

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

SAINT CLOUD AREA SCHOOL DISTRICT 742

and

SAINT CLOUD EDUCATION ASSOCIATION

BMS Case No. 10-PA-1102

Grievants:

Arbitrator: Sharon K. Imes

APPEARANCES:

Ratwik, Roszak & Maloney, PA, by **Patricia Maloney**, appearing on behalf of Independent School District No. 742, St. Cloud, Minnesota.

Nicole Blissenbach, Attorney, Education Minnesota, appearing on behalf of Education Minnesota and the Grievants.

JURISDICTION:

St. Cloud Area School District 742, referred to herein as the Employer or the District, and the St. Cloud Education Association, referred to herein as the SCEA or the Association, were parties to a collective bargaining agreement effective July 1, 2007 through June 30, 2009 and thereafter until modifications are made pursuant to P.E.L.R.A. unless one of the parties indicates a desire to modify or amend the Agreement in accord with Article XXVIII of the collective bargaining agreement. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on June 18, 2010 in St. Cloud, Minnesota. The parties, both present, were afforded full opportunity to be heard. Briefs were filed in the matter and the final one was received July 19, 2010. The matter is now ready to be decided.

STATEMENT OF THE ISSUE:

Should the District be required to grant the grievance because it failed to issue a Level III decision within the time limits set forth in Article XXVII of the collective bargaining agreement?

If not, did the District violate Article XX, Section 20.6 of the collective bargaining agreement when it refused to provide an additional .1 overload pay to two physical education teachers who were assigned additional teaching time in the 2009-2010 school year? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE XX – HOURS OF SERVICE

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Section 20.6 Overload Assignments: Any teacher who agrees to an assignment that results in teaching time that exceeds the average for that trimester, semester, or year for that assignment, shall be paid an additional amount (above a full-time contract) pro-rated by the teacher's salary for the length of the assignment.

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ARTICLE XXVII – GRIEVANCE PROCEDURE

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Section 27.3 Definitions and Interpretations:

Subdivision 27.3.1 Extensions: Time limits specified in this agreement may be extended by mutual agreement.

Subdivision 27.3.2 Days: Reference to days regarding time periods in this procedure will refer to working days. A working day is defined as all weekdays not designated as paid holidays by the school calendar.

Subdivision 27.3.3 Computation of Time: In computing any period of time prescribed or allowed by procedures herein, the date of the act, event, or default for which the designated period of time begins to run will not be included.

The last day of the period so computed will be counted, unless it is a Saturday, a Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

Subdivision 27.3.4 Filing and Postmark: The filing or service of any notice of document herein will be timely if delivered by personal service or sent by certified mail, return receipt requested, and said return receipt evidences timely service.

Subdivision 27.4 Time Limitation and Waiver: An effort will first be made to adjust an alleged grievance informally between the Association and the District's designee within ten (10) days after knowledge of the event giving rise to the alleged grievance. A grievance will not be valid for consideration unless the grievance is submitted in writing on Grievance Form, Exhibit I, to the District's designee, setting forth the facts and the specific provision of the agreement alleged violated and the particular relief sought within ten (10) days after the informal attempt to adjust the grievance. Failure to file any grievance within such period will be deemed a waiver thereof. The parties, by written mutual agreement, may waive any step and extend any time limits in the grievance procedure. However, failure of a party to proceed within five (5) days after the other party has sent written notice by certified mail that a time limit has expired may result in forfeit of the grievance, or, in the case of the employer, require mandatory alleviation of the grievance as outlined in the last statement by the exclusive representative.

Section 27.5 Adjustment of Grievance: The District and the Association will attempt to adjust all grievances which may arise during the course of employment of any teacher within the School District in the following manner:

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Subdivision 27.5.3 Level II: In the event the grievance is not resolved in Level 1, the decision rendered may be appealed to the Superintendent of Schools, provided such appeal is made in writing on Grievance Form, Exhibit I, within ten (10) days after receipt of the decision in Level 1. If a grievance is properly appealed to the Superintendent, the Superintendent or his/her designee will schedule to meet regarding the grievance within ten (10) days after receipt of the appeal. Within five (5) days after the meeting, the Superintendent or his/her designee will issue a decision in writing to the parties involved.

Subdivision 27.5.4 Level III: In the event the grievance is not resolved in Level II, the decision rendered may be appealed to the District, provided such appeal is made in writing within ten (10) days after receipt of the decision in Level II.

