

IN THE MATTER OF THE ARBITRATION BETWEEN

THE UNDERWOOD EDUCATION ASSOCIATION,)	MINNESOTA BUREAU OF MEDIATION SERVICES
)	CASE NO. 14-PA-0315
)	
Union,)	
)	
and)	
)	
INDEPENDENT SCHOOL DISTRICT NO. 550 (UNDERWOOD),)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

Meg Luger-Nikolai
Attorney
Education Minnesota
41 Sherburne Avenue
St. Paul, MN 55103

For the Employer:

Kevin J. Rupp
Rupp, Anderson, Squires
& Waldspurger, P.A.
Attorneys at Law
Suite 1200
527 Marquette Avenue South
Minneapolis, MN 55402

On March 6, 2014, in Underwood, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by placing a newly hired teacher above the wage rate permitted by the labor agreement. Post-hearing written argument was received by the arbitrator on April 2, 2014.

FACTS

The Employer (sometimes, the "District") operates the public schools in and near Underwood, Minnesota, a city located in the northwestern part of the state. The Union is the collective bargaining representative of the Teachers who are employed in the Employer's schools.

The Union initiated this grievance on August 16, 2013, not in behalf of a particular grievant, but in behalf of all of its members. The Union alleges that the Employer violated Article XII, Section 5, of the parties' 2011-13 labor agreement (effective from July 1, 2011, through June 30, 2013) by paying a newly hired Teacher, Jonathan Hartman, a salary greater than what is permitted by the agreement.

The labor agreement establishes the salaries payable to Teachers by a Salary Schedule ("Appendix B") that is similar to salary schedules used in most labor agreements between public school districts and unions representing Teachers. Across its horizontal axis, the Salary Schedule has seven "Lanes" that list annual salary, increasing with the Teacher's achievement of academic degrees and credits, ranging from the first Lane, "B.A.," through the seventh Lane, "M.A.+20" [credits]. Down its vertical axis, the Salary Schedule lists nineteen increasing amounts of annual salary in each Lane, referred to in the agreement as "Increments" or "Steps." The salary paid to a Teacher (with exceptions not relevant here) increases by one Increment with each year of the Teacher's service through the nineteenth year.

I set out below, from the Salary Schedule (Appendix B) that was effective during the fiscal year ending on June 30, 2013, the annual salary amounts listed for all seven Lanes and nineteen Increments:

	<u>B.A.</u>	<u>B.A.+10</u>	<u>B.A.+20</u>	<u>B.A.+30</u>	<u>M.A.</u>	<u>M.A.+10</u>	<u>M.A.+20</u>
1	34,573	35,512	36,452	37,391	38,540	39,688	40,836
2	34,973	35,912	36,852	37,791	38,940	40,088	41,236
3	35,382	36,321	37,261	38,200	39,349	40,497	41,645
4	35,799	36,739	37,678	38,618	39,766	40,915	42,063
5	36,217	37,156	38,096	39,035	40,184	41,332	42,481
6	36,737	37,676	38,616	39,555	40,704	41,852	43,000
7	37,259	38,198	39,138	40,077	41,226	42,374	43,522
8	37,780	38,720	39,660	40,599	41,748	42,896	44,044
9	38,609	39,549	40,488	41,428	42,576	43,725	44,873
10	39,444	40,384	41,324	42,263	43,412	44,560	45,708
11	40,280	41,219	42,159	43,098	44,247	45,395	46,543
12	41,319	42,259	43,198	44,138	45,286	46,435	47,583
13	42,363	43,303	44,242	45,182	46,330	47,479	48,627
14	43,407	44,347	45,286	46,226	47,374	48,523	49,671
15	44,656	45,595	46,535	47,474	48,623	49,771	50,970
16	45,908	46,848	47,788	48,727	49,876	51,024	52,172
17	47,161	48,101	49,040	49,980	51,128	52,277	53,425
18	48,721	49,660	50,600	51,539	52,688	53,836	54,985
19	50,287	51,226	52,166	53,105	54,254	55,402	56,551

The provision of the labor agreement that is primarily at issue in this case -- Section 5 of Article XII -- was added during bargaining for the 2011-13 agreement. In the parties' previous labor agreement, the 2009-11 agreement, Article XII had only four sections, the first three of which describe the seven Lanes used in the Salary Schedule and the process for moving from Lane to Lane. The fourth section of Article XII of that agreement, not relevant here, describes a process for earning a bonus for National Board Certification.

