

IN THE MATTER OF ARBITRATION	}	OPINION AND AWARD
	}	
between	}	
	}	
INDEPENDENT SCHOOL DISTRICT	}	
	}	
NUMBER 547, PARKERS PRAIRIE	}	
	}	BMS CASE No. 09-PA-0653
(the "Employer" or "District")	}	
	}	
and	}	
	}	
EDUCATION MINNESOTA	}	EUGENE C. JENSEN
	}	
PARKERS PRAIRIE	}	NEUTRAL ARBITRATOR
	}	
(the "Union")	}	

Advocates

For the Employer:

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Minneapolis, Minnesota 55402

For the Union:

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Witnesses

For the Employer:

Connie Wenker
Principal

Steven Inwards
School Board Chair

Robert Dorn
Former School Board Chair

For the Union:

Mike McDaniel
Union Negotiator

Michelle Goos
Education Minnesota
Field Representative

Scott Peterson
Union Treasurer and Negotiator

Hearing Date and Timeline for Briefs

An arbitration hearing was held on February 4, 2010, at the District's Elementary Building in Parkers Prairie, Minnesota. The parties agreed to submit simultaneous briefs electronically on March 2, 2010. The Arbitrator forwarded each brief to the opposing party on that same date.

Jurisdiction

In accordance with the Minnesota Public Employment Labor Relations Act (PELRA), the rules of the Minnesota Bureau of Mediation Services (BMS), and the language of the 2007 – 2009 labor agreement between the parties, this grievance is properly before the Arbitrator.

Issue

The District submitted the following issue statement:

Did the District violate Article XVII, Section 2, Subdivision 1 of the 2007-09 collective bargaining agreement by paying high school teachers during the 2008-09 school year the sixth class assignment rate specified in the 1993-95 collective bargaining agreement and incorporated by the 2007-09 contract, rather than the fourth block assignment rate specified in the 2007-09 collective bargaining agreement?

The Union submitted the following issue statement:

Did I.S.D. No. 547, the Parkers Prairie School District (the District) violate Article XVII, Section 2, Subdivision 1 of the 2007-09 collective bargaining agreement (CBA) with the exclusive representative for the teachers, Education Minnesota Parkers Prairie (the Union), and/or past practice when it paid 10 teachers overload pay for the 2008-09 school year based on the dollar amounts provided for in the 1993-95 CBA? If so, what shall the remedy be?

Although the above-listed Issue Statements are slightly different, they both capture the essence of the dispute between the parties.

Relevant Contract Language

Excerpts from the 2007 – 2009 Master Agreement Between the Parkers Prairie School District and Education Minnesota -- Parkers Prairie:

Article V, Teacher Rights

Section 7. Teacher Contracts: Any contract between the District and an individual teacher, heretofore executed shall be subject to and consistent with the terms and conditions of this Agreement. Any individual contract hereafter executed shall be in the form provided in Appendix B and shall be expressly made subject to and consistent with the terms of this or subsequent agreement to be executed by the parties. If an individual contract contains any

language inconsistent with this Agreement, this Agreement, during its duration shall be controlling.

Article XIII, Grievance Procedure

Section 1. Grievance Definition: “A grievance” shall mean an allegation by a teacher, and/or only the local Association, resulting in a dispute or disagreement between the teacher and the District as to the interpretation or application of terms and conditions of employment.

Section 8. Arbitration Procedures: In the event that the teacher and the school board are unable to resolve any grievance, the grievance may be submitted to arbitration as defined herein:

Subd. 5. Decision: The decision by the arbitrator shall be rendered within thirty (30) days after the close of the hearing. Decisions by the arbitrator in cases properly before him shall be final and binding upon the parties, subject, however, to the limitations of arbitration decisions as provide in P.E.L.R.A. The arbitrator shall issue a written decision and order including findings of fact which shall be based upon substantial and competent evidence presented at the hearing. All witnesses shall be sworn upon oath by the arbitrator.

Subd. 7. Jurisdiction: 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 beyond the limits established by the P.E.L.R.A.

