IN THE MATTER OF THE ARBITRATION BETWEEN
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Education Minnesota Education Support Professionals
Local 4798
Union,

and

Independent School District No. 361,
International Falls, Minnesota
Employer.

OPINION AND AWARD
Grievance of
Education Minnesota,
Local 4798
(Contract Interpretation)

BMS Case No. 12-PA-0322

ARBITRATOR:	Janice K. Frankman, J.D.
DATE OF AWARD:	June 21, 2012
HEARING SITE:	Conference Room AmericInn 1500 Highway 71 International Falls MN
HEARING DATE:	April 17, 2012
RECORD CLOSED:	May 22, 2012
REPRESENTING THE UNION:	Anthony L. Sheehan Legal Department Education Minnesota 41 Sherburne Avenue St. Paul MN 55103
REPRESENTING THE EMPLOYER:	Margaret A. Skelton, Attorney at Law Ratwik, Roszak & Maloney, P.A. 300 U.S. Trust Building 730 Second Avenue South Minneapolis MN 55402

JURISDICTION

The hearing in this matter was held on April 17, 2012. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of BMS. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs which were received on May 21 and 22 from the Employer and the Union respectively when the record closed and the matter was taken under advisement.

ISSUE

The parties stipulated at the opening of the hearing to the following statement of the issue:

> Did the School district violate the Collective Bargaining Agreement when it held inservice pursuant to Article 10, Section 1, subdivision 4 during the annual bumping meeting? If so, what is the remedy?[1]

The parties' proposed alternative statements of the issue(s) in their Post-hearing Briefs:

<u>Union</u>

Did the District violate the contract by conducting inservice training during the annual posting (bump) meeting and deducting all of the time for the bump meeting from the contractual inservice allotment? If so, what is the remedy?

<u>Employer</u>

1. Does the Arbitrator have jurisdiction to resolve the issue of whether the August 12, 2011 meeting was an 'in-service' when this issue was raised for the first time at hearing and was not raised as part of the original grievance?

2. The District agreed to this Statement of Issue subject to its jurisdictional argument: Did the District violate the CBA when it held an in-service per Article 10, Section 1, Subdivision 4 during the annual posting/bumping meeting?

[1] A good part of both the record made at the hearing, as well as discussion and argument in the Post-hearing Briefs, addressed precisely what the issue or issues in the case are, notwithstanding the stipulation entered into before opening statements were made and evidence and testimony was presented. Indeed, neither counsel recognized the stipulated issue in its Brief. Instead, each set out a statement or statements of the issues as provided above. The Opinion and Award addresses the apparent confusion and lack of clarity as to whether a question of arbitrability was being raised, and then as to what the precise issues for resolution accurately are. The School District now questions the scope of the arbitrator's authority.

BACKGROUND AND SUMMARY OF THE EVIDENCE

Education Support Professionals ("ESPs") "assist teachers and administrators to implement educational programs and services and to perform other duties as they may be assigned." They include teacher aides, Indian Education aides, playground supervisors and monitors. See, Joint Exhibit 1, page 1. This bargaining unit has about 60 members. In 2009, the parties negotiated a new Collective Bargaining Agreement ("CBA") provision which addresses mandatory assignment of a minimum of 14 hours inservice throughout the school year. This case has arisen as a result of a dispute with regard to interpretation and application of the inservice provision.

Posting Meeting

An annual bumping or posting meeting ("posting meeting") was held on August 12, 2011. It is a meeting, prescribed by the CBA and conducted by the Union President and the Superintendent or someone he designates, when bargaining unit positions are filled for the upcoming school year.

Notice of the posting meeting was sent by letter dated August 1, from Elementary School Principal Gerald G. Hilfer to the bargaining unit members. He attached sheets which described open and new positions available for consideration, and for members to "express an interest in" at the meeting. He encouraged review of the sheets, and that ESPs also come to the meeting prepared to ask questions. In addition, Mr. Hilfer described potential positions which would be available pending a District decision concerning provision of speech services. See, Joint Exhibit 8. The 2011/2012 Master List for ESP Personnel Assignments dated April 3, 2012, includes thirteen (13) pages of detailed assignments. It is a list which had been "tweeked" and amended as changes in assignments were made through the school year.

The posting meeting lasted 75 minutes, for which ESPs were paid. Consistent with Contract seniority provisions, they bid for their assignments for the coming School year. About fifteen (15) minutes of the meeting was devoted to the Business Manager's discussion of a change in payroll, insurance and a new time clock.

