IN THE MATTER OF ARBITRATION	**OPINION & AWARD**
-between-	**Grievance Arbitration**
A.F.S.C.M.E. COUNCIL 65, LOCAL 480	**Re: Leap Year Pay**
-and-	**B.M.S. No. 05-PA-1363**
INDEPENDENT SCHOOL DIST. 701 **HIBBING, MINNESOTA**	**Before: Jay C. Fogelberg** **Neutral Arbitrator**

Representation-

For the Union: Sarah Lewerenz, Attorney

For the District: John M. Colosimo, Attorney
Adam J. Licari, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article XVII, 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 Grievants on April 10, 2008, 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 Hibbing on November 13, 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 a preference for submitting written summary statements. They were received on December 15, 2008, at which time the hearing was deemed officially closed. While the parties were unable to agree to a precise statement of the issues, the following is believed to constitute a fair description of the matters to be resolved.

The Issue-

A) Is the grievance of the Local procedurally arbitrable?

B) If so, did the District violate the terms and conditions of the parties' Labor Agreement when they failed to pay the Grievants (all full-time employees) an hourly wage rate for work performed in the normal course of their duties on Friday, February 29, 2008?

C) If so, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The adduced evidence indicates that the Grievants are clerical, and

other support personnel employed by Independent School District No. 701 (hereafter "District", "Employer" or "Administration") in Hibbing, Minnesota. In that capacity, they are represented by the American Federation of State, City and Municipal Employees, Council 65 ("Union" or "Local") who, together with the Administration has negotiated and executed a labor agreement (Joint Ex. 1) covering terms and conditions of employment for members of the bargaining unit.

2008 was a leap year, and Friday February 29th a normal work day for the employees in the bargaining unit as well as the entire instructional staff and other administrative personnel working for the District. Following receipt of their pay checks that included that date, some of the Grievants went to their Local's leadership informing them that while they had worked the 29th of February, the amount of their checks had not been adjusted to reflect the additional pay day. Normally, the Grievants are paid twice a month. Compensation is calculated based upon their total annual salary then divided into twenty-four payments. Each pay period does not contain the same number paid work days however, as the actual number of week days varies from month to month.

When approximately thirty-five support personnel took their complaint to the Administration, their request for additional pay was

denied. The Employer responded that in their view, neither the applicable contract language, *infra*, nor the past practice of the parties supported a violation of the parties' Labor Agreement. Thereafter, on May 21, 2008, when the School Board denied the appealed grievance, the matter was referred to binding arbitration for resolution.

Relevant Contractual & Statutory Provisions-

From the Master Agreement:

Article V
Hours of Work

Section A.

> The normal hours of work shall be eight (8) hours per day and forty (40) hours per week, Monday through Friday, when school is in session. All hours worked in excess of scheduled hours per day shall be compensated at time and one-half (1½) rates....

* * *

Article XVII
Grievance Procedure

Section 1. Definition & Interpretations:

> Subd. 1. Grievance: A "grievance" shall mean an allegation in writing by an employee that the employee has been injured as a result of a dispute or disagreement between the employee and the School District as to the interpretation or application of specific

terms and conditions contained in this Agreement.

* * *

Section 2. Time Limitation and Waiver: A grievance shall not be valid for consideration unless the grievance is submitted in writing, signed by the grievant, to the School District's designee, setting forth the facts and the specific provision(s) of the Agreement allegedly violated and the particular relief sought within thirty (30) days after the date that the first event giving rise to the grievance occurred. * * * An effort shall first be made to adjust an alleged grievance informally between the employee and the School District's designee.

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Section 6. Arbitration Procedures

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Subd. 7 Jurisdiction: The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before him/her 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 herein....

* * *

Appendix A
Wage Structure 7/1/07 – 6/30/08

Positions of the Parties-

The **UNION** takes the position in this matter that the complaint now before the arbitrator for consideration is arbitrable and furthermore that the District violated the Master Agreement when it failed to pay full time employees who are members of the Local's bargaining unit for "Leap Day" (February 29, 2008) simply because it pays employees on a monthly basis not an hourly one. In support of their claim the Union maintains that it was not until the Employer raised their arbitrability argument at the hearing itself that they were ever aware of the District's position that the neutral had no jurisdiction over the resolution of the substantive issue(s). They contend that at no time during the processing of the complaint did the Administration ever indicate their objections based upon any alleged procedural flaw. Moreover, at the very heart of this matter is whether or not the Grievants are being paid as hourly employees or on a salaried basis, which is why the issue of salaried versus hourly compensation procedures must now be addressed.

