

STATE OF CONNECTICUT.
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

In the matter of

BLOOMFIELD BOARD OF EDUCATION

and

BLOOMFIELD EDUCATION ASSOCIATION

Case No. TPP-12,282

Decision No. 2832

August 3, 1990

A P P E A R A N C E S :

Neil **Macy**
for the Board of Education

William J. Dolan, Attorney
for the Association

DECISION AND ORDER

On July 12, 1989, the **Bloomfield** Education Association filed with the Connecticut State Board of Labor Relations (the Labor Board), a complaint alleging that the Blocanfield Board of Education had refused to bargain concerning the scheduling of non-instructional teacher professional development days for the 1989-90 school year, a refusal which constitutes a violation of C.G.S. Section **10-153e(b)**.

After the requisite preliminary administrative steps had been taken, these cases were brought before the Labor Board for a formal hearing. The hearing was held on December 4, 1989. Both parties were represented at the hearing and were provided a full opportunity to adduce evidence, examine and cross-examine witnesses and **make** argument. Both parties filed written briefs, the last of which was received on February 13, 1990.

On the basis of the whole record before us, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The Bloomfield Board of Education is an employer within the meaning of the Act.

2. **The** Blocanfield Education Association is an employee organization within the meaning of the Act, and at all times relevant to this case has been the exclusive bargaining representative of a unit of certified teachers.

3. The teachers' unit has been covered by successive contracts, **including** the current contract for the term July 1, **1989-June 30, 1992**, and the prior contract for the **term July 1, 1987-June 30, 1989.**¹

4. In past years, the school calendar had specified days for student attendance as well as non-instructional work days when only teachers and administrators were required to attend. On several of these **non-**instructional work days, -attendance at-professional **development** programs was required, and these days are typically referred to as either "in-service" days or "professional development" days.

5. In **some** past years non-instructional work days have also been scheduled for the day before students arrive in the fall, and the day after the students end their school year. These days did not involve any **development** programs.

6. In the spring of 1989, Paula Kuenzler, who was the Association President, learned that the Superintendent's proposed school calendars for 1989-1990 and 1990-1991 were on the agenda for the **Board** of Education's April 4, 1989 meeting.

7. **The** proposed calendars were attached to the agenda which Kuenzler received as a matter of routine from the Superintendent.

8. Among other things, the Superintendent's calendar for 1989-90 included 1) teacher professional **development** days scheduled on October **27th**, January 26th and March **23rd**, and 2) a scheduled February vacation for students and teachers which included a full week off followed by a Monday holiday.

9. **The** agenda also contained a summary of responses received from a poll of the various school **PTO's**, the teachers' association, and the administrators' association.

¹ Upon request of the Labor Board after the hearing, the 1987-1989 contract was placed in evidence. The Association advised that it had no **objection** to this evidence, which was introduced by the Board of Education. Both parties submitted letters **commenting** on the relevance of this contract. The last letter was received on June 22, 1990.

10. **The** poll dealt with preferences on a number of calendar items, including starting school prior to Labor Day, winter (i.e. February) vacation and spring vacation. Both the teachers' association and the administrators' association desired a winter vacation.

11. At its April 4, 1989 meeting, the Board of Education rejected the Superintendent's proposed calendar and approved a different one which evolved from the discussion at that meeting.

12. The **amended** calendar adopted by the Board of Education included a one week student vacation in February, but it scheduled two teacher professional development days during that week, leaving teachers with three **days vacation**.

13. The number of teacher work days under either calendar was 183.

14. The adopted calendar was a compromise which arose after the Board took the initial position at the April meeting that it did not want to have any February vacation. **This** preference was based on a number of factors, including the Board's concern about home supervision during vacations, and the late-June closing which results from a February vacation.

15. Union President Kuenzler was present in the audience at the April 4 meeting.

16. At some point during the Board discussion, the Board chairman turned to Kuenzler and asked her reaction to the professional days being put into the February vacation. Kuenzler responded that it would certainly not help teacher or staff morale.

