BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between **INDEPENDENT SCHOOL DISTRICT NO. 11** **Anoka-Hennepin Schools, Coon Rapids, Mn.** and **ANOKA-HENNEPIN EDUCATION MINNESOTA**	**BMS Case No. 10-PA-0650** **Grievants: W. Davids, Class Action** **Arbitrator: Sharon K. Imes**

APPEARANCES:

Paul Cady, General Counsel Anoka-Hennepiin Schools, appearing on behalf of Independent School District No. 11, Coon Rapids, Minnesota.

Nicole M. Blissenbach, Attorney, Education Minnesota, appearing on behalf of Anoka-Hennepin Education Minnesota and the Grievants.

JURISDICTION:

Independent School District No. 11, Coon Rapids, Minnesota, referred to herein as the Employer or the District, and Anoka-Hennepin Education Minnesota, referred to herein as the Union, are parties to a collective bargaining agreement effective July 1, 2009 thru June 30, 2011 and thereafter until modifications are made pursuant to the PELRA-71 following notice of intent to amend the Agreement as is provided for in the collective bargaining agreement. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them under the July 1, 2007 through June 30, 2009 collective bargaining agreement. Hearing was held on March 24, 2010 in Coon Rapids, Minnesota. The parties, both present, were afforded full opportunity to be heard. Briefs in this matter were submitted by both parties and forwarded to the Arbitrator on April 19, 2010. The matter is now ready for determination.

STATEMENT OF THE ISSUE:

Each party stated the issue as it was viewed by them and agreed that the Arbitrator could frame the issue within the confines of their statement. Accordingly, the issue is framed as follows:

Is the Grievance timely filed?

If so, did the District violate Appendix B, Section A., subd. 1 of the collective bargaining agreement when it failed to pay an additional $125 to a third-year co-head golf coach who had worked more than five years as a golfing coach?

RELEVANT CONTRACT LANGUAGE:

July 1, 2007 thru June 30, 2009

ARTICLE XIX

GRIEVANCES

Section 1. Definitions

Subd. 1. A grievance is any controversy between the Board and the AHEM or between the Board and an employee or group of employees as to 1) interpretation of this Agreement, 2) a charge of violation of this Agreement, or 3) an alleged violation involving wages, hours or working conditions resulting in unnecessary hardship.

. . .

Subd. 5. Days shall be considered "working" days as defined for the employee except at the end of the school year. The days in this instance shall be week days.

Section 2. Procedure: Grievances as defined in Section 1 shall be settled in the following manner and the steps set forth must be followed in the order listed within the time limits prescribed.

Step 1. The grievance shall be orally presented to the employee's first level supervisor within ten (10) days after employee knew or should have known of violation. No settlement in this Step 1 shall be made in violation of the written Contract.

If a settlement is not reached within two (2) days after oral presentation to the first level supervisor the grievance shall be reduced to writing on form number G-I with a clear statement of the issues involved. This shall be presented to the first level supervisor who shall promptly transmit the written grievance to the General Counsel for handling in accordance with Step 2.

. . .

Step 3. . . .

The arbitrator shall have no power to add to, subtract from, or modify any of the terms of the Agreement or to any agreement made supplementary hereto, and shall only be allowed to rule on those cases that apply to the definition of a grievance as described in this Article. The decision of the arbitrator, if within the scope of his/her power, shall be binding on both parties with the limitations of PELRA-71 as amended. The expense and fees of the arbitrator shall be borne jointly by the Board and AHEM.

Section 3. Rules: . . .

The number of days indicated at each step of the grievance procedure should be considered as maximum and every effort should be made to expedite the grievance process. Any time limit may be extended by mutual written consent. The failure of an aggrieved person to proceed from one step of the grievance procedure to the next step within the

time limits set forth shall be deemed to be acceptance of the decision previously rendered and shall constitute a waiver of any future appeal concerning the particular grievance.

The failure of an administrator to communicate his decision or hold a meeting within the specific time limits shall permit the aggrieved to proceed to the next step in the grievance procedure.

. . .

APPENDIX B

. . .

