

THE MATTER OF ARBITRATION BETWEEN

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EDUCATION MINNESOTA INVER)	
GROVE HEIGHTS,)	
)	
	Union,)	
)	FLEXIBLE WORK DAY
and)	GRIEVANCES
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)	
INDEPENDENT SCHOOL DISTRICT)	
NO. 199, INVER GROVE HEIGHTS,)	
)	
	Employer.)	BMS Case No. 14-PA-0454
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Arbitrator: Stephen F. Befort

Hearing Date: April 22, 2014

Post-hearing briefs received: May 30, 2014

Date of Decision: June 24, 2014

APPEARANCES

For the Union: David M. Aron

For the Employer: Margaret A. Skelton

INTRODUCTION

Education Minnesota Inver Grove Heights (Union), as exclusive representative, brings these two consolidated grievances claiming that Independent School District 199, Inver Grove Heights (School District) violated Article 10, Section 9 of the parties’ collective bargaining agreement by altering the permissible start time for middle school teachers and the permissible end time for elementary school teachers. The School District maintains that any changes in start

and end times are consistent with the parties' agreement and with past practice. The School District, in addition, raises a jurisdictional objection to the grievance claiming that the Union failed to meet the grievance timeline requirements set out in Article 12, Section 1 of the parties' agreement. The grievances proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

- 1) Are the grievances procedurally arbitrable?
- 2) Did the employer violate Article 10, Section 9 when it changed class start times from 7:25 am to 7:40 am, but the arrival time requirements for middle school teachers remained the same?
- 3) Did the employer violate Article 10, Section 9 by requiring elementary teachers to remain in the school building until 3:30 pm?

RELEVANT CONTRACT LANGUAGE

ARTICLE X – HOURS OF SERVICE

Section 1. Basic Day: The basic teacher day shall be eight hours and shall include a thirty (30) minute duty-free lunch period and at least fifty (50) minutes of preparation time during the student contact day. Teachers that leave school property during the school day shall sign out with their main office.

Section 9. Flexible Work Day:

- a. A teacher may adjust the starting and ending time of his/her basic eight (8) hour work day as defined in Sections one and two above, providing that he/she is on duty in his/her building ten (10) minutes before normal student arrival and ten (10) minutes after normal student dismissal.
- b. Teachers are responsible for all normal and customary duties (as defined in Article X), meetings, and other professional obligations.

ARTICLE XII – GRIEVANCE PROCEDURE

Section 1. Definitions:

Grievance _A dispute or disagreement as to the interpretation or application of any term or terms and conditions contained in this Agreement.

Days: Teacher duty days and summer vacation days except Saturdays, Sundays, and legal holidays.

Resolve: The disposition of a grievance as evidenced by the preparation of a written statement setting forth the terms of the agreement upon settlement and signed by the designated agent of the board and the exclusive representative.

Section 2. Procedural Steps:

Step 1. Appeal to the Immediate Supervisor: Whenever a teacher has a grievance, the teacher shall meet with the teacher's immediate supervisor within twenty (20) days after becoming aware of the incident giving rise to the grievance in an attempt to resolve the dispute. If the teacher chooses not to initiate a grievance, the exclusive representative may elect to do so within forty (40) days after the incident giving rise to the grievance occurred. This computation of forty (40) days shall not include days of school summer vacation. If the grievance involves a matter affecting a number of teachers, the exclusive representative may elect to reduce the grievance to writing and submit it directly to the Superintendent.

FACTUAL BACKGROUND

The collective bargaining agreement between the Union and the School District covers teachers at the high school, middle school, and three elementary schools. The required length of a school work day for all teachers is eight consecutive hours which runs from the time the teacher arrives at school until the time the teacher departs. Beginning with the 1989-91 collective bargaining agreement and continuing to the present, Article 10, Section 9 of the parties' contract has authorized flexible start and end times so long as teachers are "on duty in his/her building ten (10) minutes before normal student arrival and ten (10) minutes after normal student dismissal."

The middle and elementary schools operate with different bus and class schedules. These schedules are described in the following sections.

Middle School

For at least twenty years up to and including the 2012 -2013 school year, the middle school operated on the following schedule:

Morning bus arrival: 7:15 am

Classes begin: 7:25 am

Classes end: 2:30 pm

Afternoon bus departure: 2:40 pm

Two Union witnesses testified that during this time, teachers utilized a flexible schedule by which they could begin their work day at any time from 6:40 am to 7:15 am, and end their work day at any time from 2:40 pm to 3:15 pm so long as they completed eight hours of service.

School District witnesses essentially agreed with this practice, but described the flextime options as beginning at 6:45 am and 2:45 pm, respectively.

While all witnesses acknowledged a similar practice, they differed in describing the conceptual basis for this practice. Teachers Anna Arnebeck and Kelly O'Donnell testified that this practice was predicated upon arriving at school at least ten minutes prior to the beginning of class. In contrast, Associate Middle School Principal Jodi Wendel testified that the practice reflected the time at which the school buses arrived at and departed from the middle school.

