
In Re the Arbitration between:

BMS No. 08-PA-1013

Independent School District No. 719,
Prior Lake-Savage,

Employer,

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

and

Prior Lake-Savage Education Association,

Union.

Pursuant to **Article XIV** of the Collective Bargaining Agreement effective July 1, 2007 through June 30, 2009, the parties have submitted the above captioned matter to arbitration.

The parties selected James A. Lundberg as their neutral Arbitrator from a list of Arbitrators provided by the Minnesota Bureau of Mediation Services.

The grievance is properly before the Arbitrator for a final and binding determination pursuant to **Article XIV** of the Collective Bargaining Agreement.

However, the Employer challenges the Arbitrator's jurisdiction over the issue and argues that the grievance was not timely.

The grievance was submitted October 22, 2007.

The hearing was conducted on July 16, 2008.

The parties made oral final arguments and the record was held open for submissions by the parties through July 18, 2008 at which time the record was closed.

APPEARANCES:

FOR THE EMPLOYER

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FOR THE UNION

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ISSUES:

Issue One:

Whether the Arbitrator has jurisdiction over the subject matter of this grievance.

Issue Two:

Whether the grievance was timely within the meaning of Article XIV, Section 4 of the collective bargaining agreement, which says, "Grievances will not be valid for consideration unless they are submitted within thirty-five (35) calendar days of the date the grievance arose. Failure to file any grievance within such period shall be deemed a waiver thereof."

Issue Three:

Whether the lunch schedule for Prior Lake-Savage High School teachers in the academic year 2007-2008 and planned for the academic year 2008-2009 violates Article VIII, Section 4 of the collective bargaining agreement, which states "All teachers shall be provided with a thirty (30) minute duty free noon hour."

If the Employer violated the collective bargaining agreement, what is the proper remedy?

BACKGROUND:

The Prior Lake-Savage High School opened in 2003. At the time that the school opened, class periods were set for forty four (44) minutes. The daily schedule included eight class periods. Three lunch periods were established during the fourth, the fifth and the sixth periods of the day.

The communities served by the school district are experiencing rapid growth and development. Consequently, the high school become over crowded shortly after it opened.

The fact that only forty four (44) minutes were allocated for each class period was one issue of several issues concerning management and faculty prior to the 2006-2007 school term. In order to increase the amount of instructional time during the 2006-2007 academic year, the school district increased class time to fifty (50) minutes and reduced the lunch period by nine (9) minutes.

At the beginning of 2006-2007 the high school had three lunch periods but the district administration decided to experiment with some schedule adjustments. The program moved from an eight (8) period day to a seven (7) period day. A fourth lunch period was incorporated into the schedule on an experimental basis. In the process of increasing the number of lunch periods, the amount of time scheduled for lunch was reduced to twenty (20) minutes, exclusive of the two five minute passing periods before and after each lunch. At the start of the 2007-2008 academic year, the school district adopted a seven period day with four lunch periods. The class periods were fifty (50) minutes in duration and the lunch period was twenty (20) minutes with a five minute passing period before and after each lunch period.

The parties are in agreement that the school administration informed the bargaining unit during the 2006-2007 school term that it was going to experiment with the bell schedule in order to arrive at a workable schedule for classes and lunch periods. The bell schedule implemented at the end of the 2006-2007 academic year was re-established in the Fall of 2007. However, the school district never specifically notified the bargaining unit that it was no longer experimenting with the bell schedule. Through the first portion of the 2007-2008 school year, the bargaining unit attempted to engage the school administration in a dialogue over the bell schedule. The attempts failed and on October 22, 2007 the Union initiated a grievance claiming that the Employer was violating **Article VIII, Section 4** of the collective bargaining agreement. The parties were unable to resolve the problem through grievance steps and the grievance was brought to arbitration.

SUMMARY OF UNION’S POSITION:

The issue raised by Education Minnesota is limited in scope and requires the Arbitrator to interpret a clear and unambiguous section of the collective bargaining agreement. What Education Minnesota is asking the Arbitrator to determine is whether the Prior Lake-Savage School District is complying with **Article VIII, Section 4** of the collective bargaining agreement, which states “All teachers shall be provided with a thirty (30) minute duty free noon hour.” The Arbitrator is not being asked to create and/or impose a bell schedule for the school day. The Arbitrator has authority to determine whether management has violated a provision of the collective bargaining agreement.

