

IN THE MATTER OF THE ARBITRATION BETWEEN

Ely Education Association,
Ely, Minnesota,

Union,

and

OPINION AND AWARD

BMS Case No. 14-PA-135
Grievance (Severance Pay)

Independent School District No. 696,
Ely, Minnesota,

Employer.

ARBITRATOR:

Janice K. Frankman, J.D.

DATE OF AWARD:

December 23, 2013

HEARING SITE:

School District Offices
600 East Harvey Street
Ely MN 55731

HEARING DATE:

November 5, 2013

RECORD CLOSED:

November 25, 2013

REPRESENTING THE UNION:

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JURISDICTION

The hearing in this matter was held on November 5, 2013. The Arbitrator was selected to serve pursuant to the parties' Master Agreement and the procedures of BMS. The 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 by email on November 22, and by regular mail on November 25, when the record closed and the matter was taken under advisement.

ISSUES

Did the School District violate the parties' Master Agreement ("Agreement"), and, if so, what is the remedy?

BACKGROUND AND SUMMARY OF THE EVIDENCE

This Grievance was filed on behalf of the Union representing teachers in the School District when it became aware that the severance pay provision of the Retirement Benefits article in their Agreement was being computed using 190 days as the divisor to determine a teacher's daily rate of pay, and ultimately the severance pay to which a retiring teacher was entitled. The Grievance was filed on May 21, 2013, based upon the severance pay calculation presented to Nancy Olson, a teacher who was retiring at the end of the 2012/2013 the school year (FY2013). The statement of the Grievance follows:

The calculation of severance pay is being executed differently than what is stated in the contract. Specifically, the daily rate of pay is currently calculated by the staff member's (step and lane)/180 days. The estimates given to retiring staff of the severance was calculated (step and lane) 190 days. There is no reference what-so-ever in the contract to 190 days.

Union Exhibit 1

The Union became concerned when it learned of the District's formula for calculating severance pay for a retiring School Principal in 2012. The School Principal submitted a Grievance following her retirement in January, 2012, which is the subject of an Arbitration Award issued on November 1, 2012. She was both Grievant and Union Representative. Her Grievance challenged the School District's use of a divisor which purportedly added 10 holidays to the 210 duty days set out in the Contract in calculating her severance pay. Her Grievance was denied based upon Arbitrator Orman's conclusion that the District had sustained its burden to demonstrate an established past practice which supported its use of a 220 day divisor in computing her severance pay.¹

The facts of this case are largely undisputed. The School District presented evidence of calculation of severance pay using a 190 day divisor to determine daily rate of pay going back to 1976. The documentation identifies 62 individuals who have received severance pay on retirement, including three in fiscal year 2013. Testimony at hearing confirmed that one of the

¹ See, ISD 696 Ely Minnesota and Ely Education Association, BMS Case No. 12 PA 1204 (Orman, 11/1/2012)

three was a teacher on special assignment, working as a principal pursuant to a Memorandum of Agreement which was “tied to the teacher’s contract”; and another retired in October, 2013, which is in fiscal year 2014. There were no teacher retirements in fiscal year 2012, either before or after the Grievance was filed by the Principal.

Connie Ojala has been employed by the School District since January, 1986. She became Business Manager in April, 2001, when Caroline Nickerson retired from the position after 20 years of service. Ms. Ojala’s job responsibilities include handling the teachers’ payroll and calculating and issuing severance pay-out checks when teachers retire. Ms. Nickerson taught Ms. Ojala the District’s practices. She gave Ojala two pages of handwritten notes concerning calculation of severance pay.² Ms. Ojala created her own typewritten notes captioned “Things to Remember” in 2001.

