

Patton #2

AMERICAN ARBITRATION ASSOCIATION

AD HOC LABOR. ARBITIUNION

Employer

-and-

Union

Grievant: Employee 1

Grievance: Class Size

ARBITRATOR'S OPINION AND AWARD

Arbitrator Anne T. Patton

January 11, 2007

Chronology

Date of Grievance: October 20, 2005

Date of Hearing: October 11, 2006

Date of Record Closing: December 4, 2006

Statement of Issues

1. Whether the Employer violated Article X, Paragraph 243 of the Master Agreement during the 2005-2006 and 2006-2007 school years by assigning more students than work stations to science classes and by failing to consult with the Science Department Chair?
2. If so, what remedy is appropriate?

Brief Statement of the Award

The grievance is granted in part and denied in part.

INTRODUCTION

This dispute involves class sizes in the science department at High School A. This is the first grievance regarding science class size limits to proceed to arbitration. Other class size grievances were resolved prior to arbitration.

On October 12, 2005, the parties met in an informal meeting to discuss science class sizes, safety conditions and when the increases in science class sizes would stop. The Union requested a numerical limit on science sections corresponding with the number of work stations, a reduction of science class sizes in the new addition to 28 students, and the reduction of science class sizes in the "S" building to 24 students.

On October 17, 2005, Assistant Principal responded that, "there is adequate facility to safely meet the educational needs of the students as they are currently scheduled." Joint Exhibit 2 at page on.

On October 20, 2005, the Union filed this grievance at step two alleging that the Employer violated Paragraph 243 of the Master Agreement by assigning too many students to science lab classes, i.e., the number of students exceeded the number of work stations. The relief requested:

1. Students will be removed from these classes until the number of students assigned to the class is less than or equal to the number of student work stations.
2. The classes with all student work stations assigned will be closed and no new students will be added to them.

Joint Exhibit 2 at page 2.

On January 6, 2006, Superintendent Suzanne Klein denied the grievance and any violation of Paragraph 243. Joint Exhibit 2 at page 3. Her denial states, in relevant part:

[T]he district has consistently maintained the right to add additional work stations in any laboratory class as provided in the contract. To reinterpret paragraph 243 as setting a firm

class size limit for science, would not be consistent with the original intent of this language or our practice in applying it in the past or for the future to science or any other lab class.

Joint Exhibit 2 at page 3.

By letter dated February 3, 2006, the Union notified the Employer that the Executive Board had voted to take this grievance to arbitration. Joint Exhibit 2 at page 4.

On March 28, 2006, the Union filed a Demand for Arbitration with the American Arbitration Union (AAA). Joint Exhibit 2 at page 6.

On October 11, 2006, the arbitration was conducted at the High School A in City A, Michigan. Each party was provided ample opportunity to present evidence and argument. During the course of the arbitration, I toured the science classrooms at issue in this proceeding. Each party timely filed a post-hearing brief. On December 4, 2006, upon receipt of the briefs, the AAA declared the record closed.

RELEVANT CONTRACTUAL PROVISIONS

Article III. Rights of the Board

- (4) There is reserved exclusively to the Board all responsibilities, powers, rights and authority in it by the laws and constitution of Michigan and the United States or which have been heretofore properly exercised by it, excepting where expressly and in specific terms limited by other provisions of this Agreement, which rights shall include, by the way of illustration and without limiting the generality of the foregoing, the following:
 - (4a) To manage and administer the School District, its properties and facilities and to direct its administrators, teachers and other employees in the course of their duties.
 - (4f) To adopt the annual budget for the School District, and to submit to its electorate such propositions for authority to borrow monies or increase the constitutional tax rate limitation, and to levy such taxes, as it may deem necessary, and generally to exercise full control over the financial affairs of the School District.

Article X, Teacher Conditions

242. The Board recognizes [hat there are certain standards as relate to class size which

are desirable even though there is no empirical evidence which would support a given class size as universally best. Therefore, the Board pledges to exert its every influence, as it has been doing, to alleviate overcrowding of classes. Insofar as the community permits, the Board will continue to seek funds for additional staff and additional teaching facilities to meet increased enrollments and eliminate abnormally huge classes.