Official School Calendar for 2011/2012

The 2011-2012 Official calendar as updated on August 31, 2011, at Joint Exhibit 3, identifies inservice days as follows:

- TUESDAY AUGUST 30 NEW TEACHER INSERVICE DAY
- WEDNESDAY AUGUST 31 ALL EMPLOYEE MEETING – INSERVICE DAY

- THURSDAY SEPTEMBER 1 TEACHER INSERVICE/WORK DAY

- MONDAY OCTOBER 3 TEACHER INSERVICE DAY – NO CLASSES

- MONDAY DECEMBER 5 TEACHER INSERVICE DAY – NO CLASSES

2009 Negotiations

The bargaining unit sought inservice training during the 2009 negotiations so that its members would be included in inservice sessions which the District provided to teachers before school opened in the fall as well as throughout the year to be better prepared to perform their work. The new provision calls for shared decision-making between the Union and the District as to what the training will be. Autism and bullying are examples of two topics identified for desired training. Maggie McBride, Union Secretary/Treasurer and negotiator was designated to become a part of the professional development team to develop inservice workshops.

Minutes of the July 29, 2009, negotiation session, were prepared by Susan Karsnia, Administrative Assistant in the Superintendent's office. An exchange concerning the new inservice provision among bargaining unit negotiators Underdahl and Poole and Interim Superintendent Grover was reported as follows;

> . . . . .J. Underdahl asked if the fourteen hours was inservice time in addition to the work day at the beginning of the year? K.Grover responded that it was inclusive and would have to be planned carefully. J. Poole felt the fourteen hours was a place to start and would evolve over time. J. Underdahl stressed the importance of having time with the teachers prior to school starting to receive their expectations. J. Underdahl also asked what would happen if an inservice ran over the fourteen hours? K. Grover again stated it would try to be carefully planned but if something was over and the district felt it was important they would probably keep them over. . . . . .
>
> Joint Exhibit 6

While the topics of posting meetings and inservice were both addressed in the 2009 negotiations, the several party negotiators who testified at the hearing each reported that the two topics were never connected or discussed together.

Inservice – August 31, 2011; Email Exchange re Posting Meeting

The ESPs attended the August 31, 2011, All Employee Meeting-Inservice Day which was accounted for as inservice time.

On September 6 and 15, 2011, Superintendent Peura responded to emails he received from Beth Slatinski, Union President. The print-outs of their email exchanges do not reveal when she sent her messages to him. The first email is captioned "Training Hours". The second is captioned "Grievance". Their exchanges follow:

Slatinski: Good morning Mr. Peura. Do you still intend to take the hour and fifteen minutes from the bumping meeting out of our fourteen training hours? Our contract states that these hours are to be used throughout the schoolyear (sic) (Article 10, Section 1, sub. 4, page 8). And the bumping meeting did not take place during the schoolyear (sic). Please let me know.

Thanks and have a good day.

Peura: Our school year starts July 1 of each year.

Union Exhibit 1

Slatinski: Good morning, Mr. Peura. On page 2 of our contract (Section 9) the school year is defined as 'the students' regularly (sic) school year'.

I thought that I would let you know as we have had a discussion on how the school year is defined.

Have a good day.

Peura: Please refer to pg. 8 Article 10 Subd. 1. The work year will normally be those days that students are in school by (sic) may vary according to the needs of the School District. In addition, Sub. 4 states 'All ESP's will be assigned a minimum of fourteen hours inservice throughout the school year based on needs determined by the ADMINISTRATION'. Also pg.2, Article 4, Sections 1 and 2.

Union Exhibit 2

Grievance and Grievance Process

This Grievance was filed on September 6, 2011 when the Union confirmed that the School District had accounted for the August 12, posting meeting as a part of the bargaining unit's inservice hours for school year 2011/2012. BethAnne Slatinski, Union President filed the Grievance providing the following detail:

> Statement of grievance: The School District is going to deduct inservice hours from our total (14) for the Bumping Meeting held on August 12, 2011. The contract language states that the inservice hours are throughout the school year.
>
> Contract provision alleged violated: Article 10, Section 1, Subd 4 (page 8)
>
> Redress Sought: The hours for the bumping meeting will not count towards the 14 hours of inservice time.
>
> Joint Exhibit 2

The Grievance was denied on September 13 and again on September 22, by Superintendent Jeff Peura. No reason was given. Superintendent Peura joined the School District in July, 2010. He and Susan Karsnia, his Administrative Assistant

testified on behalf of the School District. Ms. Karsnia has been employed by the School District for 32 years. She attends School Board meetings as an observer. She attended 2009 Contract negotiation sessions to prepare minutes of the sessions. Ms. Karsnia testified that the word "inservice" is used "interchangeably when students are not in the building". Mr. Peura testified that the posting meeting on August 12, was consistent with the definition of "inservice" because "whenever people get together without students, it is an inservice activity." See, Karsnia and Peura testimony.