Head coaches in the following activities will receive an additional $250 if they are in their fifth consecutive year or more of work in the same activity within the District: Basketball, gymnastics, hockey, wrestling, football, swimming, soccer, track, baseball, softball, volleyball, tennis, cross country, cross county skiing, downhill skiing, golf.

July 1, 2009 thru June 30, 2011

ARTICLE XIX

GRIEVANCES

Section 1. Definitions

Subd. 1. A grievance is any controversy between the Board and the AHEM or between the Board and an employee or group of employees as to 1) interpretation of this Agreement, 2) a charge of violation of this Agreement, or 3) an alleged violation involving wages, hours or working conditions resulting in unnecessary hardship.

. . .

Subd. 5. Days shall be considered "working" days as defined for the employee except at the end of the school year. The days in this instance shall be week days.

Section 2. Procedure: Grievances as defined in Section 1 shall be settled in the following manner and the steps set forth must be followed in the order listed within the time limits prescribed.

Step 1. The grievance shall be orally presented to the employee's first level supervisor within ten (10) days after employee knew or should have known of violation. No settlement in this Step 1 shall be made in violation of the written Contract.

If a settlement is not reached within two (2) days after oral presentation to the first level supervisor the grievance shall be reduced to writing on form number G-I with a clear statement of the issues involved. This shall be presented to the first level supervisor who shall promptly transmit the written grievance to the General Counsel for handling in accordance with Step 2.

. . .

Step 3. . . .

The arbitrator shall have no power to add to, subtract from, or modify any of the terms of the Agreement or to any agreement made supplementary hereto, and shall only be allowed to rule on those cases that apply to the definition of a grievance as described in this Article. The decision of the arbitrator, if within the scope of

his/her power, shall be binding on both parties with the limitations of PELRA-71 as amended. The expense and fees of the arbitrator shall be borne jointly by the Board and AHEM.

Section 3. Rules: . . .

The number of days indicated at each step of the grievance procedure should be considered as maximum and every effort should be made to expedite the grievance process. Any time limit may be extended by mutual written consent. The failure of an aggrieved person to proceed from one step of the grievance procedure to the next step within the time limits set forth shall be deemed to be acceptance of the decision previously rendered and shall constitute a waiver of any future appeal concerning the particular grievance.

The failure of an administrator to communicate his decision or hold a meeting within the specific time limits shall permit the aggrieved to proceed to the next step in the grievance procedure.

. . .

APPENDIX B

. . .

Head coaches in the following activities will receive an additional $250 if they are in their fifth consecutive year or more of work in the same activity within the District: Basketball, gymnastics, hockey, wrestling, football, swimming, soccer, track, baseball, softball, volleyball, tennis, cross country, cross county skiing, downhill skiing, golf.

. . . .

BACKGROUND AND FACTS:

The Grievant is a tenth grade history teacher at Blaine High School in the Anoka-Hennepin School District. He is also a co-head coach of girl's golf and has been since the 2006-07 school year.

During the 2008-09 school year, the Grievant became aware of language in Appendix B of the collective bargaining agreement which stated that "head coaches . . . will receive an additional $250 if they are in their fifth consecutive year or more of work in the same activity within the District" and concluded that he should be paid the additional money since he has been paid to be either an assistant coach or head coach in girls' golf since 2002.[1] When he met with the District and requested the additional compensation, however, the District denied his request stating that "an individual must serve as a head coach in the same activity for five consecutive years" in order to be eligible for the additional compensation.

On January 29, 2009, the Union notified the District by e-mail that it was grieving the District's action on behalf of the Grievant and any other coach in the District who is a head coach of an activity in which they have coached five years or more, whether or not as a head coach and is

not being paid the additional stipend. At that time, it also stated that it was treating the grievance as a continuing grievance and asked the District to set up a Step 1 grievance meeting over this issue.

In response, on March 18, 2009, the District issued a Step 2 denial. In that denial, the District stated that the grievance was procedurally deficient in that it was not timely filed and that it was substantively deficient since the contract language requires an individual to serve as a head coach in the same activity for five consecutive years before being eligible for the longevity pay. Both the procedural and substantive issues are before the Arbitrator.

