#1284

IN THE MATTER OF

ARBITRATION

BETWEEN

THE STATE COUNCIL OF PROFESSIONAL EDUCATORS/OEA

AND

THE STATE OF OHIO/DYS

DIRECT APPOINTMENT: Gr. # 35-03-960814-0102-06-10

Before: Robert G. Stein

Advocate for the Association:

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Advocate for the State/DYS:

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INTRODUCTION

A hearing was held on the above matter on February 11. 1998. During the hearing the Parties were given full opportunity to present evidence and testimony on behalf of their respective positions. The Parties stipulated that the issue was properly before the Arbitrator. The Parties waived closing arguments in favor of filing briefs. The briefs were received by the Arbitrator on April 16, 1998 and the hearing was closed. The decision of the Arbitrator is to be rendered within thirty days, plus five days for mailing..

ISSUE

The Parties did not agree on how the issue should be defined. The respective definitions offered by each party are as follows:

ASSOCIATION'S DEFINITION

> *"Did the Employer/Management at the Cuyahoga Hills Boys School/Department of Youth Services violate, misinterpret, or misapply the 1994-97 Agreement between the State Council of Professional Educators and the State of Ohio when they rescinded the established procedure of November 20, 1992 which was agreed upon by the parties."*

EMPLOYER'S DEFINITION

> *"Did the employer, DYS/CHBS, violate the 1994-97 Agreement between the State Council of Professional Educators and the State of Ohio when they rescinded the established procedure of November 20, 1991?*

Articles 5.02 and 6.05 of the Collective Bargaining Agreement provide sufficient guidance in order for this Arbitrator to evaluate the parties' proposed definitions and to frame the issue as follows:

Did the Employer violate, misinterpret, or misapply the specific provisions, articles or sections of the 1994-97 Agreement between Scope and the State of Ohio when it rescinded the November 20,1991 established procedure of providing additional preparation time at CHBS? Is so what should the remedy be?

BACKGROUND

This case is about bargaining unit members at one State of Ohio Department of Youth Services (DYS) facility, Cuyahoga Hills Boys School (CHBS), gaining additional preparation time in November of 1991 and having it rescinded by the Employer on July 22, 1996 (Joint Ex. 4). The preparation time was gained as a result of discussion that occurred at an Agency Labor/Management Meeting on October 21, 1991. Bargaining unit employees, who are teachers at CHBS, expressed a concern that, "the proposed addition of a seventh instructional period to the school day would create a hardship on teachers unless additional time could be allotted for the additional planning and paperwork which would be required" (Joint Ex. 3).

The Educational Administrator in 1991was Al Neff. Dr. Neff noted in his letter of November 20, 1991 to SCOPE President Arthur Lunt, that teachers at CHBS "have larger classes than those at other schools because the school classrooms will accommodate more students per period" (Joint Ex. 3). In this letter President Hunt, Dr. Neff stated:

"It was agreed that the CHBS administration will set aside one work day per month for teachers to do planning and paperwork associated with the proposed changes. It was further agreed by the SCOPE representatives that this agreement will apply only at CHBS and that no similar agreement will be requested at any other DYS school."

On July 22, 1996, a subsequent Educational Administrator, Dr. John F. Littlefield, rescinded this additional planning period at CHBS in a letter to Mr. Henry Stevens, Staff Representative for SCOPE. Dr. Littlefield stated in his letter:

"The number of periods that the teachers are required to teach are similar to other schools within the Department of Youth Services. In order to comply with the standards of the Department of Youth Services School District, it is my intention to eliminate the extra planning day in July, 1996."

"As you know this is not the first time that this matter has come under discussion between the parties. We have discussed this several times in our past meetings."

"However, we still have this additional issue of the extra planning day at CHBS. It is our belief that if we eliminate this extra day we can still maintain the current work schedule without disrupting the educational progress that has been made in the last few months."

DYS eliminated the planning day in July of 1996 and the Association filed a grievance.