If a grievance is properly appealed to the District, the District will set a time to hear the grievance. Such hearing will be scheduled within five (5) days. Within ten (10) days after the hearing, the District will issue its decision in writing to the parties involved. At the option of the District, a committee or representative(s) of the District may be designated by the District to hear the appeal at this level and report its finding and recommendations to the District. The District will then render its decision.

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Section 27.8 Arbitration Procedure: In the event that the Association and the District are unable to resolve any grievance, the grievance may be submitted to arbitration as defined herein:

Subdivision 27.8.1 Request: A request to submit a grievance to arbitration must be in writing on the attached designated form, Exhibit I and signed by a legal representative of the Association. Such request must be filed in the office of the Superintendent within ten (10) days following the decision in Level III of the grievance procedure or the District's decision to revise a Level I or Level II decision or failure to reach a decision in Grievance Mediation.

Subdivision 27.8.2 Prior Procedure Required: No grievance will be considered by the arbitrator which has not been first duly processed in accordance with the grievance procedure and appeal provisions.

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Subdivision 27.8.5 Hearing: The grievance will be heard by a single arbitrator and both parties may be represented by such person or persons as they may choose and designate, and the parties will have the right to a hearing at which time both parties will have the opportunity to submit evidence, offer testimony, and make oral or written arguments relating to the issues before the arbitrator. The proceeding before the arbitrator will not be a hearing de novo.

Subdivision 27.8.6 Decision: The parties will request that the decision by the arbitrator be rendered within thirty (30) days after the close of hearing. 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. Decisions by the arbitrator, in cases properly before him/her, will be final and binding upon the parties provided that either party will have the right to appeal the decisions of the arbitrator to the court in accordance with the laws of the State of Minnesota.

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Subdivision 27.8.8 Jurisdiction: The arbitrator will have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of the procedure and P.E.L.R.A.

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BACKGROUND AND FACTS:

North Junior High School (North) in St. Cloud, Minnesota is one of the St. Cloud District's two middle schools. Offering 6th, 7th, and 8th grades, it enrolls about 700 students. Teachers, there, have a seven and one-half hour duty day which starts at 7:40 a.m. and ends at 3:10 p.m. Within that day, North uses a modular scheduling system and each modular (mod) is approximately 24 minutes long with approximately three minutes passing time between mods. The collective bargaining agreement provides that each building shall provide a 30-minute duty-free lunch period and a 50-minute preparation period. The remainder of the day is generally divided into two-mod periods that are used for classroom instruction, small group instruction, or resource time. There is also a mod designated as advisory time. The first mod starts at 8:20 a.m. Since students arrive as early as 7:45 a.m., however, they are directed to go to the gym where they are supervised by two physical education teachers until 8:15 a.m. when the teachers are released to go to their advisory time.

Prior to the 2008-09 school year North offered only 7th and 8th grades. In the 2008-09 school year, a 6th grade was added as an option for students interested in moving into a middle school environment. Approximately 100 students enrolled, all of whom were required to take physical education. During that year, a physical education teacher was hired part-time to teach the two additional 6th grade physical education classes while the two full-time physical education teachers at North continued to teach the 7th and 8th grade classes. As a result, the full-time male physical education teacher supervised students in the gym from 7:40 to 8:20 a.m.; used his unassigned time from 8:20 to 8:52 a.m. to set up and take down equipment, and the rest of his day consisted of five 2-mod classes, one 1-mod lunch period, one 2-mod prep time, one 1-mod unassigned time and an unassigned time between 3:03 and 3:10 p.m. which he used to take down equipment which had been used during the day. The full-time female physical education teacher also supervised students in the gym between 7:40 and 8:20 a.m. and used her unassigned time from 8:20 to 8:52 a.m. to set up and take down equipment. During the rest of the day, she had five 2-mod classes; one additional 2-mod class every other day; one 1-mod lunch period; an

alternating 2-mod and 1-mod prep period every other day and an unassigned period between 3:03 and 3:10 p.m. which she also used to take down equipment. Because she taught an additional 2-mod class, she was paid 0.1 overload pay for the year.

At the start of the 2009-10 school year, the teacher hired part-time during the 2008-09 school year to teach the 6th graders did not return and the two full-time physical education teachers were assigned to teach the sixth graders. After inquiring as to whether they would be paid overload pay for the additional classes, they were told there would be no additional pay since they were being assigned these mods in exchange for the resource mod, a one-mod period they previously had been assigned. During the first semester, the one-mod period was changed to a two-mod period and the teachers were paid 0.1 overload pay for the addition assigned mod during the second semester.

