

TIME REQUIRED TO RENDER AWARD: 49 DAYS

IN THE MATTER OF THE ARBITRATION BETWEEN

THE AMERICAN FEDERATION OF)	MINNESOTA BUREAU OF
STATE, COUNTY AND MUNICIPAL)	MEDIATION SERVICES
EMPLOYEES, COUNCIL 65,)	CASE NO. 08-PA-0082
)	
)	
Union,)	
)	
and)	
)	
INDEPENDENT SCHOOL DISTRICT)	
NO. 94 (Cloquet),)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

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On November 27, 2007, in Cloquet, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer in behalf of all employees classified as Teacher Assistants (also referred to by the parties as "Paraprofessionals"). The grievance alleges that the Employer violated the labor agreement between the parties by refusing to

permit Teacher Assistants to use their seniority to "bump" into preferred work assignments, i.e., to claim the work assignments of junior employees.

FACTS

The Employer operates the public schools in Cloquet, Minnesota. The Union is the collective bargaining representative of three groups of the employees who work in the Employer's schools -- those who work as Teacher Assistants, those who work in "Custodial" classifications and those who work in "Dietary" classifications. The parties use a labor agreement divided into three parts, each of which establishes the terms and conditions of employment for one of these three groups. Each part of the agreement uses separate numeration in its organization. Part III of the agreement covers the Teacher Assistants. Hereafter, I omit reference to "Part III" when referring to provisions of the agreement that cover Teacher Assistants.

The evidence and the parties' arguments make the following provisions of the labor agreement relevant to the present grievance:

Article IV Assignment - Priorities - Seniority

Section 1. Assignment: Assignment of teacher assistant personnel shall rest with the administration and the school board.

Subd. 1. Staffing: Assignment of hours and number of positions in any building for teacher assistant employees shall rest with the administration and the school board.

Subd. 2. Building Hours: The specific work hours at any individual building may vary according to the

needs of the school district. The specific work hours for each teacher assistant employee will be designated by the building principal.

Subd. 3. Assignment Changes: All changes in assignments shall be made at the discretion of the administration and the school board.

Section 2. Seniority:

Subd. 1. Definition: Seniority for teacher assistant personnel shall be defined as length of continuous service with the school district. . .

Subd. 5. Posting and Filling of Vacancies: If a vacancy is determined by the superintendent to be filled within the teacher assistant category, the school district shall post a notice of open position in all buildings on the designated bulletin boards. Employees within the teacher assistant department who have completed their initial six (6) month probationary period shall be given five (5) working days to apply for said open position. The senior qualified applicant, as determined by the school district, given due regard to the reliability, efficiency, ability (Minimum Qualification for Teacher Assistant Categories) and qualifications of the individual, shall be transferred to fill the vacancy or newly created position. In the event the vacancy or newly created position is not filled within the teacher assistant department, the position may be filled from the outside and seniority shall not be a consideration.

If, as a result of filling the vacancy from within the teacher assistant department, a second vacancy occurs, the same procedures will apply as for the first vacancy as described above. If the second vacancy is filled from within the teacher assistant department, seniority shall no longer be a determining factor in filling the third vacancy. The person selected to fill the third vacancy may be a presently employed assistant or a new employee with or without previous experience in the district.

Subd. 6. Layoffs: The school board may place on layoff as many teacher assistants as may be necessary because of discontinuance of positions, lack of pupils, financial limitations, or merger of classes caused by consolidation of school districts. In the event of a teacher assistant layoff or reduction of hours, substitutes and/or probationary personnel shall be laid off prior to teacher assistant personnel. Teacher assistant personnel shall be laid off based on their inverse order of seniority. . .

Subd. 7. Bumping: If the work hours of a teacher assistant are reduced two (2) hours or less per day, that assistant shall have the right to an assistant position with more hours within the same building. If the work hours of a teacher assistant are reduced more than two (2) hours per day or if a position is eliminated, that assistant shall have the right to an assistant position with more hours anywhere in the district. Such position changes are contingent upon proper assistant qualifications and seniority. Decisions to exercise bumping rights must be communicated to the administrative secretary within five (5) working days after receiving notice.

At the time of the hearing, there were fifty-eight Teacher Assistants employed by the Employer. The labor agreement establishes "Minimum Qualifications For Teacher Assistant Categories," listing six such categories -- Title I Assistant, General Education Assistant, Multi-Purpose Computer Lab Manager (Assistant), Media Center Assistants, Special Education Assistant and Licensed Practical Nurse.

