

**BEFORE
SEYMOUR STRONGIN
ARBITRATOR**

November 20, 2007

In the Matter of the Arbitration between-

**MONTGOMERY COUNTY BOARD
OF EDUCATION**

-and-

MCEA Grievance 2007-06: IRT Scheduling

**MONTGOMERY COUNTY
EDUCATION ASSOCIATION**

APPEARANCES:

For the Board:

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For the Association:

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Montgomery County Education Association (“MCEA”) charges in this grievance that the Board of Education of Montgomery County (“Board”), since the 2006-2007 school year and continuing during the current school year, has

been in violation of Article 16, Section F(2) of the parties' Agreement by scheduling certain Interdisciplinary Resource Teachers ("IRT's") at certain middle schools to teach more than four classes.¹ The Association asks that the Board be found to be in violation of this provision of the Agreement, and that all affected IRT's be made whole for their losses. In addition to opposing the grievance on the merits, the Board asks that, in the event of a ruling favorable to the Association, a separate hearing be held on the measure of damages, if any.

The facts of this case are not in any substantial dispute. In 1987, secondary schools were for the most part organized around a seven period per day schedule, with that same schedule followed each day. For ease of reference, this traditional schedule will be referred to as "7/1". There were some schools, apparently, operating on a six-period schedule, and some reference to a six-period schedule in the Agreement at that time. As still provided in Article 16, Section F(1.a), regular classroom teachers in 7/1 schools were required to teach no more than five classes per day: "Where the school is organized on a seven period schedule, each classroom teacher will be assigned no more than five regular classes."

In recognition of the fact that IRT's have more responsibilities than regular classroom teachers—including working a longer school year and a longer work day and earning greater pay—in 1987 the parties agreed in Article 16, Section F(2) to provide IRT's with additional daily planning time, as follows: "Secondary resource teachers ... will have a reduced teaching schedule, when possible, except in no case will they be required to teach more than four classes."

¹ The class of grievants is defined as those employees bearing Position Code 1054.

This express limitation to teaching no more than four classes has remained unchanged since that time.

In 1999, there began to be a change from the traditional 7/1 schedule to so-called “block scheduling,” where a school might have seven or eight classes taught over a two-day period, referred to herein as 7/2 or 8/2 schedules. During these negotiations, the parties deleted from the Agreement the reference to six-period schedules, and added specific contractual language for changing from 7/1 schedules to the new block schedules. Among other changes to the Agreement, the parties added language to preserve teachers’ planning time. Specifically, in what was then Article 15.F(1) but now is found at Article 16.E.1, they agreed that, “Although the parties to this agreement endorse flexibility in the use of time, changes in the structure of the student day may not reduce the amount of daily planning time for secondary teachers. ... At the secondary level, teachers may volunteer to accept a schedule that guarantees weekly rather than daily planning time.”

Also in 1999, the parties added to their protection of IRT planning time, now found at Article 16, Section F(2), by adding the provision that, “When possible, the principal, in consultation with the school leadership team, may provide additional release to RT/IRT/Ads based on the size of their departments and responsibilities.”

So far as this record shows, there were no changes to the relevant provisions during the term of the 2002 Agreement, and only minor changes in the 2005 Agreement. Specifically, at Article 16, Section F(4), the parties agreed in 2005 to try to find extra planning time for secondary classroom teachers with more than three separate preparations and/or an unusually large student load.

The County has treated the 7/2 schedule identically to the traditional 7/1 schedule for purposes of Article 16, Sections E(1), and F(1.a) and (2), in that regular classroom teachers have been required to teach five periods per seven-period schedule, and IRT's have not been required to teach more than four periods per seven-period schedule, regardless of whether that seven-period schedule plays out over one day or two. While there may be slight differences in the time requirements, it is accepted by the parties that the 7/2 schedule preserves the classroom teachers' daily planning time.

In the case of 8/2 schedules, the record shows that the parties, without dispute, have applied, by implication or extrapolation, the language of Articles 16.E.1 and 16.F.(1a) to the regular classroom teachers. In practice, regular classroom teachers are assigned to no more than six regular classes, leaving them with two non-teaching periods per schedule rotation. Notwithstanding the fact that planning time is slightly reduced under the 8/2 schedule than under the 7/1 or 7/2 schedule (those who teach 6/8's of a workday teach more minutes than those who teach 5/7's of the same workday), so far as this record shows the Association apparently has accepted the application of these provisions to the regular classroom teachers.