Also beginning that year, most regular classroom teachers were assigned five 2-mod classes which were subject-specific and a resource time mod in addition to supervisory responsibilities at the beginning and end of each duty day. Prior to 2009-10, classroom teachers were assigned to a team composed of five teachers and each teacher had 1-mod Team Study Lab (TSL) which was primarily used as a study hall. Each team developed a plan to help students prepare for the Minnesota Comprehensive Assessment (MCA) tests with the goal of boosting student scores. Students assigned to TSL were not graded and teachers did not provide assessments to the students for their time spent in TSL. During 2009-10, the teams were disbanded and the TSL period was rescheduled as resource time. How that time was used is disputed. The St. Cloud Education Association (SCEA) states that the resource time was used as a study hall and students used the time to work on their homework while the District asserts that the teachers were to use the period to supplement student instruction in reading based upon each student's reading needs and that if the teachers did not use the period for that purpose the District was not aware of that. In addition, because North had failed to meet adequate yearly progress goals (AYP) under the federal No Child Left Behind Act during the previous two years the math department implemented a math program that consisted of three 3-mod classes and one 2-mod class and a Read 180 program that runs on a 4-mod cycle was established.

Believing they were entitled to overload pay for teaching the 6th graders in lieu of supervising students during the resource mod since the addition of the classes required them to

develop new curriculum; provide a daily grade for each student in the class; conduct physical fitness tests and more, the two physical education teachers grieved the District's action first at the informal level and then at the formal level. A formal grievance was filed on September 21, 2009. The grievance was denied at Level I and Level II.

The SCEA appealed the Level II decision and a Level III grievance meeting was held on December 17, 2009. At that meeting, the parties agreed to extend the District's time to reply to the Level III appeal to January 19, 2010. When no response was received by January 22, 2010, the SCEA sent the Human Resources Director an e-mail asking about the decision. In response, the Human Resources Director sent the SCEA an e-mail informing them that the Board of Education Chair had provided them with a draft decision for their review in December; that consideration of the draft by the Personnel Committee had been delayed due to its reorganization in January but that the draft had been considered by them on January 18, and that the Committee had recommended the decision to the full Board for authorization at its next board meeting. Following receipt of this e-mail, the SCEA sent the Human Resources Director another e-mail stating the parties had agreed to extend the time for the Board to give its response to January 19 and that no one had contacted the Association about extending the timelines beyond that date and that it was the SCEA's position that the District had missed the timeline. Still later that day, the Board Chair sent the SCEA an e-mail informing them that he had sent them his decision "some time ago" and that if they were going to contend that the decision was untimely he understood the contract to require a certified letter providing notice and one was not sent.

Three days later, on January 25, the SCEA sent the Board Chair an e-mail stating that they had only pointed out that the parties had agreed that they would have a decision, not a draft, by January 19th and that all they were trying to do was find a solution to the problem. The Association also said that if it "takes invoking the contract and sending a certified letter" that could be done although they thought that an e-mail reminder might get the job done. Further, they asked that the Chair send the Board decision as soon as possible.

The Board meeting was held on January 28, 2010 and the decision was approved by the full Board. On February 5, the Association sent an e-mail, with a letter from it attached, to the District's Superintendent. In that letter, also dated February 5, 2010, the Association stated that since the Board had met on January 28th and it had still not received the response regarding the

grievance it was asserting that the timeline has been violated and was taking the position that the grievance is sustained. The letter was not sent by certified mail, however. That same day, the SCEA received the Level III decision and the January 28, 2010 school board minutes authorizing the decision. Both the procedural issue and the merits are before the Arbitrator.

ARGUMENTS OF THE PARTIES:

Procedurally, the SCEA argues that the grievance should be sustained since the District failed to issue a Level III decision within the time limits set forth in the collective bargaining agreement. On the merits, it argues that the District violated Section 20.6 of the collective bargaining agreement when it refused to provide 0.1 overload pay to the grievants for teaching an additional one-mod period during the first semester and an additional two-mod period during the second semester during the 2009-10 school year. In response, the District declares that the grievance should not be sustained based upon the District's failure to timely respond to the issue at Level III since the SCEA never sent the District written notice by certified mail as is required by the collective bargaining agreement and since the SCEA failed to show its members were harmed by the District's untimely response. And, on the merits, it declares that while the parties agree that Section 20.6 was added to ensure that overtime was paid consistently and fairly throughout the District and that while they did not define "teaching" load due to varying class schedules and teaching assignments between buildings and intended the average teaching load to be based on the assignments of regular education classroom teachers, the SCEA's definition of teaching is inconsistent with the popular and commonly accepting meaning of the term "teaching" and that it cannot prevail in this grievance unless it is deemed that "resource time" is not "teaching time". Further, the District charges that granting the grievance would result in an inconsistent and inequitable interpretation and application of the contract language.