In both the 2009-11 and the 2011-13 labor agreements, the title given to Article XII is the same: "Salary Classifications, Lanes, Credits, & Placements."

Section 5 of Article XII, newly adopted in bargaining for the 2011-13 labor agreement, is set out below:

Section 5: School District Discretion. The School District may, in its sole discretion compensate newly hired teachers above the scheduled salary as provided in this agreement if the following are met:

- 1) Teacher must be new to the district.
- 2) Teacher must be in a hard to fill position as determined by the Superintendent.
- 3) The maximum step level for this section will be Step 6 of Appendix B.

Jeremiah M. Olson, the District's Superintendent of Schools since the 2010-11 school year, testified as follows. In February of 2013, the District's regular Art Teacher, who had been on parenting leave during the 2012-13 school year, notified the District that she would return to her teaching position during the 2013-14 school year. The District informed the long-term substitute who had been teaching Art during the parenting leave that the regular Art Teacher would be returning at the start of the next school year. In July of 2013, however, the regular Art Teacher notified the District that she had changed her mind and would not be returning to teach during the 2013-14 school year -- which was about to begin. Olson asked the long-term substitute to return for the 2013-14 school year, but she had taken another position and was not available.

Olson began a search for a new Art Teacher. Before doing so, he discussed the process with the District's previous Superintendent of Schools, Gary Sletten. Sletten told Olson that when hiring a new Teacher he could offer a salary up to the Salary Schedule's Step 6 and that he could offer more if he obtained the approval of the School Board.

Olson received applications from two Teachers for the vacant Art Teacher's position -- one from Jonathan Hartman, who was eventually hired, and one from another applicant, whose name Olson could not recall at the time of the hearing.

Olson interviewed both applicants in late July or early August of 2013. Hartman had twelve years of experience as an Art Teacher, ten in Minnesota and two in Missouri, and the other applicant had fourteen years of Art teaching experience. Olson offered Hartman the position, with compensation set at Step 6 on the Salary Schedule, but Hartman rejected the offer. Olson offered the other applicant the position, also with compensation set at Step 6 on the Salary Schedule, and that applicant also rejected the offer.

Olson then took the matter before the School Board and obtained its approval to hire Hartman at Step 13 on the Salary Schedule, thus giving him Step credit for his twelve years of teaching experience outside the District.

On August 16, 2013, the Union brought the present grievance, challenging the decision to set Hartman's salary above Step 6. The Union makes the following argument. Article XII, Section 5 (hereafter, for ease of reference, merely "Section 5"), limits the District in the amount of salary it can pay to a newly hired Teacher. Though Section 5 gives the District discretion to pay a Teacher "above the scheduled salary," that discretion has three limitations: first, the Teacher must be new to the District, second, the position the Teacher is hired to fill must be "hard to fill" and third, the District is prohibited

from paying such a newly hired Teacher more than the salary specified at Step 6 on the Salary Schedule.

The Employer makes the following argument. Section 5 does not apply to what occurred in the hiring of Hartman. That provision covers the hiring of Teachers with compensation "above the scheduled salary." The Employer argues that Hartman's compensation was not set "above the scheduled salary." Rather, according to the Employer, his salary was set neither above nor below the scheduled salary -- because, with twelve years of teaching experience, he was entitled to be placed at Step 13 during his thirteenth year of teaching. As the Employer interprets Section 5, it applies only when the District proposes to set the compensation of a new Teacher at a Step above what the Teacher's total teaching experience would allow.

DECISION

A threshold question in contract interpretation is whether the text being interpreted is ambiguous.* If the meaning of the text is clear, ordinarily that meaning should be enforced without the use of extrinsic evidence (usually bargaining history or practice) to resolve any ambiguity. Nevertheless, extrinsic evidence may be necessary in the initial determination whether the text to be interpreted is in fact ambiguous. The context of the parties' practice or limiting statements, made or not made

* See Elkouri and Elkouri, How Arbitration Works, 428-446, (6th Ed.) for an excellent discussion of issues related to contract ambiguity.

during bargaining, may be relevant to the decision whether contract text is ambiguous, and such relevant evidence should be used in the initial decision whether the text is ambiguous.

In the present case, the parties' arguments about the meaning of Section 5 indicate that they have different understandings of the phrase "above the scheduled salary." For the Union, compensation "above the scheduled salary" means Step placement at any Step level greater than the number of years of teaching in the District, and, of course, for a newly hired Teacher, the number of years teaching in the District is none, and the starting Step on the Salary Schedule is always the "scheduled salary." Under this interpretation, 1) the District is not entitled to use the newly hired Teacher's teaching experience outside the District when determining what Step level is "above the scheduled salary," but 2) Section 5 gives the District discretion to set the compensation of a Teacher new to the District higher than Step 1, provided that the Step level is not higher than the Step 6 maximum stated in Section 5.