During the 2006-2007 school year, the school district tried two different bell schedules at the high school. The bell schedule that was used in the last trimester of the

2006-2007 school year was implemented at the beginning of the 2007-2008 school year. The Union raised several concerns about the bell schedule. While there were some benefits to the trial schedule, teachers with a fifth hour class were saying, “We need more time. It’s not working.” The grievance was initiated when the Union became aware that the Administration had decided to make the trial bell schedule permanent. The grievance was raised when the Union knew that the schedule change had become permanent. Hence, the grievance was timely raised by the Union.

The Union has a right to challenge the violation of a clear and unambiguous term of the contract. In this case, the Union did grieve once it became clear that the Administration was no longer experimenting with the bell schedule. Even if the Union should have realized that the Administration intended to make permanent the schedule it used in the last trimester of the 2006-2007 year, the contract violation was a continuing violation and the Union is asking for back pay. Teachers were required to work in violation of their collective bargaining agreement. Each time they were required to work during time specifically set aside by the collective bargaining agreement as non duty time, a new contract violation occurred. Hence, the grievance was filed in a timely manner.

According to witnesses who described their specific situation in testimony, the current bell schedule does not provide for a thirty (30) minute duty free lunch period. When classes end, students often need to talk with a teacher about assignments or other matters. Some teachers have to disassemble their classroom and move their course materials to another classroom. In one instance, a teacher must do laundry in order to be ready for the next class. In the Physical Education area teachers must have a presence in

the locker room until all students have left the area. Lab classes require take down and/or resetting. As a general rule, classroom equipment must be secured and the classroom must be appropriately configured for the next class before a teacher departs. At the end of the lunch period, teachers must have their classrooms open and appropriately configured, when students arrive from lunch. A significant amount of the passing period for teachers at the high school is consumed by teaching duties.

Arbitrator Thomas Gallagher in *Duluth Federation of Teachers and Independent School District No. 709, BMS 04-PA-1089, 2005* reviewed a similar grievance and found that “de facto, [t]eachers must perform some work related duties after the bell ends the last class before lunch and before the bell starts the first class after lunch.” P. 10

The rules promulgated by the school district require teachers to perform supervisory duties after the bells end the last class before lunch and before the next class starts. The rules are found in the Teacher/Staff Handbook at page 23. The policy is as follows:

During the five minutes of passing time between classes, at least two teachers from each cluster, and for five minutes prior to the beginning of first hour class and for ten minutes after the last class at the end of the day, at least three teachers from each cluster will be expected to move out into the locker bay/circulation area outside their cluster to monitor student conduct in the locker bay area, and to help assure that students are getting to class on time. When not on locker/circulation supervision, teachers may remain in the cluster resource area during these passing times, but should still be monitoring student conduct and punctuality...

Teaching duties, student conversations, telephone calls and other non-emergency tasks are not sufficient reason to be absent without permission from hall supervision.

District policy imposes strict duties upon teachers during passing times and there is no policy which relieves teachers from those duties during the passing time immediately before they go to lunch and/or immediately after a lunch break.

If a teacher has not agreed to supervise in the locker bay areas before or after lunch, he/she is still required to monitor student conduct and punctuality. Teachers are on duty during all passing periods. Hence the current schedule that provides a twenty (20) minute duty free lunch period violates the collective bargaining agreement.

The Union asks the arbitrator to order the school district to follow the contract and requests money damages for time that teachers were required to work beyond their contractual obligation. The Union asks for back pay for all teachers for the school year 2007-2008 in the amount of 10/450ths each student day, together with an order directing the school district to provide a duty free lunch period of thirty (30) minutes.

SUMMARY OF EMPLOYER'S POSITION:

The Employer argues that the contract does not give the Arbitrator authority to change the bell schedule or to make a monetary award. Nowhere in the contract is there language that authorized an Arbitrator to create and impose a bell schedule on a building. Hence, the grievance is asking for remediation that is outside the jurisdiction of the Arbitrator.

The grievance is not timely based upon **Article XIV, Section 4, Subd.1** of the collective bargaining agreement.

—Waiver – Grievances will not be valid for consideration unless they are submitted within thirty-five (35) calendar days of the date the grievance arose.

Failure to file any grievance within such period shall be deemed a waiver thereof. The school district imposed the bell schedule that includes the lunch period that is being challenged prior to the start of the 2007-2008 school year. The Union did not challenge the schedule through the grievance process, until more than thirty five (35) days lapsed. Having failed to bring a grievance within thirty five (35) days of imposition of the schedule, the Union waived its right to grieve the issue. The grievance is untimely and must be denied.

The school district has not assigned any teacher specific duties during the thirty (30) minutes that the school district has designated as the “duty free lunch hour.” From the five minute passing period before lunch through the five minute passing period at the end of the lunch period, no teacher is assigned specific duties. Hence, the teachers have a thirty (30) minute duty free lunch hour. The Employer has not violated the collective bargaining agreement.