Article XVII, Teacher Assignments and Qualifications

Section 2. Teaching Load:

Subd. 1. High School Teaching Load/Prep Time: The normal weekly teaching/supervision load for junior/senior high school teachers will be three hundred (300) minutes per day. In the event a teacher is asked to teach more than three whole block preparations in a semester, they will receive \$1,350 for each additional semester block of 45 minutes they teach. In no case will the teacher be assigned less than 45 minutes of continuous preparation time daily. In the event that the District reverts back to the class schedule in effect for the 1993-94 school year the language in effect for this subdivision would replace the above language in this paragraph.

Article XXII, Duration

Section 2. Effect: This Agreement constitutes the full and complete Agreement between the District and the exclusive representative representing the teachers of the District. The provisions herein relating to terms and conditions of employment supersede any and all agreements, resolutions, practices, District policies, rules or regulations concerning terms and conditions of employment inconsistent with these provisions.

Section 3. Finality: Any matters relating to the current contract term, whether or not referred to in this Agreement, shall not be open for negotiation during the term of this Agreement.

Excerpts from previous agreements' language related to additional assignments:

1987 – 1989 Agreement -- Article XVII, Teacher Assignments and Qualifications, Section 2. Teaching Load:

Subd. 1. The normal weekly teaching load in the junior and senior high schools will be thirty (30) teaching periods and five (5) unassigned preparation periods or not to exceed six (6) hours of pupil contact per day. Assignment to a supervised study period shall be considered a teaching period for purpose of this Article. Beginning with the 1988-89 school year when a sixth class is assigned to a secondary classroom teacher they shall be reimbursed at the rate of \$1,000.00 for a full year class and \$500.00 for a semester class.

1989 – 1991 Agreement

Arbitrator's Note: Language is unchanged from previous agreement

1991 – 1993 Agreement

Arbitrator's Note: Language is unchanged from previous agreement

1993 – 1995 Agreement

Arbitrator's Note: Language is unchanged from previous agreement

1995 – 1997 Agreement

Subd. 1. High School Teaching Load/Prep Time: The normal weekly teaching/supervision load for junior/senior high school teachers will be three hundred (300) minutes per day. In the event a teacher is asked to teach more than three whole block preparations in a semester, they will receive \$600 for each additional semester block of 45 minutes they teach. In no case will the teacher be assigned less than 45 minutes of continuous preparation time daily. In the event that the district reverts back to the class schedule in effect for the 1993-94 school year the language in effect for this subdivision would replace the above language in this paragraph.

Arbitrator's Note: Underlined language represents a change from the previous agreement.

1997 – 1999 Agreement

Arbitrator's Note: Language is unchanged from the previous agreement

1999 – 2001 Agreement

Subd. 1. High School teaching Load/Prep Time: The normal weekly teaching/supervision load for junior/senior high school teachers will be three hundred (300) minutes per day. In the event a teacher is asked to teach more than three whole block preparations in a semester, they will receive \$1,350 for each additional semester block of 45 minutes they teach. In no case will the teacher be assigned less than 45 minutes of continuous preparation time daily. In the event that the district reverts back to the class schedule in effect for the 1993-94 school year the

language in effect for this subdivision would replace the above language in this paragraph.

Arbitrator's Note: Underlined language represents a change from the previous agreement.

2001 – 2003 Agreement

Arbitrator's Note: Language is unchanged from the previous agreement

2003 – 2005 Agreement

Arbitrator's Note: Language is unchanged from the previous agreement

2005 – 2007 Agreement

Arbitrator's Note: Language is unchanged from the previous agreement

Background

The Employer is Independent School District (ISD) 547 in Parkers Prairie, Minnesota. The Union is the Parkers Prairie local affiliate of Education Minnesota. The issue giving rise to this arbitration relates to the amount of compensation junior and senior high teachers receive for additional teaching assignments.

Negotiations between the parties for the 1987 – 1989 agreement ended with a provision for “overload pay,” should a teacher be assigned to teach six, rather than five classroom periods. This overload pay provision called for an additional five hundred dollars (\$500.00) for each semester or one thousand dollars (\$1,000.00) for each year.

