

**In the Matter of the Grievance Arbitration Between**

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Independent School District No. 347,

Willmar, Minnesota

And

**BMS Case #13-PA-0665**

Education Minnesota Willmar

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Before: Arbitrator Harley M. Ogata

Date and Place of Hearing: June 16, 2013, Willmar, Minnesota

Date of submission of briefs: July 3, 2013

**For the Employer:**

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**For the Union:**

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This is a grievance arbitration between the above named parties in accordance with procedures outlined in the collective bargaining agreement. The dispute involves an interpretation of language in that agreement concerning teaching loads for part-time teachers. The parties agreed that the matter was properly before the arbitrator.

Article XII, Section 10 of the collective bargaining agreement states in total:

Part-time teachers will be compensated at a rate commensurate with a full-time teacher's student-related responsibilities in accordance with the site(s) at which the part-time teacher will be teaching. A pro-rated amount of preparation time will be included as will a pro-rated amount of general duty time. The teaching load, preparation time, and general duty time will be pro-rated to the seven and a half (7.5) hour workday of a full-time teacher. General duty time will include such items as:

1. Being available to students seeking assistance;
2. Being available to parents;
3. Meeting with department chairperson and specialists;
4. Being available to administrators for conferences and faculty meetings; and carrying out other responsibilities as indicated by the School District.

The parties agree that the three part-time teacher grievants each have a .86 contract relative to a full-time teacher. What is in dispute concerns the amount of teaching load carried by each of them. The union asserts that the language requires the district to limit the teaching load of these part-time teachers to .86 of a full-time teacher and that their current assignment is in excess of that figure. The employer denies that the teaching load is excessive under the collective bargaining agreement. The focus of the dispute between the parties concerns whether testing and progress monitoring under the district's

reading “Response to Intervention (RTI)” program is part of a part-time reading teacher’s teaching load or whether it is general duty time. This will be discussed in further detail below.

### **Statement of the Issue**

Whether the District violated Article 12, Section 10 of the collective bargaining agreement between the parties when it assigned part-time teachers to do testing and progress monitoring of students’ reading levels as part of the part-time teachers’ general duty time rather than as part of their teaching load? If so, what is the appropriate remedy?

### **Background**

The Willmar School District is located in West Central Minnesota. The two schools relevant to this arbitration are experiencing difficulties in student achievement in the area of reading. Kennedy Elementary has been designated as a priority school under the federal No Child Left Behind act, which means it is performing at the lowest 5% of elementary schools. Roosevelt is designated as a focus school which reflects the fact that it is performing at a low level and has an achievement gap problem that the district is mandated to address and improve.

Suffice it to say, schools in this condition are required to address the low level of achievement under state and federal mandates. Specifically, the district is required to come up with plans to raise achievement and narrow any gaps in achievement that are found in those schools.

Accordingly, as part of an overall plan to address these issues, the district hired Cheryl Nash (Nash) as its new Director of Teaching and Learning. Nash was hired from a position with the State Department of Education with a wide range of experience and credentials suited to the task of bringing a fresh look at closing the achievement gap and performance levels.

In addition, the district hired Todd Goggleye (Goggleye) as principal at Kennedy, the lowest performing school. Goggleye's most recent assignment was at a first ring Minneapolis suburb.

In a direct effort to address the problems at Kennedy and Roosevelt, the district implemented a completely new reading program for the 2012-13 school year it called Response to Intervention (RTI). As a part of the plan, the district also implemented a new district-wide reading testing assessment called AIMSweb.

As part of the new program, staff were trained in September and students were tested and assessed and placed in reading categories. Those students receiving the lowest scores were placed in an appropriate group in RTI. This was a major undertaking by the district and was designed to bring the entire district to focus on the new program.

The district was also undergoing other significant programmatic changes. Under the new collective bargaining agreement, the length of the work day was increased by one half hour. The total work day was now 8 hours. In addition, the parties negotiated language involving what it called professional time. Under that

language, full-time teachers were granted about 30 minutes a day where they could conduct professional business that was only allowed to be otherwise scheduled by the principal twice a month. Finally, the district also implemented Professional Learning Communities as part of the work day.

This grievance involves implementation of the pro rata language contained in Article 12 of the CBA. The three grievants are part-time Title 1 reading recovery teachers. Their contract percentage is listed as 0.86 of a full-time teacher. Implementation of pro rata language in question was mathematically simpler under the old 7 period day schedule in effect under the old contract. 86% of a seven period day is 6 periods. This dispute has its genesis in implementing a .86 contract under a longer work day.