17. Kuenzler otherwise was silent at that meeting in the face of the revised calendar which was ultimately adopted.

18. **The** Association did not agree to the scheduling of the professional days in the February vacation or on October 27, the days contained in the adopted 1989-90 calendar.

19. By letter of May 4, 1989, the Association requested "midstream bargaining over the professional calendar" **(Ex.6)**.

20. By letter of May 10, 1989, Superintendent Paul Copes asked for clarification concerning the Association's request stating in pertinent part:

"..I don't understand the rationale/need for negotiations. More specifically, I **would** appreciate your 1) pointing out the impact of the approved calendar on the teaching staff and, 2) how this impact leads to your desire for midstream bargaining."

(Ex.7)

21. By memorandum of May 16, 1989, the Association replied:

"The Association has the right, as outlined in the Teacher Negotiation Act 10-153, to negotiate over teacher hours.

This language refers to time which is not student contact time and is defined in paragraph (b) section **10-153d** under the title: **DUTY TO NEGOTIATE**. Further, the legislation not only allows the bargaining unit to negotiate over teacher time beyond the student day but also provides for negotiations over that part of the calendar which does not affect the student calendar, specifically the professional **development** days. The Association is clearly not asking to bargain over the student calendar or the student day.

I trust you have a recent copy of the **Teacher** Negotiation Act and that this answers the questions raised in your letter of May 10th."

(Exhibit 8)

22. **On** June 7, 1989, representatives of the parties met to discuss the Association's request for midstream negotiations.

23. By letter of June 9, 1989, the Superintendent replied that the Board would not "mid-term bargain on this issue" and gave an extensive explanation of the bases of its refusal. (Exhibit 9)

24. **The** Superintendent's letter cited several reasons for the decision not to bargain, which may be summarized as follows:

1) that the Board has a past practice of setting the calendar and that the Union should have made the claim that this was bargainable the year before, after the statutory amendment to include "hours" as a mandatory subject of bargaining.

2) that the Association should have raised the demand to bargain in the prior contract negotiations.

3. that the Board had been and would remain open to suggestions.

4. that negotiating the dates with the Association could lead to a prohibited practice charge by the administrators' association since the dates the teachers' association suggested would fall on the administrator's holiday.

STATUTORY & COLLECTIVE BARGAINING HISTORY

26. Effective July 1, 1987, the **Teacher** Negotiations Act was amended to include teachers' hours, with certain specific exceptions, among the mandatory subjects of bargaining. Public Act 87-250 specified:

The local or regional board of education and the organization designated or elected as the exclusive representative for the appropriate unit, through designated officials or their representatives, shall have the duty to negotiate with respect to salaries, **HOURS**, and other conditions of employment about which either party wishes to negotiate. **FOR PURPOSES OF THIS SUBSECTION AND SECTIONS 10-153b, 10-153b, 10-153e, 10-153g, 10-257b AND 10-257e, AS AMENDED BY THIS ACT, "HOURS" SHALL NOT INCLUDE THE LENGTH OF THE STUDENT SCHOOL YEAR; THE SCHEDULING OF THE STUDENT SCHOOL YEAR; THE LENGTH OF THE STUDENT SCHOOL DAY; THE LENGTH AND NUMBER OF PARENT-TEACHER CONFERENCES; AND THE SCHEDULING OF THE STUDENT SCHOOL DAY, EXCEPT FOR THE LENGTH AND THE SCHEDULING OF TEACHER LUNCH PERIODS AND TEACHER PREPARATION PERIODS.**

26. The 1987-1988 calendar was the first calendar operating after the statutory amendment concerning "hours".

27. If the 1987-88 calendar was adopted in the spring of 1987, its adoption would have **pre-dated** the effective date of the statutory **amendment**.

28. Although the record does not indicate when the 1987-88 calendar was adopted, if it was adopted in the spring of 1987, its adoption would have pre-dated the effective date of the statutory amendment.

