

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

**THE KERKHOVEN-MURDOCK
EDUCATION ASSOCIATION**

Re: Preparation Time

-and-

B.M.S. No. 08-PA-1107

**INDEPENDENT SCHOOL DIST. 775
KERKHOVEN, MINNESOTA**

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the School District: Patricia Maloney, Attorney

For the Union: William Garber, Staff Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article XI, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. A formal complaint was submitted by the Union on behalf of the Grievant on November 28, 2007, and eventually appealed to binding arbitration when the parties were unable to resolve the matter to their mutual satisfaction during discussions at the intermittent steps. The undersigned was then selected as the Neutral Arbitrator to hear evidence

and render a decision from a panel provided to the parties by the Minnesota Bureau of Mediation Services. Subsequently, a hearing was convened in Kerkhoven, Minnesota on July 15, 2008. There, the parties were afforded the opportunity to present position statements, testimony and supportive documentation. At the conclusion of the proceedings, each side indicated that they would be submitting written summary statements. They were received on August 13, 2008, at which time the hearing was deemed officially closed. The parties have stipulated that all matters in dispute are properly before the Arbitrator for resolution on their merits, and that the following constitutes a fair description of the matter to be resolved.

The Issue-

1) Did the School District violate Article XVIII, Preparation Time, Section 1, of the Master Agreement by not providing the Grievant with fifty minutes of preparation time during the regular school day during the 2007-08 school year?

2) If there were any days on which the Grievant did not have 50 minutes of preparation time during the regular student day, did the Employer violate Article XIII, Extra Compensation, Section 4, Substitution Within Staff, by not paying her the rate of pay applicable to teachers who

are asked to substitute for another teacher during their prep time?

3) If the answer to either or both of the above questions is affirmative, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The adduced evidence indicates that the Grievant, Sharyl Syverson, is a Special Education instructor employed by I.S.D. 775 (hereafter "District", "Employer" or "Administration") assigned to the elementary school. In this capacity, she is represented by the Kerkhoven-Murdock Education Association ("Union" or "Association") who, together with the District has negotiated and executed a labor agreement (Joint Ex. 2) covering terms and conditions of employment for the non-supervisory professional personnel that comprise the bargaining unit.

During the 2006-07 school year, the Grievant lost some of her daily preparation time as specified in the Master Agreement when a new student was added to her work load. She brought the matter to the attention of the Administration and submitted a pay voucher for the time lost, but received no additional compensation. However, she recalls the District's Superintendent, Martin Heidelberger, telling her that it would not occur again.

At the start of the 2007-08 academic year, the Grievant submitted her proposed schedule to the Administration which reserved forty-five minutes for preparation time each day.¹ This was five minutes less than what she was otherwise entitled to under the terms of the Labor Agreement, *infra*. Shortly after the school year commenced however, she was assigned another student which, in her view, shortened her preparation time by thirty minutes. Ms. Syverson recalls taking the matter up with her principal, Jeffrey Keil, who told her to submit a pay voucher for the lost time. She did so, submitting a number of them to the Employer (Joint Ex. 7).

In January of 2008, another Special Education instructor working at the High School, Fran Clarke, took over one of her classes, thereby returning the thirty minutes of preparation time to the Grievant (Joint Ex. 6). However, Ms. Syverson did not receive any additional compensation that she had claimed on the vouchers. Accordingly, she filed a formal complaint with the District through the Association, alleging that she should have been compensated for her loss of preparation time during the first few months of the 2007-08 school year, under the terms of Articles XIII,

¹ The evidence shows that Education Specialists working in the elementary school, such as Ms. Syverson, construct their own work schedules depending upon the number of students assigned to them each year and their educational needs.

and XVIII of the parties' Collective Bargaining Agreement (Joint Ex. 1).
When her complaint was denied by the School Board on February 11,
2008, the matter was appealed to binding arbitration for resolution.

Relevant Contract Provisions-

Article IX
Hours of Service

Section 1. Teachers shall be required to report for duty at 8:00 a.m. on the students' regular school day. Teachers shall be permitted to leave at 3:30 on a regular school day....

Article XIII
Extra Compensation

* * *

Section 4. Substitution Within Staff. \$20.00 per hour additional compensation shall be granted to a teacher asked to substitute during his or her prep time. Special Ed. Teachers and others whose schedules do not include prep time shall be paid the same additional compensation.

* * *

Article XVIII
Preparation Time

Section 1. Each full time teacher will be provided with prep time during the regular student day. This preparation time shall be a minimum of the class period in secondary and fifty (50) minutes in elementary. This time shall be in one (1) block of time if possible.