For the Employer, a newly hired Teacher is compensated "above the scheduled salary" only if Step placement is above the Step level that gives credit for all teaching experience, including teaching experience outside the District. As the Employer interprets Section 5, Hartman was not compensated "above the scheduled salary," because his twelve years of teaching experience entitled him to placement at Step 13, exactly matching his years of teaching experience. The Employer argues, therefore, that Hartman was not compensated "above the scheduled salary" and that Section 5 does not apply.

Article XIII, Section 2, in both the 2009-11 and 2011-13 labor agreements, provides for annual Increment advancement, as follows:

Increments: All teachers shall be granted increments as indicated on the schedules set forth herein, except in the case where the District is dissatisfied with a teacher's performance, it may withhold that teacher's increment for the next year upon giving said teacher written notice of its intent to do so prior to February 1st of each year with the following provisions attached:
. . . .

This section provides for annual Step increments to "all teachers" -- presumably, those who are employed in the District. It does not, however, resolve the present dispute about the meaning of the phrase "above the scheduled salary" because it says nothing about giving or denying annual Step credit to Teachers hired with teaching experience outside the District.

As the Union argues, compensation "above the scheduled salary" can be read plausibly to mean compensation above the Step level appropriate to the number of years of teaching experience within the District. The District's reading is also plausible -- that compensation "above the scheduled salary" is compensation above the Step level appropriate to the number of years of all teaching experience, inside or outside the District. Because either of these interpretations is reasonably possible, I rule preliminarily that the duality of reasonably possible meanings creates a latent ambiguity in the wording of Section 5.

The evidence the parties presented in aid of interpretation concerns bargaining history primarily. In addition, they

presented some evidence relating to practice and post-contract administration.

The Union presented the testimony of Jill A. Roisum, who testified as follows. In May of 2013, she applied for a position as a newly hired First Grade Teacher for the District. She had twelve years of teaching experience in other Minnesota school districts at the time of her application. Olson interviewed her on May 13, 2013, and a few days later, he offered her the position with compensation set at Step 6 on the salary schedule. She rejected the offer because it would have required her to accept a 20% reduction in salary. Roisum testified that Olson told her he could not offer more than Step 6 because of the labor agreement. He did not tell her he could go to the School Board to request a higher Step placement. Olson also offered her an additional \$1,500 in extra assignment pay as a volleyball coach. She turned down the employment offer.

Olson testified that, when he told Roisum he could not offer her more than Step 6, he knew that he had five other applicants for the First Grade position she had applied for and he thought he could fill the position without going to the School Board for authority to offer more to Roisum.

Mary J. Good testified as follows. In the spring of 2013, she applied for a five-sixths position as a Mathematics and Science Teacher in the District's high school. She had twelve years of teaching experience as a Mathematics Teacher for other Minnesota school districts. Good was interviewed by three people -- Olson, John Hamann, the District's High School

Principal and a member of the School Board, and a Mathematics Teacher, unnamed at the hearing. Hamann offered her the position, and later she discussed compensation with Olson. Good testified 1) that Olson offered her the five-sixths position based on Step 6 placement, 2) that he told her that the School Board would not allow more than Step 6 placement, and 3) that he was limited to Step 6 placement by the labor agreement, showing her the agreement. After reading the agreement, Good agreed, and she accepted the offer.

Olson testified that, when he interviewed Good he did not offer her more than Step 6 placement, which would have required him to get School Board approval, because he thought he had time to find another Teacher to take the position at Step 6 if Good did not accept Step 6 placement. In response, the Union presented evidence that Science Teachers are especially difficult to find and that the District had to obtain a waiver from the Minnesota Department of Education to allow Good to teach Science without licensure in that field.

Bargaining for the 2011-13 labor agreement occurred in five meetings held in 2011 -- one in August, one in September, one in November and two in December -- followed by a sixth and final mediated meeting in February, 2012.

