

**BEFORE AN ARBITRATOR APPOINTED BY
AGREEMENT OF THE PARTIES**

In the matter of:

**PINELLAS CLASSROOM
TEACHERS ASSOCIATION,**

Union,

and

**SCHOOL BOARD OF PINELLAS
COUNTY, FLORIDA,**

Employer.

ARBITRATOR'S AWARD

Appearances:

For the Association: Jade Moore, Executive Director
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650 Seminole Boulevard
Largo, FL 33770-3625

For the Board: Dr. Ron Stone, Associate Superintendent, Human Resources
School Board of Pinellas County
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Arbitrator: Christopher M. Shulman
Christopher M. Shulman, P.A.
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BACKGROUND

The Association represents a bargaining unit that includes all middle school teachers employed by the Board. The Parties had a collective bargaining agreement between them which expired June 30, 2008; the Parties have not reached a new contract as of yet, so they are operating under a status quo agreement.

In the present class action grievance, the Association alleges that the Board, in implementing a 6-of-7 schedule, has violated Articles XXXIX, regarding work schedules, and XXVII, regarding teacher planning periods. The Board denied the grievance at second level, and the Parties submitted this controversy to binding arbitration. At the arbitration hearing, the Parties stipulated that the matter was properly before the arbitrator for decision.

ISSUE PRESENTED

The Parties substantially agree on the issue presented:

Whether the Board violated Article XXXIX of the Collective Bargaining Agreement between the Parties, by not unilaterally implementing a 6-of-7 schedule and, if so, what shall the remedy be?¹

In this non-discipline case, the Association has the burden of proof.

RELEVANT CONTRACT PROVISIONS

ARTICLE XXVII PLANNING PERIODS AND LUNCH TIME

The Parties agree that the allocation of planning and lunch time is best determined jointly by the faculty and administration given unique circumstances in each building. Schools unable to reach agreement shall be governed by the following provisions:

¹ The Association also asserts that the schedule change deprives middle school teachers of their planning periods. The Board further clarifies the issue by asking whether a proposed alternating block schedule remedies any violation.

...

B. The regular daily schedule of each secondary and full-time post secondary school teacher shall provide for one (1) full period or its equivalent of planning time during the pupil day and a minimum of two (2) hours per week outside the instructional day free from assigned duties except in cases of emergencies. That when the nature of the subject that is taught is organized in such blocks of time as to make this provision unworkable without seriously hampering the instructional program, time shall be provided to the extent possible.

C. No teacher shall be required to forfeit planning time on a regular or continuing basis.

....

ARTICLE XXXIX - TEACHING HOURS AND TEACHING LOADS

It is the philosophy of this agreement that a teacher's primary responsibility is to teach. The Parties to this agreement recognize that there are certain other activities which must be performed during the teacher day that are essential to the safe and effective operation of the school. It is the intent of the Parties that the individual school is the best source of determining the relationship of instructional time to non-instructional time and the duties to be performed therein. In keeping with the intent of school improvement, local school staffs are encouraged to use the provisions of Article XV to fashion the most beneficial schedule of activities for that particular school. They may elect to waive any or all of the provisions of this section of the Agreement and convert their schools to a thirty-seven and one-half (37.5) hour work week in lieu of a seven and one-half (7.5) hour/day schedule. Such decisions must be part of the School Improvement Plan, approved by the school administration and a seventy-five percent (75%) vote of the faculty, and endorsed by the District Quality Council.

...

D. The teaching load for secondary teachers shall not be in excess of five (5) teaching periods per day on a six (6) period overall school schedule and not more than five (5) teaching periods per day on a seven (7) period overall school schedule. The teaching load for post secondary vocational teachers shall be five (5) teaching periods in a six (6) period overall school schedule. Where innovative programs, such as flexible, modular scheduling are employed, teachers shall have a substantially equivalent ratio of teaching duties to planning time. When the nature of the subject taught is organized in such blocks of time as to make this provision unworkable without seriously hampering the instructional program, time should be provided to the extent possible. Instructional related time may

include planning time, necessary faculty meetings, assisting students, parent conferences, and other activities directly related to instruction.