RELEVANT CONTRACT LANGUAGE
(listed for reference-see Joint Exhibit 1 for text)

- ARTICLE 1 BARGAINING UNIT
- ARTICLE 5 GRIEVANCE PROCEDURE
- ARTICLE 6.5 ARBITRATOR'S LIMITATIONS
- ARTICLE 11 LABOR/MANANGEMENT COMMITTEES
- ARTICLE 23.01 WORK DAY/WORK WEEK/WORK YEAR

- ARTICLE 23.04 PLANNING TIME
- ARTICLE 23.11 SCHOOL CALENDAR
- ARTICLE 39.02 PURPOSE AND INTENT OF AGREEMENT

ASSOCIATION'S POSITION

The primary position of the Union in this matter is that the additional preparation day at CHBS was a long-standing practice recognized and accepted by the parties. Furthermore, all the conditions that created a need for the additional monthly planning day are still in existence. The Associations strongly contends that the agreement reached with DYS was "a mutual and/or bilateral agreement. The Association asserts that on October 21, 1991 the parties reached agreement on the following:

1. The addition of an extra period in the employee's work day
2. One (1) work day per month for planning and paperwork associated with the extra period.
3. The Association agreed that the agreement would only affect Cuyahoga Hills Boys School.

The Association contends that the parties cannot negotiate every eventuality that may arise in an employment relationship. In the instant matter the Association argues, "It is not unreasonable to conclude that, if the parties have followed a clear, consistent practice that is not restricted by contract language, that the practice should be permitted to continue."

The Association also makes the argument that because the practice of providing an additional planning day extended over a period in which a subsequent collective bargaining contract was negotiated, the parties have "frozen the status quo on extra contractual conditions that have been previously in effect." The parties have provided a clear basis of rules governing matters not included in the contract and have amended the clear language of the Collective Bargaining Agreement, asserts the Association.

The Association raises a third argument regarding the placement of the extra educational instructional period in the school calendar. The language of Article 23, HOURS OF WORK, Section 23.11 School Calendar reads as follows:

> ***"In those agencies and/or facilities using a school calendar, the Association shall be afforded an opportunity for input so that the concerns of employees may be considered. Once established, school calendars shall not be changed arbitrarily. The subject of school calendars is an appropriate topic for discussion at agency Labor/Management Committee meetings."***

When the parties agreed to the extra planning day, the calendar reflected the extra instructional period that was the basis for the additional monthly planning day, argues the Association. Its incorporation in the school calendar is governed by the language of Article 23. 11, contends the Association. In addition, according to the Association, Article 39.02 of the Agreement requires that the written understanding to add an additional monthly planning day can only be ended by subsequent written agreement of the parties. According to the Association there was no written agreement to end the practice of providing an additional planning day per month at CHBS.

Based upon the above, the Association seeks reinstatement of the extra monthly planning and preparation day associated with the additional instructional period, and that each teacher be compensated financially or with compensatory time for 20 missed work days.

EMPLOYER'S POSITION

The Employer's argument can be clearly summed up by its assertion that it retains the right to manage its operation and that the practice to add an additional monthly planning period was unilaterally implemented by the Employer. In the words of the Employer, "The dispute is one involving the discontinuation of a practice, not the denial of a negotiated benefit." The Employer asserts that the record reflects that the need for more planning time was discussed at a Labor/Management meeting. However, there is nothing that establishes that the practice of providing additional planning time was ever reduced to a contractual benefit.

The Employer points to the language under the Labor/Management article, Article 11 and argues that the following sentence, *"No agreement may be reached on any matter that would alter in any way the terms of the Agreement"* is germane to the instant dispute. The parties added additional planning time by consent of management following the Labor/Management Committee meeting held on October 21, 1991. However, the language of Article 11 prohibits any understandings reached during such meetings from having the effect of altering the Collective Bargaining Agreement.

The Employer contends that Joint Exhibit 3, a letter issued by Dr. Neff, is not a jointly issued document or written agreement between the parties. Furthermore, the Association contends that if the Association wanted to make the additional planning day part of the Collective Bargaining Agreement it could have done so in the 1994 negotiations. The 1994 negotiations occurred some 3 years after the practice began.

Another argument raised by the Employer regards the scope of the Arbitrator's authority in this matter. The Employer cites Article 6.5 of the Agreement which reads as follows:

> ***"Only disputes involving the interpretation, application or alleged violation of provisions of this Agreement will be subject to arbitration. The arbitrator will have no power to add to, subtract from or modify any of the terms of this Agreement; nor will the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement."***

The Employer assert that "if the Arbitrator is to proceed and issue a decision concerning the discontinuation of the practice of providing an additional planning day at CHBS he must first determine that the planning day is addressed by a provision of the Agreement." The Employer argues the only specific language that addresses planning time is contained in Article 23, Section .04 of the Collective Bargaining Agreement. This section clearly provides for a minimum of forty-five (45) consecutive minutes of daily planning/preparation time. Therefore, there is no express provision of the Collective Bargaining Agreement that addresses the issue of an additional monthly planning day, concludes the Employer.