243. The Board agrees that it will exert reasonable efforts to effect elementary and secondary class sizes not greater than the average class size by subject arm and level which prevailed during the 1975-76 school year. See Appendix H. However, the number of students assigned to a class shall not exceed the number of student work stations. Additional work stations may be created by the administrator in consultation with the Department Chair. This provision shall also be applicable to counselor pupil ratios. If, in the opinion of the Union, there is an increase in class size resulting from the failure of the Board to exert such reasonable efforts as required by this provision the procedure provided under Article (Grievance Procedure) shall apply.

A.PPENDIX H

AVERAGE CLASS SIZE HIGH SCHOOL LEVEL 1975-76

SCIENCE:	SOUTH HIGH SCHOOL	26.0
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STATEMENT OF FACTS

Background

Bargaining History Regarding Class Size and Paragraph 243

During contract negotiations in about 1976, the Union proposed a class size limit of 32 students.

The parties were not able to reach agreement and their contract proposals went to Fact Finding.

On or about February 17, 1977, Arbitrator Edward Simpkins issued his Fact Finder's Report_

Employer Exhibit 17. He rejected the Union's class size limit proposal. Instead, he recommended the following language:

The Board agrees that it will exert reasonable efforts to effect elementary and secondary class sizes not greater than the average class size by subject area and level which prevailed during the 1975-76 school year. This provision shall also be applicable to counselor pupil ratios. If, in the opinion of the Union, there is an increase in class size

resulting from the failure of the Board to exert such reasonable efforts as required by this provision the procedure provided under Article (Grievance Procedure.) shall apply.

Employer Exhibit 17 at page 8.

The parties adopted the quoted language in paragraph 243 of the Agreement and it remained unchanged until the 2000-2004 contract. Joint Exhibit 3.

During contract negotiations in 1979, the Union again proposed a class size limit. This time it proposed a maximum of 27 students for all classes in grades 7 through 12. Employer Exhibit 15. The Employer rejected this proposal and it never appeared in the Agreement.

During the 1987 negotiations, the Union's proposal included a class size limit. Employer Exhibit 16. The proposed maximum number of students per class does not appear on this record.

In 2000, during the negotiation of the 2000-2004 Agreement, the Union proposed that the following language be added to paragraph 243:

However, the number of students assigned to a class shall not exceed the number of student work stations. A work station is defined as a computer in a lab, a place in a foreign language, science, life skills, or math lab.

Employer Exhibit 14.

The Employer accepted the first sentence of the Union's proposal, but rejected the second sentence defining "work station."

Ultimately, the parties agreed to add the following two sentences to Paragraph 243:

However, the number of students assigned to a class shall not exceed the number of student work stations. Additional work stations may be created by the administrator in consultation with the Department Chair.

Joint Exhibit 1 and 4.

The Planning and Construction of New Science Classrooms/ Laboratories

In 2001, the electorate of the Employer approved a bond issue resulting in the construction of new classrooms at High School A (South). The science classrooms feature a

lecture section with student desks in the front half of the room and a laboratory section with work stations in the rear of the room. With one exception, each classroom also has a separate teacher prep room and a teacher office. Joint Exhibit 5.

The science teachers at South were invited to provide input regarding the design of the science classrooms/labs, Science Department Chair Chairperson 1. Chemistry Teacher Employee 2, Earth Science Teacher Employee 3, and Physics Teacher Employee 4 each testified that they met with the architect during the planning stages and reviewed the architectural drawings. Much of their input was based on information and guidelines disseminated by the National Science Teachers Association (NSTA). Union Exhibits 11, 12, and 13. For example, one study conducted in Florida showed that the average class size in science classrooms found to be unsafe was 31, while the average class size for classrooms found to be safe was 24. Union Exhibit 11. The study concluded that increasing the number of students in a science laboratory increases the likelihood of accidents. Union Exhibit 11. Another article noted that the National Fire Protection Association recommended one student per 30 net square feet in each science classroom/lab. Union Exhibit 10.