FACTS AND ARGUMENT OF THE PARTIES

The facts in this case are undisputed. The collective bargaining agreement provides, in relevant part, that teachers will have no more than five teaching periods per day, whether the school day is divided into six or seven periods. (Joint Exhibit 1, Article XXXIX, § D)

Over the preceding three years, the Parties have had various discussions between them about changing the structure of the middle school day, with an eye towards addressing drop-out rates of middle school students. These joint efforts culminated in the creation of the 6-12 Redesign Committee, which met over several months in the 2007-2008 school year. These discussions have resulted in a general agreement on the need to include more periods in the school day and school week, to allow for increased electives for the students in the top tier as well as increased remedial course offerings for students needing such assistance to meet standards in core courses.

Various specific schedules have been proposed – including a “seven opportunities” schedule, in which middle schoolers would have a seven periods per day, with teachers teaching six of the seven periods. Some schedules have even been piloted under another provision of the agreement, which allows the Board to make schedule deviations at a school upon a majority vote of the bargaining unit teachers at that school. However, the Parties were not able to reach agreement on a global schedule change for the middle school teachers.

Additionally, this past Spring, the Florida Legislature gave preliminary indications that school boards (a) would receive substantially less money from the State, (b) would be required to meet class-by-class class-size amendment limits, rather than extending the

previous school-by-school class-size amendment limits, and (c) could be required to implement additional curriculum requirements, all of which would require the Board to spend substantial additional money.

With these concerns in mind, the Board proposed a 6-of-7 schedule for middle school teachers for the 2008-2009 school year, in which all middle school teachers would teach (have student instruction) six periods each day. Per Board Administration, this schedule would result in budgetary savings of some \$2.2 Million. Accordingly, the Board directed its middle school principals to develop such 6-of-7 schedules for the 2008-2009 school year.

The 6-of-7 schedule was adopted at the June 2008 School Board meeting: after the end of the student school year and with the teachers already on summer break. Over the summer, attempts were made to have school-by-school votes of the teachers, to take advantage of the Article XXXIX local-option provision but, due to the fact that school was out and the teachers were not at work, these votes were haphazard at best. Nonetheless, the Board implemented the 6-of-7 schedules in all middle schools as of the beginning of the current academic year.

The Association's Position.

The Association asserts that the unilateral change in schedule is a *prima facie* violation of the collective bargaining agreement.

Article XXXIX Section D contemplates teachers having only five periods per day of student instruction, irrespective of whether the school day is divided into either six or seven periods. Moreover, Article XXVII requires the Board to provide teachers with a planning period each day. Neither the 6-of-7 schedule implemented nor the alternating block schedule subsequently proposed by the Board honors these two provisions. Further, the Association

points out that most of the anticipated Legislative cutbacks or added expenses were not finally imposed, and the Legislature again allowed the Board to continue school-by-school method of determining compliance with the class-size amendment, vitiating the fiscal reasons for the change.

Accordingly, the Association urges the arbitrator to require the Board to restore the 5-of-6 (or 5-of-7) schedule that prevailed last school year, and direct the Board to reimburse teachers for any missed planning periods.

The Board's Position.

The Board acknowledges that the 6-of-7 schedule “was inconsistent with what the labor agreement envisions”. (Joint Exhibit 2, October 28, 2008 School Board response to Class Action Grievance) However, the Board asserts, the schedule *had* to be implemented due to anticipated Legislative changes which imposed additional financial pressures on the Board; implementing the schedule change saved the Board approximately \$2.2Million. Because of these budgetary concerns, the Board implemented the 6-of-7 schedule at its June 2008 meeting. With the unfortunate confusion surrounding attempts to obtain school-by-school teacher approval of the schedule change, and the start of the academic year looming, the Board imposed the schedule unilaterally.

The Board also points out that the schedule change did not affect teachers’ total work day nor did it substantially affect the percentage of each day spent in direct student contact. Under the 6-of-7 schedule, teachers now spend 64% of their work days in direct instruction, as compared with 59% of the work day spent in direct instruction under a 5 of 6 schedule. (Board Exhibit 2)

During the pendency of the present grievance, the Board proposed an alternating block schedule, with seven student learning opportunities each day, some of which are shorter and some of which are longer, with the subjects taught during the lengthier blocks alternating across a two-week cycle. (Board Exhibit 3) The Board states that this alternate proposal would serve both the need to meet projected budgetary concerns,² as well as the Parties' mutual intent to improve students' middle school experience and reduce middle school drop-out rates. As such, the Board urges the arbitrator, if not to deny the grievance, then to impose the alternate block schedule as a remedy.³

DISCUSSION

As noted by the United States Supreme Court almost 50 years ago, in language still widely regarded as the cornerstone of a labor arbitrator's authority:

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

Accordingly, to determine the merits of the grievance at issue here, i.e., whether, by implementing the 6-of-7 schedule, the Board has violated the collective bargaining agreement and, if so, what shall the remedy be, we first turn to the contract language.