The Employer also argues that teachers in all other buildings in the school district have a thirty minute duty free lunch period that includes the passing period. In fact, where the teachers negotiated preparation time at **Article VIII, Section 6** of the collective bargaining agreement, they specifically stated that transition time is not to be included in the calculation. “**Subd. 2 – Elementary, C.** Preparation time shall be provided in one (1) or two (2) uninterrupted blocks (of at least 20 minutes duration) during the student contact day and shall not include student transition time.” If the teachers wanted to have transition time excluded from the thirty (30) minute Duty Free

Lunch, they should have used the same language that was employed with regard to elementary preparation time.

The school district asks that the grievance be denied.

OPINION:

Article XIV, Section 8 of the collective bargaining agreement addresses the arbitrator's jurisdiction over a grievance. The agreement says:

The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure.

The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written Agreement, nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure, as outlined.

In this instance, the Union raises a question over whether **Article VIII, Section 4** of the collective bargaining agreement has been implemented by the Employer. One clear purpose of grievance arbitration is to resolve issues arising over contract interpretation. The arbitrator is not being asked to modify the agreement nor is he being asked to create and/or impose a specific bell schedule on the high school. Hence, the arbitrator has contractual authority to resolve this grievance.

The grievance was raised over an alleged reoccurring violation of the collective bargaining agreement. The arbitrator does not have authority to make a ruling regarding a violation of **Article VIII, Section 4** of the collective bargaining agreement prior to thirty five (35) days before the date of the grievance. However, if the contract was breached on

a reoccurring basis, the Union has a right to raise a grievance upon any new occurrence. The Union waived any right to remediation for past violations but has a right to seek remediation from thirty five (35) days prior to initiation of the grievance. Because the alleged contract violation is a reoccurring violation, the grievance is timely and the arbitrator has authority to resolve the grievance for all instances where the Union has not waived its right to grieve pursuant to **Article XIV, Section 4, Subd.1.**

The Union established by a preponderance of the credible evidence that the Employer has failed to provide a thirty (30) minute duty free noon hour, as required by **Article VIII, Section 4** of the collective bargaining agreement. According to the policy established in the Teacher/Staff Handbook at page twenty three (23), teachers are charged with monitoring student conduct and punctuality during all passing times. The passing time prior to a lunch break is not an exception from the policy. The passing time following a lunch break is not an exception from the policy. The policy imposes a duty on teachers during all passing periods. Hence, the passing time may not be counted as part of the “duty free” lunch period.

Arbitrator Gallagher’s observation in *Duluth Federation of Teachers and Independent School District No. 709, BMS 04-PA-1089, 2005, p. 10* was supported by all faculty witnesses to this arbitration, “de facto, teachers must perform some work-related duties after the bell ends the last class before lunch and before the bell starts the first class after lunch.” The school district has failed to provide all high school teachers with a thirty minute duty free lunch period, pursuant to **Article VIII, Section 4** of the collective bargaining agreement.

The bell schedule currently being used at the high school provides a twenty (20) minute duty free lunch, not a thirty (30) minute duty free lunch. In order to remediate the contract violation, the school district shall be ordered to provide a thirty minute duty free lunch for all high school teachers in the school year 2008-2009.

The Union asks for back pay for the school year 2007-2008 in the amount of 10/450th of each teacher's salary for each student day of the school year affected by the grievance. In this instance, it is clear that the Employer required employees to work ten minutes each day during time that was contractually set aside as duty free time. The teachers followed the Employer's order and filed a grievance and the grievance was processed in accordance with the contractually agreed upon procedure. Teachers are entitled to payment for the time they were required to work that was set aside as duty free time by the collective bargaining agreement. The back pay calculation proposed by the Union accurately reflects the method that should be used to calculate back pay in this case. The back pay award to each high school teacher shall be 10/450ths of each teachers 2007-2008 salary for each student day of the school year affected by the grievance. The calculation of back pay shall begin 35 calendar days prior to the date of the grievance in accordance with **Article XIV, Section 4, Subd.1** of the collective bargaining agreement.

AWARD:

- 1. Independent School District 719 is directed to change its schedule to provide all Prior Lake High School teachers a three minute duty free lunch period in the school year in a manner that is consistent with this opinion.*
- 2. Independent School District 719 shall pay back pay to Prior Lake High School teachers in the amount of 10/450ths of each teacher's salary for each student*

day of the 2007-2008 school year. The calculation of back pay shall begin 35 days prior to the date of the grievance.

Dated: August 16, 2008

James A. Lundberg, Arbitrator