With respect to the procedural issue, the SCEA asserts that the parties have agreed to contract language which provides specific timelines for filing and responding to the various levels of the grievance process and that the District failed to issue the Level III decision within the timelines agreed to by both parties. It also argues that while the contract provides that notice of a missed timeline must be sent by certified mail, there is no question that it provided the District written notice of its failure to comply with the timelines and the District not only ignored the

notice but continued to fail to timely comply. As a result, the SCEA seeks that the grievance be sustained based upon this procedural error.

In response, the District asserts that the grievance should not be sustained when it failed to timely issue the Level III decision since the SCEA failed to notify the District by certified mail, a condition required by the collective bargaining agreement, that it had failed to timely issue the Level III response even though the District had reminded the SCEA that it must be notified by certified mail in the many e-mails they had exchanged regarding this issue. The District also argues that even if the notice had been sent to the District, the SCEA must show the delay caused it harm in order to prevail since the parties use of the word "may" instead of "shall" in that provision grants the arbitrator the authority to determine if an untimely delay in responding has caused harm before imposing the "harsh penalty" of granting a grievance without hearing it on the merits.

On the merits, the SCEA asserts that the bargaining history shows that the parties intended overload pay to be given to teachers assigned to teach an additional class; that the District's past practice concerning overload payments supports a finding that supervisory or advisory time does not constitute teaching time; that the District's definition espoused in this dispute is not supported by its past application of the language; that resource time does not constitute teaching time, and that even if resource time had been used to help students improve their reading skills, it would not constitute teaching time. The SCEA also charges that the additional teaching time assigned the grievants exceeds the average teaching time assigned teachers during the 2009-10 school year at North. And, finally, the SCEA declares that it did not waive its right to grieve this dispute even if the District argues that the SCEA did since it did not file a grievance over other potential violations.

Referring more specifically to the parties' bargaining history and past practice, the SCEA asserts that the contract language added by the parties to assure that teachers were provided overload pay in a consistent and fair manner, has not changed since it was first added in 2001-03 and that the District continued to provide overload pay in the same manner that it had prior to the addition of the language. As proof of its assertion, it notes that the female grievant was paid a 0.1 overload for the additional two-mod every other day assignment she was given in 2008-09 and the male grievant received a 0.2 overload payment for an additional two-mod class every day assignment he was given in 2007-08.

Continuing, the SCEA rejects the District's broad definition of "teaching" time and charges that it does not support the District's past application of that language. As proof of this assertion, the SCEA notes that teachers at St. Cloud Technical High School have been provided overload pay when they give up a study hall. Further, it cites the fact that a grievance at Apollo was settled only after the District acknowledged that the teacher's original schedule with an additional class rather than an advisory time constituted an overload under the contract even though the teacher waived the overload pay since she wanted to teach the class rather than have an advisory time.

And, finally, the SCEA rejects the District's broad definition of teaching time and its assertion that resource time constitutes teaching time. Arguing that the District's definition of teaching time is so broad that the only time a teacher would be granted overload pay is when a teacher's prep time is reduced, the SCEA states that not only does the District admit that there have been instances where overload pay has been granted and a teacher has not given up prep time but that resource time in 2009-10 was uniformly used by teachers as supervised study time and not as instructional periods. Further, in response to the District's assertion that teachers were directed to use that time to provide reading support to students, the SCEA states that the only "directive" the District provided as proof of its assertion was an e-mail that was sent to teachers assigned to a resource time after this grievance was filed and that no evidence was provided to contradict SCEA testimony that teachers used the resource time as a study hall. And, it adds that even if resource time was used to help students with reading, that time does not constitute teaching time since it does not entail "extra planning, instruction, implementation of curriculum and grading."

Based upon its definition of "teaching" time, the SCEA declares that the grievants in this dispute are entitled to overload pay since the additional teaching time assigned in 2009-10 exceeded the average teaching time at North for that year. Citing testimony by one of its members, the SCEA states that excluding special education teachers and teachers not assigned typical classes (i.e. counselors and psychologists) there are thirty teachers working at North and twenty of them teach five classes or ten mods per day. Further, addressing the District's contention that the average teaching time at North is eleven mods, the SCEA argues that "that figure can only be obtained if resource time is classified as teaching time and past practice shows that only classes that require instruction and grading constitute teaching time." Continuing, the

SCEA posits that the grievants teaching load during 2009-10 exceeded ten mods per day since they taught eleven mods during the first half of the school year and twelve mods per day during the second half of the year.

