right to change." From the foregoing, it is clear that the issue of whether there should be a seven period day or an eight period day is not before the Arbitrator for decision. What is before the Arbitrator is the impact of that change.

Looking first to the proposed language which each party proposes, the undersigned finds deficiencies, irrespective of which party's offer is accepted. The Association final offer provides that teachers teaching a sixth period will be compensated at the rate of $1,608 for teaching that period. The Association final offer, however, makes no provision for employes teaching a seventh period, and teaching a seventh period is a very likely possibility under the eight period day, which the Employer is implementing for the 1987-88 school year. Thus, it is conceivable that a teacher teaching a sixth period would be compensated under the Association proposal for teaching the sixth period, and if teaching a seventh period would receive no additional compensation whatsoever. Furthermore, there is the problem in the Association proposal where the Association has proposed to delete Article IX, Section 1, d, which provides for the pro-ration of the overload pay in the event the assignment is for less than one year. Thus, there is no provision for prorating the overload pay under the Association proposal.

The Employer proposal deficiencies are of a different type than the defficiencies found in the Association proposal, in that, while the Employer proposal is clear that the overload pay would now go into force when teaching a seventh period and not a sixth period, the amount of preparation time during a given week at both the elementary, middle and senior high schools, has been reduced by the specific language of the proposal to 45 minutes per day, where 50 minutes of preparation time had previously been the standard. There is testimony in the record from the Superintendent of Schools indicating that it is the intention of the District for the forthcoming school year to provide the same amount of preparation time to the teachers which they had received in prior years. While that may be the intent of the Employer, the clear and unambiguous language of the Employer proposal reads to the contrary, and thus, a problem is created if the intent is to continue the equivalent of perpetuating that 250 minutes of weekly preparation time that all teachers of the District have heretofore enjoyed while the Contract only calls for 45 minutes per day under the terms of the proposal of the Employer when the Employer goes to an eight period school day. Consequently, the undersigned is concerned that the intent of the parties is unenforceable as it goes to the 250 minutes of weekly preparation time, by reason of the clear and unambiguous language of the Employer proposal.

Notwithstanding all of the foregoing, the undersigned has reviewed the evidence submitted by the parties as it goes to the prevailing practices in payment for overload, and at what point an overload is established, pursuant to the customs in the surrounding comparable school districts. In Exhibit Nos. 13 through 21, the Employer has submitted evidence with respect to the prevailing practices of overload payments, length of classroom periods, number of preparation times, etc. in the large Cloverbelt conference, the small Cloverbelt conference, and the "Altoona Ring" as established by Arbitrator Yaffe. Employer Exhibit No. 16 establishes the length of the teachers' work day among this comparable group. The teachers in the Altoona School District have a work day from 8:00 a.m. to 3:45 p.m., a time period of 465 minutes, which includes a 30 minute duty free lunch. 14 of the remaining districts in the aforeidentified comparables have a 480 minute work day, with a 30 minute duty free lunch, with the exception of Bloomer, which has a 47 minute duty free lunch, and Colby which has a 23 minute duty free lunch. The remaining 4 districts range from 450 minutes to 465 minutes for length of school day with 30 minute duty free lunch. Thus, the teachers in the instant school district have a work day which is 25 minutes shorter than the prevailing practice in the area among 14 of the 18 comparables.

Employer Exhibit No. 18 establishes the prevailing practice among the comparables as to the number of periods in a school day, and the length of those periods. 9 of the comparable districts have an eight period school day as the Employer proposes to implement in the school year 1987-88. One has a four period school day, however, the periods consist of 95 minutes, which would equate to eight period days in terms of length of class time. 2 comparable districts have nine period days, and 6 comparable districts have seven period days. Therefore, from the foregoing, it is clear that 12 of the 18 comparable districts establish a prevailing practice of eight period days or more. With respect to the length of the periods, 10 of the 18 comparable districts have periods consisting of 45 minutes or less. 4 of the comparable districts have periods lasting 45 minutes but less than 50 minutes, and 4 districts have periods lasting 50 minutes or more. Thus, the prevailing practices establish class periods of 45 minutes or less among the comparable districts.