ARGUMENTS OF THE PARTIES:

The District asserts that the grievance is procedurally deficient in that it was not timely filed and substantively deficient in that Appendix B, Section A., Subdivision 1 clearly and unambiguously requires a head coach to be in his or her fifth year as head coach in the same activity in order to be eligible for the stipend. As further support for its position, it states that the challenged language is silent with reference to assistant coaches or assistant coach experience in the same activity and cites the fact that for nearly thirty years it has only paid the stipend to head coaches who are in their fifth year as a head coach in the same activity, and that neither the Union nor any employee has grieved or discussed at the bargaining table the manner in which it has administered this provision over that period of time.

With respect to its procedural argument, the District asserts that the grievance was not timely filed since it was not filed until nearly three years after the alleged violation occurred and the Grievant knew or should have known of the alleged violation when it occurred. As proof, the District cites Article XIX, Section 2 of the collective bargaining agreement which requires a grievance to be filed within ten working days after an employee knows or should have known of the violation and declares that the Grievant should have known of the possible violation when it occurred since he serves as a Union building representative and on the district-wide grievance teacher rights' representative committee for the Union and since he served as a head wrestling coach for ten years prior to becoming a golf coach and would have received the increment while coaching wrestling.

---

[1] This language was first negotiated in the 1981-83 collective bargaining agreement and, other than the dollar amount

The District also charges that the Union should have known of the potential violation before January 2009 since it drafted the language and since it has argued that the benefit was of great importance to its members. The District also maintains that the Union has acquiesced to the District's interpretation and administration of the language since it has not challenged the District's consistent and uniform interpretation and administration of the language since its adoption.

On the merits, the District declares that the clear and unambiguous language in the provision requires a head coach to be in their fifth consecutive year or more in the same activity and cannot be read to include assistant coaches. It adds that even if the language could be considered ambiguous, the pre-bargaining history and standards for interpreting contract language support its interpretation. As evidence that the language conforms with its intent, the District charges that the negotiation notes contradict the Union's argument and show that proposals during bargaining attempted to include compensation for assistant coaches as well as advisors in non-athletic activities and that ultimately the language agreed to by the parties excluded reference to either.

Continuing, the District charges that several principles of contract interpretation dictate against a finding that the Union's position should prevail. Citing a principle often applied in contract interpretation disputes – to express one thing is to exclude another, the District asserts that since the contract language is silent with respect to assistant coaches and non-athletic advisors the inclusion of head coaches in the provision must be taken as an exclusion of the others. In addition, the District rejects the Union's argument that the District's "reading head coaches into 'of work' is misplaced" and maintains that if the parties had intended assistant coach experience to be included, the provision would have expressly stated that. And, finally, citing another contract interpretation rule – that ambiguous language should be construed against the party who proposed or drafted it, the District urges that the District's interpretation be favored since the Union proposed the language.

The Union, however, argues that its grievance is timely since it is a continuing violation since each time the District fails or refuses to pay the stipend required by Appendix B a new violation occurs. As support for its position, it cites *Elkouri and Elkouri* and *Jackson v. Galan*, 868 F.2d 165

---

and the addition of downhill skiing to the list of sports, is the same language that is in the current contract.

(5th Cir. 1989). Based upon these cites, the Union asserts that it is the District burden to prove that the violation does not constitute a continuing violation.

In addition, the Union rejects the District's argument that it has waived its right to grieve this issue and cites as proof *Weinstein Wholesale Meat, Inc.*, 98 LA 636 (Eagle, 1992) and several other arbitration decisions, as well as a court decision, where it was concluded that the union does not waive its right to grieve or object to an employer's actions that violate the contract even when it has not objected to similar actions in the past.[2] The Union also argues that since the District claims the Union has waived its right to grieve, the District has the burden to prove that claim by clear and unmistakable evidence and that the District has no evidence to support its assertion let alone "clear and unmistakable evidence".