29. There was no request by the Association to bargain concerning the 1987-1988 teacher calendar or professional days.

30. The Association President testified **that there** was no request to negotiate because there was no **"change"** and no concern with actual choice of professional days. In the 1987-1988 calendar, these professional days did not intrude on any traditional school vacation or holiday.

31. The 1988-1989 calendar was adopted by the Board using the same procedure as in 1987-1988.

32. There was no request to bargain over the 1988-89 professional calendar or in-service days. According to the Association, as in 1987-1988, this was because there was no **"change"** and no concern over the actual choice of professional days.

33. There was no week-long February vacation for either teachers or students in 1988 or 1989.

34. In the negotiations held in the fall of 1988 for the 1989-1990 contract, the Board of Education made a proposal to eliminate the **"work day"** for teachers which had traditionally been held on the day after students ended the school year. The Board expressed its plan to use this teacher work day during the year as an in-service day.

35. **During** the fall 1988 negotiations, this was the only discussion which specifically involved the days on which teachers worked and students were not in attendance.

36. **The** subsequent arbitration award included the Board of Education proposal to eliminate the end-of-year work day.

37. **The** record does not reveal which portions of the contract resulted from an arbitrator's award and which arose **from** agreement of the parties.

38. **The** record does not reveal the date of that award, although reference to it in the Superintendent's June 9, 1989 letter reflects that the award pre-dated that letter.

39. **The** 1989-1992 contract contains the following provisions in Article VIII, Section F (Exhibit 2) concerning the work year:

F. Work Year

2. During the work year, all teachers shall be allowed the vacations and holidays as determined by the Board of Education, after conferring with the Association.

3. A shortened day shall be scheduled immediately preceding Thanksgiving and also the last school day for students. **The** last work day for teachers shall be the last day of student attendance. Teachers may leave on that day after, students are dismissed and all their record keeping is completed.

4. Prior to the adoption of the calendar, the Board shall consult with the Association.

40. **The** 1987-1989 contract contained only the following provisions concerning "work year":

F. Work Year

1. The work year of teachers covered by the teacher salary schedule (other than new personnel who may be required to attend additional orientation sessions) shall not exceed 184 days.

2. **During** the work year, all teachers shall be allowed the vacations and holidays as determined by the Board of Education after conferring with the Association.

3. A shortened day shall be scheduled immediately preceding Thanksgiving and also on the last day of school.

CONCLUSIONS OF LAW

1. The scheduling of non-instructional teacher work days, including "professional **development**" or "in-service" days, involves "hours" within the meaning of the Teacher Negotiations Act, as amended by Public Act 87-250, and thus is a mandatory subject of bargaining.
2. **The** scheduling of professional development days within the Bloomfield school calendar in April, 1989, constituted a mandatory subject of bargaining about which the Board of Education was required to bargain upon a timely request of the Bloomfield Education Association.
3. The Bloomfield Education Association made a timely request to bargain.
4. The 1987-1989 collective bargaining agreement is the contract applicable to the instant dispute.
5. **The** 1987-1989 contract did not provide for the unilateral setting of the professional calendar or in-service days.
6. The Association did not otherwise waive its request to bargain concerning establishing a professional calendar in the spring of 1989.
7. The Board of Education **committed** a prohibited practice by refusing to bargain upon request by the Association concerning scheduling of professional development days.

DISCUSSION

For decades, establishing school calendars has been a recurrent controversy in public education. Disputes on this topic, which involve many different interest groups, are often emotionally charged. Thus, while the limited issue before us is a legal one about the duty to bargain over the scheduling of the Bloomfield teachers' non-instructional days, we are aware that the controversy probably is heightened by emotions. The teachers may be dismayed that a desired "February vacation" was in the same moment gained and eaten away by the inclusion of two in-service days. **The** Board of Education is dismayed that there is any dispute at all—especially since there **would** probably have been no February vacation if two days hadn't been used for "in-service". For many years this type of controversy was usually remote from the bargaining table because "hours" of teachers were not mandatory subjects of bargaining. However, in 1987, an amendment to the Act made "hours" of teachers a mandatory subject of bargaining, with certain exceptions which **primarily** exclude from bargaining aspects of the student school day and year.² It is this statutory change which occasions our involvement in this dispute.