In the action giving rise to this grievance, instead of limiting IRT's to the express four class maximum of Article 16.F.2 when they work in 8/2 schools, the County permitted IRT's to be scheduled to teach as many as five classes on the theory that IRT's still are teaching one fewer class per schedule than their regular classroom teacher counterparts who teach six of eight periods under the 8/2 schedule. As the County views it, Articles 16.F(1.a) can be applied by implication to any particular block schedule, and 16.F(2) guarantees no more than that IRT's

will teach one fewer class per day than regular classroom teachers, whatever number that happens to be under a particular block schedule. That is, Article 16.F(1.a) and 16.F(2) provide no specific limitation on the number of classes regular classroom teachers and IRT's may be required to teach once a school departs from a traditional 7/1 schedule.

Of note, of 64 secondary schools in the County, only six employ IRT's who are teaching more than four classes. In those six schools, there are approximately 48 IRT's, and only approximately 33 of them are teaching more than four classes.

Finally, it bears noting that both parties were aware during their recently-concluded negotiations (resulting in the 2007 Agreement) that certain IRT's were teaching more than four classes, but neither party proposed any change to the language of Article 16.F. Apparently, the County believed it was within its rights in scheduling the IRT's as for the most part it was, and the Association chose to challenge that interpretation through the arbitration process. This proceeding follows.

The Association principally contends that the language of 16.F(2) clearly and unambiguously provides that the IRT's may not be required to work more than four classes, requiring a finding that the Board is in violation of the Agreement. As a corollary, the Association argues that the Board's attempt to portray this provision as simply providing a reduced teaching schedule, untethered to the four-class maximum, is not supported by any evidence and cannot be reconciled with the clear language of the provision. Rather, the Association argues that the Board's proffered interpretation of the intention of the provision—that it does not establish a fixed maximum, but only evinces an intention to reduce the

workload below that of regular classroom teachers—would render the plain language meaningless.

The Association argues, however, that even if the Arbitrator considers extrinsic evidence such as the parties' bargaining history and existing practice, that evidence substantiates the plain language of the provision and provides the same result. With regard to the parties' bargaining history, the Association argues that both parties were aware of the effect of block schedules on teacher workload and planning time, but chose not to negotiate any change to the four-class maximum of Article 16.F(2). Rather, as the Association points out, the Association regularly sought to protect and increase planning time in the various negotiations since 1987, and in fact won in 1999 additional commitments from the Board to provide additional release time for IRT's when possible. As for the parties' practices, the Association argues that the Board has shown that it can implement the four-class maximum for IRT's in its secondary schools, including those schools using the 8/2 schedule.

The Board, for its part, characterizes the Association's insistence on strict construction of the language of the Agreement as inconsistent with years of the parties' course of dealing and bargaining history, and contrary to the simple fact that eight-period block schedules did not exist at the time the language was added to the Agreement. The Board first argues that the Arbitrator must consider the disputed provision in light of its relationship to other provisions, and not in a vacuum divorced from its history and underlying intention. As the Board views the matter, the seven-period schedule is the direct predicate for the four-class maximum for IRT's, and, in the absence of any expression of intent regarding the relationship between the four-class maximum and an eight-period block schedule,

the conceptual relationship between the workloads of IRT's and regular classroom teachers—that IRT's “teach one less class than regular teachers”—must be preserved, just as it has been since 1999.

The Board further argues that the Association's strict construction of Article 16.F(2) is contrary to the parties' commitment to flexible scheduling so as to maximize student achievement, whereas the Board's position allows the parties to pursue flexible scheduling even while protecting IRT's required daily planning. In this regard, the Board suggests that the Association's position in this matter threatens school budgets and imperils the continued use of the eight-block schedule.

The Board also contends that the Association's position is inequitable, as some IRT's would gain a windfall of planning time not shared by their colleagues at non-8/2 schools, whereas they presently enjoy roughly equivalent non-teaching time.

The Board further argues that the four-class maximum provision must be read as limited to the 7/1 schedule referenced in Article 16.F(1.a), rendering the provision ambiguous as it relates to the eight-period schedule. In a similar vein, the Board contends that although schedules are divided into periods, the disputed maximum speaks instead to classes, apparently contending that there is an intended difference between classes and periods, which in the context of block schedules renders the four-class maximum inapplicable.