Superintendent Peura testified relative to the District's General and Staff Development Funds and his decision to code payment to bargaining unit members for the posting meeting from the Staff Development Fund. It appears that the Union was alerted to the fact that the posting meeting had been accounted for as inservice training when it became aware of the fund source, for the pay, it had received for the day. Superintendent Peura testified that as designated District Chief Financial Officer, his decision was within inherent management rights in dealing with overall budget matters. See, Peura testimony. Ms. Slatinski testified that the Union's concern was getting job-related training, not from which fund the training expense is paid. She acknowledged that the Union cannot direct the District as to which fund is charged for the training.

The record includes dictionary and encyclopedia definitions of "inservice" and "Inservice program":

> In-service adj.
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> Definition of IN-SERVICE
>
> 1 : going on or continuing while one is fully employed <inservice teacher education workshops>
> 2 : of, relating to, or being one that is fully employed <inservice policy offers>
>
> Merriam-Webster at m-w.com
>
> Inservice program
>
> An **inservice program** is a professional lecture, where professionals are trained and discuss their work with others in their peer group.
>
> ***
>
> Inservice programs also refers to educators, where they discuss methods and cases and work loads.
>
> Wikipedia, the free encyclopedia

Joint Exhibit 5

Relevant Contract Provisions

Articles 3, 4, 10, 11 and 13 of the CBA address Definitions, School Board Rights and Obligations, Hours of Service, Seniority and Grievances. Relevant portions of each follows:

ARTICLE 3
DEFINITIONS

SECTION 9. SCHOOL YEAR: The students' regularly scheduled school year.

Joint Exhibit 1, page 2

ARTICLE 4
SCHOOL BOARD RIGHTS AND OBLIGATIONS

SECTION 2. MANAGEMENT RESPONSIBILITIES: The Union recognizes that the School Board has the right and obligation to efficiently manage and conduct the operation of the School District within it legal limitations and with its primary obligation to provide educational opportunity for the students of the School District.

SECTION 4. RESERVATION OF MANAGERIAL RIGHTS: The foregoing enumeration of rights and duties shall not be deemed to exclude other inherent management rights and management functions not expressly reserved herein, and all management rights and management functions not expressly delegated in the Agreement are reserved to the School Board.

Joint Exhibit 1, pages 2 and 3

ARTICLE 10
HOURS OF SERVICE

SECTION 1. BASIC WORK YEAR: The work year shall be prescribed by the School Board or its designee for ESPs.

Subd. 1: The work year will normally be those days that students are in school but may vary according to the needs of the School District.

Subd. 2: The yearly schedule may be modified, shortened or lengthened at the discretion of the Board. ESPs will only be paid for actual hours worked.

Subd.4. All ESP's will be assigned a minimum of fourteen (14) hours inservice throughout the school year based on needs determined by administration. The onus of ESP needs should be the burden of both the district and the Union. All ESP's will be expected to participate and may not use 'other leave' during inservice days.

Joint Exhibit 1, page 8

ARTICLE 11
SENIORITY

SECTION 8. POSTING AND FILLING OF POSITIONS: . . . . .

Subd. 1. Annual Posting meeting: All vacancies that were filled during the preceding school year or vacancies at the time of the bump meeting will be filled in the following order:. . . . . Bumping meeting will be set mutually between the district and the Union president.

SECTION 12. POSTING/BUMPING MEETING: A mutually agreed upon posting/bumping meeting will be held annually with a minimum of 2 week notice afforded for member notification. The posting/bumping meeting will be conducted by the Union president and the Superintendent, or designee.

Joint Exhibit 1, pages10 and 12

ARTICLE 13
GRIEVANCE PROCEDURE

SECTION 1. DEFINITIONS

Subd. 1. Grievance: Grievance shall mean an allegation by an ESP or group of ESPs in a dispute or disagreement between the ESP or group of ESPs and/or administration or the School Board as to the application or interpretation of the terms and conditions of employment as found in this agreement.

SECTION 3. ARBITRATION: . . . . .