With regard to the substantive issues, the Local contends that the Collective Bargaining Agreement provides for an hourly rate and clearly states that members of this bargaining unit shall be paid "100% of the

maximum hourly rate after one year" of full-time employment in the District. The Grievants are all non-exempt hourly employees under the definition of the Fair Labor Standards Act ("Act") and therefore must be paid for all hours worked. Each pay period does not contain the same number of paid days of work as there are not the same number of week days in each year due to the fact that the year does not start on the same day of the week every year. Further, there are a different number of days in different months. Thus it follows that there are not the same number of paid hours in all pay periods. In fact the number of hours in each pay period varies between 80 and 96. If an employee works 80 hours in a pay period and makes approximately $1,697 during that time he/she would be paid at an hourly rate of $21.21. However, if the number of hours in a given pay period is 96, then that bargaining unit member would receive an hourly rate of $17.67 using the same formula. For the 2008 Leap Day however, no Grievant was compensated for the additional hours worked on February 29th. Accordingly the Union asks the grievance be sustained and the affected employees be made whole.

Conversely, the **SCHOOL DISTRICT** takes the position that the grievance is not arbitrable as the Union drastically altered the content and their position relative to the initial complaint which was moved through the

grievance procedure, and what they are now asking the arbitrator to consider. Matters of salary versus hourly pay for the Grievants were never made the subject of the original complaint. Rather, the Local merely sought compensation for the additional day worked in 2008 by its members, as it fell during a normal work week. Further, at no time during the processing of the grievance did the Union raise the issue of the Grievants being paid on an hourly basis. Instead, they sought relief for working the extra day last year. This is what was discussed between the parties at all of the steps leading to the appeal to arbitration.

In connection with the substantive issues, the Administration argues that what the Local is essentially seeking here is the re-negotiation of the Contract and to ignore a thirty-year past practice of converting the method in which the bargaining unit personnel have been paid. There is no dispute but that the Grievants all worked 2,088 hours last year. Yet, it is significant that the Master Agreement nowhere defines the work year. Rather, the parties' Contract merely indicates that the normal work day is to be eight hours and the work week 40 hours. Significantly, according to the Administration, Appendix A establishes income rates for the employees in terms of salaries, and historically that is how they have been paid: dividing the annual salary of each position by twenty-four and distributing

the pay checks twice a month. This happens regardless of how many hours have been actually worked in any given pay period. Further, the Employer notes that all of the job descriptions for the Grievants refer to their wage rates as "determined by the Master Agreement" as reflected in Appendix A. It is significant to note that the Local ratified each of the job titles and descriptions. Finally, they maintain that the parties have always bargained compensation for these employees on an annual basis rather than an hourly one. The Grievants have been paid in the same identical manner for over thirty years without complaint. For all these reasons then they ask that the complaint be denied in its entirety.

Analysis of the Evidence-

Initially, the District's argument regarding procedural arbitrability must be addressed. The Employer maintains the Union is now arguing that the Grievants are hourly employees, and as such should be paid an additional sum for work performed on February 29th of this year. As this issue, in their view, was not raised either in the initial grievance or in processing it through the established steps set forth in Article XVII, it follows that the substantive complaint cannot now be considered by the arbitrator, and the Local must "start the process over."

Beyond the fact that there is a dearth of evidence in the record to support the Employer's claim, their argument begs the very question that is to be considered relating to the merits of the grievance itself. First, the documentation submitted, fails to demonstrate that the Administration had been unfairly misled concerning the nature of the complaint that has been brought by the Union. No claim of undue surprise has been made, nor was there any evidence placed in the record indicating that the Administration's defense of the grievance has been compromised when the initial written submission is compared to the position taken by the Local at the hearing.

Moreover, whether the Grievants are entitled to additional compensation for working "Leap Day 2008" necessarily includes consideration of whether they are paid on an hourly basis (Union's view) or are effectively treated, for all intent and purposes, as salaried personnel.

In the final analysis, I conclude that the District's procedural objections constitute little more than a mélange of smoke and mirrors, and that it is entirely appropriate to resolve this dispute based upon its merits.

As this is a contract interpretation matter, the burden of proof lies initially with the Union to demonstrate via a preponderance of the evidence that the Employer's failure to compensate the Grievants for

working on Leap Day in February of this year, constitutes a violation of the parties' Labor Agreement. To that end, the Local asserts that the controlling language is clear; that under the terms of Article XXVII, members of the bargaining unit are to be paid on an hourly basis. Thus, they maintain that when someone works 262 days in a year, as opposed to 261, but are not paid any more or any less, the Administration violates the Contract.

Following a careful review of the testimony taken and the supportive arguments submitted, however, I must conclude that the Grievants have not satisfied their evidentiary obligation in this instance.