Chairperson 1, Employee 2, Employee 3, and Employee 4 testified that they each understood, based on their meetings with the architects, that each classroom/laboratory would have 28 work stations and no more than 28 students. Additionally, Chairperson 1 and Employee 4 testified that School Administrator, Administrator 1 attended the first meeting in the spring of 2003. Employee 4 recalled that Administrator 1 nodded "yes" regarding the room size, i.e., that each classroom would accommodate 28 students. However, none of the teachers testified that any member of the administration promised that science class sizes would be limited to 28 students.

Drawings of the new science classrooms/laboratories show each has 28 work stations.
Employer Exhibit 5.

On the day of arbitration, 1 had the opportunity to view the new science classrooms/
laboratories. My tour of these classrooms/laboratories confirmed that each has 28 work stations.

The 2004-2005 School Year

During the 2004-2005 school year, the new science classrooms/laboratories were not
ready for use. A total of 1636 students enrolled in science classes. There were about 68 science
class sections. Of those, about 14 classes had more than 28 students. Thus, about 20% of the
class sections had in excess of 28 students. Science Department Chair Chairperson 1 testified
that the administration consulted with him regarding the number of students assigned to each
section. Employer Exhibit 6.

Events Triggering the Filing of the Grievance

The 2005-2006 School Year

Some of the new science classrooms/ laboratories opened during the 2005-2006 school
year. A total of 1583 students were enrolled in science classes. There were about 62 science class
sections. Of those, about 13 classes had more than 28 students. Thus, about 20% of the class
sections had in excess of 28 students. Employer Exhibit 7. The largest class size was 30 students
(three class sections). Employer Exhibit 7.

Chairperson 1 testified that, unlike the prior school year, the administration did not
consult with him regarding the number of students assigned to the new classrooms. The only
consultation involved what section would be placed where on the schedule.

The 2006-2007 School Year

All of the new science classrooms/laboratories were in use during the 2005-2006 school

year. As of September 21, 2005, a total of 1799 students were enrolled in science classes. There were about 62 science class sections. Of those, about 39 classes had more than 28 students. Thus, about (53% of the class sections had in excess of 28 students. Employer Exhibit 8. The largest class size was 33 (two class sections). Employer Exhibit 8. By October 11, 2006, the largest class size was 32 (six class sections).

Chairperson 1 testified that, as with the prior school year, the administration failed to consult with him regarding the number of students assigned to the new classrooms. The only consultation involved what section would be placed where on the schedule.

Stipulations and/or Facts not In Dispute

The parties stipulated that all science classes, except for physiology and microbiology, are full year courses. Although there is a new class list published each semester, most names on the list are the same.

The parties further agree that;

1. Over the period of time relevant to this dispute the School District has laid-off a number of teachers. All. but two, of the laid off teachers have been recalled; and
2. In general, class sizes are increasing in all subject areas.

POSITIONS OF THE PARTIES

The Union

The Union takes the position that the Employer violated Paragraph 243 of the Agreement by assigning students to science classes in excess of the number of work stations and by failing to consult with the Department Chair regarding the creation of additional work stations. It notes that, as a result of consulting with science teachers, the new science classrooms/labs were designed to have 28 work stations and that, in fact, each science classroom/lab was built with 28

work stations.

The Union points out that the evidence proves that during both the 2005-2006 and the 2006-2007 school years the administration assigned more than 28 students to some of the science classes. It also points out that the Employer failed each school year to consult with the Department Chair regarding the creation of additional work stations to accommodate the students in excess of 28. The Union stresses that the Employer does not even claim that it consulted with the Department Chair. Why the Employer failed to adhere to the contractually required consultation process is a "mystery" to the Union. The Union stresses that "had the 'consultation' process required by Paragraph 243 been followed and the number of 'student work stations' been increased as required there would never have been a grievance,"

The Union charges the Employer with "paying lip service to a desire to dialogue to discuss solutions" and with engaging in a blatant violation of its obligations under Paragraph 243.

The Employer

The Employer denies any violation of the Agreement. It maintains that the Union has not met its burden of proving the School District violated Paragraph 243 in assigning students to science classes. The Employer submits that the Union's case is "built entirely upon an alleged 'understanding' between certain of the Science teachers and the architectural firm retained by the School District, to the effect that the work stations language of Paragraph 243 ... would be applied in such a way that only 28 work stations would exist in each of the classrooms."

