IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING
STATE OF OHIO

AND

STATE COUNCIL OF PROFESSIONAL EDUCATORS

ARBITRATION AWARD

Grievance: 35-16-(88-08-19)000-06-10
Arbitrator: John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on October 11, 1989 in the Office of Collective Bargaining, Columbus, Ohio. Appearing for the Union were: Mr. Henry Stevens, Ms. Carrie Smolik, Mr. Steve Sunker, and the grievant, Ms. Emily Vazquez. Appearing for the Employer were: Deneen Donaugh, Esq., Mr. Tim Wagner, and Mr. Bud Potter.

The parties were given full opportunity to examine and cross examine witnesses and to submit written evidence supporting their respective positions. Post hearing briefs were filed on or about November 11, 1989 and the case was closed. The discussion and award are based solely on the record described above.

II. ISSUE

The parties did not agree on a joint issue. The Employer asked :

> Did management of the Department of Youth Services act within its rights, Article 3, and consistent with the Agreement, Section 23.04, when it changed the teachers' schedules? If not, what shall the remedy be?

The Union put the issue as:

> Does Management violate the 1986-89 Agreement between the State Council of Professional Educators and the State of Ohio when they change or modify matters pertaining to wages, hours or terms and other conditions of employment, and continuation, modification, or deletion of any existing provision of the Agreement for employees within the bargaining unit, State Unit 10, in the classifications listed in Article 1, Section 1.03 without negotiating the affects of that change?
>
> If so, what shall be the appropriate remedy?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1, #2, #3, #4, and #5.

The parties also stipulated the following statements:

> Emily Vazquez is a teacher at the Training Center for Youth, Department of Youth Services.
>
> This case is properly before the Arbitrator for a determination.
>
> In August, 1988, Management changed the class schedule from five (5) fifty (50) minutes periods to six (6) fifty (50) minute periods and eliminated one (1) fifty (50) minute duty period.
>
> The hours of work stayed the same.
>
> Management did not bargain this particular change with the Union.
>
> A group Grievance was filed on July 19, 1988 over the changing of the number of teaching periods.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. UNION

1. TESTIMONY AND EVIDENCE

Mr. Steven Sunker testified that he was a counselor at the Riverview School for Boys. He said the bargaining unit comprised teachers in the Department of Youth Services, Mental Health employees, MRDD employees, Rehab and Correction employees, as well as librarians and that there were about 700 people in the unit.

Sunker testified that Article 1.02 of the Contract (see Joint Exhibit #1) requires that Management bargain with the Union over changes in terms and conditions of employment. He went on

to say that librarians work unusual hours and correctional librarians work various shifts and various days.

Sunker testified that Article 23.01 does not allow Management to change any working conditions.

Ms. Emily Vazquez testified that she was a teacher and a site representative at the Training Center for Youth in Columbus.

Vazquez testified that in the 1987-88 school year, she had five instructional periods per day and that it was changed to six instructional periods for the 1988-89 school year and it has remained so for the 1989-90 school year.

Vazquez said that she was not given an opportunity to negotiate the changes or to discuss the changes.

On redirect, Vazquez said that adding another period caused more work for the teachers and she especially identified English teachers.

Ms. Carrie Smolik, a teacher at the Ohio School for the Deaf, testified that there were similar situations at her employment site.

Smolik asserted that there was a grievance over a change in schedule and it was resolved at Step 2.

The Union cross examined Mr. Bud Potter, the Superintendent of the Training Center for Youth, who said that a duty period is a multi-purpose period. He went on to say that teachers carried out all the activities noted in the opening statement. Potter said that the change in schedule did not require people to take work home.

Potter said that all institutions had to have six instructional periods and he said it was decided at a staff meeting and that was his understanding, although he did not attend that staff meeting.

Potter said that he did not notify the Association of the change; rather, he notified the teachers.

Potter testified that he thought the change was a Management right and that it did not involve a working condition. As a result, Potter said that he saw no reason to negotiate the affect of the change.

Potter said that he understood the reason for Article 23.01 in the Contract.

2. ARGUMENT

The Union asserts that the issues are whether Management altered the schedule and if so, was Management required to negotiate the change with the bargaining unit representative.

The Union argues that Article 1.02 of the Contract indicates that the Association is the exclusive bargaining representative on matters relating to wages, hours, and other terms and conditions of employment. The Union goes on say that in the Perrysburg Board of Education v. SERB, the Court held that a change in daily class time is a change in the term or condition of teachers' employment, even though the hours remain stable. Such a change, noted the Court, affects the terms and conditions

of employment under 4117.08(A) and, therefore, should be negotiable.

The Union also cites SERB v. IAFF in Lakewood where the Board held that the changes in schedules which affect hours require the parties to bargain over the affect of hour changes and it cites Article 4117.08. The Union goes on to say that the Lakewood case supports its position that a change in the hours of work requires the parties to bargain that change.

