

IN RE ARBITRATION BETWEEN:

EDUCATION MINNESOTA

and

ISD 728, ELK RIVER SCHOOLS

DECISION AND AWARD OF ARBITRATOR

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ARBITRATOR

November 26, 2012

IN RE ARBITRATION BETWEEN:

Education Minnesota,

and

ISD 728, Elk River Schools.

DECISION AND AWARD OF ARBITRATOR
BMS Case # 11-TD-10
Oral Warning Grievance

APPEARANCES:

FOR THE UNION:

Anthony Sheehan, Association Attorney
Hal Shogren, Business Representative
Katherine Kurmis, teacher/grievant
Eric Opsahl, teacher/grievant
Bill Hjertstedt

FOR THE DISTRICT:

Michael Waldspurger, District's Attorney
Marcia Welsh, Principal
Rod Barnes, Exec. Dir. Labor Relations & Personnel Services

PRELIMINARY STATEMENT

The hearing in the above matter was held October 9, 2012 at the District Offices in Elk River, MN. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated November 19, 2012.

ISSUE PRESENTED

Did the District violate Article 10.3 when it issued the written documents used in this case to document oral warnings to the grievants in this matter? If so, what should the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering 2011 –2013. Article 17 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 10

10.3 ORAL WARNING

If an administrator has reason to warn a teacher, it shall be done in a manner that will not embarrass the teacher before other employees, students, or the public. Oral warnings shall be clearly identified as such at the time the oral warning is administered. The documentation of an oral warning shall clearly identify the warning as an “oral” warning. Before an oral warning is placed in a teacher’s file, a copy will be given to the employee

ARTICLE 25

25.2 EFFECT

This Agreement constitutes the full and complete Agreement between the School District and the Association regarding the terms and conditions of employment except for practices, policies, or rules that are not inconsistent with the plain language of this Agreement.

ASSOCIATION’S POSITION:

The Association’s position was that the District violated the contract, and Article 10.3 when it issued the volume of written documents used to issue the oral warnings to the various teacher/grievants in this matter. In support of this position, the Association made the following contentions:

1. The Association acknowledged that several teachers had been given oral warnings for certain actions. Ms. Kurmis was disciplined for showing an inappropriate video that contained offensive scenes and language in violation of school policy. Mr. Opsahl was disciplined for failing to return a parent’s phone calls in a timely manner after having been warned and counseled about this on prior occasions.

2. The Association however is not challenging the just cause or propriety of the oral warnings themselves but is rather challenging the documentation that was placed in the file regarding the details of the warning. The Association asserted that Article 10.3 limits the amount and nature of detail used to document oral warnings.

3. The Association pointed to the provisions of Article 10.3 cited above and asserted that the history of this language shows an intent that any documents used to memorialize an oral warning would be quite short and would not go into the level of detail used here.

4. The Association asserted that the documentation used here went far beyond what was negotiated and intended to be used to document an oral warning. See Joint Exhibits 2 and 4. Both of those go into excruciating detail regarding the events giving rise to the oral warnings for both Ms. Kurmis and Mr Opsahl. The Association argued that this was unnecessary and unduly detailed and that such level of detail violates the spirit if not the letter of article 10.3.

5. The Association asserted that the length and detail of the documentation used in these instances gives a greater weight to the incidents than they deserved and a far more severe consequence to the discipline than the contract intended.

6. The Association pointed to the bargaining history of this provision and asserted that there were specific discussions about the level of detail that could be used to document oral warnings. While there was some agreement to use “minimal” detail in the documentation of oral warnings, the level of detail provided here goes well beyond the pale and is simply far too much.

7. The Association’s witnesses testified regarding the negotiations for this provision and asserted that they were led to believe that documentation of oral warnings would be minimal and done in a summary fashion so as to effectuate the language regarding embarrassing the teacher. The Association made it clear that it wanted summary details, i.e. name, date and a short 3 or 4 sentence description of the events leading to the warning but no more. The Association further asserted that despite the fact that more specific language regarding this was not placed in the CBA, there was general agreement that the documentation of oral warnings would be short and “appropriate.”