At the beginning of the 2013-14 school year, the School District changed the class start time for middle school students from 7:25 am to 7:40 am. While class start times changed at the middle school, bus schedules did not. Accordingly, the estimated 76% of middle school students

who are transported by school bus continued to arrive at the middle school between 7:05 am and 7:15 am.

The School District modified the middle school class schedule so as to coincide with the high school class schedule which commences at 7:40 am. The middle school and high school are geographically adjacent, and students at both schools take the same buses. High school teacher Anna Arnebeck testified that teachers at the high school have long worked on a flexible schedule pursuant to which they must arrive no later than 7:15 am and may leave as early as 2:40 pm.

On September 4, 2013, Principal Wendel distributed a memo that defined the flexible work day for middle school teachers for the 2013-14 school year to be 6:45 am to 2:45 pm or 7:15 am to 3:15 pm. The Union filed a grievance in response to the memo on September 24, 2013, alleging a violation of the contract's flexible work schedule provision. In the grievance, the Union stated that proper application of the Article 10, Section 9 would provide middle school teachers the flexibility to arrive at school as late as 7:30 am, which is ten minutes prior to the beginning of classes.

Elementary School

For all times relevant to this dispute, the schedule for the School District's three elementary schools has been as follows:

Morning bus arrival:	8:15 am
Classes begin:	8:30 am
Classes end:	3:10 pm
Afternoon bus departure:	3:20 pm

In contrast to the middle school, the School District did not change the elementary school schedules for the 2013-14 school year.

Two Union witnesses testified to a longstanding flextime practice by which elementary teachers could arrive no later than 8:05 am and depart as early as 3:20 pm. The School District did not dispute the existence of this practice.

On October 29, 2013, Dr. Deidre Wells provided a grievance response regarding the middle school start times in which she also explained the School District's interpretation of the flexible work day for elementary teachers. Dr. Wells stated that Article 10, Section 9 requires elementary teachers to be in the building by no later than 8:05 am and remain in the building until at least 3:30 pm, which is 10 minutes after the buses leave.

At the hearing, Elementary Principal Bert Strasberg testified with respect to the impact of an earlier grievance concerning teacher preparation time. Settlement discussions relating to that grievance included an examination of how preparation time might fit within flextime schedules. During a meeting on January 30, 2013, the parties reviewed a document that described two flextime schedules that ran from 7:30 am to 3:30 pm and from 8:05 am to 4:05 pm, respectively. Principal Strasberg testified that in resolving the preparation time grievance, the Union implicitly recognized 3:30 pm as the earliest possible departure time for elementary teachers working on a flextime schedule. In contrast, elementary school teacher Marlene Hoelt testified that the document describing the two flextime schedules was meant to be illustrative only, and that the resolution of the preparation time grievance did not in any way alter the parties' existing flextime practice.

In a November 27, 2013, memo Stephanie Taufen, a Union Member Rights official, expressed the Union's disagreement with Dr. Well's interpretation of Article 10, Section 9 as applied to the end of the school day for elementary teachers. The memo stated that since students are dismissed at 3:10 pm, an elementary teacher's flexible work day can end as early as

3:20 pm. Ms. Taufen further requested that the elementary school grievance be consolidated with the middle school grievance. In a response letter dated December 10, 2013, Dr. Wells disagreed with the Union's interpretation, but agreed that both issues would be considered in arbitration if the parties could not reach agreement.

The School District also elicited testimony as to safety concerns. In this respect, Principal Gerald Skakela testified that middle school teachers need to be in the building by at least 7:15 am in order to provide supervision for arriving students even though classes do not start until 7:40 am.

DISCUSSION AND OPINION

Arbitrability

The School District contends that the Union failed to file either grievance in a timely manner. The Union denies this contention and claims that both grievances are arbitrable.

Middle School Grievance

Article 12, Section 1, regarding the timeline for filing a grievance, states “. . . the exclusive representative may elect to do so within forty (40) days after the incident giving rise to the grievance occurred” The School District argues that the application of the flexible scheduling language has been applied consistently for several years to require teachers to report to work no later than 7:15 am. This practice has been in place since the inception of the flexible work day language and therefore the time to challenge this interpretation expired years ago.

The Union claims that it first learned of the School District's modification of the flextime arrival practice in Principal Wendel's September 4 memo. The Union believes that, consistent with the parties' contract and past practice, middle school teachers should be permitted to arrive

as late as ten minutes prior to the first bell, which is 7:30 am, and that the School District's requirement of a 7:15 am start time constitutes a contract violation.

I conclude that the Union first became aware of the School District's purported contract violation upon receipt of Principal Wendel's September 4, 2013 memo. Since the Union filed a grievance challenging that interpretation on September 24, 2013, that grievance was well within the 40 day timeline of the parties' collective bargaining agreement and is properly before this arbitrator.

Elementary School Grievance

The School District also challenges the timeliness of the grievance filed by the Union with respect to the elementary school, arguing that the parties' January 30, 2013 settlement of the preparation time grievance included an implicit agreement that 3:30 pm would be the earliest permissible flextime departure for elementary teachers. As such, the School District contends that the Union's November 27, 2013 grievance is well beyond the 40 day time limit.