Article XXVII, Section B, does, as the Union contends, make reference a "maximum hourly rate" when speaking to the compensation of "new employees hired after July 1, 1986" (Joint Ex. 1). At the same time however, it is noted that the article itself is entitled "Salaries,"[1] and Section A speaks to the manner in which each regular full-time employee's "base salary" will be increased effective July 1st of the years covered by the Agreement (*id.*). The Local's President, Jace Tramontin, testified that historically the parties refer to the "Wage Structure" appended to the

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[1] Section headings, though of and by themselves not necessarily dispositive, have nevertheless been utilized to resolve ambiguities when interpreting contract language. See: *Florez vs. Sargeant,* 185 Ariz. 521, @ 524, 917 Pac. 2nd, 250 (1996).

Contract, *supra*, when bargaining increases in compensation for the membership. Two of the three columns contained in the schedule are entitled "salary," while the third is couched in terms of "hourly rate." However, Trina Quiggins, the Superintendent's secretary and the District's payroll clerk, testified that the third column is routinely invoked only in situations such as call outs, overtime, leave time and shift differential. Otherwise she posited that employees are consistently paid on a "salary basis."

The Administration notes that the Contract itself makes reference to the term "salary" in no fewer than seventeen separate places. No one denies that the term is utilized more than any other when describing compensation for those covered by the Agreement. At the same time however, the Local points out that there are at least five separate words found throughout the document which refer to the form of payment the employees are to receive. These include such terms as "salary," "wages," "hourly," and "pay."

Beyond the fact that the parties have chosen to utilize a varying number of words when addressing compensation in their Labor Agreement, it is undisputed that nowhere in the document is the work year defined in terms of days or hours to be worked. Nor do I find any clear

definitive declaration in the Contract that the Grievants are hourly employees who are to be paid on an hourly basis. While Article V, Section A, *supra*, specifies eight hours each day and forty hours per week as being the "normal hours of work," it is clear from a reading of the entire section that the parties were addressing the matter of overtime. Further, at the hearing, the Union stated specifically that overtime was not at issue here.

It is widely held that an agreement is ambiguous if "plausible contentions may be made for conflicting interpretations" of the relevant language. *Armstrong Rubber Co.* 17 LA 741. Some of the provisions in the parties' Agreement, standing alone, may at first glance appear to be clear and definitive, supporting one side's position more than the other's. However, when the entire contract is considered, I find that the various parts lack harmony and consistency as they relate to the method in which wages are computed. I conclude then, that the applicable language is indeed ambiguous.

While both the Union and the Employer have cited various cannon's of construction which they believe support their respective arguments, what is controlling here is the past practice of the parties when examining the method in which the Grievants and others have been compensated in previous years.

The objective evidence is manifestly consistent with the District's position that members of this bargaining unit have been paid more on a salaried basis than an hourly one. It was aptly demonstrated that after any increase in compensation has been negotiated, the Administration simply divides the newly bargained amount into twenty-four separate pay periods over the course of a calendar year, paying the employees twice a month. Nearly every witness who testified at the hearing – Union and District alike – confirmed the same methodology. The evidence shows that routinely after the Employer divides an employee's newly negotiated "salary" into twenty-four payments, the amount of pay does not vary depending upon the number of days actually worked within that pay period. Moreover, as the Local noted in their opening remarks at the hearing, bargaining unit members are paid the same amount each pay period regardless of the number of actual hours worked in any given bi-monthly period.

In the course of her testimony, Ms. Quiggins offered data covering the school-years 1999-2000 forward, which supports the Employer's position. In each instance, employees were paid based upon 260, 261 or 262 days in the year (District's Ex. 2). Yet it is uncontroverted that the calculations of their compensation remained consistent. This same exhibit

necessarily included two leap years prior to 2008. It is illuminating that whether the end result was 260 days worked or 262 days, the employees were not paid any additional amount other than the "salary" figure that was negotiated, divided into twenty four compensatory segments.

Two other factors have influenced the decision reached here. The first concerns the job descriptions of the various positions within the bargaining unit (Employer's Ex. 3). It was shown that each has routinely been ratified by the Local. Significantly they are all couched in terms of months, as opposed to an hourly structure when defining the "work day/work year." Under the terms of the Master Contract (Article XX) these descriptions are reviewed annually by both sides. The Union correctly observes that the job descriptions make no reference to the specific manner in which the employees are to be paid. However, the recorded evidence reveals that Mr. Tramontin has served as a member of the Union's negotiating team for no fewer than three contract terms. During that time neither he nor any other member of the Local's negotiating team ever asserted that the Grievants were hourly employees and should regularly be identified and paid as such. This additional fact only serves to further buttress the Administration's argument that for all intent and purposes, the Grievants have regularly been compensated on a salaried

basis, and that there is no history of anyone in the bargaining unit ever receiving additional monies for working a "leap day."

Award-

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

Respectfully submitted this 19th day of December, 2008.

Jay C. Fogelberg, Neutral Arbitrator