Finally, the Board contends that the Association has sand-bagged the Board by choosing not to raise this issue during the recent negotiations. As the Board views the matter, this deliberate avoidance of the bargaining process is inequitable and should not be rewarded.

As the parties of course are aware, the Arbitrator's authority derives from the Agreement, and the legitimacy of this arbitral process depends on fealty to that Agreement. The Board generally is correct that the parol evidence rule does not strictly apply in arbitration proceedings, and that an Arbitrator ought to be mindful of a particular provision's place in the context of the entire Agreement. The purpose of viewing a provision in the context of the Agreement, however, is not to search out creative interpretations of otherwise plain language in furtherance of some unexpressed intention and undefined conception of equity. The Arbitrator's purpose in looking beyond the immediate terms of a disputed provision, rather, is to search for the parties' apparent intention with regard to a particular disputed issue where the language of the Agreement appears not to provide a ready answer, in the hopes that some other provision might provide some guidance. As these sophisticated negotiating partners know well, the collective bargaining process is not a guarantor of equity; rather, it is a guarantor of the parties' respective rights to strike the very best deal that they can, on a presumed level playing field within a framework of basic procedural fairness.

Here, the Board's urgings that the Arbitrator must search beyond the plain terms of Article 16.F(2) to determine whether IRT's properly are scheduled to teach more than four classes betrays its dissatisfaction with the result of application of that clear provision, but does not persuade the Arbitrator to conclude that the provision means other than what it expressly provides. The Agreement states, "in no case will [secondary resource teachers] be required to teach more than four classes." There is nothing ambiguous about that provision as it is written, and the Arbitrator is duty bound to enforce it as written. The provision only invites charges of ambiguity when it is viewed in context with other

provisions and the parties' practices, and even then the Arbitrator is persuaded, for the reasons that follow, that the Board has violated Article 16.F(2) by scheduling IRT's to teach more than four classes.

First, the Arbitrator of course is mindful that the four-class maximum language was added to the Agreement at a time when eight-period schedules did not exist, and so readily concludes that the parties' did not have any intention to apply the language to such schedules. It is unreasonable, however, to suggest that the limiting language of Article 16.F(1.a) therefore is meaningless as it applies to this case. Principally, this is because the language is a stand-alone provision, and does not depend on any other provision to provide context or meaning. It says that IRT's will not be made to teach more than four classes, and that language was known to the Board through successive collective bargaining agreements, including those that followed the advent of the eight-block schedule, yet the Board chose not to suggest any changes to the provision. Given the sophistication of these two bargaining partners, both of whom are able to plan and implement complex bargaining strategies, the better view is that the parties, for whatever strategic reasons of their own, chose not to seek a change to the language of Article 16.F(2).

Neither is the Arbitrator persuaded that the limiting language of Article 16.F(1.a), "Where the school is organized on a seven period schedule," similarly limits the other provisions of Section F or otherwise creates ambiguity with regard to those provisions. That limiting language is contained solely within the confines of Paragraph 1.a, and does not apply to the other provisions of Article 16, Section F.

Nor is the Arbitrator persuaded that Article 16.F(2) bears any necessary proportional relationship to the seven-period schedule, notwithstanding the fact that the parties perhaps agree on the proper scheduling of regular classroom teachers under the eight-block schedule. Although Article 16.F(1.a) provides explicit guidance on how many classes a regular classroom teacher will teach under a seven-period schedule, it provides no explicit guidance on how many periods regular classroom teachers will teach under a 8/2 block schedule. The Board argues that it extends Article 16.F(1.a) to the 8/2 block schedule, and by implication it should carry that same proportional relationship over to IRT workload, so that IRT's just would be guaranteed that they will work one fewer class than the regular teachers, regardless of what schedule the school may be following.

The difficulty with this argument is that the Board ignores the fact that its application of 16.F(1.a) to the 8/2 schedule cannot be separated on this record from the provision of Article 16.E(1), which guarantees that "changes in the structure of the student day may not reduce the amount of daily planning time for secondary teachers." Under a baseline 7/1 schedule, a regular classroom teacher teaches no more than five classes, providing the necessary context for understanding and applying Article 16.E(1), *i.e.*, regular classroom teachers normally get two periods of non-teaching time in a 7/1 schedule, and any change from the 7/1 schedule may not reduce the teachers' planning time. As it happens, teaching six of eight periods in a schedule is roughly the equivalent of teaching five of seven periods, or at least is close enough for the Association to accept in light of its commitment to be flexible with regards to scheduling. The point is, however, classroom teachers in an 8/2 school teach six periods rather than five not