The parties had difficulty with this issue. One or all of the grievants were given up to 3 different schedules prior to the schedule that is the subject of this arbitration. Suffice it to say that there were a lot of issues raised during the process of working out the schedules and assigning workloads under the new system.

At the hearing, the sole question before the arbitrator boiled down to whether AIMSweb testing and progress monitoring is part of the grievants' teaching load or whether it is part of general duties under the language of Article 12, Section 10. The union contends that the testing and progress monitoring is part of the grievants' teaching load. The district contends the opposite.

## Discussion

The arbitrator finds the language of Article XII, Section 10 both clear and unambiguous in parts and ambiguous in other parts. The first sentence states: “[p]art-time teachers will be compensated at a rate commensurate with a full-time teacher’s student-related responsibilities in accordance with the site(s) at which the part-time teacher will be teaching.” A straight forward reading of this language means that you first determine the full-time teacher’s student related responsibilities at the particular school that is in question and you pay the part-time teacher based on the proportionate number of student-related activities performed by that part-time teacher. If a full-time teacher has 6 hours of student-related responsibilities at that site, then a part-time teacher who has 3 hours of student-related responsibilities will be paid one half that of the full-time teacher.

The second sentence is similarly straight forward. That sentence reads: “[a] prorated amount of preparation time will be included as will a pro-rated amount of general duty time.” The amount of prep time is not in dispute in this matter. The parties agree that a full-time teacher is contractually afforded 56 minutes (on average) of prep time each day.  $.86$  of 56 minutes of prep time is equal to 48 minutes, therefore the part-time teachers in question are entitled to 48 minutes of prep time. The amount of general duty time is similarly not in dispute. The amount of general duty time at the school sites in question equals 70 minutes, on average.  $.86$  of that amount is equal to 60 minutes.

The third sentence of the Article in question reads: [t]he teaching load, preparation time, and general duty time will be pro-rated to the seven and a half (7.5) hour workday of a full-time teacher.” Again the amount of time for each category is amenable to easy mathematical formulation and is not in dispute. Full-time teachers work for 450 minutes per day. .86 of that amount is equal to 387 minutes. The amount of time allocable to general duties and prep time have already been determined to be 106 minutes. Therefore, the time allocable to the teaching load is the remainder, or 279 minutes.

The amount of time allocable to each category is not in dispute. What is in dispute is what duties are allocable to the general duty category versus the teaching load category. Specifically, the question is whether AIMSweb testing and monitoring of progress in reading is general duty time or a part of these teachers’ teaching load.

General duty time is defined in the Article in question. It reads:

General duty time will include such items as:

1. Being available to students seeking assistance;
2. Being available to parents;
3. Meeting with department chairperson and specialists;
4. Being available to administrators for conferences and faculty meetings; and carrying out other responsibilities as indicated by the School District.

The district argues that the “other responsibilities” language contained in sentence 4 above gives them the right to assign testing or progress monitoring as a general duty. As a general rule, even without this language, the arbitrator

agrees that the district has the right to assign whatever duties it sees fit to its teachers. This inherent right of assignment may be tempered by specific language in a collective bargaining agreement that restricts that right or otherwise places some type of limit on the effect of that assignment.

The language of Article 12, section 10 places a limit on the district's right of assignment. It requires a pro rata apportionment of time in three specific areas: teaching load, prep time and general duty time. General duty time, therefore, is not the same as either prep time or teaching load. This language specifically restricts the right of assignment of general duties to those duties that are not otherwise allocable to teaching load or prep time. In other words, if the testing and progress monitoring in question is actually part of these teachers' teaching load, then the district does not have the right to simply label it a general duty function rather than a part of the teaching load.

Both parties argued opposite viewpoints over whether testing and progress monitoring was instructional and therefore a part of the teaching load or not. The arbitrator finds these arguments to be unavailing. First, the language uses the term "teaching load" not "instructional duties" nor even "teaching duties." In other words, there is nothing in the language that restricts teaching load to instruction only. There are any number of tasks that a teacher might perform in a given day that would not be deemed to be instructional in a strict sense. For example, classroom teacher Cynthia Kroona testified that one half hour of the full-time teacher's day each morning was spent supervising students eating breakfast and

getting ready for the day. Those hours were used in calculating the pro rata teaching load and were unquestioned by the parties. There can be little question that these activities do not constitute instructional time.