Most of the Teacher Assistants work as Special Education Assistants in special education classrooms that are supervised by one or more Special Education Teachers. Though this grievance is written as a "class action" grievance, i.e., one brought in behalf of all Teacher Assistants as a group, the evidence presented relates to the Union's objection to the method used to assign Special Education Assistants, as I describe below.

Special Education students are classified according to their disability. Some are classified as learning disabled ("LD"), some as "emotionally and behaviorally disabled ("EBD") and some as developmentally and cognitively delayed ("DCD"). In addition, a student in one of these classifications may be subclassified according to the severity of his or her

disability. Thus, a DCD student with the most severe disability may be subclassified as having a severe-profound disability -- designated as "DCD/SP." The labor agreement establishes higher hourly rates of pay for Teacher Assistants who are assigned to teach and provide care for students considered to have the most severe disabilities. Those assigned to teach a student classified as DCD/SP receive the highest rate of pay.

Although the parties agree that the present grievance is a class action grievance, it developed from the allegations of a single Teacher Assistant, Lori L. Hietala. I summarize her testimony as follows.

Hietala has been employed by the Employer for six years. During the 2006-07 school year, she was assigned to teach a student (hereafter, "John Smith," a fictitious name) who was classified as DCD/SP. She provided that service at the Employer's High School in the "DCD Room." Smith's Individual Education Program ("IEP") required that his Teacher-Assistant service be given "one-on-one" -- that the Teacher Assistant serving him do so without serving any other student. The evidence does not expressly establish that Smith's IEP required that he receive his one-on-one service always from the same Teacher Assistant. Nevertheless, he did receive his Teacher-Assistant service throughout the year exclusively from Hietala and from no other Teacher Assistant, except when Hietala was unavailable because of lunch breaks, illness or similar cause; then, another Teacher Assistant provided him with one-on-one service.

At the end of the 2006-07 school year, Smith graduated, and Hietala sought to exercise the right to choose which student she would be assigned to care for during the forthcoming 2007-08 school year -- a right here alleged by the Union to be a contract right established by practice. The Union argues that a binding practice requires the Employer to permit a senior Teacher Assistant whose assignment to care for a particular student has ended (when, for example, the student graduates or perhaps moves from the District) to select a new assignment by bumping into the assignment of a junior Teacher Assistant. The junior Teacher Assistant so bumped would then be permitted, in a second round of bumping, to claim the assignment of a Teacher Assistant junior to him or her.

At the end of the 2006-07 school year, when Hietala sought to use this bumping process to select an assignment for 2007-08, the Employer refused to permit her to do so. The Employer asserted, as it argues here, that it has a right, established by Article IV of the labor agreement to determine what Hietala's assignment would be in the forthcoming year. During June of 2007, the parties discussed the dispute, but were unable to settle it, and the Union brought the present grievance as a class action grievance rather than one brought solely in behalf of Hietala. Hietala testified that, if she had been permitted to exercise the right to bump into an assignment of a junior Teacher Assistant, she would have selected an assignment to serve a particular student one-on-one. Nevertheless, as I understand the right asserted by this class action grievance, it

could include the right to bump into any assignment of a junior Teacher Assistant for which the senior claimant is qualified -- even if that assignment is not a one-on-one assignment to serve a particular student.

At the time of the hearing, during the 2007-08 school year, two Special Education Teachers, fourteen Special Education Assistants and one Nurse were assigned to the High School's DCD Room to teach and care for twenty students. The IEPs of twelve of those students required one-on-one service by a Special Education Assistant, and accordingly, twelve of the fourteen Special Education Assistants were assigned to provide one-on-one service to those twelve students.

The other eight students in the DCD Room were considered to be "higher functioning," and thus they had IEPs that did not require one-on-one service. Two of the fourteen Special Education Assistants in the DCD Room were assigned to provide those eight students with service ("general service," as the parties sometimes describe such service).

Hietala remained in the DCD Room at the start of the 2007-08 school year. She was assigned to provide one-on-one service, alternating such service between two students every other week, with another Special Education Assistant. Hietala continued to have a six hour and forty-five minute daily assignment -- the maximum allowed under the labor agreement -- as she had the previous year. She was not permitted to bump into the assignment she preferred, the one-on-one care of a student of her own selection.

Margaret A. Peer, who appeared as a witness for the Union, testified as follows. She retired in June of 2007 after serving as a Special Education Assistant since 1989. She was a Union Steward for the Teacher Assistants from 1998 till her retirement, and she has participated in bargaining for the part of the labor agreement that covers them. At least since 1991, the language of Article IV has not changed, and the parties have had no discussions about changes relevant to the present dispute.