8. The essence of the Association’s argument is that there was discussion about the length and detail of documentation for oral warnings and that the language of Article 10.3 reflects the agreement that it be short and done in a summary fashion. While there was no specific limit on the number of words or sentences, the level of detail provided here was far beyond what was discussed or intended by the parties and should be removed from the files and replaced with only a short memorialization that there was an oral warning and nothing else.

The Association seeks an award ordering the District to remove the written documents used to document the oral warnings in this matter as set forth above, from each teacher/grievant's file and ordering the District to cease and desist from using this level of written documentation to support oral warnings in the future.

DISTRICT'S POSITION

The District's position was that there was no contractual violation and that the documentation used in this case was appropriate to document the oral warnings in this matter. In support of this position, the District made the following contentions:

1. The District also pointed to the language of Article 10.3 and asserted that it is clear and places no limit whatsoever on the number of pages, words, sentences or length of the documentation used in oral warnings.

2. The District also pointed to the provisions of Article 25 as well and asserted that it is well established that the intent of the parties must first be determined by looking at the language of the agreement. Here that language places no limit whatsoever on the District's right to place whatever documentation it wishes to memorialize an oral warning.

3. Further, there was no claim that the District violated any of the other provisions of that language by "embarrassing" the teacher in front of students, staff or the general public. The warnings were appropriately given for the actions set forth in Joint exhibits 2 and 4 and the principal and Administration was well within their right to place that level of detail in the file.

4. Further, the District also pointed to the negotiation history of this provision and asserted most strenuously that while there was *discussion* regarding the level of detail, there was no *agreement* as to that level of detail;. In fact, the District asserted, the District specifically rejected the Association's proposal to place a specific limit on the level of detail. Thus, not only was there no agreement to limit it, there was in fact an agreement to allow the District to place whatever it wanted in terms of documentation of an oral warning.

5. The District cited the well-established principle that a party to a labor agreement may not gain in arbitration what it failed to gain in bargaining and claims that the Association is attempting to do precisely that here. See District exhibits 14 through 17. Specifically Exhibit 17 shows that there was a specific rejection by the District of the Association's attempt to place a limit on the documentation used for oral warnings. See also District exhibits 19, 20 and 21.

6. The essence of the District's argument is thus that there is no limitation in the language and that the Association's proposal to limit the District's otherwise unfettered right to place whatever documentation it thinks is appropriate regarding an oral warning was specifically rejected during bargaining. Further that there is no evidence of any embarrassment or actions by the District that violated the CBA.

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

DISCUSSION

FACTUAL BACKGROUND

The grievants are teachers in the Elk River School District. Each was issued an oral warning for various actions, discussed below, but the question presented here was not whether there was just cause for these actions. Rather the issue is whether the documentation placed in their respective personnel files was appropriate under Article 10.3 and the bargaining history of that provision.

The case involves the oral warnings given to two teachers, the details of which, not to sound facetious, are not strictly germane to the issue presented here. Suffice it to say that Ms. Kurmis was warned regarding a video she showed to a class that contained some offensive language and conduct. She apparently had not viewed the video prior to showing it to the class and did not stop it once the offensive scenes began playing. A parent complained about the video and the principal investigated and determined that the video was shown in violation of school policy. The evidence showed that the investigation was appropriate and that an oral warning to the teacher was also appropriate.

Mr. Opsahl was given an oral warning for failure to return phone calls to parents regarding a student in his class. Again, the details of this are not strictly germane or material here but the evidence showed that he had been counseled regarding the need to return phone calls and contacts in a timely fashion but failed to do so in the instance set forth in District Exhibit 4. The evidence showed that the investigation by the District and the oral warning was appropriate in this instance.

