

IN RE ARBITRATION BETWEEN:

ISD #535, ROCHESTER PUBLIC SCHOOLS

and

EDUCATION MINNESOTA

DECISION AND AWARD OF ARBITRATOR

BMS No. 10-PA-0346

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May 11, 2010

IN RE ARBITRATION BETWEEN:

ISD #535, Rochester Public Schools

and

DECISION AND AWARD OF ARBITRATOR
BMS # 010-PA-0346423

Education Minnesota

APPEARANCES:

FOR THE ASSOCIATION:

Meg Luger-Nikolai, Staff Counsel Educ. MN
Dan Becker
Dr. Kit Hawkins, President of REA
Angel Morales, Field Representative
Pat Harris, retired President of REA
Marsha Peterson, teacher
Kathy Barnes, teacher
Karen Van Vooren, teacher

FOR THE DISTRICT:

Joann Kunjummen, Lindquist and Vennum
Nancy Vollertsen, Lindquist and Vennum
LaToiya Glass, Human Resources Director
Gordon Ziebart, Director of Area Learning Center
Dawn Swiers, former HR Secretary

PRELIMINARY STATEMENT

The hearing in the matter was held on March 25, 2010 at 10:00 a.m. at the Edison Administration Building in Rochester, Minnesota. The parties submitted post-hearing Briefs dated April 23, 2010 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement for 2007 – 2009. Article XL sets forth the grievance procedure providing for binding arbitration of disputes. The parties stipulated there were no procedural arbitrability issues and that the matter was properly before the arbitrator. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

ISSUES

The District stated the issues as follows:

1. Did the contract language of the 2007-2009 Master Contract (“the Master Contract”), which expressly excludes the Alternate School from the requirement of hiring based on seniority, exempt the District from applying seniority when filling summer program positions, when all of the positions were either a direct part of the Alternate School or another alternate program?

2. Even if the terms of the Master Contract regarding seniority requirements were ambiguous, did the District's long-term practice of hiring summer program teachers based primarily on factors outside of seniority, including teachers' previous experience with summer programs and "at-risk" youth, create a binding past practice between the parties?

The Association stated the issues as follows:

1. Whether the District violated the terms of the 2007-2009 collective bargaining agreement, specifically Article XXXIII, Section 33.4, A and B, when it hired teachers for 2009 summer school positions without consideration of seniority. If so, what is an appropriate remedy?

The issues as determined by the arbitrator were as follows:

1. Did the District violate the terms of the 2007-2009 collective bargaining agreement; specifically Article 33.4 sections A & B, or a past practice between the parties when it hired teachers for the 2009 summer school program without regard to area of licensure and seniority in the District? If a contract violation occurred, what shall the remedy be?

ASSOCIATION'S POSITION

The Association took the position that the District violated the clear provisions of Article 33.4 when it failed to apply seniority and the other criteria set forth in that section of the labor agreement in filling certain summer school positions for the summer of 2009. In support of this the Association made the following contentions:

1. The Association cited the provisions of Article 33.4 as follows:
 - A. All openings for positions which require elementary, secondary, and vocationally licensed teachers, including Alternate School, adult education classes, summer school, (curriculum writing and teaching) and other programs which require licensed teachers shall be posted in accordance with Article "XXXVI."
 - B. Such position(s) shall be filled on the basis of a teacher's area of licensure and seniority in the District. When these factors are substantially equal, preference shall be given to teachers who have taught the grade and/or subject in question in the District. Teachers employed in the District shall have priority to such assignments before appointment of applicants not currently employed by the District unless such applicant has unique and substantially superior qualifications.

2. The Association pointed to the provisions of Section B requiring that summer school positions be filled on the basis of the teacher's "licensure and seniority." The Association also asserted that all summer school positions fall into this category and that the positions at issue were in fact summer school positions that fell squarely within the provisions of the above language.