The Union discussed the case of Bedford Heights v. SERB which produced a result similar to the Lakewood case wherein the Board said that "the employers must bargain on matters insofar as they "affect"...hours"

The Union also cites a recent Ohio Supreme Court decision in the Lorain City Board of Education v. SERB wherein the change in working conditions which affected the term of the contract required bargaining between the parties. In short, the Court held if the public employer intends to alter a work schedule which "affects" wages, hours, etc., the employer must bargain the issue. The Court went on to say that a reasonable interpretation of 4117.08(C) is that where an exercise of a management right results in a change in or affects working conditions, such as hours, then the decision to exercise that right is a mandatory subject of bargaining.

The Union goes on to say that Management's decision to change its schedule from five fifty minute periods to six fifty minute periods produced a material influence on working

conditions and therefore, the Employer is required to negotiate that change with the Union as supported by the above noted cases.

Therefore, the Union asks that Management return to the old schedule until negotiations concerning the affects of the change can be worked out.

B. EMPLOYER

1. TESTIMONY AND EVIDENCE

Mr. Bud Potter, Superintendent of the Training Center for Youth, testified he was aware of the change from five to six instructional periods. He went on to say that teachers had other times to do other things at the end of the day and they were notified of the change in schedule during July and August of 1988.

Potter said that after the change, the teachers spent five hours a day with the students whereas in the past it was about four plus hours per day. He went on to say that preparation periods remained the same and the teachers work from either 8:00 to 4:30 or 7:30 to 4:00 and that classes ended at 3:05.

Potter said that the reason for the change was because the State of Ohio required a six hour instructional period per day.

The Employer cross examined Union witnesses. Mr. Steve Sunker testified that Article 23.01 of the Contract focuses on a scheduled work day, work hours, and work week, but he agreed that it did not talk about scheduling throughout the work day.

Ms. Emily Vazquez testified on cross that she used the old duty period to man the halls, relieve other teachers, call companies to get prices for various products, gave tests, planned lessons, evaluated pupils, graded papers, changed the bulletin board, discussed problems with other teachers, and previewed software.

Vazquez said after the change in schedule, she had to cancel some classes in order to give various tests and the new tests are longer than fifty minutes. She said there is other time to carry out these tests, but there is not as much time as in the prior situation. She said that between 11:30 and 12:20, there is a preparation period and she can talk to students at that time.

Between 3:10 and 4:00, Vazquez indicated that she could write evaluations and call companies for prices and clean the classroom, etc..

2. ARGUMENT

The Employer asserts that the question is whether Management acted within its rights when it changed the number of periods from five to six per day. The change, asserts Management, was required by the State Board of Education and the resulting change did not increase the hours teachers worked. Moreover, after the change was effected, teachers still had forty-five consecutive planning minutes per day.

Management argues that Section 23.01 does not address the issue at hand and it goes on to assert that Management had a right under the Contract to change a schedule. Article 3 of the Contract, continued Management, indicates that it has the right to improve the efficiency and effectiveness of governmental operations and to manage its facilities and it cites an arbitral support for its position in page 1 of its brief.

The Employer goes on to say that the Union argued that the change affected hours and conditions of employment and, therefore, they had to be negotiated and it cited the Lorain City School case. The Employer argues that this case is not applicable because in the Lorain case, the Board took bargaining unit work and gave it to non-bargaining unit employees; thereby eroding the unit and therefore, this affected conditions of employment. In this specific case, the change in the schedule did not erode the bargaining unit and no duties, terms or conditions of employment were changed as a result of the new schedule.

The Employer also notes SERB v. Bedford Heights cited in Lorain wherein the City of Bedford Heights changed the fire-fighters work schedule and SERB ordered the City to bargain that change and that order was upheld by the Court of Appeals which stated that:

> The City is required to bargain on the subject of scheduling, even though scheduling is a subject which has been reserved for managerial discretion, if the scheduling affects hours of employment.

The State asserts that in this case, there was no change in the hours of employment.

The Employer also cited the matter of Piscataway Board of Education in New Jersey which is distinguishable from this case because the New Jersey case involved the reassignment of bargaining unit work to non-bargaining unit employees and that was not the issue in the case at hand.

The Employer goes on to say that the change at the TCY school did not affect wages, hours, terms and conditions of employment and, therefore, the Lorain case does not apply.

The Employer points out that Section 1.04 of the Contract states that:

> This Agreement governs the wages, hours, and terms and conditions of employment of employees within the bargaining unit.

It goes on to say that if the Contract makes no specification about a matter, the employer and employee are subject to all State laws and therefore, according to section 1.04, this Contract governs.