because of any requirement in Article 16.F(1.a)—16.F says nothing about how many classes a teacher will teach in an eight-period block schedule—they teach six rather than five periods in such schedules because the planning time guarantee of Article 16.E(1) guarantees that they may not be required to teach as many as seven out of eight, and because nothing guarantees their right to teach as few as five out of eight. The fact is, no clear answer is provided under the Agreement for how many periods a regular classroom teacher must teach under a 8/2 block schedule, so the parties presumably have done their best to extrapolate an answer from relevant provisions. In any case, the Agreement does not mandate any fixed relationship between the planning time of classroom teachers and IRT's.

Unlike regular classroom teachers whose workload in block schedule schools must be extrapolated from the application of planning time guarantees to their workload under the seven-period schedule, the IRT's workload is expressed instead as a maximum untethered to any particular schedule, and that clear expression of a four-period maximum conflicts with the Board's effort to redraw the provision in order to tie it directly to the seven-period schedule. As the Board would have it, all that Article 16.F(2) provides is that IRT's will teach one fewer class than regular classroom teachers, however many classes that may happen to be under any particular schedule that may be implemented. But that is not what Article 16.F(2) provides in language or by fair implication. Moreover, comparison of the actual language of Article 16.F(2), "in no case will they be required to teach more than four classes," with the Board's proffered interpretation of that language, "teach one less class than regular teachers," shows just how thin the Board must stretch its case.

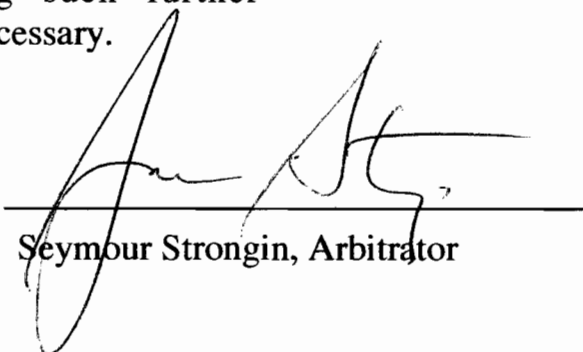
The Arbitrator also cannot accept the Board's claim that the Association's grievance must be rejected in favor of the Board's alleged consistent practice of allocating only a single release period for each IRT in the eight years since 1999. The Board's allocations, of course, are a budgetary matter. While the number of non-teaching periods allocated to IRT's doubtlessly bears a budgetary cost, the four-class maximum provision of Article 16.F(2) is not made to be dependent on budgetary concerns. In any case, the Board's position in this regard—as well as its contention that the Association's claim creates inequities between IRT's—does not withstand scrutiny invited by the evidence that IRT's are treated inconsistently not only from one school to the next, but also within each school. The parties, collectively and individually, regularly allocate available resources as they think best and circumstances warrant. The parties, as do parties in any bargaining relationship, have difficult decisions to make, and sometimes that includes extending a benefit to one group that is not, for whatever reason, extended to another. In this particular regard, it bears noting that Article 16.F(2) expressly provides for just such “inequitable” treatment of IRT's, as individual principals are empowered to provide additional release time to individual IRT's based on department size and responsibilities. This is not a guarantee of across-the-board reductions within a school for all IRT's.

Finally, the Board makes much of the claim that the Association has “sandbagged” it, and should be rebuked rather than rewarded for that conduct. Both parties acknowledge that they were aware of the problem of IRT scheduling in the 8/2 schedule, yet neither party chose to address the issue at the bargaining table. It is true that the Association could have raised the issue, but it also is true that the Board could have raised the issue. When the issue is viewed in context of

the parties' actual practice under the prevailing terms of the Agreement—with evidence of inconsistent scheduling of IRT's throughout the secondary schools and within single schools, compounded by differing bases for those differing schedules due to the operation of other budgetary discretion—that appellation could just as well apply to the Board.

DECISION

The grievance is sustained. The Board is in violation of Article 16, Section F(2) by requiring certain IRT's at eight-period block schedule schools to teach more than four classes. Pursuant to the Board's request, the question of appropriate remedy is returned to the parties for settlement in the first instance. Within 30 days from the date of this Award, either party may return the matter to the Arbitrator for final decision, including such further hearing as may be necessary.



Seymour Strongin, Arbitrator

Washington, D.C.