The dispute arose over the level of detail in the documentation placed in the files of these teachers and whether the CBA places a limit on the amount of such detail that can be placed in a teacher's file to support an oral warning.¹

The Association asserted that the spirit if not the letter of Article 10.3 prevents the District from placing this level of detail in teachers' files. The Association further asserted that there had been an agreement to limit the amount of detail in such documentation that was reached in bargaining. The evidence and contractual language in this matter did not support the Association's claims.

First, a review of the contract language shows, just as the District asserted, no specific language limiting the amount or the nature of the detail found in Article 10.3. There is a prohibition against embarrassing the teacher but there was no evidence of that whatsoever on this record. The documents were appropriately placed in the teachers' file and were not somehow "leaked" to the public or the students or to other staff. There was no evidence that the District acted inappropriately and that the matter was handled privately between the affected teacher and the Principal.

Further, the language of Article 10.3 provides only that the documentation "shall clearly identify the warning as an 'oral' warning." This was done in this case. There was no dispute that these were in fact oral warnings for purposes of progressive discipline and that the documentation was merely to reflect why that action was taken.

¹ Joint Exhibit 2, the documentation for Ms. Kurmis' warning is a 4 page single spaced memo with a one-page attachment on District policy regarding videotapes. The documentation for Mr. Opsahl is a 3 page single spaced memo with four pages of attachments regarding policy for returning parent calls and e-mails. A review of these shows that they are factual in nature and that they contain nothing beyond a recitation of relevant facts that formed the basis of the warning. There was nothing arbitrary in the documents nor designed specifically to unduly embarrass the teachers.

There was also no evidence that the warnings were anything more than what they were – i.e. oral warnings. The Association asserted that the level of detail here meant that the severity of the discipline was somehow greater than an oral warning and might be used for something beyond that for purposes of progressive discipline. There was no evidence of that at all. To the contrary, the clear evidence showed that the affected teachers received oral warnings and that these documents were merely to document what had transpired to give rise to that. There was no evidence that the District considered these actions to be anything other than that.

Moreover, there was the claim by the Association that the bargaining history reflected an agreement to limit the amount of detail. The evidence showed the opposite however. The clear documentation of the bargaining history does indeed show that there was discussion about the documentation for oral warnings. Contrary to the assertions by the Association however, the evidence showed that the efforts to limit the amount and/or nature of the detail provided to support an oral warning was rejected by the District. See e.g. District Exhibit 17.

Further, there was some testimony by Association witnesses that the former superintendent had assured them at or around the time the CBA was negotiated that the documentation of oral warnings would not be unduly detailed, or words to that effect. There was however no solid evidence of that nor any evidence as to what exactly was meant by it.

The most persuasive evidence was the language of the contract, which, as noted above, does not contain the sort of limiting language the Association asserted it believed was there. While bargaining history can be instructive in the interpretation of ambiguous or unclear language, it is well established that a party may not gain something by arbitration it was not able to gain in negotiations. Here, it was clear that the Association sought to include much more restrictive language in the agreement but that this was rejected by the District.

Thus, the best evidence of what was intended on this record is what the clear CBA language showed as well as the bargaining notes. Those notes show that the District rejected the efforts to place limitations on the level of detail that could be placed in the file regarding oral warnings and that the question of how much documentation to place in the file under those circumstances was left to the District only as limited by the language of Article 10.3.²

Thus, both the clear language of Article 10.3 as well as the bargaining history supports the District on this record. There being no evidence of any other violation of the contractual language, the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: November 26, 2012

Elk River Schools and Education Minnesota - AWARD.doc

Jeffrey W. Jacobs, arbitrator

² Article 25 contains relatively standard “complete agreement” language making it clear that any “side agreements are subsumed in the language of the collective bargaining agreement. On this record, there was no evidence that the parties have ever deviated from the language found in Article 10.3 nor of any practice or bargaining history that might otherwise alter the clear language of that provision.