Positions of the Parties-

The **UNION** takes the position in this matter that the District violated Article XVIII of the Master Agreement when it failed to provide the Grievant with fifty minutes of preparation time during the regular student day in the fall of 2007, and then failed to compensate her for her lost prep time per the terms of Article XIII. In support of their claim, the Association maintains that under the clear language in Article XVIII, all teachers in the bargaining unit are guaranteed a certain amount of preparation time during each school day. However, when the Administration asked Ms. Syverson to take on an additional student shortly after the start of the 2007-08 school year, she agreed to do so even though it meant that more than half of her guaranteed preparation time would be usurped as a result. The Union contends that in 1999 new language was inserted into the parties' Agreement which promised compensation to those Special Education Teachers who were shorted their prep time, at a rate of \$20/hour. While the Grievant does not challenge the reduction of her prep time as a consequence of taking on another student (a fact that occurs with relative frequency for Special Ed. instructors) she does nevertheless argue that she should be compensated for the lost time per the language in

Article XIII. Indeed, in this instance she was told by her principal that he was authorizing the additional payment and that she needed to submit the requisite vouchers in order to be paid. Further, the Union argues that the term "regular student day" as set forth in Article XVIII means the time that the teacher is in contact with his/her students. In the elementary grades for Special Education instructors, the "day" begins at 8:30 in the morning and ends at 2:50 in the afternoon. Any extra time that the Grievant has away from her students during this time is spent in conference with their regular classroom teachers and para-professionals assigned to the class. Therefore, this is not prep time as referenced in the Contract. Accordingly, for all these reasons, they ask that the grievance be sustained, and that Ms. Syverson be reimbursed for lost preparation time in the fall of 2007 at the agreed-to contract rate of \$20 per hour.

Conversely, the **DISTRICT** takes the position that neither Article XIII nor Article XVIII has been violated as a result of the Administration's actions. In support, they claim that the "regular student day" for the elementary school instructional staff, as referenced in Article XVIII, is synonymous with the teacher's duty day. Thus, the time between 8:10 in the morning and 8:30, is routinely counted toward the fifty minute preparation allotment. In addition, they note that unlike the rest of the elementary school teachers,

Special Education instructors are not responsible for getting their students on the bus each afternoon. Thus, the time between 2:50 p.m. and 3:00 p.m. is also considered preparation time. Further, the Administration argues that the loss of preparation time does not automatically entitle a teacher to the \$20 hourly stipend under the terms of Article XIII, as Ms. Syverson contends. Rather, that language is reserved for situations where an instructor would lose their prep time when they are asked to substitute for another teacher. While the Employer has attempted to give Specialists fifty minutes of prep time each day, as a practical matter that has not occurred all of the time. Indeed, this is the first time a member of the bargaining unit has filed a grievance regarding the subject. Moreover, they note that the Special Education instructors in the high school do not have a prep period, and that is what is intended by the second sentence in Article XIII. In addition, the District argues that regular elementary teachers are required to be with their students by 8:10 each morning of school, whereas Special Education instructors do not have this requirement. That is why a Specialist is considered to have prep time between 8:10 and 8:30 each day. Finally, the Administration contends that the Grievant was not compensated per the terms of Article XIII after she submitted her vouchers because there was no internal substitution

which is the clear intent of the language. For all these reasons then, they ask that the grievance be denied in its entirety.

Analysis of the Evidence-

At the outset, I would note that a number of undisputed facts relevant to the outcome of this matter have been established on the record. More particularly the uncontested evidence demonstrates:

- That every full-time teacher, under the terms of the Contract, is entitled to prep time.
- That the Master Agreement under which this grievance arose, specifically states "...each full time teacher will be provided prep time during the regular student day."
- That nowhere in the parties Labor Agreement is there language defining the term "regular student day."
- That for elementary instructors, prep time has been established as being "fifty minutes" to be administered "...in one (1) block of time, if possible..." (Joint Ex. 2).
- That the language in issue contained in Articles XIII and XVIII, has remained essentially unchanged since at least the 1999-01 Agreement.
- That some teachers – generally non-classroom instructors – have routinely created their own daily schedule depending upon the number of students assigned to them and other relevant factors. This would include the Grievant as a Special Education instructor for elementary school, who established her own schedule for the 2007-08 school year.

- That regular elementary classroom teachers report for work at 8:10 a.m. Monday – Friday. While their instructional day commences at 8:30 and ends at 2:50 p.m., they continue to have supervisory duties normally until three o'clock each afternoon during the normal work week; taking them to the busses during the last ten minutes of each day. For the first twenty minutes of the day these same instructors are also required to be in their classrooms supervising students.
- That Elementary School Specialists do not have supervisory responsibilities during the same time period as classroom instructors (Employer's Ex. 3).