In the 1995 – 1997 agreement the language was amended to adapt to the District’s decision to move to a “block schedule.” This new language provided for a six hundred dollars (\$600.00) additional payment to teachers for each forty-five (45) minutes of teaching per semester, or twelve hundred dollars (\$1,200.00) per year. If the District opted to return to the previous scheduling pattern that was incorporated in the 1987 –1989 agreement and carried forward into successor agreements, the following sentence was added to the new agreement:

In the event that the district reverts back to the class schedule in effect for the 1993 – 94 school year the language in effect for this subdivision would replace the above language in this paragraph.

Subsequent labor agreements maintained the amended language, however, in the 1999 – 2001 agreement the dollar amounts increased significantly to one thousand, three hundred and fifty “(\$1,350.00) for each additional semester block of 45 minutes they teach,” or two thousand, seven hundred dollars (\$2,700.00) per year.

On February 21, 2008, approximately one month following the ratification of the 2007 – 2009 agreement, the District decided to return to the seven period day that was referenced in the 1993 – 1995 agreement. Three months later ten secondary teachers were given their individual contracts addressing overload assignments. Those contracts provided for five hundred dollars (\$500.00) per semester or one thousand dollars (\$1,000.00) per year. The Union was contacted and they asked the District to bargain on the matter. That request did not result in a continuation of the bargain, and the grievance at bar in this arbitration was filed.

The Union's Position

The Union argues the following to support its grievance:

ARBITRATOR'S NOTE: The following arguments are contained in the Union's Post-Hearing Brief.

There is no need for contract interpretation if the words are plain and clear. Elkouri & Elkouri, How Arbitration Works, Fifth Edition (1997), page 470.

The CBA [Collective Bargaining Agreement] language in questions refers to “**the language** in effect for this subdivision (emphasis added). It does not state that the current Subdivision 1 “will be replaced”, or words to that effect, by the “old Subdivision 1. If the

entire “old” subdivision was replacing the “new” subdivision, there would be need to note that “the language” was reverting. . . .

In the parlance of bargaining, it is usual and customary to refer to “language” items and “monetary” items. Although both are terms and conditions of employment, “language” deals with words and “monetary” deals with wages and benefits.

The parties agreed that the District could revert back to the 1993-94 class schedule, which is a language item, but never agreed on the amount of overload pay that would be due if the District did this. (pp. 7-8)

The Union urges the arbitrator to look to past practice to determine the correct amount of overload pay under the “new” 7 period day. Past practice fills the gap. The arbitrator does not have to substitute his judgment for that of the parties, as argued by the District:

“Arbitrators have sometimes recognized that contract language may cover a matter generally but fail to cover all of its aspects--that is, “gaps” may exist. It has been recognized that established past practice may be used, not to set aside contract language, but to fill in the contract’s gaps.” Elkouri & Elkouri, *How Arbitration Works*, Fifth Edition, (page 654).

From the 1999-2001 CBA forward until the 2008-09 school year, the District paid an overload rate of pay at an amount of 37 cents per minute, thereby establishing a past practice. . . .(p. 9)

It defies common sense that the parties contemplated that as the years went by, the 1993-95 schedule was brought back, whether 10, 20, 30, or 40 years later, the 1993-94 rate of pay would remain in effect. . . . (p. 10)

Finally, the District's position is unfair. . . .

The District claims it cannot legally reopen the CBA to bargain overload pay, citing PELRA. This is legally incorrect and is being used by the District to reap savings by claiming it cannot bargain overload pay and that it is an unfortunate but unpreventable occurrence that it must pay staff overload pay at the 93-95 rate. . . .

For the District to claim that the Union "overlooked" the issue of the possibility of the District moving to a different schedule is disingenuous. The levy referendum had failed, the Scheduling Committee had effectively been disbanded, and the commonly held belief by both sides was that the schedule would remain unchanged. (pp. 11-13)

The Union concludes:

The District had the right, pursuant to Article XVII, Section 2, Subdivision 1 of the 2007-09 CBA, to return to the "old" 7 period day that it last used in 1994-95 beginning with the 2008-09 school year. However, neither the plain language of the CBA nor the practice of the parties allowed it to revert to the 1993-95 overload rate of pay. (p. 14)

The District's Position

The District argues the following to support its denial of the Union's grievance.