Employer Exhibit No. 19 establishes the number of teaching periods assigned per

teacher. 12 of the 18 comparable districts assign six teaching periods per day or more. (Cadott is included in this number because it has 3 teaching periods of 95 minutes) 6 of the 18 have five teaching periods assigned to the teachers per day. In all 18 of the districts, the teachers are subject to one period non teaching assignment such as study hall. Thus, a prevailing practice is established among these comparables for six teaching periods per day.

Employer Exhibit No. 20 establishes the maximum teaching time in minutes among the comparables. The Employer, in implementing an eight period day for 1987-88, will require 270 minutes of teaching, compared to 250 minutes of teaching for 1986-87 school year. Among the comparables, there are 11 of the 18 comparable districts which require 270 minutes or more of teaching time, ranging to a high of 315 minutes in the District of Elk Mound. There are 7 districts where teachers teach less than 270 minutes per day, ranging to a low of 245 minutes teaching time per teacher per day at the districts of Greenwood and Owen-Withee. Therefore, the prevailing practice among the comparables supports teaching time of 270 minutes or more.

Employer Exhibit No. 21 establishes the length of preparation period in minutes. 8 of the 18 comparable school districts have preparation periods of 45 minutes or less. 4 of the comparable districts have preparation periods of more than 45 minutes, but less than 50 minutes. The remaining 6 districts have preparation periods of 50 minutes or more, ranging up to a high in preparation time of 120 minutes per day at Fall Creek. Thus, the majority of the comparable districts have preparation periods of less than 50 minutes. However, only 8, one less than half of the comparable school districts, have preparation periods of 45 minutes or less.

From all of the foregoing comparisons, the prevailing practices as they go to the length of the preparation periods, the maximum teaching time per day in minutes, the number of teaching periods per teacher per day, the length of the teaching periods in minutes, and the length of the teacher work day, all support the change proposed by the Employer.

The most significant argument that the Association raises in opposition to the adoption of the Employer final offer is that the Employer has proposed the modification in the overload language, and, therefore, has the burden of establishing the necessity of the change which it has proposed. The Association then argues that the Employer has failed in its burden to establish the need for those changes. In support of its argument, the Association cites Arbitrator Stern in City of Greenfield Police Department, Dec. No. 15033 B (3/1977), wherein Arbitrator Stern opined: ". . . that the Employer did not show that the existence of these benefits has hampered the Employer in carrying out his functions or in any way caused significant harm to the Employer." Association further relies on School District of Colfax, Dec. No. 19886-A (3/1983), wherein Arbitrator Rice opined: ". . . unless exceptional circumstances prevail a fundamental change in the layoff language or any other aspect of the bargaining relationship should be negotiated voluntarily by the parties and not imposed by the Arbitrator." The Association further cites Drummond School District, Dec. No. 23349-A (1/1986), wherein Arbitrator Rice opined: "It is a generally accepted principle that interest arbitration should not be used as a procedure for initiating changes in basic working conditions absent a compelling reason for changing them." The Association also relies on Barron, Dec. No. 16276 (11/1978), wherein Arbitrator Krinsky held:

> However, what is involved here is an attempt by the District to have the arbitrator completely restructure the parties' collective bargaining relationship . . . . The Arbitrator holds strongly to the view that unless exceptional circumstance prevail, a fundamental change in layoff language or any other fundamental aspect of the bargaining relationship should be negotiated voluntarily by the parties, not imposed by an arbitrator.

In response to the foregoing argument of the Association, the Employer, in its reply brief, attributes to Arbitrator Christenson commentary that it is the very purpose of interest arbitration ". . . . . the arbitrator comes in when parties have failed to agree and imposes a resolution consistent with what one party or the other tried to achieve through negotiations." (citations omitted in the brief) The Employer further relies on Beloit Schools, Dec. No. 21918-A (5/24/85), quoting

the Arbitrator as follows:

> Indeed, Arbitrators should be reluctant to institute changes that there is little reason to believe would be made voluntarily in the context of free collective bargaining. The mediation/arbitration process is, after all, a substitute impasse procedure that avoids, in the public interest, the impact of the Parties counterveiling (sic) economic powers, and should not be viewed or used to expand the rights of either party beyond what they might be absent compulsory arbitration.