The foregoing then, serves as a backdrop against which the balance of the evidence must be viewed.

As previously noted, there are two basic issues that need to be resolved in connection with Ms. Syverson's grievance. The first involves an interpretation of the relevant language found in Article XVIII ("Preparation Time") and more particularly, whether the critical phrase, "regular student day" found in Section 1 includes the time prior to the commencement of formal student instruction (District's view) or is limited to the time that the students are actually in class (Union's position). Following a careful review of the evidence and supportive arguments proffered by the parties, I conclude that the Employer's argument must be credited where in conflict with the Association's.

It is an uncontroverted fact that the term "regular student day" is not

specifically defined in Article XVIII or anywhere else in the Master Agreement. Similarly, as the Union has observed, there appears to be little or no arbitral precedent within the state addressing this issue in particular. At the same time however, I find the first sentence in Article IX (“Hours of Service”) to be somewhat instructive. Establishing the bargaining unit members’ hours of service - when teachers in the District are “required to report for duty” each day - the time specified is described in terms of, “...the student’s regular school day.” Nowhere in the Contract is there any distinction made between this phrase and “regular student day” utilized in Article XVIII, and it takes no quantum leap of faith to conclude that one is consonant with the other. If, by contract, the elementary classroom instructional staff is expected to “report for duty” at 8:00 a.m. on the “student’s regular school day,” and are required to be in their classrooms by 8:10 for student supervision, it is most reasonable to conclude that the prep time guarantee contained in 18.1 of the Agreement can be satisfied, in part, during the “regular student day” which extends beyond the actual instructional time with students.

A cogent argument can also be made that absent a commonly understood definition of the term “regular school day” (or “regular student day”) within the education community in general, the language may be

considered ambiguous, and as such it calls into play the past practice of the parties as an interpretive aid.

The evidence shows that elementary specialists have routinely used the twenty or so minutes between 8:10 and 8:30 a.m. each day as part of their prep time. As previously noted, elementary specialists do not have students in their classrooms in the morning until 8:30, even though they are expected to report for duty at 8:00 a.m. "...on the student's regular school day." Employer's Exhibit 1; Joint Exhibits 9 – 15. The Union argues that no teacher referenced in the data was called by the Administration to verify its accuracy. However, much of the documentation was submitted and identified as joint exhibits, and moreover appears to be a part of records routinely kept in the normal course of the District's operation.

The Association contends further that the Employer's argument would not apply to the great number of classroom teachers who are otherwise occupied with students in a supervisory capacity before the start of actual classes. Thus, they maintain an adoption of the Administration's position would mean that the same language in the Agreement applies to allow prep time for specialists but precludes prep time for classroom teachers, which makes little sense. The applicable language, they assert must apply to all teachers in the same way.

What is ignored in the Union's argument however, is the unrefuted fact that historically specialists – whether in speech, art, music or special education – have not been treated exactly the same as classroom teachers. They develop their own work schedules by in large. Unlike their classroom counterparts, they are not assigned any supervisory responsibilities in advance of 8:30 each morning, and spend a smaller percentage of their time each day in actual contact with students (District's Ex. 3).²

The Grievant testified that yet another problem with the Employer's interpretation of Article XVIII is that it disregards what she actually does during these two time periods when she is not engaged in student instruction. According to Ms. Syverson, she spends that time meeting with classroom teachers regarding their mutual students and therefore cannot utilize those twenty minutes first thing in the morning as prep time. Other than this limited testimony however, there was little evidence placed into the record to substantiate the claim. Nor did the Grievant maintain that each day was utilized in such a manner.

Similarly, the record, when viewed in its entirety, does not adequately

² Further, as the Employer notes, if regular elementary classroom teachers can be assigned supervisory duties from 8:10 to 8:30 each morning (a fact that is not disputed) then it is not unreasonable that the Administration can designate that same time for teacher preparation for elementary specialists.

support the Association's position, in my judgment, when considering the evidence pertaining to Article XIII.

Article XIII is entitled "Extra Compensation." The critical provision is found in Section 4 under the heading "Substitution Within Staff." Not unlike the language in Article XVIII, the construct of this segment is also somewhat amorphous. While the first sentence standing alone (which it had been for years prior to 1999) appears to be relatively straight forward, the addition of the second raises questions. Is the reader to understand that "Special Ed. Teachers and others" are to be paid the same dollar amount specified in the opening sentence due to the lone fact that they do not have a prep time, or are they eligible for the \$20 hourly stipend if they substitute for another teacher and their normal work schedule does not include any prep time? The answer cannot be readily ascertained merely from a reading of this provision.