The Nickerson notes were received into evidence over the Union’s hearsay objection. They detail the formulae for computing “Teacher Severance” and “Principal” including calculation of the daily rate. For the teachers, the directions provide, “Divide Salary by 190 days Contract Days (180 Duty + 10 Holidays)” Ms. Ojala added her note, “(daily rate is contract days not duty days)”.³ The second handwritten page captioned “Holidays” details duty and holidays totaling the 190 days:

Duty Days	180
Labor Day	1
MEA	2
Thanksgiving	2
Presidents	1
Easter	2
Memorial	1
Floating Holiday	<u>1</u>
	190

District Exhibit 9, pages 2 and 3

Ms. Ojala’s typewritten notes make two references to the use of 190 days in calculations:

2. TO DOCK A TEACHER BASE SALARY/190 DAYS, USE TEACHER CODE AND AN EXPLAIN. (remember to use base salary not longevity) in contract pg.5

4. Only use 190 for dock and severance (210-+10 principal), otherwise use 180 days, and always use base salary divided By 180 days-no matter if fte or anything base/180/7

District Exhibit 9, page 1

² The Nickerson notes are not dated. They include notes which Ojala made on them in distinct handwriting.

³ Nickerson’s notes with regard to the Principal’s daily rate was “Divide Salary by duty days + 10 Holidays example 210 duty days + 10= 220”.

Ms. Ojala was referred by District counsel to relevant portions of the parties' Agreement and acknowledged that the 2007-2009 Contract changed the calculation for pay deductions or "docking" from 190 to 180 days. She agreed that the Contract language for severance pay-out at retirement had remained the same over the years and did not provide the divisor number to calculate daily rate of pay. She was not at the bargaining table during Contract negotiations, and was not told to change the severance formula when the 2007-2009 Contract took effect. She was aware that some assignments are increased requiring a change in the FTE calculation for a particular individual. She testified that she would talk with a teacher who worked beyond his/her duty day, and would use 180 days as the divisor to determine the teacher's hourly contract rate as provided in Schedule A. G. She was not aware that special education teachers were given extra days. In any event, she does not calculate the FTEs. They are calculated by the administration.

Bo DeRemee, science teacher with the District since 1990, is Union President in his second term and third year in the position. He filed this Grievance. Nancy Olson was the first person to retire after the Union learned that the District was using 190 days to calculate daily rate of pay for severance pay-out. She was paid severance based upon the 190 day divisor after this Grievance was filed. Carol Peterson retired in October, 2013, and is also affected by this Award. The Union filed this Grievance after several meetings with the new Superintendent. The difference between what Olson was paid for severance and what she would have been paid if the 180 day divisor had been used to calculate daily rate of pay is approximately \$1751.

Mr. DeRemee pointed to several provisions in the parties' Agreement which support the Union's position including those which expressly or implicitly define duty days and the 180 day length of the school year for which teachers are contracted.⁴ He observed that there is no reference in the Master Agreement to 190 days. He agreed that "daily rate of pay" is not a term expressly defined in the Agreement; however, it is defined by means of calculation.

Jim Lah is an English teacher in the District. He was Union President in the nineties into the 2000's, and was a Union negotiator during bargaining for the 2007-2009 Agreement. Ed Anderson was temporary Superintendent during the negotiations. Mr. Lah reported that the discussion of "consistencies" was "big that year". It included defining terms such as "day" and "year" to be able to consistently apply a formula. The question was asked why, through the entire agreement with one exception, was there reference to 180 days?

This record includes District bargaining proposals dated 10-8-07 and the Union's Response dated November 6, 2007. The first proposal refers to Article VI, Section 6, "Pay Deduction: Whenever pay deduction is made for a teacher's absence, the annual salary divided by 190 days shall be deducted for each day's absence." The proposal also refers to "additional 'Pro rata consistencies'", set out on a second page as proposal 7. The Union agreed to the first proposal: "Agree to change '190' To '180' even though it is disadvantageous to the teachers. 190 was the divisor because 10 sick days were applied to the formula." Union Exhibits 1-3