² Public Act 87-250.

The parties are in agreement that in the abstract, the scheduling of non-instructional teacher work days, including in-service or professional **development** days, is a mandatory subject of bargaining. We concur. The scheduling of non-instructional teacher work **days, clearly** falls within the term "**hours**" contained within the Act as amended.³ However, the parties disagree over the Board of Education's duty to bargain in the circumstances of this case. The Association asserts that its right to negotiate over the professional calendar was triggered on April 4, 1989, when **the Board** of Education adopted the student calendar. It claims that it made a timely demand to negotiate on May 4, 1989, and that the Board illegally refused that demand. The Association asserts that any demand before April 4th would have impeded the **Board** of Education's sole right to schedule the student calendar.

The Board of Education's defense to its undisputed refusal to bargain has two prongs-1) the absence of a unilateral change and 2) the waiver of bargaining rights by the Association. First, it asserts that there has been no unilateral change from past practice which would entitle the Association to mid-stream bargaining. Thus the Board of Education argues that it scheduled the in-service days **using the** same procedure-proposal, agenda, and Board of Education vote-that it had used in the past. We note that the Union's case is not argued on the theory of an illegal, unilateral change either in **procedure** or in the use of established week vacations for **in-service** days.⁴ Rather the Association's case apparently is premised on the theory that once the student calendar was established, the Association retained **the right** to bargain about in-service days. To address this theory, which we do below, we do not need to analyze whether in fact a change in practice took place.

The second prong of the **Board** of Education's defense does address the Union's principal theory. Specifically, the Board of Education argues that the Association waived any right to bargain because it did not raise any proposal in the 1988 negotiations about the scheduling of in-service days or workdays. In the Board of Education's view, the absence of any Association **proposal** on workdays is particularly significant since the Union did agree with the Board proposal to reschedule the only non-instructional day which was set by the predecessor **contract**--the day after the students finish school for the summer. It claims that the Association's claim is barred by

³ The Association's initial demand in May, 1989, was for "midstream bargaining over the professional calendar", a request which technically encompassed bargaining about the scheduling of all non-instructional work days. However, it is clear from the Association's brief, the complaint, and the dealings between the parties that the focus is the scheduling of "in-service" or "professional **development**" days.

⁴ Although in testimony the Association President does focus on the claim that use of vacations was unprecedented, neither the complaint nor the brief rely on this theory.

laches. In sum, the **Board** of Education argues in its brief that the Association "lost its opportunity to negotiate on this topic until negotiations occur on a successor agreement unless the Board unilaterally changes the process by which it determines **the non-student day calendar.**"

The Association counters that it did not waive its right to bargain by failing to make a proposal in negotiations in the fall of 1988, because it would have been inappropriate to demand bargaining over the professional schedule in **advance of the Board of Education** setting the student calendar. **The** student calendar was not set until the **April 4, 1989** meeting.

The Board defenses raised **a question** in our minds about which contract and which negotiations have bearing in this case. **This** issue was not addressed in the initial brief. However, in response to our post-brief **inquiry**, both parties claimed, without elaboration, that the 1987-1989 contract was not controlling. Despite this position; we cannot ignore the simple fact that it was the 1987-1989 contract which was actually in effect in **April and May, 1989**, when the new calendar was set and bargaining was requested. While we do not have pertinent dates, even if the parties had already received an award for the 1989-1992 contract-or reached agreement on certain provisions-by the time the calendar was set, those provisions would not take effect until a few months later, in July of 1989. The parties presented absolutely no evidence of any agreement that the 1989-1992 contract became effective earlier than provided by its express terms, or that there was any side agreement to apply its terms to the adoption of the 1989-1990 calendar then under consideration. Accordingly, we conclude that the 1989-1992 contract has no bearing on the instant case. **Thus**, we need not determine whether **the** Association waived **some** rights either 1) by failing to **make** a calendar-related proposal in the negotiations for that successor contract in the fall of 1988 or 2) by the terms of that contract.' If there was a waiver, it does not apply to this dispute. Accordingly, we turn to the 1987-1989 contract which was in effect in April and May, 1989, when the instant issue arose.