3. The Association pointed to the history of this language going back even prior to the passage to PELRA to the time when meet and confer was the order of the day. The Association noted that the language that had been in place in the 1972-74 contract was changed in 1975 to require that seniority be used to fill summer school positions.

4. The Association asserted that since then, seniority has in fact been the basis on which summer school positions have been awarded in the Rochester District. The Association discussed the history between the parties, which apparently included litigation and negotiation to achieve hard won negotiated benefits in favor of seniority in filling summer school positions.

5. The Association noted that traditionally there has been a difference between students attending "regular" summer school and the so-called Alternate School. Originally, summer school attendees were students in "regular" courses who were seeking additional help with their traditional studies, but that there was a distinction between students attending summer school to catch up or become more proficient in subjects offered in the traditional school setting, and students continuing in the Alternate School. Students in the Alternate School included pregnant students and those who had dropped out of traditional schools.

6. The Association further asserted that even now the labor agreement draws a distinction between the teaching positions in the regular summer school classes and the Alternate School. The Alternate School has a very different targeted audience and so too are the teaching positions offered for that school. The District has offered those positions under the title "ALC Summer School Teacher." In fact the District, as will be discussed below, posted those positions under that same title, which were separate and distinct from "summer school" positions, in 2009. See, Joint Exhibit 2.

7. Moreover, summer school positions are offered at various locations throughout the District depending on grade level. The positing at issue here also showed that the positions were at the school traditionally used for summer school classes and were not at the ALC, except for those positions listed as Alternate School positions.

8. Historically too, the District has used seniority to fill summer school positions and this was in keeping with the intent and the specific language of Article 33.4. The Association asserted most strenuously that the District cannot now be allowed to unilaterally alter the negotiated language of the contract simply by calling the summer school positions “Alternate School positions.” The District has always used seniority to fill summer school jobs and cannot change it without re-negotiating the language with the Association.

9. The Association further noted that simply because the funding source changed, that fact does not obviate clear language of the labor agreement. The District is also voluntarily participating in a program that gives it additional funding by limiting the students who can attend summer school and by further participating in a different funding mechanism. The Association acknowledged that the District is certainly concerned about the well being of the students but that it cannot ignore clear contract language. Any change in the way in which summer school positions are filled must be negotiated with the Association.

10. Furthermore, the District could only say that the funding may have changed “sometime in the 1990’s” or words to that effect, and provided no hard evidence of how the funding actually changed. The District provided no evidence that the funding required that the summer school classes be characterized as Alternate School - the Association asserted that the District merely called them that to avoid the clear provisions of Article 33.4. In addition, the Association asserted that even if the summer school classes constitute “targeted services,” this does not necessitate a conclusion that summer school classes are by definition part of the Alternate School.

11. The Association pointed to the posting, required by the provisions of Article 33.4 A, and noted that the positions at issue for 2008-09 were listed separately and clearly delineated a difference between traditional summer school positions and positions in the Alternative Learning Center: This distinction also undercuts the District's claim that the positions for the summer of 2009 were all "Alternate School:" positions. The Association argued that one cannot change the nature of the position simply by renaming it no matter how it is funded.

12. The Association asserted that the language at issue is clear and unambiguous and requires that summer school positions be filled by seniority. Further that these positions are and have always been considered "summer school positions" in this District and fall squarely within the requirements of Article 33.4 A and B.

13. Further, there is no "past practice" of failing to use seniority since there have been fewer applicants than there have been positions thus seniority was not needed in those situations. That however does not negate the language. Further, the mere non-use of a provision does not equate with its forfeiture – a party is free to chose when and how to enforce its rights under a labor agreement.

14. The Association asserted that the positions at issue were not located in "the Alternate School" as the District claimed. The Association asserted that the District witnesses acknowledged that the Alternate School is housed at the Golden Hill campus. However, the vast majority of the positions at issue here were *not* housed at Golden Hill and were, as noted above, at the schools that have always been used for "summer school." The Association acknowledged that the language of Article 33.4 C excludes "Alternate School positions" from the requirements of Section B and seniority but asserted that these positions were not Alternate School positions and were never posted as such by the District. In fact these positions were even called summer school positions by the District in the posting.