The arbitrator shall not have the power to add to, to subtract from, or to modify in any way the terms of the existing agreement.

The decision of the arbitrator shall be final and binding upon the parties. He shall have the power to make appropriate awards of compensatory reimbursement, if any. The decision shall be issued to the parties by the arbitrator and a copy shall be filed with Bureau of Mediation Services, State of Minnesota.

Joint Exhibit 1, page 14

OPINION AND FINDINGS

It is appropriate to sustain the Grievance. The Union has demonstrated that the Employer violated the parties' CBA. The language of the Grievance and of the relevant CBA provisions together with the record made at hearing support this conclusion. It perhaps is understandable that the parties did not recall the stipulation of the issue which was entered into as the hearing opened. As noted at footnote 1 above at page 2,

there was a great deal of confusion and discussion between counsel as to whether an arbitrability issue was being raised, without clarity or resolution. Indeed, the arbitrator agrees that the stipulated issue does not accurately state the issues in the case. To be clear, there was no reservation made to raise an arbitrability issue following participation in the hearing. In fact, there is no support for it in any event. The School District now questions the Arbitrator's authority.

While the Grievance, and even the stipulated issue invite argument with regard to the breadth of this matter, there is no support for a conclusion that the Union's grievance is not arbitrable or that consideration of whether the posting meeting constitutes "inservice" exceeds the Arbitrator's authority. The background and summary of the evidence, including relevant CBA provisions, have been detailed above and will not be repeated. It is appropriate to highlight the record in support of this Award.

The Union's statement of the Grievance together with its allegation of violation of Article 10, Section 1, Subd 4 of the CBA and the redress sought, clearly and adequately provided the School District with notice of the nature of its complaint. It is not required to fully argue its case with the filing of a grievance.

The issue in this case stems from the District's decision to identify and account for an annual posting meeting, a well-established administrative matter, as a mandatory inservice pursuant to a new provision included in the parties' current CBA in 2009. The nature of the posting meeting as well as when it occurred are both relevant. Without the posting meeting which occurred more than two weeks before the school year began, the provision of a mandatory inservice would be unnecessary. There is no evidence to contradict a conclusion that the bargaining unit work did not begin until jobs were posted and assigned. Nor is there evidence to support a conclusion that the posting meeting, in any event, could properly be considered an inservice.

In addition, the Employer's arguments must fail with regard to the timing of the first inservice which the bargaining unit attended, at its request, on August 31. Bargaining notes for July 29, supported by both Union and District witnesses confirm the clear intent of the parties to include the bargaining unit in the opening inservice provided for the teachers, a few days before students arrived for the new school year. This, notwithstanding the Superintendent's testimony that the bargaining unit "begged(him)" to attend the meeting.

By dictionary and encyclopedia definitions provided jointly by the parties; by express intent of the parties in negotiation; by the express language of the CBA provision at Article 10, SECTION 1, Subd. 4; and by common knowledge, the posting meeting does not conform with that of an inservice. Inservice training principally provides substance for professional development . There was testimony that during negotiations the District required input from the Union as to the training which was needed, resulting in the sentence, "The onus of ESP needs should be the burden of both the district and the Union." Ms. McBride's express desire that both the School

District and the ESPs have input in the development of workshops resulted in her placement on a Professional Development Committee.

Finally, it is noteworthy that the grievance process was not followed in this case. Article 13, SECTION 2. Subd. 1. directed this Grievance to Step 3 which requires a meeting within five days between the Superintendent and the Union to attempt to resolve the matter, and a written decision in the event of no resolution within five days thereafter. The Union was advised that arbitration was the next step by the Superintendent on September 22. There is no evidence of a meeting to attempt to resolve the matter, and there is no written decision to illuminate the District's position in denying the Grievance. At the least, it appears that an opportunity to resolve the matter or come to a better understanding was missed.

The Union has conceded that the 12-15 minutes that the Business Manager spent with the ESPs on August 12, 2011, may properly be regarded as inservice time. Accordingly, it is appropriate to sustain this Grievance, making whole all bargaining unit members who were adversely affected by the Employer's decision to account for the one and one quarter (1 ¼) hour bumping/posting meeting as inservice training, offset by ¼ hour, attributed to the Business Manager's presentation.

AWARD

The Grievance is sustained. Consistent with the foregoing Opinion and Award, the Employer shall make whole the bargaining unit members for inservice hours to which they are entitled for the 2011/2012 school year.

Dated: June 21, 2012

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Janice K. Frankman, J.D.
Labor Arbitrator