The Employer asserts that there are at least six reasons why this argument lacks merit: 1) the evidence does not reveal the alleged understanding. It notes that during the arbitrator's view Department Chair Chairperson 1 admitted that the number of "work stations" could be increased in the following ways; the teacher's demonstration area could be used by a student after the

teacher completed a demonstration; work stations which accommodate only two students in wheelchairs can be used by four students not using wheelchairs; sometimes laboratory activities are simultaneously ongoing in the main laboratory and in the separate prep area; and sometimes students are permitted to stand at lab tables. The Employer adds that the Union's witnesses were not consistent in their testimony regarding the alleged understanding,

2) The Employer argues, in the alternative that even if an understanding did exist such understanding did not constitute collective bargaining. 3) The Union's witnesses each testified that they were not told the number of students assigned to science classes would be limited to 28. 4) The "secondary sources" (Union Exhibits 10, 11, and 12) contain mere recommendations, not relevant to this case. 5) The Union's position that the Employer must add work stations and desks involves great expense and undermines the Board's rights to manage and control the facilities and to control the financial affairs of the School District. 6) The Union's argument "defies common sense" it lacks credibility to conclude that the School District agreed to limit the size of science classes and not the size of other classes.

Further, the Employer claims that evidence of bargaining history "belies" any conclusion that the School District agreed to any definite number of work stations under Paragraph 241 it notes that in 1977 the Fact Finder rejected a class size limit proposed by the Union. The language recommended by the Fact Finder was adopted by the parties and that language remained unchanged until 2000, in spite of several attempts by the Union to include a class limit and to define "work station." The Employer asserts that the Union cannot achieve at arbitration what it failed to achieve during negotiations, i.e., a class size limit. It also maintains that ambiguous language, such as what constitutes a workstation, must be interpreted against the drafter of that language. In short, the Union cannot transform the reference to work station into a statement

limiting class size, Moreover, the Employer contends that Paragraph 243 must be read in the context of the entire Agreement, specifically Paragraph 242, which addresses class size and its relationship to learning and to funding but does not impose any class size limit.

The Employer adds that the parties' actions since the "work station" language was added to the contract in 2000 contradicts the Union's position. As the Local President admitted, and as Employer Exhibits 6, 7, and 8 show, class sizes in all subject areas have been increasing. For example, in the 2004-2005 school year, 65% of the social studies class exceeded the Appendix H targeted number of 25.8 students, while only 35% of the science class exceeded the targeted number of 26.9 students. In the 2005-2006 school year, 69% of the social studies class exceeded the target number, while only 54% of the science classes exceeded the target number. In the current year, these figures increased to 92% for social studies classes and 83% for science classes. The Employer stresses two points: 1) in spite of the greater increases in social studies classes, no grievances have been filed; and 2) The highest number of students assigned to any science class is 32, a number which can be easily accommodated.

Finally, the Employer argues that discretionary managerial decisions, such as class size, can be reversed only upon a finding that the decision was arbitrary, capricious, or discriminatory. Here, there is no evidence that management acted in an arbitrary, capricious, or discriminatory fashion.

ANALYSIS

This case features two separate but intertwined issues. The first is whether the board has the right to assign more students than existing "work stations" to a science class. The second is whether the administration must consult with the Union whenever it assigns more students than existing "work stations" to a science class.

I will separately address each issue:

The Board's Right, In General, To Determine Class Size

In Article III of the Agreement, the parties recognized that the Board reserves certain rights. Of particular relevance to this case are the rights to manage and administer, the right to direct administrators and teachers, the right to hire and assign teachers, the right to establish levels and courses of instruction and to determine basic and generally accepted methods of instruction, and the right to adopt the annual budget, to submit bond issues to the public, and to fully control financial affairs. Implicit in its basic rights to manage, hire, assign, determine instruction, and plan the budget is the right to determine class sizes. Determining the number of teachers needed is necessarily a managerial decision based on consideration of a combination of factors, such as the size of the enrollment, the number of classrooms, and available monies. In turn, teacher assignments are determined according to the number of students, the number of courses, the number of classrooms, and class sizes. Thus, in order to exercise its basic rights to manage, hire, assign, and to determine instruction and the budget, the Board must have the right to determine class sizes.