15. The Association argued that even if extrinsic evidence is necessary to interpret this language, the fact that the District called these positions summer school positions and gave them separate job numbers, would not alter the result here. The Association noted that the fact that the student mix and funding has changed does not alter the fact that these are summer school jobs. If the District had desired to change that designation it should have negotiated it with the Association.

16. The Association further asserted that if the District's interpretation of the language is allowed to stand it will render meaningless the term "summer school" found in Article 33.4. By simply calling the summer school positions "Alternate School" positions allows the District to circumvent the clear language and the intent of that language.

17. The Association asserted that the postings show that the District needs teachers familiar with the types of teaching strategies required to cater to students for whom traditional class settings have not worked. Second, there has been no bona fide change in the nature of the summer school classes. The Association noted that there was no evidence that the summer school positions were materially altered such that they were similar to the Alternate School positions of prior years. The sole difference is the funding source, which under the provisions of the language here, is immaterial.

18. The Association pointed to several documents and other pieces of evidence it alleged were proof that the District acknowledged that it had violated the contract but was going to proceed anyway. See Union exhibits 4 & 5. The District in fact used seniority to fill certain positions after the Association brought the District's error to its attention.

19. The Association refers to the traditionally used elements of past practice and asserted that the parties have long used seniority to fill these positions and that the practice is accepted understood and mutual. At the very least this practice should be allowed to interpret the language even if the arbitrator were to somehow find it to be ambiguous. The Association noted that its main witness has been with the District far longer than any of the District's witnesses and could therefore speak directly to this longstanding practice whereas none of the District's witnesses were able to do so.

20. The essence of the Association's position is that the clear language of Article 33.4 requires that the District use seniority to fill summer school positions and that these are in fact summer school positions, not Alternate School: positions as the District asserts. Further that there is a longstanding, well understood and mutually accepted practice to use seniority to fill summer school positions that should be respected and given effect here.

The Association requests that the Arbitrator sustain the grievance and issue an order requiring the District to utilize seniority in summer school hiring decisions and making bargaining unit members whole for the District's failure to do so in 2009 summer school session. The Association further asked the arbitrator retain jurisdiction to determine back pay and contractual benefits issues.

DISTRICT'S POSITION:

The District took the position that no contract violation occurred here and that summer school classes now are "alternate school" classes, exempt from the seniority provisions of Article 33.4. In support of this the District made the following contentions:

1. In addition to the provisions of Article 33.4 set forth above, the District pointed to the provisions of Article 33.4 section C as follows:

The seniority provision in "B" above shall not apply to openings in the Alternate School or in curriculum writing.

2. The District asserted quite simply that these positions are now "Alternate School positions" despite the fact that they were offered during the summer and that they are no longer considered "summer school positions for purposes of the interpretation or application of Article 33.4 set forth above. The District argued that the plain language of the agreement requires that the grievance be denied because these are "Alternate School positions." The arbitrator is not free to ignore this language and must therefore apply it per its strict terms.

3. The District noted that while at one point in history, summer programs were offered through the District's main schools, for the past several years, summer programs have been offered

primarily through the Area Learning Center, known as the “ALC.” The ALC receives funding from the State of Minnesota that is separate from the general revenue the District receives.

4. The District further noted that summer programs that are not offered through the ALC are offered through the Extended School Year program, ESY, which is tailored to special education students. The District further noted that there are specific criteria now in place of students who are admitted to summer school programs offered through the ALC; some nine of them and are geared to truly at risk students. See District Exhibit C.

5. The District asserted that while students could volunteer for summer school in the past, they are not able to now and that this programming has been in place for several years, at least since 2005. The District asserted that that had been in place for summer school programming and funding is no longer the case now and that all summer school programs are now under ALC or ESY programming.