The Union contends that the preparation time grievance had nothing to do with the flexible schedule issue. The Union maintains that the two flextime schedules described in a document leading to the settlement of the preparation time grievance were included only to illustrate how preparation time could be allocated within two possible schedules and were not intended to limit the full range of otherwise permissible flextime options. The Union also provided testimony that elementary school teachers continued to leave the school as early as 3:20 pm even after the January 30 agreement.

I conclude that the Union was not aware of the School District's new view of flextime for elementary teachers until receipt of Dr. Wells' October 29 grievance response. As such, the Union's grievance of November 27 is timely, and this second grievance also is arbitrable.

Flexitime Schedule for Middle School Teachers

The phrase “normal student arrival” in Article 10, Section 9 is susceptible to more than one possible interpretation. In such circumstances, it is well-recognized that a clear and well-established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A “past practice” arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 605-30 (6th ed. 2003).

In this instance, both parties acknowledge the existence of a longstanding practice by which middle school teachers used a flexitime schedule that enabled them to arrive at school at any time within a 30 or 35 minute window ending at 7:15 am. While this temporal practice is clear, the parties disagree as to the conceptual basis for the practice. The Union claims that the practice is based upon the bell time at which daily classes start and end. The School District, in contrast, claims that the practice is based upon the time at which the school buses arrive and depart.

This conceptual difference became important once the School District modified class start times at the middle school for the 2013-14 school year from 7:25 am to 7:40 am, while retaining the 7:15 school bus arrival time. From the Union’s perspective, the change in class start time also should cause a change in the window for teacher arrival time so as to permit teachers to arrive at school as late as 7:30 am (*i.e.*, ten minutes prior to the beginning of classes).

According to the School District, on the other hand, the teacher arrival window should not change as the bus arrival time did not change.

The current dispute reveals that the longstanding flextime practice was less an agreement as to the interpretation of the contract language, than the product of divergent interpretations that happened to support the same schedule for almost 25 years. Quite simply, both parties thought 7:15 am was the right arrival time for teachers, but the Union got there by looking at the bell time while the School District focused on when the buses arrived. In order to be binding on the parties, a past practice needs to reflect a meeting of the minds as to how the language should be interpreted. In this case, it seems clear that there was no true meeting of the minds with respect to the conceptual basis for the parties' flextime arrangement, but rather a convenient coincidence that served the parties well for many years.

By concluding that the required element of mutual acceptance does not exist with respect to the conceptual basis for the parties' flextime practice, a closer look at other considerations is warranted in order to discern what the parties intended by the phrase "normal student arrival." Language that requires teachers to arrive at the school ten minutes before the normal student arrival time seems clearly focused on providing teacher supervision of students once students have arrived at the school. The Union's reliance on class bell times rather than bus drop-off times would result in a fifteen minute gap during which students could be in the school building without adequate faculty oversight. The resulting potential safety threat should not be lightly inferred.

In addition, the phrase "normal student arrival" does not easily equate with the time that the bell rings or classes start. The ordinary meaning of the word "arrive" is to "reach a destination." Oxford New Desk Dictionary and Thesaurus 40 (3rd ed. 2009). In the context of

this dispute, the most plausible meaning of “normal student arrival” is to refer to the time at which the school buses drop off the majority of students at their respective school locations. For the middle school, this occurs at 7:15 am.

Finally, this interpretation is supported by what occurs at the other schools covered by the same contract language. Teachers at the high school and the three elementary schools are required to arrive at their buildings before the buses arrive. This suggests that a similar policy is appropriate for the middle school.

For all of the above reasons, the Union’s middle school grievance is denied.

Flextime Schedule for Elementary School Teachers

The parties agree that, for more than 20 years, teachers at the elementary schools were permitted to conclude their work day within a flexible window beginning at 3:20 pm and ending at 4:05 pm. The School District asserts that an agreement concerning flexible schedules was reached during the process of resolving a separate grievance concerning teacher preparation time in January 2013. The School District maintains that the parties agreed to limit flexible schedules for elementary teachers to a more narrow 3:30 pm to 4:05 pm range. As noted above, however, the Union contends that the discussion of flex schedules was merely peripheral to the preparation issue and that the parties never agreed to a more restricted flextime window.

In contrast to the middle school, the School District made no change for the 2013-14 school year to either the class or bus schedule for the elementary schools. As a result, no apparent reason exists to deviate from the longstanding past practice permitting a 3:20 pm teacher departure time. The School District has not alleged a deficiency in supervision or any safety concerns associated with the longstanding elementary school flextime practice. During

the current school year, as in the past, the school buses depart by 3:20 pm, leaving no supervisory gap for the elementary students.

Based upon these circumstances, the Union's elementary school grievance is sustained,

AWARD

The grievance is granted in part and denied in part. Both the middle school and elementary school grievances are arbitrable. The grievance challenging the School District's modification of the flextime practice for teachers at the middle school is denied. The grievance challenging the School District's modification of the flextime practice for teachers at the elementary school is sustained. The School District is directed to take such actions as may be necessary to implement this award.

Dated: June 24, 2014

Stephen F. Befort
Arbitrator