Because the 1987-1989 contract was negotiated prior to the statutory amendment, the parties would not have dealt with the professional calendar as a mandatory subject of bargaining. The parties have not supplied evidence concerning this bargaining history, but any failure during those negotiations to **make** a proposal about the professional calendar would certainly not constitute a waiver in this statutory context--there were no rights to waive at that time. Additionally, we find nothing in the terms of that contract which gave the Board the right to set the calendar unilaterally during that contract term.

We now turn to a defense raised by the Superintendent in his May, 1989 letter, although it is not expressly argued in the **Board's** brief-that the Union waived its right by never having requested bargaining in the past. Assuming that the 1987 calendar was set in the spring of 1987, the statutory amendment which rendered teachers "hours" bargainable would not yet have

taken effect. **Thus** the 1988-89 calendar was the first one set after the amendment took effect, and raised the first Opportunity for the Association to have a legal basis for a demand to bargain. It was also the only occasion for a demand prior to the setting of the 1989-1990 calendar. We are unwilling to find that the Association's failure to request bargaining at this first and only opportunity constituted a waiver of its statutory bargaining rights.

In response to an additional waiver argument raised by the Board of Education, we also note that the Association President's conduct at the April 1989 Board of Education meeting falls far short of being a waiver. Since President Kuenzler was not present as a participant, she was not able to participate in the "compromise". Neither was she in a position to actively voice the Union's desire to bargain. The Association President did not have to use this Board meeting as a forum to challenge the Board's action, particularly since the Board was simultaneously taking action on the student calendar -- a non-bargainable item.

In sum, we find no waiver by the Union in this case of its right to bargain in April or May of 1989 concerning the professional calendar for 1989-1990, including the scheduling of professional **development** days. **Thus**, since this topic was a mandatory subject of bargaining, the Board of Education illegally refused to bargain when the Union made its **demand** in May, 1989. And, contrary to the Superintendent's claims, the fact that the administrators also may have had a legal interest in the scheduling of professional **development** days does not justify the Board's refusal to bargain. As argued by the Association, that fact might have affected the Board's ultimate position in bargaining -- or resulted in bargaining with the Administrators' Association as well, but **it** did not deprive the Teachers' Association of its right to bargain.⁶

⁶ Similarly, although the established nature of the student calendar placed **some** practical limits on the nature of proposals concerning the professional calendar, this did not negate the **Association's** right to bargain.

O R D E R

By virtue of and pursuant to the power vested in the Connecticut State Board of Labor Relations by the Teacher Negotiation Act, it is hereby,

ORDERED, that the Bloomfield Board of Education;

I. Cease and desist from failing to bargain with the Association concerning the scheduling of professional development days (following the setting of the student calendar) when there is no waiver by contract terms or the Association's conduct.

II. **Take** the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post immediately and leave posted for a period of sixty (60) consecutive days from the date of posting, in a conspicuous place where the employees customarily assemble, a copy of this Decision and Order in its entirety;

(b) Notify the Connecticut State Board of Labor Relations at its offices at 200 Folly Brook Blvd., Wethersfield, Connecticut, within thirty (30) days of the receipt of this Decision and Order of the steps taken by the City of East Haven to comply therewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

By s/Patricia V. Low

Patricia V. **Low**, Chairman

s/Margaret Lareau

Margaret Lareau

s/Craig Shea

Craig Shea

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