Peer testified that in 1989, when she was first hired by the Employer, she was assigned to provide one-on-one service to a particular student, but that she was bumped from that assignment by Linda Jutila, a senior Teacher Assistant, when that student was in second grade. That student then graduated in 2003, and Jutila bumped into an assignment to teach another student, displacing a junior Teacher Assistant. Peer testified that she also recalled that Teacher Assistant Belinda Olson, whose assigned student moved from the District, was permitted to bump into the assignment held by a junior Teacher Assistant to teach another particular student. Peer also testified that she thought the same bumping process had been used more than once, but she was not sure how many times.

Connie L. Hyde, Assistant Principal at the High School, testified as follows. She supervises the school's special education program. Changes have occurred recently in the method by which the Employer provides special education service to "high needs" students -- those whose IEPs require one-on-one service. In the past, the Employer has usually assigned the

same Teacher Assistant to provide one-on-one service to each student requiring such service. In recent years, however, research in the field of special education has favored a different method, referred to as "consistent support." The research has determined that, for several reasons, students requiring one-on-one service are better educated if they receive their one-on-one service from various Teacher Assistants. Students receiving service from varying Teacher Assistants are less likely to develop a dependency on special education services. Teacher Assistants with varying assignments are less likely to "burn out." Students are less likely to become "stagnant and dull" in their interactions and learning. Students' friendships and interactions with peers are promoted with service from varying Teacher Assistants.

Since November of 2006, the Employer has posted vacant Special Education Assistant positions as Consistent Support positions, which require the incumbent to provide service to various students -- perhaps one-on-one service to one or more high needs students or perhaps general service among higher functioning students -- as assigned during the day by the Special Education Teachers in the DCD Room. The Union has not objected to these postings, which reflect the Employer's present policy for delivering special education services through Consistent Support.

Hyde also testified that, even before the Employer's adoption of Consistent Support, it had never designated positions as carrying a permanent assignment to a particular

student. She testified that the number of Teacher Assistant positions available has always been determined by the total IEP minutes that must be filled as student needs change during the year and from year to year and that those holding the positions are assigned according to their qualifications by the Special Education Teachers. In support of this testimony, Hyde noted that the seniority lists used by the Employer describe the position held by each Teacher Assistant by reference to the program each is assigned to and not by reference to particular students whom they teach.

DECISION

The primary issue raised by the parties' arguments requires interpretation of Article IV of the labor agreement. The Employer argues the language of Article IV, Section 1, establishes the contract right of the Employer to determine staffing and assignments of personnel, especially in the parts of that section that I have underlined below:

Section 1. Assignment of teacher assistant personnel shall rest with the administration and the school board.

Subd. 1. Staffing: Assignment of hours and number of positions in any building for teacher assistant employees shall rest with the administration and the school board.

Subd. 3. Assignment Changes: All changes in assignments shall be made at the discretion of the administration and the school board.

The Employer concedes that Article IV, Section 2, of the labor agreement establishes limitations on the Employer's right of assignment when specified conditions occur -- for bumping

under Subdivision 7, as well as for filling vacancies under Subdivision 5 and for layoff and recall under Subdivision 6. The Employer argues, however, that the limitations that affect bumping are clearly stated in the language of Subdivision 7 and that the Union, by this grievance, seeks to impose limitations not expressed in the contract language.

Thus, the Employer argues that the clear language of Subdivision 7 establishes the right to bump ("contingent on qualifications and seniority") only when three conditions occur:

1. Under the first sentence of Subdivision 7, a Teacher Assistant whose work hours are reduced two hours or less per day "shall have the right to an assistant position with more hours within the same building."
2. Under the second sentence of Subdivision 7, a Teacher Assistant whose work hours are reduced more than two hours per day "shall have the right to an assistant position with more hours anywhere in the district."
3. Under the second sentence of Subdivision 7, "if a position is eliminated, that assistant [presumably, the Teacher Assistant whose position has been eliminated] shall have the right to an assistant position . . . anywhere in the district."

The Employer argues that, in this class action grievance, the Union seeks to establish a kind of bumping different from any of the three kinds thus established by the language of Subdivision 7 -- the right of a senior Teacher Assistant, after the student he or she was teaching leaves the District, to claim the assignment of a junior Teacher Assistant.

The Union argues that, even though the language of Subdivision 7 does not expressly provide for bumping after the student taught by a senior Teacher Assistant leaves the District, that right has been established by longstanding and consistent

practice. The Union urges that such practice has established a mutual understanding of the word, "position," in the phrase, "if a position is eliminated," as used in Subdivision 7, According to the Union, practice shows that the parties have a mutual understanding that positions are defined by the particular assignment of each Teacher Assistant. The Union showed that some Teacher Assistant postings for vacant positions, though not identifying a particular student by name, have described the disability of a particular student in order to fill the open position with an employee who is qualified to provide needed service to that student. The Union urges that this evidence supports the argument that the parties define each position by particular assignment.