² Even though some of the anticipated fiscal shortfalls did not come to pass, the Board asserts it still need to take advantage of the \$2.2Million savings, to replenish cash reserves that have been depleted over the past several years.

³ The Board also states that the arbitrator is without authority to impose reimbursement or compensation to middle school teachers for any missed planning periods, because the teachers all received their full days' pay.

In relevant part, the contract provides that “[t]he teaching load for secondary teachers shall not be in excess of five (5) teaching periods per day on a six (6) period overall school schedule and not more than five (5) teaching periods per day on a seven (7) period overall school schedule.” Article XXXIX Section D. As recognized in the Board’s October 28, 2008 letter denying the grievance, the Board violated this provision in implementing the 6-of-7 schedule. The question, then, is what shall the remedy be?

It seems that there are only two possible remedies advanced by the Parties. One is the resumption of last academic year’s schedule, which would, according to the Board, cost taxpayers some \$2.2 Million. The other is implementation of the alternating block schedule, which would, according to the Board, address both the Board’s fiscal needs and the Parties’ mutual concern with improvement of students’ middle school experience. While the alternating block schedule may very well be the solution that best addresses these twin goals, the arbitrator believes that this schedule does not comport with the provisions of Articles XXXIX and XXVI, as they currently exist.

The Parties are certainly free to bargain over this schedule change – and, indeed, they have begun to do so. In fact, to the extent that the Board Administration should deem this to be a matter of financial urgency, the Parties may engage in expedited collective bargaining over the impact of a financially-required modification to the Parties agreement. Fla. Stat. § 447.4095. However, the *arbitrator* is without authority to add to or rewrite the Parties’ agreement. *See, e.g., CFS Continental-Los Angeles and Teamsters Local 595*, 83 Lab. Arb. (BNA) 458 (Arb. Sabo 1984); *Wolf Baking Co., Inc. and Teamsters Local 568*, 83 Lab. Arb. (BNA) 24 (Arb. Marlatt 1984). Indeed, an arbitrator who chooses to substitute his judgment on what a contract should be, rather than simply interpreting and applying the contract and

issues submitted to him thereunder, exceeds his authority to the point that his award may be set aside on that basis alone. *Communications Workers of America v. Indian River County School Board*, 888 So. 2d 96, 101 (Fla. 4th DCA 2004). Consequently, the arbitrator does not and cannot adopt the Board's urged remedy.

To remedy the Board's acknowledged violation of the collective bargaining agreement, the Board is required to restore, effective with the next grading period or semester beginning after January 1, 2009, the 5-of-6 schedule at those middle schools that had such schedules last academic year and whose faculty did not vote to accept the 6-of-7 schedule, if any. However, the Board should not be required to pay any teacher for claimed lost planning periods, as the teachers have not actually lost pay, they lost planning time. To require payment to such teachers would constitute a windfall, and is not required to remedy the violation.


Finally, while the arbitrator does not require this as part of the award – since he is without authority to do so in any event – the arbitrator strongly urges the Parties to meet and confer quickly to explore some other means to address the financial and other consequences the Parties will both experience as a result of abiding by this award. It is the arbitrator's sincere hope that the Parties can reach an agreement (on a new schedule that addresses both fiscal concerns and the need to enhance middle school students' experience) in advance of the deadline for compliance set above, such that the Parties can avoid the significant budgetary impact the Board believes may result.

AWARD

For all the reasons discussed above, the Grievance is UPHELD.

As remedy, the Board is required, effective with the next grading period or semester beginning after January 1, 2009, to restore the 5-of-6 schedule at those middle schools that had such schedules last academic year and whose faculty did not vote to accept the 6-of-7 schedule, if any. All other relief requested is denied.

Respectfully submitted this 26th day of November, 2008, at Tampa, in Hillsborough County, Florida.



Christopher M. Shulman
Arbitrator