Further, it is clear to the arbitrator that testing and forms of progress monitoring have historically been a function of a teacher's role both generally and in this district. This would be true whether the testing in question is standardized testing (note statewide MCA testing) or weekly quizzes in subtraction administered to 3rd graders. Arguments over whether testing and progress monitoring are instructional miss the point of whether they are part of a teacher's teaching load or not. The testimonial evidence introduced at the hearing substantiated that both standardized and subject matter testing and progress monitoring have historically been part of a teacher's teaching load in the past.

Similarly, the union's argument concerning other arbitral decisions in other school districts are not helpful here. Those decisions equate either "teaching time" or "teaching assignment" with instructional time only. The language in those contracts were interpreted in the context of the collective bargaining agreements and practice of the parties in a completely different setting. Those decisions were cited to make the point that testing and progress monitoring is instructional, an analysis rejected above.

The language in question, taken as a whole, breaks down a part-time teacher's duty day into three types of activities: teaching load, prep time, and general duty time. The parties agree that the part-time teachers in question have

a teaching load of .86. That percentage was arrived at by application of the first sentence of Article XII, Section 10, which states that a part-time teacher will be compensated at a rate commensurate with a full-time teacher's student-related responsibilities.

Reading the first three sentences together, the arbitrator finds that the term student-related activities is used interchangeably with the term teaching load. The first sentence describes how a part-time teacher will be paid for student-related activities. The second sentence then mandates the amount of prep time and general duty time will be assigned. Finally, the third sentence states that the three categories of duties will be pro-rated to a 7.5 hour day. It would have been clearer if the language stated that student-related responsibilities, prep and general duty time were pro-rated to a 7.5 period day rather than labelling it teaching load, prep and general duty time, but this construction is the only way this arbitrator can make sense of the language.

In analyzing the evidence introduced at the arbitration, full-time teachers student-related responsibilities equated to those activities where a teacher was required and scheduled to interact with students, face to face. These activities included block times that included standardized testing of many types, subject matter testing, supervising breakfast activities and other activities that might not normally be considered instructional. These activities can be differentiated from those activities where a teacher might be only required to be available to see students. There is a difference between being available to see students and

being required to perform some function with them. Under the facts in this case, that difference is the difference between what constitutes teaching load or student-related responsibilities and general duty time.

### **Remedy**

This decision will require the district to include AIMSweb testing and progress monitoring as a part of the teaching load of these three grievants in the coming school years.

Going further, fashioning a make whole remedy in this case is made difficult by evidentiary gaps in the record. The number of hours that should be allocated to the three duties listed in Article 12, Section 10 is easily determined by mathematical calculation. A .86 teacher should have 48 minutes of prep time, 60 minutes of general duty time and 279 minutes of teaching load time on average for their daily schedule. The amount of minutes testing and progress monitoring actually took up each day is difficult to determine based on the record developed so far.

The union argued in its brief and through the testimony of Mark Schmiesing, that if you take out testing and progress monitoring, the three grievants averaged only 37 minutes of general duty time each day and had 298 minutes of teaching load. It argued further that this amounted to an approximate 5% teaching overload. The problem with this computation is that the arbitrator cannot figure out how the union arrived at the 37 minutes of general duty time based on the evidence in the record.

The district's submissions indicate a range of time allocated for testing and progress monitoring for each of the grievants on their Friday schedule. See District Exhibit 8. This range of time further exacerbates the problem of computing how much time was allocable to teaching load versus general duties

In addition, the grievants had their schedules changed several times before the district settled on a final schedule, in response to the grievance that was filed over this issue.

As a result of all this, the arbitrator is at a loss as to how to calculate a make whole remedy based on the record that's been developed so far. Accordingly, the arbitrator orders the parties to work out a remedy that is consistent with this decision. The grievants should be paid an amount equal to overload pay for the time spent on testing and progress monitoring for the 2012-13 school year.

The arbitrator will retain jurisdiction over this matter for 60 days to give the parties an opportunity to agree to a monetary remedy consistent with this decision. During this 60 day period, either party may request that the arbitrator decide the monetary aspect of this decision. If neither party requests this from the arbitrator within the 60 day period, this matter will be considered closed.

If either party requests further assistance from the arbitrator within the 60 day period, the arbitrator will determine how the matter will proceed to conclusion.

For the foregoing reasons, the grievance is sustained.

A handwritten signature in black ink, appearing to be "H. J. A." with a long horizontal stroke extending to the right.

July 20, 2013