6. Accordingly, so the argument goes, the specific exclusion for “Alternate School programs” set forth in the language of Article 33.4 C set forth above excludes these programs and classes from the requirement that seniority be used to fill these positions.

7. The District further argued that for several years, seniority has not been the criterion used to fill these positions and that other criteria; established by the District has been used to fill summer school positions.

8. The District asserted that it uses a variety of established factors in making these hiring decisions, including previous experience with the District’s summer programs, the teachers’ familiarity with students at the specific sites, and experience with students who are deemed to be “at-risk” for academic failure in their present school environment, See District Exhibits A, B, and C.

9. The District acknowledged that in the past there has in fact been some difficulty in filling positions but that this changed in 2009 with the recent economic downturn. In the past principals and administrators had to encourage teachers to apply but that this does not alter the fact that

the District was not using seniority to fill the positions but rather was making decision “in the best interests of the kids” to fill the positions.

10. The District argued that even if the arbitrator were to find that the cited language is somehow ambiguous the parties have a binding past practice whereby the District has not used seniority to fill these positions in the past. The District asserted that since at least 2005 it has used other factors than seniority to fill summer school/ALC positions and noted repeatedly that the ALC program is the Alternate School within the District.

11. The District asserted that this practice has been in place for years and that District administrators certainly knew about it and applied it consistently to not use strict seniority to fill summer school positions.

12. The essence of the District’s argument is twofold. First that the clear language excludes the Alternate School from the requirement of seniority to fill the positions and that these positions are in fact in the Alternate School. Second that the District has not been using seniority to fill the positions for several years and that this fact provides the basis of a binding past practice between the parties establishing that these positions are “Alternate School” positions within the meaning of Article 33.4 C.

The District seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

As with any matter involving the interpretation of contract language as applied to the facts of a particular case, the starting point is of course the language itself. Article 33.4 provides as follows:

A. All openings for positions which require elementary, secondary, and vocationally licensed teachers, including Alternate School, adult education classes, summer school, (curriculum writing and teaching) and other programs which require licensed teachers shall be posted in accordance with Article “XXXVI.”

B. Such positions(s) shall be filled on the basis of a teacher’s area of licensure and seniority in the District. When these factors are substantially equal, preference shall be given to teachers who have taught the grade and/or subject in question in the District. Teachers employed in the District shall have priority to such assignments before appointment of applicants not currently employed by the District unless such applicant has unique and substantially superior qualifications.

C. The seniority provision in “B” above shall not apply to openings in the Alternate School or in curriculum writing.

Section A requires that the positions at issue here, whether they are considered summer school or Alternate School positions are to be posted in accordance with the requirements of the labor agreement. These requirements are not at issue here and there was no allegation that the postings were incorrectly done. This is significant however, as will be discussed below because they were posted in accordance with the provisions of the labor agreement.

Section B refers to the listed positions in Section A and sets forth the general rule that all such positions shall be filled on the basis of area of licensure and seniority. Section C excludes the Alternate School from the more general requirement of seniority.

At the outset it should be noted that the contract provisions at issue are in fact clear and unambiguous. The issue here however is whether the positions in question were in fact posted as Alternate School positions or summer school positions. Thus, this case is more about the facts than the contract language itself.

The District’s main assertion here is that for years the summer school programs were open to any student who wished to enroll and that these classes were offered at various places throughout the District. However, for the past several years the District has offered those classes only to at-risk students, which District witnesses defined as having one or more at risk factors, such as homelessness, failed classes, low MCA scores, victims of sexual abuse, chemical dependency, mental health issues, withdrawn or truant from class or English as a second language. These classes have been offered through the Area Learning Center, ALC, and are considered by the District at least as part of the Alternate School. The District also asserted that for these students, simply following the seniority model does not always result in the best teaching methodology for the children and the District’s main function is to do what is best for its students.

The District also noted that special funding follows these students and that it is separate from the District's general fund. Both the ALC programs and the Extended School Year, ESY, program, which is tailored to special education students, are funded separately by State special education funds. Both are separate from the District's general fund as well.