The Employer points out that given the presence of clear and ambiguous language contained in Article 23, Section .04, planning time cannot be altered or modified by a practice of the parties. This point of view is widely shared by the arbitration community, the National Labor Relations Board, and the Ohio State Employment Relations Board, asserts the Employer.

Finally, the Employer argues that the presence of Article 39, Section .02 which contains a "zipper clause" establishes the Employer's right to discontinue a practice. The Employer argues that the language of Article 39, Section 2 is a strong "zipper clause." It reads as follows:

> ***"This Agreement may be amended only by written agreement between the Employer and the Association. This is the full and final agreement on all issues and concludes collective bargaining for the term of the Agreement between the parties."***

This language is a waiver of the right to bargain about other conditions of employment and is a specific affirmation that management rights are not restricted by prior practices, contends the Employer. The Employer also asserts that the testimony of Principal Wayne Marok demonstrates that the conditions underlying the original granting of an additional day of planning time did change, necessitating a review of the need for teachers at CHBS to have additional planning time.

Based upon the above, the Board requests that the grievance be denied.

DISCUSSION

It is an undisputed fact that the basis for the instant grievance originated from a Agency Labor/Management Committee. Therefore, in analyzing the arguments in this case the first article to be considered is Article 11, the provision containing the scope and authority of the Agency Labor/Management Committee. The language of Article 11 that defines the purpose of these committees reads as follows:

> ***"The purpose of these committees is to provide a means for continuing communication between the parties and for promoting a climate of constructive employee-employer relations.***

Labor/management committees serve many purposes in labor relations. The Association accurately points out that the parties to a collective bargaining agreement cannot possibly contemplate every nuance or contingency that may befall them. Therefore, there is a need for a structure of continual dialogue between the parties. This structure of labor/management dialogue works best when it is well defined regarding the obligations of both parties and when it is flexible and responsive to changing conditions.

Such is the case with the language of Article 11. The language is specific in its meeting times and deadlines. It also carefully defines who is to attend and calls for agreed upon agendas. Along with the many procedural items in this article is a prohibition contained in Article 11 that reads as follows:

"Agenda items will be discussed and agreed upon by these representatives no later than fourteen (14) calendar days prior to the meeting. No agreement may be reached on any matter that would alter in any way the terms of this Agreement." [emphasis added]

This language means what it says! The parties clearly and unequivocally intended to guard against having labor/management committees cloaked with the authority to alter the express terms of the Collective Bargaining Agreement. The plain meaning of the word "alter" means to change or modify. It is reasonable to conclude that Article 11 restricts the scope of resolutions to those that are not in conflict with the terms of the Collective Bargaining Agreement. The parties in Article 39.02 reinforce the notion that agreements reached in labor/management committees are not to be elevated to the status of contractual language. Article 39.02 must also be regarded as a term of the agreement that cannot be altered by understandings reached in labor/management committees as provided for in Article 11. In other words, agreements reached in labor/management committees cannot represent contractual commitments unless they are in the form of a written agreement between the Association and the Employer.

This does not mean that resolutions that are reached in Labor/Management Committees are not to be taken seriously. Resolutions to problems can clearly be agreed upon provided they do not alter in any way the terms of the Collective Bargaining Agreement. This raises the obvious question of whether the agreement reached between the parties on October 21, 1991 in an Agency Labor/Management meeting in any way altered the language of Article 23.04, Planning Period.

The language of Article 23.04 provides for a "minimum of forty-five (45) consecutive minutes of daily planning/conference time and acknowledges that an employees planning time may exceed forty-five (45) consecutive minutes. This language provides a "floor" for planning time and not a "ceiling." Therefore, I find that the agreement reached between the parties in October of 1991, regarding an extra planning day did not act to alter the provisions of Article 23.04.

However, a careful examination of the details of the agreement reached by the parties reveals that the agreement to add the additional day of planning time per month at CHBS was part of discussions regarding the "master school schedules proposed for the Cuyahoga Hills Boys School and the Scioto Village/Riverview school for Boys Complex for the 1991-92 school year." (Joint Ex. 3). This was a verbal agreement summarized in writing by Dr. Neff (Joint Ex. 3). It was for one school year and became part of the school calendar. Article 23.11, School Calendar needs to be examined as a relevant article to this agreement.