School Board Chair Ray Marsnik is completing his twelfth year on the Board. He has been involved in negotiations with the Union during his entire tenure on the Board. He could not recall severance being of concern during the 2007-2009 negotiations. He recalled the change

⁴ Relevant provisions of the Master Agreement are set out below at pages 5-7.

made in the 2002-2004 Agreement setting a threshold, with certain exceptions, for eligibility for severance pay to those hired before July 1, 2002. He characterized the change to be a “cost-savings measure”. He also acknowledged that provision for an annuity replaced the lump-sum severance pay-out. He testified if the severance calculation were restructured to use 180 days as the divisor, the increase would be approximately \$2,000 per teacher which would be of concern because of the added expense.

Master Agreement Provisions

Relevant portions of Articles VI, XII, XIV, XV, XVII, XVIII and Schedule A follow:

ARTICLE VI
BASIC SCHEDULES AND RATES OF PAY

Section 1. 2011-2012 Salary Schedule: The wages and salaries reflected in Schedule A, attached hereto, shall be part of the Agreement for the 2011-2012 school year.

Section 2. 2012-2013 Salary Schedule: The wages and salaries reflected in Schedule A, attached hereto, shall be part of the Agreement for the 2012-2013 school year.

Section 6. Pay Deduction: Whenever pay deduction is made for a teacher’s absence, the annual salary divided by 180 days shall be deducted for each day’s absence. (emphasis added)

ARTICLE XII
RETIREMENT BENEFITS

Section 1. Severance Pay: Teachers hired prior to July 1, 2002, who have completed at least 15 years of full-time service with the School District who are at least 55 years of age or have completed 30 years of service, fifteen of which are in the District, shall be eligible for severance pay pursuant to the provisions of this article upon submission of a written resignation accepted by the School Board.

Subd. 1. Eligible teachers, upon retirement, shall receive as severance pay an amount equal to 50% of the accrued sick leave days times the daily rate of pay as determined from his/her last position on the salary schedule. In no case shall compensation exceed 100 days pay. (emphasis added)

Subd. 2. In applying these provisions, a teacher’s daily rate of pay shall be the daily rate at the time retirement, as provided in the basic salary schedule for the basic school year, and shall not include any additional compensation for extra-curricular activities or other extra compensation. (bold and emphasis added)

ARTICLE XIV
HOURS OF SERVICE

Section 1. Basic Day: The **basic** teacher's day shall be 7 hours, 20 minutes exclusive of a duty free lunch. (bold and emphasis added)

ARTICLE XV
LENGTH OF THE SCHOOL YEAR

Section 1. Teacher Duty Days: Pursuant to M.S. 126.12, the School Board shall establish the number of school days and teacher duty days for the next school year, and the teacher shall perform services on those days as determined by the School Board, including those legal holidays on which the School Board is authorized to conduct school, and pursuant to such authority as determined to conduct school. The school year shall consist of 180 duty days. (emphasis added)

ARTICLE XVI
PART-TIME TEACHERS

Section 5. Compensation:

Subd. 1 Pro-rated Contracts: A teacher will receive a contract with payment based on educational level and earned experience steps in the category in which they are teaching proportionate to a full-time contract.

Subd. 4. All Others: All other part-time personnel shall be paid at an hourly rate equal to the beginning Bachelor's Degree divided by 180 teacher duty days and the part-time calculation. (emphasis added)

ARTICLE XVII
EARLY CHILDHOOD FAMILY EDUCATION TEACHERS

Section 3. Compensation:

ECFE teachers shall be paid on a pro-rata basis. The teacher's total number of hours shall be divided by the 1320 (the total number of hours of an FTE). The quotient will (sic) used as the multiplier of the appropriate step and lane to calculate the teacher's salary. (emphasis added)

ARTICLE XVIII
GRIEVANCE PROCEDURE

Section 8. Arbitration Procedures: In the event that the teacher and the School Board are unable to resolve any grievance, the grievance may be submitted to arbitration as defined herein:

Subdivision 8. Jurisdiction: The arbitrator shall have the jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written agreement; nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlines (sic) herein; nor shall the jurisdiction of the arbitrator extend to matters of inherent managerial policy, which shall include but are not limited to such areas of discretion or policy as the functions and programs of the employer; its overall budget, utilization of technology, the organizational structure, and selection and direction and number of personnel. In considering any issue in dispute, in its order the arbitrator shall give due consideration to the statutory rights and obligations of the public boards to efficiently manage and conduct its operation within the legal limitations surrounding the financing of such operations.

Salary A. Salary Schedule:

G. Beyond Duty Day

When teachers mutually agree to teach beyond the FTE as established by their Notice of Assignment (NOA), they shall be compensated at the teacher's per hourly contract rate. (emphasis added)

I. Beyond Duty Year

Special education professional assignments beyond the 180 day contract year shall be compensated at the teacher's current contract rate.

Union Exhibit 2

OPINION AND FINDINGS

It is appropriate to sustain this Grievance and direct the School District to adjust the severance pay for the two teachers who have retired since it was filed, and to cease and desist from applying the 190 day divisor in the future. This is a most unusual case in that it was commenced following more than three decades during which the calculation of a severance pay-out on retirement was performed contrary to clear and unambiguous Contract language. This Grievance was filed following the Union's discovery of the error when a Principal filed a grievance following her January, 2012, retirement.

The Union has not sought retroactive redress for the approximately 60 teachers who retired during fiscal years 1976- 2011. In addition to plain language of the Retirement Benefits provisions of the Master Agreement which has not changed in relevant ways over those many years, the Union's case is supported by negotiated changes made in the 2007-2009 Agreement, and persuasive evidence and testimony provided by tenured employees. The remedy sought here

is to correct the manner in which severance pay has been incorrectly calculated since the Union discovered the error.

The School District relies upon Arbitrator Orman's Award issued in November, 2012, in which he denied the Principal's Grievance, concluding that the District had demonstrated established past practice. In this case the District has argued that the relevant Contract language is ambiguous and, therefore, it is appropriate for the Arbitrator to look to past practice in denying this Grievance. Arbitrators are not bound by awards issued by their colleagues. While they may be informed and guided by their work, the facts of two similar cases are rarely identical, and therefore, the outcome is unique to the specific facts of a case. Indeed, an arbitrator may respectfully disagree with her colleague or point to distinctions in their cases. Simply, an arbitrator is charged with consideration of the record made at hearing and with issuing an opinion and award which takes its essence from the parties' Agreement and the sworn testimony and evidence received at hearing.

The principal question raised in this case has been the propriety of using 190 rather than 180 days to compute a teacher's daily rate of pay in determining severance due at retirement. Using a higher divisor results in a lower severance pay-out which is capped at 100 days. The District has pointed to past practice, supported by its records going back to 1976, and the testimony of an individual employed in the payroll office since 1983, who computed severance for the Principal in the earlier case, and the two teachers directly impacted by this Award. It has argued that the Contract language is ambiguous because it does not define the term "daily rate of pay" and is, therefore, subject to interpretation. Because of the alleged ambiguity, it urges the Arbitrator to agree that the long-time practice of using 190 days as the divisor in determining the daily rate of pay is determinative in supporting denial of the Grievance. It has not provided credible history or an argument that would support an interpretation of the Contract language to call for the use of the 190 day divisor. There has been no evidence or testimony as to when or how the practice began or justification for adding 10 days to the 180 day school year.