Further, the Union argues that the idea of defining each position according to a particular assignment is supported by the fact that teaching requirements set by each IEP vary from student to student -- not only in the number of one-on-one minutes required per day, but in the kind of service needed to fit the degree and nature of each student's disability. The Union argues that "if the student leaves, the minutes leave with the student," i.e., that the minutes are identifiable to each particular student because the needs of each student vary, and that, therefore, the departure of a student is the equivalent of the elimination of a position.

Finally, the Union argues that during a discussion of this grievance at a School Board meeting held on June 25, 2007, a member of the School Board argued that contracts need a

"flexible interpretation," implying an admission that in the past each position was identified by the student being taught.

I make the following additional findings of fact and rulings resolving the parties' arguments. The contract's relevant language is clear in the following respects. Article IV, Section 2, Subdivision 7, establishes three preconditions for bumping. First, if the work hours of a Teacher Assistant are reduced by two hours or less, that Teacher Assistant may bump a junior Teacher Assistant in the same building; second, if the work hours of a Teacher Assistant are reduced by more than two hours, that Teacher Assistant may bump a junior Teacher Assistant anywhere in the District; and third, if the position of a Teacher Assistant is eliminated, that Teacher Assistant may bump a junior Teacher Assistant anywhere in the District.

The primary issue described by the parties' arguments is whether a Teacher Assistant's position is eliminated when the particular work assignment of that Teacher Assistant ends -- for example, because of the graduation of the student he or she had been teaching. The word "position" has a meaning different from the word "assignment," as both words are used throughout Article IV. Section 1 begins with the unambiguous reservation to the Employer of the right of "assignment" of personnel, thus:

Assignment of teacher assistant personnel shall rest with the administration and the school board.

Subdivision 3 of Section 1 establishes the Employer's right to make changes of "assignments," thus:

All changes in assignments shall be made at the discretion of the administration and the school board.

When the parties drafted this language, they intended that "assignments" -- a word ordinarily used to indicate kind of work, place of work or hours of work -- could be changed as the Employer determined. They did not use the word "position" to express the right of the Employer to change the kind, place and hours of work -- a use that would give that word a clearly unusual meaning.

The parties used the word "position" and not the word "assignment" when expressing the third kind of bumping permitted by Article IV, Section 2, Subdivision 7 -- the right to bump "if a position is eliminated." Thus, because the parties used the two words in their ordinary sense, it is clear that they did not intend that the elimination of an "assignment," i.e., in the kind of work done by a Teacher Assistant, should be considered the equivalent of the elimination of a "position." Accordingly, I rule that the contract language is clear and unambiguous. It does not mean that a position is eliminated when the assignment of a Teacher Assistant to teach a particular student ends.

The question remains whether the parties' practice in administering the labor agreement has supervened its plain meaning. The manner in which practice may affect interpretation of a labor agreement is described in Elkouri and Elkouri, How Arbitration Works (6th Ed.), 605-630. A fundamental rule of contract interpretation is that unambiguous language will be enforced according to its plain meaning, thus giving effect to the bargain intended by the parties. When contract language is unclear, however, evidence about the way the parties have admin-

istered the contract, if occurring over time and with mutual assent, may be used as an extrinsic aid to interpretation.

Thus, as the Elkouris write:

While custom and past practice are used very frequently to establish the intent of contract provisions that are susceptible to differing interpretations, arbitrators who follow the "plain meaning" principle of contract interpretation will refuse to consider evidence of a past practice that is inconsistent with a provision that is "clear and unambiguous" on its face. [At page 627.]

Here, there is evidence that at times the Employer has permitted a senior Teacher Assistant to use the bumping process described in Article IV, Section 2, Subdivision 7, after her assignment to teach a particular student has ended. Even though the Employer has sometimes assented to such bumping, the language of Subdivision 7 is clear. It establishes the right to bump only when a Teacher Assistant's hours are reduced or when a position is eliminated. It does not establish the right to bump when a Teacher Assistant's assignment to teach a particular student ends. Under the plain meaning of the contract, the end of such an assignment does not cause the elimination of a position, and instances of past permitted bumping have not created an enforceable change in the meaning of the contract.

AWARD

The grievance is denied.

January 15, 2008


Thomas P. Gallagher Arbitrator