Although there is no language in the Agreement that explicitly provides that the Board has the right to determine class sizes, this right is implicitly recognized by the parties in Paragraph 242. In that provision, the Board recognizes certain standards regarding class sizes and pledges to avoid "overcrowding" and to seek funding for additional teachers to eliminate "abnormally large classes." Paragraph 242 would be meaningless unless the Board has the unilateral right to determine class sizes. The inclusion of Paragraph 242 indicates the Union's recognition that the Board has the right to determine class size_ if the Union did not recognize the Board's right to determine class size, there would be no need to negotiate the assurances and

pledges it contains.

Restrictions Upon the Exercise of the Employer's Rights

However, the right to determine class sizes is not absolute. Rather, there are both implied, unwritten restrictions, and explicit restrictions stated in the Agreement. Implicit in the exercise of any managerial right is the rule of reasonableness, the obligation to act in good faith and not arbitrarily, capriciously, or discriminatorily. See, S. Antoine, *The Common. Law of the Workplace*, BNA, 2nd Ed., Sections 2.13 and 3.2.

General restrictions are set forth in Paragraph 242 where the Board recognizes "certain standards" and pledges to avoid "overcrowding" and to "eliminate abnormally large classes." The most specific, written restrictions are stated in Paragraph 243, as follows:

1. The Board will exert reasonable effects to keep class sizes by subject area and level in line with those prevailing in the 1975-76 school year.
2. The Board will not assign more students to a class than the number of student work stations.
3. The Board may create additional work stations in consultation with the Department Chair.

Appendix 11 indicates that science class sizes at South High School in 1975-1976 were 26 students. However, the Union does not claim violation of this, the first restriction in Paragraph 243. Rather, it maintains violation of the second and third restrictions.

The Second Restriction in Paragraph 243

In spite of the class size indicated in Appendix (26 students), the Union's position in this case discloses that it finds 28 students per science class to be an acceptable class size. It protests adding students in excess of this number. Its position is based on the Union's assertion that the parties reached an "understanding" during the pre-construction planning stage that only 28 students would be assigned to each science classroom/laboratory. According to the Union this understanding is evidenced by the fact each science classroom was designed and built with 28

stations for laboratory work.

Other than the language in Paragraph 243 referring to the class sizes in Appendix H as a guideline, the parties have never entered a written agreement setting a limit on the number of students, who could be assigned to a class. The bargaining history reveals that the Union has sought unsuccessfully to impose class size limits during three different negotiations. The Board rejected all proposals. The reference to Appendix H was language recommended by the Fact Finder in 1977 when he rejected the Union's proposal to limit class sizes to 32 students. During subsequent negotiations in 1979 and 1987, the Union again attempted to establish a contractual class size limit. In 1979, the number proposed was 27 students.

So, this dispute turns on determining whether the language added in 2000, combined with the alleged understanding, had the result of imposing a 28 student limit for science classes. In 2000, the parties added the following two sentences:

However, the number of students assigned to a class shall not exceed the number of student work stations. Additional work stations may be created by the administrator in consultation with the Department Chair.

I shall refer to this addition as the work station language.

I find no basis for imposing a 28 student class size limit. First, there is no evidence on this record that the parties discussed a particular number Of students per class when they agreed to add the work station language to Paragraph 243. Additionally, they added this language long before the architects submitted any designs showing 28 work stations in the science classrooms. Second, the evidence is not sufficient to prove that the parties reached an understanding that a 28 student limit would be added to the contract. The evidence shows that the teachers working with the architects understood that each science classroom would have 28 stations in the laboratory area of the room. However, the evidence does not establish that representatives of the Union met

with representatives of the Board and agreed to modify the Agreement by imposing a 28 student limit. To be effective, any modification must be jointly negotiated. There were no joint negotiations. The fact that each science classroom has 28 stations in the laboratory merely evidences the architects' intent. It does not evidence the intent of the parties to modify the Agreement by adding a 28-student science class limit.