Finally, the SCEA, noting that the District may decide to argue that the Union waived its right to grieve the District's failure to pay overload pay since it didn't file a grievance over other potential violations, argues that the District has the burden to prove waiver "by clear and unmistakable evidence" and cites several arbitration decisions to support its position.¹ Based upon this requirement, it declares that the District provided no evidence to support a waiver let alone clear and unmistakable evidence. Further, addressing the fact that it had not grieved the math department's schedule raised by the District, the SCEA states that not only was the Union not notified that teachers in that department had changed their schedule but that it understood that the teachers were involved in developing a new class structure, a factor that would have been considered in deciding whether to grieve the schedule.

The District, however, declares that it did not violate Section 20.6 of the collective bargaining agreement and rejects the SCEA argument that the grievants are entitled to overload pay since their assigned teaching time exceeds the average. As support for its position, it argues that the average teaching time at North is 10.87 mods which when rounded up amounts to eleven mods a day, the same amount of teaching time that was assigned to the grievants. Further, it challenges the SCEA exhibit introduced to show the teaching loads assigned all teachers at North for the 2009-10 school year; asserts there are several inaccuracies in it, and declares that two music teachers and two Read 180 teachers were improperly characterized as non-regular education classroom teachers. It also states that the music teachers and Read 180 teachers were assigned 11 mods a day; that five other teachers (four full-time math teachers and one part-time teacher) in addition to the grievants were assigned to teach eleven mods a day and that three other teachers taught eleven mods a day since they were assigned to co-teach either a reading or math mod. And, finally, it declares that thirteen other teachers were assigned a resource time, which if considered teaching time within the meaning of Section 20.6, would bring the total

¹ *Weinstein Wholesale Meat, Inc.*, 98 LA 636 (Eagle, 1992); *New Orleans S.S. Ass'n.*, 105 LA 79 (Nicholas, Jr., 1995); *Excel Corp.*, 106 LA 1069 (Thornell, 1996), and *Clorox Co.*, 103 LA 932 (Frankiewicz, 1994).

number of teachers assigned an average teaching load of eleven mods to thirty-one teachers and clearly establish that the average teaching load is eleven mods.

Continuing, the District disagrees with the SCEA's definition of teaching time and asserts that teaching "can occur at any time or place during the school day". Noting that neither the collective bargaining agreement nor PELRA defines teaching time and arguing that there is no evidence that the parties intended some special meaning for the term "teaching", the District charges that the common meaning of the word as defined by several dictionaries should govern and cites **Elkouri and Elkouri, How Arbitration Works** as support for its position.² Based upon this assertion, the District states that a review of several dictionaries establishes that "teaching can occur at any time or place during the school day" and that it "involves showing or instructing a student how to do something". It adds that none of the commonly accepted definitions of the term includes planning, assessing and grading students, all criteria the SCEA declares occurs in order for teaching to take place.

To support its argument that resource time should be considered teaching time, the District asserts that teachers assigned to a resource time class were directed to provide instruction to supplement student instruction in reading based on individual student needs and that if some of the teachers failed to provide that individualized instruction, the District was unaware of their "insubordination prior to the hearing". Continuing, the District declares, however, that even if resource time is not deemed to be "teaching time" granting the grievance would result in an inconsistent and inequitable interpretation of Section 20.6 since twelve other teachers were assigned to teach an eleventh mod during the 2009-10 school year and since the SCEA is not asserting a violation of Section 20.6 for their assignments. In addition, it charges that the reasons for not seeking overload pay for the full-time math teachers who were assigned to teach eleven mods a day cited by the SCEA "do not justify a different application of the overload language".