Article 23.11 calls for the Association to have formal input into the school calendar process. The school calendar is an appropriate topic for agency Labor/Management Committee meetings. The language of Article 23.11 requires that once established, the school calendar cannot be arbitrarily changed by the employer. It is reasonable to assume that following the November 20, 1991 letter from Dr. Neff, the school calendar was adjusted to reflect the additional planning day per month at CHSB and the additional 7th instructional period. The conditions underlying this agreement were the 7th instructional period and the size of classes at CHBS.

However, the evidence and testimony demonstrate that the agreement reached by the parties to provide an additional planning day per month at CHBS (coupled with SCOPE'S promise not to request an additional planning day at any other DYS school) continued as "a practice" in the 92/93, 93/94, 94/95, and 95/96 school years. This practice spanned the 1994 negotiations for the 1994-97 contract. The question to now answer is whether this practice is binding on the Employer or can it be unilaterally rescinded by the Employer.

I do not find this dispute to be one in which the traditional concept of "past practice" can be applied. The primary reason for this is the origin of this dispute. As stated above, Article 11 resolutions cannot be elevated to contractual status since any agreement cannot alter the understandings of the parties contained in Article 39.02. I find that the provision of an extra day of planning time per month at CHBS was a 91/92 school year agreement that was carried for another four (4) school years by the unilateral determination of the Employer.

The essential difference between the establishment of this 4 year practice is the fact that the agreement originated in a labor/management context under Article 11. The parties clearly intended that any resolutions to issues resulting from a labor/management committee are not to alter existing contractual terms or cannot become contractually obligated terms, without conforming to "zipper clause" contained in Article 39.02.

The language of Article 23.11 lends further support to the nonbinding nature of the extra planning day. Article 23.11 states, "that once established school calendars shall not be arbitrarily changed." However, the longest time this requirement could apply is for the remainder of the 1991-92 school year. It is common knowledge that school calendars are

established annually, and by contract with Association input. Therefore, I find that following the 1991-92 school year the extra planning day was no longer part of any agreement reached in an Agency Labor/Management Committee meeting, but rather it was a day which the Employer unilaterally carried forward in the subsequent four (4) school years.

The unrefuted testimony of Association witness, Maxine Shell, lends further credence to the unilateral nature of the planning day. Ms. Shell testified that the one day was difficult to schedule and it was changed by the Employer. She testified that initially all bargaining unit employees had off the same month planning day. Sometime later this was unilaterally changed by the Employer to each employee having his/her own day per month for planning. The planning day was again changed by the Employer and became two ½ day segments. The evidence indicates this was done unilaterally by the Employer with no approval by the Association.

Further evidence of the unilateral nature of the continuation of an additional day and the Employer's right to abandon it is the convincing testimony of the Employer's witnesses regarding the change in conditions at CHBS from 1991 to 1996. One of the underpinnings of the 1991 agreement to add an additional planning day was the enrollment at CHBS (Joint Ex. 3). Association witness Shell testified that the population at CHBS in 1991 was between 350 and 400 students. In 1996 the population was in the high two hundreds (Employer Ex. 4). A comparison of student enrollment data in Employer Exhibit 4 (August 1996)and Employer Exhibit 6 (January 1998) demonstrates that there can be significant swings in the average daily enrollment of students at CHBS.

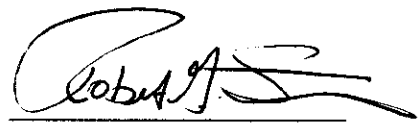
Another condition that had changed from 1991 to 1996 was the number of classrooms. Principal Marok offered unrefuted testimony that there are more classrooms in 1996 than in 1991. The impact of having more classrooms on class size is not clear from the evidence provided. However, it can be said with certainty that having more classrooms in 1996 represents a change in the underlying conditions that existed in the 1991-92 school year.

It is an established principle in labor relations that changed circumstances generally present a valid basis for discontinuing a past practice (see Hoboken Board of Education, 75 LA 988 (Silver, 1980). Although the evidence indicates that there are still 7 periods at CHBS, the agreement reached in 1991 was directly linked to the size of classes at CHBS. The evidence supports that this condition changed from 1991 to 1996, providing the Employer with a sufficient basis to discontinue the extra planning day at CHBS.

AWARD

Grievance Denied

Respectfully submitted this eighteenth day of May, 1998 in Summit County, Ohio.



Robert G. Stein, Arbitrator