As the Administration points out, the very fact that the second sentence is included in the section entitled "*Substitution Within Staff*" is revealing (emphasis added). If it was intended that extra compensation at the rate of \$20 per hour was to apply generally to all members of the instructional staff who had an inadequate amount of scheduled prep time for whatever reason, then the authors of the language could have drafted

such a provision and included it either in the same “Extra Compensation” article or in Article XVIII (“Preparation Time”).³ That however, did not occur. Rather, the new sentence was appended to a section that specifically addressed substitution situations. Although section headings are not necessarily dispositive, they have been held to aid in the resolution of ambiguous language when interpreting relevant contract provisions. See: *Florez vs. Sargeant*, 185 Ariz. 521, @ 524, 917 Pac. 2nd, 250 (1996).

The Association counters that the placement of the sentence in 13.4 had nothing to do with substitutions. Rather, according to their (former) chief negotiator, Jim Thompson, the only reason the new language was included in 13.4 was to make use of the compensation portion of the first sentence. In this regard the Union maintains that the parties agreed to place the sentence where they did in order to make certain that the loss of scheduled prep time would not be paid on a pro-rata basis of the teacher’s salary. Moreover, they contend that if the Employer’s interpretation is accurate, then there would be no reason to adopt the second sentence at all, as it says nothing different than the first.

It is true, as the Union has observed, that the Employer called no

³ It is noted that Section 6 of Article XIII contains relatively clear language calling for a \$20 hourly payment to bargaining unit members “...for preparation and set up time” who are assigned to teach summer school in the District.

witnesses who were at the bargaining table when the language was first adopted. However, with all due respect to their witness, I do not find the argument to be persuasive in light of the countervailing evidence.

Beyond the fact that the sentence been placed in the "Substitution" section of the article, I cannot agree there would have been no reason to adopt the language in 1999, if the Employer's interpretation is favored. Rather, I find that it makes a separate and distinct statement from the opening sentence. The first specifies the entitlement paid to a teacher "who is asked to substitute during his or her prep time." However, as it was demonstrated, there are other members of the faculty who do not have regular prep periods. It was shown that at the time the language was negotiated, the special education teachers at the secondary level in the District did not have scheduled prep periods (cross-examination of Mr. Thompson). It is not unreasonable then to conclude that the sentence added in 1999 to 13.4 was adopted to expand the coverage referenced in the opening sentence to those members of the faculty who did not have prep time on their regular schedules, but were asked to substitute for another teacher from time to time.

Two other commonly-applied interpretative aids are relevant to this issue. The first is the universally accepted canon of construction, "*contra*

proferentem,” holding that where doubt exists concerning its intent, the language in issue will be construed against the party who drafted it. *Crown Cork & Seal Co.* 104 LA 1133; *Turner v. Alpha Phi Sorority House*, 276 N.W. 2nd, 63, 66 (Minn. 1979). The rationale expressed in the *Restatement of the Law of Contracts*, Subsection 205, is instructive:

“[W]here one party chooses the terms of a contract, they are likely to provide more carefully for the protection of their own interests than for those of the other party. They are also more likely than the other party to have reason to know of uncertainties of meaning. * * * In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.

There is no dispute but that it was the Union who authored and then proposed to add the second sentence to this segment of the article during the 1999-01 contract negotiations.

The second aid addresses the practice of the parties since the language was first adopted. Here, the record demonstrates that during the eight or nine years that the second sentence has been a part of the Master Agreement, no member of the bargaining unit has received any compensation as provided in 13.4 who has not substituted for another teacher. It is widely held that for a past practice to be enforceable certain antecedent conditions must be satisfied. Among them are longevity and consistency. Here, I find the unrefuted fact that no teacher

has been paid under the terms of the second sentence in 13.4 over a relatively extended period of time in the manner now sought in the grievance, constitutes significant evidence of an accepted way of administering the provision. This same rationale can be said to demonstrate the element of mutuality via implication. I must respectfully disagree with the Association's counter argument that the dearth of evidence of any payment to a teacher who has not substituted but who has nevertheless lost his/her prep time for whatever reason, is proof of no practice. It is simply less plausible to assume that the bargaining unit membership was unaware of the manner in which the language in issue - which can only be considered a benefit - had been administered by the Employer over all these years. Certainly the Administration's conduct in this regard cannot be characterized as vague and ambiguous. Nor was there any evidence that it had been contradicted as often as it has been followed since the adoption of the language in 1999.

Award-

Accordingly, for the reasons set forth above, the grievance is denied.

Respectfully submitted this 29th day of September, 2008.

/s/ Jay C. Fogelberg, Neutral Arbitrator