The Employer then argues that since only one of the schools with an eight period day had its work load arbitrated and the remainder were negotiated, those negotiations reflect what might be expected to be accomplished in free collective bargaining between the parties, consistent with the dicta of Arbitrator Vernon in Beloit Schools supra.

The undersigned has considered all of the foregoing argument with respect to who bears the burden of proof, and it is clear to the undersigned that the proposed changes in work load are the result of the position taken by the Employer that the number of teaching periods in a day is a permissive subject of bargaining. It is further clear to the Arbitrator that the Association's position with respect to Article VIII, Section 3 is in response to the permissive position taken by the Employer with respect to the number of teaching periods in a day, in an effort to negotiate impact language to replace what had formerly been in the Contract as permissive language. Consequently, if it is concluded that all of the Association's proposals dealing with work load in this matter are merely impact in response to the Employer's evaporation of the permissive language, it would follow that the Association impact language is intended to maintain the status quo, whereas, the Employer intends language to reflect change.[1] However, a careful examination of the Association proposal reveals that the Association proposal in this matter goes beyond merely establishing impact language which would reflect the status quo after the Employer evaporated the permissive language. The undersigned refers specifically to the Association proposal which deals with Article IX, Section 1, d, wherein the Association final offer proposes to delete that section and attributes it to be a deletion consistent with the proposal of the Employer. The undersigned has reviewed the contents of the predecessor Article IX, as well as the deletion proposed by the Employer. In the predecessor Agreement, Article IX, Section 1, d provided for additional compensation of a sixth teaching period each day, and for pro-ration of the scheduled amount of money for performing that teaching duty in the event the assignment is of a duration of less than one year. The Association proposes no language in its stead, and, therefore, proposes a change from the status quo in a mandatory area of bargaining dealing with the proration of the amounts of money paid for an assignment of less than one year which had heretofore existed in the predecessor Agreement. By way of contrast, the Employer has perpetuated that concept, even though he has proposed the deletion of the same section that the Association proposes to delete (Article IX, Section 1, d), because his final offer clearly states that the amount of overload pay shall be $2,000 and provides for proration.

Because there is a change from the status quo in a mandatory subject of bargaining in the Association proposal, the citations of the Association with respect to who has the burden are misplaced, since both parties are making modification from the status quo in sections of the predecessor Contract which were mandatory subjects of bargaining. Having concluded that both parties to this Agreement have proposed modifications to the status quo in areas of the predecessor Collective Bargaining Agreement which are mandatory subjects of bargaining, it follows that the outcome of this proceeding must necessarily be controlled by consideration other than who has the burden of proof to support the proposed changes.

1/ The Arbitrator is aware that in its brief the Employer has argued its offer reflects the status quo because it continues to pay overload pay for the seventh period of an eight period day under its proposal where it had formerly paid overload pay for the sixth period of a seven period day. The undersigned concludes that the addition of an additional work period represents a significant change of working conditions, and is a departure from the status quo.