Expanding upon its argument concerning the SCEA's failure to seek overload pay for the math, music, and Read 180 teachers who have been assigned to teach an eleventh mod, the District states there is nothing in the collective bargaining agreement that states that teachers who "agree to, or at least do not complain about, being assigned teaching time that exceeds the average are not entitled to be paid an overload." Further, it states that there is no "direct

² Chapter 9.3.A.i., 6th Edition, 2003.

evidence” that supports the SCEA’s assertion that math teachers do not teach during the third mod of the three-mod classes and that it is “unbelievable that the . . . District would schedule longer math classes . . . and then not have the math teachers teach the entire class period.” And, finally, the District urges that the SCEA’s attempt to convince the arbitrator that music and Read 180 teachers should not be considered when determining the average teaching load be rejected. As support for its position, the District states that music and reading are part of regular education classes; that there is “no logical basis” for distinguishing between physical education, music, math teachers when applying Section 20.6, and that the SCEA is “simply trying to reconcile its claim” that the grievants should be paid overload pay for being assigned eleven mods with the fact that many other teachers are being assigned to teach eleven mods without being paid an overload.

DISCUSSION:

The procedural issue raised by the SCEA is an interesting one. Usually, procedural challenges regarding failure to comply with the grievance process timelines are raised by the employer and arbitrators generally dismiss grievances where the time limits are clear and failure to observe those timelines, absent waiver or some unusual circumstance occurring.³ In this dispute, it is not the District who is charging that the SCEA failed to meet grievance process timelines but the SCEA who is charging that the District failed to timely respond.

A review of the record clearly indicates the District failed to timely respond to this grievance at Level III and that the parties have bargained language which provides that failure to comply with the time limits established in the collective bargaining agreement, unless extended by mutual agreement of the parties, shall result in forfeiture or mandatory alleviation of the grievance depending upon which party has failed to comply with the time lines.⁴ Although no evidence was introduced to indicate whether the parties regularly enforce the time line language, it is concluded that the language would not have been bargained had the parties not wished to have grievances heard in a timely manner. Given this fact, the District's failure to respond within the agreed upon time limit at Level III without seeking a further waiver of the time limits from the SCEA is a problem that cannot be overlooked, particularly since the SCEA provided notice by e-mail

³ See **Elkouri and Elkouri, How Arbitration Works, Sixth Edition**, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Inc., Washington, DC, Chapter 5, pp. 217-222; **Labor and Employment Arbitration, Second Edition**, Bornstein, Gosline, Greenbaum, General Editors, Chapter 8, pp. 8-28 – 8-41.

that it had not received the Level III decision as agreed upon by both parties.⁵ This failure would normally be cause to enforce that part of the grievance procedure which states that the District's failure to comply with the time lines will result in mandatory alleviation of the grievance if the SCEA had provided notice by personal service or by certified mail.⁶ Since the SCEA did not give notice by personal service or by certified mail, it, too, failed to comply with the grievance procedure. Consequently, this violation together with the fact that there is no evidence that the SCEA was harmed by the District's failure to comply in a timely manner at Level III of the grievance process warrants deciding this dispute on the merits and not on procedure.

On the merits, the parties agree that Section 20.6 was added to the collective bargaining agreement to assure that, throughout the District, teachers assigned a teaching load that exceeded the average number of teaching assignments receive overload pay in a fair and consistent manner. In addition, they agree that they did not define the average teaching load since teaching schedules and assignments vary from building to building. And, finally, there is no dispute over whether the grievants were scheduled to teach an additional physical education mod during the first semester of the 2009-10 school year and two additional physical education mods during the second semester. They differ, however, over whether the grievants are entitled to overload pay for the additional mod assigned during the first semester and for one of the two mods assigned during the second semester.

In arguing the merits of their position, the District asserts that the grievants are not entitled to overload pay for the additional mod assigned during the first semester and for one of the two additional mods assigned during the second semester since they were not assigned resource time and, therefore, their teaching time did not exceed the average teaching load for regular education classroom teachers at North. In response, the SCEA argues that resource time does not constitute teaching time; that the average teaching load for regular education classroom teachers is ten

⁴ See Article XXVII, Section 27.4.

⁵ While the District argued that the SCEA knew what the decision would be since it had received a draft of the decision written by the Board chair, a draft cannot be considered the decision until approved by the Board since it is subject to revision or rejection until final action is taken by the full Board.

⁶ Although the District insisted that the SCEA had to provide notice by certified mail, it is noted there is a conflict between the language contained in Section 27.4 and Section 27.3.4. Although Section 27.4 states that the party failing to proceed within the time lines set forth in Article XXVII must be sent notice that a time limit has expired by certified mail, Section 27.3, Subdivision 27.3.4 states that any notice will be timely if delivered by personal service or sent by certified mail. Since this subdivision is under the section that defines the language used in this Article, it appears that personal service would also have sufficed.

mods, and that the grievants were assigned eleven mods during the first semester and twelve mods during the second semester. Since there is no dispute over the number of mods each of the grievants was assigned, the issue to be resolved is whether assigned resource time is teaching time and whether the average teaching load for regular education classroom teachers at North is ten mods or eleven mods.