On the merits, the Union declares that Appendix B, Section A., Subdivision 1 clearly and unambiguously provides that head coaches who have been working for the District in the same activity at least five years are entitled to additional compensation. As proof of its assertion, it cites the bargaining history relating to the adoption of the language and argues that the history shows that the language drafted by the Union was intended to address both the employees' concern over pay and rewards for experience and the District's concern over its high turnover rate for coaches by providing an incentive for coaches to continue coaching.

Continuing, it argues that arbitrators are required to follow the plain language of the collective bargaining agreement and cites *Elkouri and Elkouri, How Arbitration Works* (5th Edition), 1997 and several arbitration decisions, as well as a court decision, to support this argument.[3] According to the Union, the clear language sets forth a two-part test to qualify an individual for the stipend, first the individual must be a head coach in one of the specified activities and, secondly, that individual must be in their fifth or more consecutive year of work for the District in that activity. As further proof that the disputed language is clear and unambiguous, the Union asserts that if the parties had intended the language to apply only to coaches in their fifth year of head coaching, the language in the provision would have said "in the same position" or "in the same

---

[2] See *New Orleans S.S. Ass'n*, 105 LA 79 (Nicholas, Jr., 1995); *Excel Corp*, 106 LA 1069 (Thornell, 1996) and *Clorax Co.*, 103 LA 932 (Frankiewicz, 1994).

[3] *Ralph's Grocery Co.,* 109 LA 33 (Kaufman, 1997); *National Linen Service,* 95 LA 829 (Abrams, 1990); *Clean Coverall Supply Co.*, 47 LA 272 (Whitney, 1996); *Lorillard, Inc.,* 87 LA 507 (Chalfie, 1986); *Western Michigan University,* 82 LA 93 (Kahn, 1984); *Red Owl Stores*, 83 LA 652 (Reynolds, 1984), and *Excel Corp. v. United Food & Commercial Workers Int'l Union, Local 431*, 102 F.3d 1464 (8th Cir. 1996).

assignment" and not "of work in the same position". And, finally, the Union charges that the District's interpretation is correct only if the words "as head coach" are inserted after "of work" and since those words are not there, that interpretation cannot be read into the contract.

DISCUSSION:

Before the merits of this dispute can be discussed it must be determined whether the grievance is timely filed since the collective bargaining agreement provides that to be timely a grievance must be filed within ten days of when the grievant knew or should have known of a contract violation. After reviewing the record, it is clear that the grievance was not filed within the time limit established in Step 1 of the grievance procedure. The alleged violation, however, does fall into that category of violations which arbitrators, including this one, generally find are continuing in nature since the violation involves compensation and is repeated from day to day. This type of alleged violation allows an employee who asserts a contract violation to file a grievance within ten days of each time the violation occurs. In this instance, that was done. Therefore, it is concluded that the grievance was timely filed.

The second question is whether the Union has waived its right to grieve language which has consistently and uniformly been administered by the District for over thirty years. In order to waive their right to grieve, there must be clear evidence that the Union knew both how the language was being administered and that it tacitly consented to that practice. In this dispute, the evidence did not sufficiently show that. Consequently, given the presumption of arbitrability established by *Warrior & Gulf Navigation Co.*, 475 U.S. 643, 105 S. Ct. 1415, 121 LRRM 3329 (1986), a finding that the Union is now grieving the manner in which the language is being administered and that a grievance occurs each time the contract is allegedly violated is sufficient reason to find this issue is properly before the Arbitrator.

On the merits, the Union argues that Appendix B, Section A, Subdivision 1 of the collective bargaining agreement requires the Employer to pay head coaches who have worked five or more years in the activity for which they are the head coach a $250 stipend and that each time the Employer fails to grant the stipend it violates the collective bargaining agreement. The Employer, however, argues that only a head coach of a specific activity who has worked as head coach in that activity for five or more years is eligible for the stipend. The language each relies upon is as follows: "Head coaches in the following activities will receive an additional $250 if they are in their fifth consecutive year or more of work in the same activity within the District: basketball,

gymnastics, hockey, wrestling, football, swimming, soccer, track, baseball, softball, volleyball, tennis, cross country, cross county skiing, downhill skiing, golf."