District witnesses reiterated this and asserted that they try to match the best teachers for the students in these classes in order to find the best match to bring student achievement up and to provide them with the best learning environment possible. Seniority does not always achieve that. The District further argued that the methodology of teaching to these at risk kids is not always what is done in the traditional classroom and that the teachers it wants to use to provide the best opportunity for the kids should have that expertise.

Several problems arise from these arguments however that undercut the District's case in this matter. First, the evidence showed that until several years ago, the understanding had always been through multiple rounds of bargaining and over the course of many years, that seniority was being used to select teachers for summer school positions. Second, until 2009, the evidence showed that there were more positions than applicants. Indeed, the evidence was clear that until 2009, the District had to try to find teachers willing to take summer school positions. Thus, there was no way for the Association to know that the District had somehow changed the way in which it felt it was selecting teachers for summer school positions.

Third, there was substantial evidence to show that some of the senior teachers who were passed over for summer school positions had in fact taught summer school positions in the recent past. Several of the Association's witnesses testified credibly that they had taught these very summer school classes as recently as the past year. There was no evidence to suggest that these teachers were unqualified or that the requirements for summer school have changed. Neither was there any evidence to suggest that anything material had changed from the past years' summer school programs and 2009. There was thus on this record ample evidence to show that the senior teachers should have been hired

for the summer school classes in 2009 and no evidence to show that anything had changed to prevent them from being hired.

Moreover, while the District was aware of the process it was using to select teachers for the past several years it was not shown that the Association was made aware of the fact that the District had changed it to some other methodology. In labor relations it is axiomatic that the outward manifestations, or lack therefore, to the other side of the bargaining relationship is the operative factor to be considered. Here, the Association showed by credible evidence that it was never aware of the unilateral change in the selection criteria until well into the 2009 summer school selection process.

Further, while it is very likely true that the funding follows the students and that the at-risk nature of the students governs the funding mechanisms, there was no evidence to show that the funding was dependent on the teachers that were selected to teach these classes. There was evidence to show that the District's participation in the funding mechanism for these at risk students was voluntary as well. Irrespective of whether that was true or not, the funding mechanism does not trump clear contract language – if these positions were posted as summer school positions than the clear requirements of seniority applies.

Finally, and perhaps most significantly, the postings themselves clearly listed several of the positions as summer school positions. Whether the District considered them internally to be ALC or Alternate School positions or not; the District did not call them that. They were listed as summer school positions with the sites being listed at various schools around the District. Joint exhibit 2 shows that Job ID 2878 is listed as “Elementary Summer School Teacher.” The qualifications listed are “MN teaching license required.” The remainder of the qualifications are listed as “preferred.” There is nothing on that job posting to suggest that the position was an ALC position or that the requirements of the clear provisions of Article 33.4 would not apply.

Much the same can be said for the remainder of the summer school positions found in Joint Exhibit 2. The sole exception seems to be Job ID 2884, ALC Summer School Teacher. Initially it

should be noted that this job was listed separately from the remainder of the other postings found on Joint Exhibit 2 and have separate requirements and separate job ID numbers. The clear implication is that the ALC position as posted was something different from a “summer school” job. There was thus some merit to the Association’s argument that simply renaming “summer school” positions to “Alternate School” positions renders meaningless the reference in Article 33.4 to “summer school.” Indeed, if all of the summer school positions are Alternate School positions, why are they listed there? This was a question for which the District’s argument had no clear answer.

The District raised the issue of whether there was a binding past practice at work here that trumps the language of the labor agreement. In some cases a practice that is different from the language can be found to have taken precedence over that language. It should be noted however that there is a considerable split amongst arbitrators as to whether past practice can take precedence over clear and unambiguous language.¹ Rather than turning this into a law review article about the vagaries of that question, suffice it to say that even if one agrees with the notion that past practice can in fact be applied contrary to clear language the District’s assertions in this regard were not supported by the evidence on this record. There are several very clear requirements for that to be the case not all of which are present here.