Since the term "teaching time" is not defined in the collective bargaining agreement, the District argues that resource time constitutes "teaching time" because "teaching" occurs any time student instruction/assistance is provided and that teachers assigned resource time were teaching since they were expected to assist students in improving their reading skills. The SCEA, however, maintains that resource time does not constitute "teaching time" but supervisory time since it is a study hall; that teachers assigned resource time treated the resource time as a study hall, and that "teaching time" as defined by the District, even if the teachers were to assist students with their reading skills, is far too broad. It adds that "teaching time" as defined in Section 20.6 requires teachers to plan lessons and instruct, grade and assess students, none of which teachers assigned to resource time are required to do.

Urging that the Arbitrator conclude that resource time is "teaching time", the District asserts that the term "teaching" is defined in several dictionaries as the act of imparting knowledge or instructing someone and, citing Elkouri and Elkouri, **How Arbitration Works**, states that absent an understanding by the parties that a term in the collective bargaining agreement has a meaning to the contrary arbitrators often rule that the usual and ordinary dictionary definition should govern. The District's argument is not persuasive, however. The standard cited by the District is only one of many that arbitrators, including this Arbitrator, consider when asked to resolve a grievance that involves contract interpretation in an attempt to issue a decision that is in keeping with what the parties intended when they agreed to the disputed language. Among the generally accepted standards applied by arbitrators are the generally accepted standards of contract interpretation; bargaining history and past practice and the principle of reason. Further, if an arbitrator considers a dictionary definition in an effort to determine the meaning of a disputed term, the definition is used only as an aid since words have no absolute meaning and can only be understood in context, context which includes the customs and practices within the

business.⁷ Consequently, while one would not dispute that the term "teaching" means imparting knowledge or instructing someone and that this definition is a common and popular meaning of the word, that definition does nothing to clarify the meaning of the term "teaching time" as contained in Section 20.6 of this collective bargaining agreement.

Since Section 20.6 specifically states that teachers will receive overload pay when assigned "teaching time that exceeds the average for that trimester, semester, or year" the term "teaching time" must incorporate a concept that means more than simply imparting knowledge or there would be no need for this provision. By necessity, it must include the concept of imparting knowledge to children and/or young adults that will give them a sound knowledge base and skill set which they may draw upon once they are contributing members of society. Given this goal, it can only be concluded that "teaching" and, subsequently, "teaching time" incorporates the concept of providing instruction regarding a specific subject area through prepared lesson plans and establishing a method of evaluating whether those being instructed are acquiring the knowledge being imparted. This, in essence, whether or not one agrees with it, is the reason for the standardized tests imposed by the No Child Left Behind Act and the required Adequate Yearly Progress monitoring.

Applying this concept to the term "teaching time" it must, then, be decided whether teachers assigned resource time are assigned "teaching time" in order to decide whether the average teaching load at North is ten mods or eleven mods. The parties agree that in 2008-09 teachers were assigned a 1-mod Team Study Lab (TSL), a study time during which a team of teachers worked with students to help them get caught up on their work in social studies, math, science and language. During the TSL period, instruction of students, without assessment, occurred four days a week and the fifth day was used as a study hall in an effort to help students improve their MPA test scores. At the end of the year, it was concluded that this type of intervention was not successful and the TSL period became resource time during the 2009-10 school year.

⁷ See **Elkouri and Elkouri, How Arbitration Works, Sixth Edition**, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Inc., Washington, DC, Chapter 9; **Labor and Employment Arbitration, Second Edition**, Bornstein, Gosline, Greenbaum, General Editors, Chapter 9, and **The Common Law of the Workplace, The Views of Arbitrators, Second Edition**, National Academy of Arbitrators, The Bureau of National Affairs, Inc., Washington, DC, Chapter 2.