Both parties argue that the language is clear and unambiguous and the Union demands that the plain meaning of that language be enforced. The language is not as clear and unambiguous as the parties contend, however. The record clearly establishes that the disputed language is susceptible to more than one meaning; that the parties differ over that meaning, and that there is no plain meaning to enforce.

In most contract interpretation disputes, arbitrators, including this Arbitrator, generally rely upon contract interpretation principles; the concept of past practice, and the principle of reasonableness as guides to determining the parties' intent when they agreed to disputed language. After reviewing the evidence and the arguments advanced in this dispute and applying these principles, it is concluded that the parties' past practice (although not argued as a past practice) establishes that the intent of the language is as the District has administered it and, consequently, the contract was not violated when the District failed to pay the stipend to the Grievant or to others similarly situated.

This conclusion is reached despite the fact that the bargaining history appears to support the Union's argument that the parties intended the language to address the employees' concern that coaches and advisors be compensated for their experiences and the District's concern about high turnover among coaches. While the District argued that the intent expressed by the Union should be rejected since the Union drafted the language, the record adequately establishes that the Union drafted the language at the request of both parties to address their respective concerns; that the Union's initial drafts of the proposal provided compensation for head coaches as well as assistant coaches and advisors and that through the give and take of bargaining the parties finally agreed to provide an experience increment to head coaches only. Based upon the fact that the parties initially discussed compensation for head coaches, assistant coaches and advisors, one could easily conclude that when the final language was adopted it was the parties' intent to reward head coaches who had five or more years experience coaching the sport, whether as head coach or in some other capacity, for their experience in the sport and as an incentive to remain as head coach. This finding would be consistent with the Union negotiator's testimony that achieving this benefit was especially important to its members and to the District's assertion that the language was negotiated as an incentive for head coaches to remain in their coaching positions.

Complicating such a conclusion, however, is the fact that once the contract was ratified, the District only provided the stipend to head coaches of sports who were in their fifth year of coaching that sport and that neither the head coaches with four plus years experience in the sport which they were coaching nor the Union challenged the District's implementation of the language for nearly thirty years. Given this fact, greater weight must be given to the District's practice than to the parties' bargaining history and that practice has been to compensate only head coaches with four plus years experience as a head coach in the sport which they were coaching.

While the District did not specifically argue that its actions established a binding past practice it did provide evidence that establishes one did exist. Typically, a past practice exists when there is a clear and consistent pattern of conduct; when there has been a long and repeated pattern of implementation; when there is evidence that the action has been accepted as a normal and proper response to a given set of underlying circumstances and when there is evidence that the action has been mutually accepted by the parties.[4] In this dispute, the record clearly establishes that the District's practice with respect to administration of the disputed language meets all four criterions.

The evidence indicates that the District has consistently implemented the language as it has interpreted it for nearly thirty years. The evidence also shows that no employee has grieved the manner in which the language was implemented during that period of time and that the Union has not challenged it either. In addition, while the Union argues that it did not know for nearly thirty years that the stipend had been paid only to coaches with four plus years of experience coaching as a head coach, its argument is not persuasive. During the hearing the Union testified that payment for coaching experience, no matter how it had been earned, had been important to its members and that was one of the reasons for bargaining the language. If the benefit had been as important to the bargaining unit as the Union asserted and the District had not administered the language as the bargaining unit had expected one would reasonably expect that a grievance over the administration of that language would have been filed far earlier than now. Since one was not, it can only be concluded that the District's implementation of the language had been mutually accepted.

---

[4] See "Past Practice and the Administration of Collective Bargaining Agreements", Richard Mittenthal, *Arbitration and Public Policy*, *Proceedings of the Fourteen Annual Meeting National Academy of Arbitrators,* BNA Incorporation, Washington, DC 1961, pp. 30-58.

In summary, based upon the record, the arguments and the discussion above, it is concluded that the District's interpretation of the language in dispute is correct and that it did not violate the collective bargaining agreement when it failed to pay the Grievant or any other coach similarly situated the stipend provided for in Appendix B, Section A., Subdivision 1. Accordingly, the following award is issued.

AWARD

The grievance is denied.

By: _____
Sharon K. Imes, Arbitrator

May 18, 2010
SKI