The undersigned has already concluded that the prevailing practice among the comparables supports the Employer offer which would establish an eight period day and overload pay for teaching the seventh period where there is an eight period day. There are other considerations, however, which need to be addressed as argued by the Association. The Association has argued that the Employer has made no quid pro quo for the requirement that there be an additional teaching period on an eight period day. The Employer responds that it has established a wage leadership position, both in terms of salary paid, as well as in terms of overall compensation; and that it has negotiated the highest wage settlement among the comparables which had been settled at the time of hearing, thus establishing a quid pro quo in this matter. The Employer further argues that the additional work time is minimal by reason of only asking additional teacher-pupil contact of 20 minutes per day. The undersigned has considered the argument of both parties. While the Association may be correct that the quid pro quo is insufficient for an additional teaching period, that argument pales because the arbitration of this proceeding deals with the 1986-87 school year and not the 1987-88 school year. The record is clear that during 1986-87, the school day remained at seven periods, and that the regular teaching load was five periods, and that the overload pay kicked in at the sixth period. As a result of the foregoing, it is clear to the undersigned that the Employer proposal, as it relates to 1986-87, is superior to the Association proposal, because any teacher who has taught a sixth period for 1986-87 is entitled to receive $2000 additional compensation for teaching said period; whereas, under the Association proposal a teacher teaching a sixth period in 1986-87 would receive $1,608. Consequently, the undersigned concludes even though there may be an insufficient quid pro quo for teaching the seventh period, that argument is irrelevant as it pertains to 1986-87 because there is no application of a seventh teaching period for that year. Consequently, the insufficient quid pro quo argument raised by the Association is unpersuasive in this matter.

The Arbitrator has reviewed the evidence contained in Employer Exhibit Nos. 18 and 25, as well as the evidence contained in Employer Exhibit Nos. 26 through 58. From this evidence it is clear that the Employer is a wage leader among the comparables, both in terms of salaries paid, as well as in terms of total compensation. While there may not be a sufficient quid pro quo for teaching a sixth class in 1987-88, the fact that the Employer is a wage leader enhances the support for its final offer.

Finally, the undersigned has considered the content of the Association proposal which at best is ambiguous, and at worst creates a significant inequity. The Arbitrator refers specifically to the proposal that overload pay be paid for the sixth period in the amount of $1,608. There is no mention in the Association proposal of any additional payment to be made at the end of the seventh period. Certainly, minimally, the foregoing proposal, if the Association claims that the language requires an additional payment for the seventh period, will result in a contested reading of the provision and very possibly a grievance arbitration to determine the matter. Alternatively, if one were to read the proposal literally, teachers under the Association proposal would be paid $1,608 for teaching the sixth period of an eight period day, and would receive no additional compensation if the Employer assigned a seventh period. Consequently, if this interpretation of the Association proposal prevailed, the Employer would pay $2,000 for teaching the seventh period under its proposal, whereas, the teacher would receive $1,608 for teaching a sixth and seventh period under the Association proposal. The fact that there is minimally ambiguity or maximally an inequity in the Association proposal further warrants adoption of the Employer offer in this matter.

The undersigned has reviewed the testimony at hearing adduced by the Association, as well as all of the exhibits introduced into this record by the Association

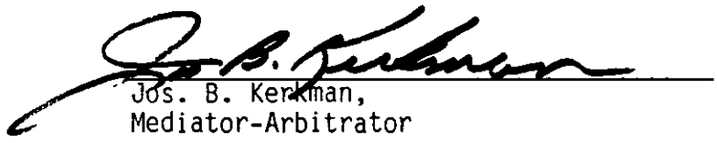
dealing with the wisdom or propriety of going to an eight period day consisting of 45 minutes of teaching. The undersigned has reviewed all of that testimony and record evidence, and concludes that it is not relevant to the instant matter. As cited earlier in this Award, the Association has accepted the fact that the Employer has the right to establish the number of teaching periods in a day. Once that fact has been accepted, any evidence with respect to the propriety or wisdom of establishing an eight period day is not relevant in the instant matter, since that is a decision of educational policy totally within the purview and discretion of the Employer. Consequently, the undersigned makes no finding with respect to the propriety or impropriety of the adoption of an eight period school day.

Based on the foregoing discussion, after considering the record evidence, the arguments of the parties, and the statutory criteria, the Arbitrator makes the following:

AWARD

The final offer of the Employer, along with the stipulations of the parties, as well as the terms of the predecessor Collective Bargaining Agreement which remain unchanged through the bargaining process, are to be incorporated into the written Collective Bargaining Agreement of the parties.

Dated at Fond du Lac, Wisconsin this 20th day of October, 1987.



Jos. B. Kerkman,
Mediator-Arbitrator

JBK:rr