ARBITRATOR'S NOTE: The following arguments are contained in the District's Post Hearing Brief.

The 2007-2009 CBA is straightforward and produces a clear result with regard to overload pay. Article XVII, Section 2, subdivision 1, unambiguously provides that "[i]n the event that the District reverts back to the class schedule in effect for the 1993-1994 school year the language in effect for this subdivision would replace the above language in this paragraph." (Joint Ex. 1). . . .

It is undisputed that, for the 2008-2009 school year, the School District reverted to the seven period day that was also in effect during the 1993-1994 school year. Thus, the contingency was met and the contract language from Article XVII, Section 2, subdivision 1, of the 1993-1995 CBA was incorporated by the 2007-2009 CBA. As a result, the contract language in effect for the 1993-1994 school year with respect to overload pay replaces the overload pay language found in the 2007-2009 CBA.

The contract language for the 1993-1994 CBA states that high school teachers assigned to a sixth class period "shall be reimbursed at the rate of \$1,000.00 for a full year class and \$500.00 for a semester class ". . . . (Joint Ex. 3, p.29)

In what can only be described as an astounding feat of cherry-picking, the Union argues that only the words and not the dollar amounts of the 1993-1994 CBA are incorporated by the 2007-2009 CBA. . . .

There is no evidence to support a conclusion that the parties meant that only words, and not numbers, would be incorporated. . . .

[B]y accepting the Union's argument that no dollar amounts are incorporated by the 2007-2009 CBA, the Arbitrator would be left to conclude that there then is no extra pay for the sixth class period assignment. . . .

By incorporating the words only and not the dollar amounts, the Arbitrator would have to guess at what the parties would have agreed to if the issue had been specifically raised at the bargaining table. . . .

Both the District and the Union negotiated the CBA language which provided for replacing the current language with the 1993-1995 overload pay language. Arbitrators have no authority to define fairness in an abstract manner. Instead, the parties have defined for themselves what is "fair." What is "fair" is for the Arbitrator to enforce what the parties plainly negotiated. . . .

[T]here is a fatal flaw in the Union's attempt to compare the "fairness" of the \$0.12 per minute rate associated with the 1993-1995 language to the \$0.37 rate associated with the block schedule. The justification for any overload pay at all is the teacher is working more than what has been deemed through negotiations to be the standard workload for a full-time teacher. Under the seven period

day schedule, the teacher on an overload is substituting teaching a class for a supervisory assignment. The teacher still has a preparation period. . . .

At the bargaining table, the parties might very well decide that \$.12 per minute for overload is warranted for a teacher who, under the seven period schedule, will now teach a class rather than perform a supervisory assignment. . . .

["F]airness" might not be what it appears at first blush and that these are discussions for the bargaining table. They are not for the Arbitrator.

The District further argues that the Union's past practice claim fails: 1) The contract language is clear and unambiguous and therefore not subject to amendment by an alleged past practice; and 2) the behavior of both parties does not meet the "frequent," "regular," "repetitious," or "mutual understanding" requirements of a valid past practice.

Discussion

The facts in this case are not in dispute; the assertions of the parties are in dispute. The Union argues that they had negotiated compensatory improvements in the language over the years. Initially (1985-1987), there was no provision in the labor agreement to compensate teachers for being assigned a sixth class. Later (1988), a provision was added to compensate secondary

teachers assigned the sixth class at the rate of five hundred dollars (\$500.00) per semester, or one thousand dollars (\$1,000.00) per year. In the 1995-1997 agreement the compensation increased to six hundred dollars (\$600.00) per semester. And, in the 1999-2001 it was dramatically increased to one thousand, three hundred and fifty dollars (\$1,350.00) per semester. This dollar amount appears in the labor agreement at issue in this arbitration.

There is one caveat in the language that threw this entire matter into arbitration.

In the event that the District reverts back to the class schedule in effect for the 1993-94 school year the language in effect for this subdivision would replace the above language in this paragraph.