The Union argues that there is no ambiguity, that definition *per se* of the term "daily rate of pay" is not necessary to conclude that the District has violated plain language of their Agreement when it has used 190 days to determine the daily rate of pay. It points to express language which provides the formula which undisputedly requires a 180 day divisor to properly compute severance. It acknowledges the long history of the District's error and asserts, through testimony of long-term employees, that it was not until the Principal filed her grievance that it became concerned that the Teachers' Contract might be applied in the same manner. With regard to a past practice analysis, it argues that there has been no acceptance or knowing acquiescence to the District's practice. It provided evidence and testimony concerning negotiations in 2007, which resulted in relevant language changes in the 2007-2009 Agreement. It challenged the quality and credibility of the District's evidence and testimony. It observed that the Master Agreement does not address holidays, the District's explanation for adding 10 days to the divisor for daily rate computation, and that there has been significant reliance on directions provided by an earlier Business Manager, hearsay in this record.

The Arbitrator is persuaded by the Union's case. Two Union presidents, long-term employees of the School District, testified credibly in support of this Grievance. They had both

been involved in multiple contract negotiations. Without the issue of past practice, the clear and unambiguous language of the Contract supports the Union's case. There is no question that the daily rate of pay is based upon a "basic" 180 day school year. Several relevant mandatory provisions of the Agreement are set out above in the background detail. Article XV prescribes the length of the school year, including legal holidays on which the District is authorized to conduct school, the only reference in the Agreement to holidays.

The topic of consistencies addressed during 2007 negotiations bolsters this conclusion, with, most specifically, the agreement to replace the 190 day divisor in the "docking" provision of the Agreement. It is apparent that the issue of retirement benefits, specifically computation of severance pay, was not raised in the context of the "consistency" discussion because there was no known issue. It was an appropriate, if not necessary, time for the issue, had it been known, to be raised. Surely the Union's agreement to the District's proposal to change the docking provision, disadvantageous to its members, would have been made in exchange for a provision for use of a 180 day divisor in calculating the severance provision, to the advantage of the Union. There is no evidence in this record that the Union's right to raise the issue in this Grievance had been waived.

With regard to the required consideration of the District's rights and obligations to efficiently manage and conduct its operations, as provided in the Agreement, there was limited testimony and no documentary evidence presented in that regard. The School Board President simply testified that the impact of changing the severance calculation would increase costs by about \$2000 per retiree.

Finally, for clarity, a threshold issue in considering past practice is most often determination whether contract language is clear and unambiguous. However, there are cases where even unambiguous language may be "trumped" by past practice which is clear, and mutually accepted by the parties over a significant period of time so as, in effect, to become a term of their contract. This case is unique in a different way. Long-term practice, unknown and unchallenged for several decades by the Union, does not defeat the contract language. There has been no evidence of either acceptance or acquiescence to the practice of using a 190 day divisor in computing severance pay at retirement. The 2007 negotiations, where inconsistent provisions were raised as a topic of bargaining by the District, underscore lack of common knowledge, if not lack of actual knowledge by either party, of the application in question of the Retirement Benefits provision. This Award reflects much more than a weighing of the equities between the parties. It is supported by unrefuted testimony and evidence in support of the Grievance.

It is, therefore, appropriate to direct the District to re-compute certain retirement benefits, and to cease and desist from its earlier practice in that regard. It is also appropriate for the Arbitrator to retain jurisdiction of this matter for limited time and limited purpose.

AWARD

Consistent with the foregoing Opinion and Findings:

1. The School District shall re-compute and make appropriate severance payments to bargaining unit members who have retired since the filing of this Grievance.
2. The School District shall also cease and desist from using a 190 day divisor, replacing it with a 180 day divisor, in computing severance pay going forward.
3. The Arbitrator shall retain jurisdiction for sixty days from the date of this Opinion and Award, or for such longer time mutually agreeable to the parties, for the sole and exclusive purpose of resolving questions, if any, arising from the remedy described above. Jurisdiction shall continue until the remedial question is resolved if either party invokes the Arbitrator's retained jurisdiction during such sixty day or extended period.

Dated: December 23, 2013

Janice K. Frankman, J.D.
Labor Arbitrator