Generally, for a binding past practice to exist and be binding, as opposed to a practice that may be mere happenstance or one that is the result of managerial discretion, several elements must be present. The Minnesota Supreme Court held in Ramsey County v AFSCME, 309 NW2d 785 (Minn. 1981) as follows:

“past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and

¹ See e.g., Tri Valley Local School District, 119 LA 229, 233 (Skulina 2003); See also, ME International, 117 LA 307, 319 (Szuter 2002) (the arbitrator stated that “ A long standing practice has the capability of altering the CBA in one of two ways, either it is an unwritten amendment to the agreement, or a cure for ambiguity in the agreement.” This implied that if the language was clear such practice may not have been considered.); Besser Co., 117 LA 1413, 1417 (Elkin 2002) (Arbitrator found that there was no binding practice under the facts of the case but noted that “[o]nly when the contract is silent or ambiguous is it possible for a binding practice to arise.”)

consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 NW2d at 788, n. 3 (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961).

The District argued that this practice has been in place since at least 2005 and that this satisfied the longevity and repetition requirements. There was no evidence that the District had not applied the selection for summer school positions since 2005 even though there was evidence to suggest that it had been done differently prior to that time.

The remainder of the criteria were certainly not met in these circumstances. There was no evidence that the Association was on notice of the practice even if there was one and that as far as the Association knew, seniority was being applied to select summer school teachers. The evidence was clear that until 2009 there were always more positions available than applicants. Accordingly, there was no mutuality or acceptability by both parties on this record. For a practice to be mutual it must be understood and accepted by both parties as the accepted and agreed upon way of performing a particular function. Here that was simply not shown to be the case.

The somewhat subjective factor of a consideration of the underlying circumstances is somewhat neutral on this record but certainly was not a factor that mitigated in the District's favor. Here while the arbitrator was quite mindful of the financial burdens faced by this and virtually every school District in the State of Minnesota, especially in these trying economic times, and the cost to the District of a finding in favor of the Association, this factor does not trump the clear contractual requirement to use seniority and area of licensure as the criteria for selection of summer school teachers. There was nothing on the record other than the financial burden to support the District. As noted above, the District's funding source appears to be based on the types of students in the classes not the teachers selected to teach them.

Further, the Association notified the District of the potential for a contractual grievance in this matter well before June 2009; it was not as if the Association waited until after the summer school classes had already been taught and then filed their grievance. While these factors do not necessarily

tie into the calculation of past practice as set forth by the Court in Ramsey County, they were considerations made in this case.

Thus the necessary elements of mutuality and acceptability were not present and the District's assertion that there was a binding practice was not supported by a preponderance of the evidence. Neither was there anything in the "and the underlying circumstances" that militated in favor of the District's assertion of a past practice here.

Finally, the District asserted that the nature of the instruction called for something different and that the teachers selected to teach these students should possess a special sort of skill. That however flies in the face of the contract language requiring only that area of licensure and seniority be used. Clearly, the District's motives were quite pure here – they wanted only to use the best teachers for these at risk students. That cannot be used to justify the obviation of clear contract requirements and very clear facts. Had the District desired to change this requirement it could have and should have negotiated with the Association in order to achieve the best results for the students in the District and to remain compliant with the labor agreement.

For the foregoing reasons, the grievance must be sustained. The senior teachers who applied for summer school positions and who were not selected for those positions shall be made whole for all lost wages and contractual benefits for the contractual violation here. The parties requested that the arbitrator retain continuing jurisdiction over the matter to resolve any ongoing issues with respect to the remedy.

AWARD

The grievance is SUSTAINED as set forth above. Per the parties' request at the hearing, the arbitrator will retain jurisdiction to determine back pay and contractual benefits issues if necessary.

Dated: May 12, 2010

Jeffrey W. Jacobs, Arbitrator