Both the Union and the District argue that the language is clear and unambiguous, and yet they argue for two diametrically opposed interpretations. The Arbitrator disagrees with the clarity of either interpretation; he finds the language ambiguous. Should it be interpreted as the District does: 'when the sixth class contingency is met, the language, including words and amounts, is reactivated from the previous agreement (1993-1995);' or should it be interpreted as the Union does: 'if the District returns to the previous class schedule, the agreement reverts to the previous language, not the previous dollar amounts.'

In How Arbitration Works, Elkouri and Elkouri, Third Edition, page 296, the authors offer the following words regarding ambiguity:

The great bulk of arbitration cases involve disputes over “rights” under such agreements. In these cases the agreement itself is the point of concentration, and the function of the arbitrator is to interpret and apply its provisions. . . .

[A]n agreement is ambiguous if “plausible contentions may be made for conflicting interpretations’ thereof. . . .

The very fact that almost all such agreements provide for the arbitration of grievances concerning agreement interpretation suggests that the parties recognize the impossibility of foreseeing and providing for all questions which may arise during the life of the agreement. (pp. 296-7)

The Arbitrator recognizes the Union’s argument regarding a binding past practice, although it has limited value. The consistency of the parties’ behaviors is mitigated by both the infrequency of those behaviors (few teachers received additional assignments and pay) and the absence of mutuality. If the parties had a mutual understanding about the intent, it was not evident at the hearing. Absent a strong past practice argument, the Arbitrator is left to analyze the language itself and the environment in which the language was initially negotiated.

The language at issue first appeared in the 1995-1997 agreement. Coincidentally in that same agreement, the amount of reimbursement for

additional teaching assignments increased from five hundred dollars (\$500.00) per semester to six hundred dollars (\$600.00) per semester. If there was a time when both highly educated sides were cognizant of the meaning and implications of this language, it was during those negotiations. If the District's position in this matter is accepted, one would have to believe that the Union negotiated a twenty percent increase in compensation for the additional teaching assignment and then turned around and negotiated a provision that allowed the District to unilaterally take it away.

The District's position in this matter relies on a very narrow interpretation of the language.

The rule primarily to be observed in the construction of written agreements is that the interpreter must, if possible, ascertain and give effect to the mutual intent of the parties. The collective agreement should be construed, not narrowly and technically, but broadly and so as to accomplish its evident aims. (Elkouris, p. 302)

Considering the fact that the 1995-1997 negotiators from both sides had the new compensatory increase right in front of them, the Arbitrator concludes that Union negotiators would not choose to eliminate a dollar benefit in the same year that they negotiated it. It is logical to assume that if the District had achieved its stated position in this matter during negotiations, the language would have clearly reflected that. It is also logical to assume that if the Union had lost their right to retain the higher monetary level that they just achieved, that also would

have been clearly spelled out in the language. Both sides would have had a desire to clarify the language, and yet that did not occur. The very fact that the language did not spell out this sought after interpretation, supports the Union's position that the money was a separate issue – before and after the bargain.

District negotiators were likely satisfied with the amended subdivision: they attained language to reflect “block scheduling,” and they achieved the unilateral right to return to the previous schedule. The District gained the language they wanted and the Union received additional compensation. Both sides won in the bargain; a *quid pro quo* was realized.

Finally, and perhaps most apparent, upholding the District's position in this matter would amount to an almost sixty-three percent (63%) reduction in compensation for teachers assigned a sixth class. Arbitration is best served when arbitrators write awards that make sense and avoid punitive results for either party.

When one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used. (Elkouris, p. 309)

In accepting the Union's position, the Arbitrator is merely maintaining the *status quo*.

Award

The Union's grievance is sustained, and the District shall reimburse those secondary teachers assigned additional pupil contact at the appropriate rate contained in Article XVII, Section 2, Subdivision 1, of the 2007-2009 agreement between the parties: \$1,350 per semester assigned.

The Arbitrator will retain jurisdiction over this matter for sixty days.

Respectfully submitted this 30th day of March, 2010.

Eugene C. Jensen, Neutral Arbitrator