Although the District's principal testified that it was his intent that teachers assigned a resource time were to use the time to assist students with their reading skills, it is not clear that this intent was ever communicated to the students or the teachers. Proof of this lies in the fact that the principal also testified that he never told students that the time was to be used as a study lab and there was no testimony that he ever directly told teachers assigned resource time that they were to use that time to assist students with their reading skills. While the District submitted an e-mail the principal sent to teachers assigned a resource time on November 9, 2009 as proof that the teachers had been told to use the time to assist students in improving their reading skills, the e-mail was dated well after this grievance had been filed and several teachers assigned resource time testified that they had never been told to use that time in that manner prior to receiving the e-mail and that they generally used the time as a study hall. Also mitigating against the District's proof that the teachers were instructed to use the resource time to improve students' reading skills is the fact that the District's Step 1 response to the grievance filed on September 9, 2009 was that teachers assigned resource time were expected to use the time to instruct students on an individual basis in reading and math while the principal testified that the focus of the resource time was to assist students with their reading skills since not everyone is comfortable with math and since the District had people who could give staff ideas in reading. This discrepancy between their positions further calls into doubt what the teachers assigned resource time may have been told about how to use the time, if at all. Further, while the November 9th e-mail sent the teachers assigned resource time told them they should contact the reading specialists to ask them about ideas on how to evaluate and assist students with their reading needs, nothing in that e-mail told the teachers they were to be using the resource time only for improving reading skills. And, finally, since the e-mail was sent a month after this grievance had been filed and a full week after the District's Human Resources Director had denied the grievance at Step 1 asserting that the resource time was to be used to instruct students in math and reading; since it did not direct the teachers to use the resource time only to assist students with their reading skills; since the District provided no other evidence as proof that the teachers had been instructed to use the time to assist students with their reading skills, and since the principal testified that he thought he must have talked with the teachers about using resource

time as time to assist students in reading although he had no notes to that effect, it cannot be concluded that the e-mail is sufficient proof of the District's assertion.

Based upon the lack of evidence proving that the teachers were ever told they were to use resource time as time to assist students with their reading skills and the teachers' testimony that they used the time as a study hall, with no proof to the contrary, it is concluded that assigned resource time during the 2009-10 school year does not fall within the definition of "teaching time" and should not be considered when deciding the average teaching load. Given this finding, it is determined that the average teaching load at North in 2009-10 is ten mods and that the Grievants' assignment of an extra mod during the first semester of 2009-10 and two extra mods during the second semester of 2009-10 constituted an overload assignment which entitled them to overload pay. In reaching this conclusion, the fact that several teachers are teaching eleven mods and have not grieved their overload assignment was not ignored.

The record establishes that the math department restructured its math program and that an early reading intervention program was introduced into the school in the 2009-10 school year in the hopes of helping students improve their math and reading skills and to help the District meet its AYP goals. It also establishes that the programs were scheduled in such a way as to require those teaching in them to have students for eleven mods each day and that none of these teachers sought overload pay for the assigned eleventh mod. And, finally, the record establishes that the SCEA was not aware that these teachers had agreed to the extra mod assignment without being paid overload pay for doing so until it had filed the current grievance. The fact that these teachers did not seek overload pay does not negate the fact that Section 20.6 provides that teachers whose teaching assignments exceed the average teaching load shall be paid overload pay, nor should their action be grounds for denying this pay to the teachers who did grieve such scheduling even though the District correctly argues that sustaining the grievance will result in an inconsistent application of Section 20.6. Their agreement with the District simply means only that they cannot now seek enforcement of the provision and recovery under the provision for the additional assignment during the 2009-10 school year.

Further, since there is no evidence that the SCEA neither knew of the teachers' agreement nor agreed to it, it cannot be concluded that the SCEA is waiving any right to seek application and enforcement of Section 20.6. This finding is supported by evidence that the SCEA has consistently

sought enforcement of this provision in the past and agreed to waive its enforcement only when the teacher indicated that she preferred the additional assignment and would forego the overload pay. In that situation, application of the overload pay provision was waived only after the District acknowledged that the teacher's schedule constituted an overload and that the teacher's waiver was not binding on the SCEA as an accepted practice.

In summary, based upon the record, the arguments advanced by the parties and the discussion above, it is concluded that the District's failure to timely reply at Step III of the grievance procedure, while a violation of the grievance procedure, is not cause to decide this grievance without hearing the merits since the SCEA did not comply with the notice requirement set forth in the same procedure and since there is no showing of harm to the grievants. On the merits, it is concluded that teaching time incorporates the concept of providing instruction regarding a specific subject area through prepared lesson plans and establishing a method of evaluating whether those being instructed are acquiring the knowledge being imparted and that based upon this definition assigning the grievants an additional teaching mod in lieu of resource time, which is not teaching time, and failing to pay them overload pay for the additional mod violates Section 20.6 of the collective bargaining agreement. Accordingly, the following award is issued:

AWARD

The grievance is sustained.

By: 
Sharon K. Imes, Arbitrator

August 18, 2010
SKI