The Employer noted that the schedule change resulted in somewhat less planning time for teachers and more student contact time. It goes on to say that Section 23.04 states that employees shall have a minimum of forty-five consecutive minutes of planning/conference time. The Employer continues by arguing that the Union appears to believe that it is entitled to more than forty-five minutes in spite of the language of Section 23.04 of the Contract. The Employer goes on to say that the Contract

language only limits Management from changing the schedule if it ends up denying the employees their forty-five consecutive minutes of planning time and it cites arbitral precedent for that position. The Employer goes on to say that the language in 23.04 provides for forty-five consecutive minutes and that is guaranteed and that employees may be compensated if that forty-five minute time period is violated. The Employer points out that employees may have more than forty-five minutes for a planning time, but that is not required under the Contract and the fact that they might have had it and then lose it is not the basis for compensation.

The Employer goes on to say that the issue of student contact time was discussed in a side letter from Edward Siedler to Robert Sauter and that letter indicates that Management actions are limited only to the extent that they are consistent with the six hour limit.

The evidence at the Hearing, notes the Employer, indicated that no teacher was scheduled for more than six hours of student contact time per day.

For these reasons, Management asserts that it acted within its rights and that its decision was consistent with the Contract and, therefore, the grievance should be denied.

V. DISCUSSION AND AWARD

The parties did not agree on the issue. The Employer asked if it had the right under Article 3 to change the teachers' schedule and whether this change was consistent with Section 23.04 of the Agreement. The Union asked whether the Employer's unilateral addition of a sixth (6th) teaching period violated the Contract because the Employer did not negotiate the affects of the change?

Prior to the 1988-89 school year, teachers at TCY taught five fifty minutes periods. Beginning in September 1988, teachers taught six fifty minute periods. According to Joint Exhibit #3 (Master schedules for H.H. Goddard H.S. for 1987-88 and 1988-89), the division of the school day into periods was identical for both years. There were three fifty minute teaching periods in the morning and three fifty minute teaching periods in the afternoon which followed a thirty minute lunch (11:00 - 11:30) and a forty-five consecutive minute prep/planning time (to 12:15 or 12:20). Instruction was carried out during all of the six periods but an individual teacher taught during five of these periods and had one period as a duty period. In addition, there was time from the end of the last period at 3:10 until the end of the word day (4:00) scheduled for grading, records, etc. The length of the work day remained the same, but the content of a work day changed when the Employer required teachers to teach six (6) rather than five (5) periods.

The Employer asserts that the change was made in order to comply with the new The State Department of Education standard that there be six instructional periods - presumeably meaning that students were required to be taught six (6) instructional periods per day. Apparently this was not the case in the past. To satisfy this requirement, Management at TCY replaced the existing duty period with a sixth instructional class.

The Employer argues that the Management Rights section (Article 3) of the Collective Bargaining Agreement allows this change in teaching assignments; and that the Contract has not been violated (specifically 23.04). Moreover, the Employer asserts that there is nothing in the Contract which prohibits the Employer from requiring teachers to teach a sixth period in place of the duty period.

While there is no precise language in the Contract concerning the schedule within the work day (with the exception that there be 45 consecutive minutes during that day for planning and conferences), this silence does not mean that the Employer can unilaterally change the number of instructional periods per day. The Employer argued that Article 23.04 gives it the right to substitute a 6th teaching period for the duty free period since it does not disturb the 45 minutes for prep time since that is its only contractual constraint in applying its Mananagement rights to direct employees, schedule employees, and effectively manage the work force, etc..

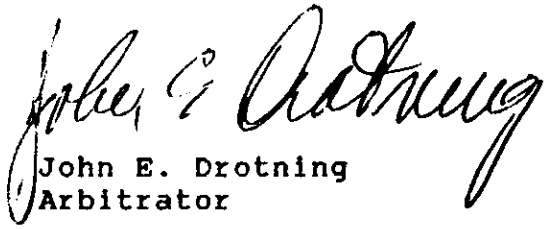
Conversely, the Union as the sole representative for bargaining over wages, hours, terms and conditions of employment

(see Article 1.02) argues that the teachers' schedule has been five fifty minute periods of instruction, one duty period, as well as lunch and prep time for a number of years and was the basis for determining the 1986-89 Agreement.

Emily Vazquez testified that there was no effort by Management to discuss the increased instructional period. On cross, Vazquez said that in the old duty period, she manned the hall, relieved other teachers, contaccted vendors for product prices, administered tests, planned lessons, evaluated pupils, graded papers, changed bulletin boards, and previewed software. Moreover, Vazquez noted that the 6th period generated more instructional work than was the case with the five classes.

The Lorain case is important because SERB & the Court held that if a public employer intends to alter a work schedule which "affects" wages, hours, or conditions of employment, etc, the employer must bargain the "affects" of the change(s).

The Employer added a sixth period without bargaining the affects of this change. Thus, the addition of the sixth period is not the critical issue, rather it is the failure of the Employer to bargain the "affects" of the additional instructional period. Therefore, it is ruled that the parties must negotiate the "affects" of the additional instructional period.



John E. Drotning
Arbitrator

Cuyahoga County, Ohio
December 5, 1989