Third, the work station language in Paragraph 243 does not operate as an absolute limitation on class size. Standing alone, the first sentence appears to be absolute: no more students than work stations. However, the parties did not define work station or agree how to count work stations. The Union proposed to define "work station" as a "computer in a lab, a place in a foreign language, science, life skills, or math Lab." But, the Board rejected this proposal and the contract contains no definition of work station.

More importantly, the second sentence added in 2000 makes clear that, however defined or counted, the Board may add work stations. The necessary implication of the Board's right to add work stations is that the Board may assign more students per class than the number of work stations already existing at the time class size is determined. The two sentences must be read as a whole. When read together, there is no absolute limit on the number of students per class. The only absolute limit, based on the first sentence of the new language, is that there must be a work station for each student. This is not the same as limiting the number of students because the Board has the flexibility to increase the number of work stations to accommodate any increase in the number of students.

The Third Restriction in Paragraph 243

The third restriction stated in Paragraph 243 is a procedural one. Whenever the Board adds work stations because it has assigned more students than existing work stations, it must do

so in consultation with the Department Chair. The duty to consult is clear and unambiguous. The first sentence of the work station language makes clear that the Board cannot avoid its duty by adding students in excess of the existing number of work stations without increasing the number of work stations. Each student must have a work station, according to the first sentence of the work station language. The problem is how to define or count work station, which the parties failed to define when they added the work station language.

Absent any agreement between the parties, the job of defining "work station" falls to the arbitrator. In such situations, I look to the plain and most obvious meaning of a term. Here, work station obviously refers to a place where a student has sufficient space and equipment to learn and to accomplish whatever experiment or task is assigned. The precise determination of whether there is a place with sufficient space and equipment is best left to the parties to handle on a case-by-case basis. However, I want to stress that "creating" additional work stations does not necessarily mean designing and constructing new work stations. Less drastic options can be pursued to "create" additional work stations. For example, where no students in a class use a wheelchair, more students can be assigned to the work station designed to accommodate only two students in a wheelchair. Or, a student can use the teacher's demonstration area or the prep area to conduct an experiment. At a minimum, a student should have a place to sit where he or she can also write or complete an assigned task.

The Reasonableness Restriction

The final question is whether the Board has acted reasonably in assigning more than 28 students to science classes. I find that the Board has acted reasonably. There is no evidence of bad faith, or any arbitrary, capricious, or discriminatory action. In fact, the increases in class size have been less in the science department than in other departments. Additionally, I note that no

more than 32 students have been assigned to any one science class. (In 1976, the Union proposed this number as a class size limit) Further, my tour of the classrooms persuades me that each room is large enough to accommodate four students more than the 28 places the work stations were designed to handle. As discussed above, stools can be added to existing work stations, several more non-wheelchair using students can use the work stations designed for wheelchair using students, and the teacher demonstration and prep areas can be converted for student use. Most important, there is no evidence on this record that the health or safety or learning ability of any student has been adversely affected by being placed in classes with more than 28 students.

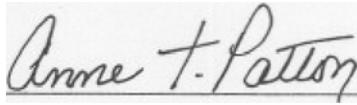
CONCLUSION

I conclude that the Employer did not violate Article X, Paragraph 243 of the Agreement by assigning more than 28 students to science classes during the 2005-2006 and 2006-2007 school years. The Board has the right to determine class size. The parties have never agreed upon or imposed a class size limit. Assigning 28 students to certain science classes meets the standard of reasonableness.

However, I further conclude that the Employer did violate Article X, Paragraph 243 of the Agreement by failing to consult with the Department Chair regarding the creation of additional work stations in those classes where more than 28 students were assigned.

AWARD

1. The grievance is granted in part and denied in part.
2. The Board is ordered to consult with the Department Chair regarding the creation of work stations in those classes where more than 28 students have been assigned.
3. This order applies to the remainder of the 2006-2007 school year and all school years in the future.

A handwritten signature in cursive script, reading "Anne T. Patton", written in dark ink on a light-colored background.

Anne T. Patton, Arbitrator

Dated: January 11, 2007