Susan M. Nelson, a Special Education Teacher for the District for sixteen years and Secretary of the Underwood Education Association, testified as follows. She had five years of teaching experience for various Minnesota school districts before she was hired by the District. When she was hired, the

Superintendent of Schools was Gary Sletten. She has participated in bargaining for the last three labor agreements between the parties, and she was a member of the Union's bargaining team that negotiated the 2011-13 labor agreement. Though she testified that she was not aware that any newly hired Teacher had been placed above Step 6 or had received credit for more Steps than the years of experience the Teacher had, the Employer showed that, when Nelson was hired sixteen years ago, she had five years of teaching experience, but was placed at Step 7 when she began.

Nelson testified that early in the 2011-13 bargaining that led to the adoption of Section 5, Olson told the Union representatives that the District wanted flexibility in determining compensation for newly hired Teachers for difficult to fill positions. She testified that the Union agreed, but stipulated that the maximum should be Step 6. She also testified that there was no discussion about placing Teachers above their years of experience. She testified that, at the next bargaining meeting, Olson brought a draft of proposed contract language and that she understood the "scheduled salary" to mean the salary schedule set out in Appendix B.

James L. Granger, Field Representative for Education Minnesota, testified as follows. He was present at two of the bargaining meetings that led to adoption of the 2011-13 labor agreement. He testified that in Union caucuses, the Union understood the final language of Section 5 to mean that Step 6 was the maximum compensation payable to a newly hired Teacher, regardless of years of teaching experience.

The first draft of Section 5 was proposed by the Employer at the parties' first meeting in bargaining for the 2011-13 labor agreement, as follows:

Section 5: School District Discretion. The School District may, in its sole discretion compensate teachers above the scheduled salary as provided in this agreement.

Below this proposal, Olson wrote: "This may be beneficial in the future as we try to recruit new math/science or other hard to fill positions. I would rather give a high caliber candidate additional compensation than fill the position with a warm body. It would at least give us flexibility." Olson testified that the parties "worked on" this language, and, from other evidence, it appears that most of the bargaining about Section 5 occurred in the first three bargaining meetings.

Though the evidence does not show how many proposals and counter-proposals were made in the bargaining about Section 5, it appears that, in one of the first several meetings, the Employer presented a draft that incorporated all the text of Section 5 as finally adopted, including the first two numbered limitations, but it did not include the third limitation, thus:

Section 5: School District Discretion. The School District may, in its sole discretion compensate newly hired teachers above the scheduled salary as provided in this agreement if the following are met:

- 1) Teacher must be new to the district.
- 2) Teacher must be in a hard to fill position as determined by the Superintendent.

The final change to Section 5 was the addition of the third numbered limitation, a change proposed by the Union:

- 3) The maximum step level for this section will be Step 6 of Appendix B.

The Employer also presented the testimony of Ardy A. Johansen, a member of the District's School Board and the lead negotiator for the Employer in bargaining for the 2011-13 labor agreement. Johansen testified as follows. Section 5 was discussed at the parties' bargaining meetings in August, September and November, but not in December or in February when the parties met in mediation. He testified that he gave an example to the Union representatives of how Section 5 would be used -- to allow the District to hire a Teacher with little or no teaching experience at a Step crediting the Teacher with extra teaching experience. Johansen also testified that at the September meeting he said that the practice of the District was to allow hiring of new Teachers at a level up to Step 6 without School Board approval and to obtain School Board approval to hire a new Teacher above Step 6. He conceded to Nelson, when questioned by her at the September meeting, that the District had no written policy reflecting this practice. He also testified that during his five years as a member of the School Board, the only time the Board had been asked to approve hiring a new Teacher above Step 6 was when Hartman was hired. The evidence shows one other instance of new hiring above Step 6, the hiring of Nelson in 1998 at Step 7, but it does not show whether School Board approval was sought then. In addition, the record includes Olson's hearsay testimony that Sletten told him previous practice had been to obtain School Board approval for hiring above Step 6.

Olson testified that during bargaining about Section 5, the parties did not discuss the concept of giving newly hired Teachers credit for teaching experience outside the District. He also testified, however, that, because the language of Section 5 dealt only with the subject of hiring new Teachers at a Step higher than their "years of experience," there was no reason for such a discussion. In this testimony, there remains present the latent ambiguity that led to the present dispute -- whether, under Section 5, the appropriate "scheduled salary" placement of a newly hired Teacher, should give credit for teaching experience outside the District. The testimony of Nelson incorporates the same latent ambiguity, but, of course, it incorporates the Union's interpretation of Section 5 -- that the appropriate "scheduled salary" placement is determined by crediting only teaching experience in the District.

I make the following rulings. Bargaining history does not resolve the issue of contract interpretation. The testimony of Nelson and Granger shows only that the Union understood the phrase "above the scheduled salary" to mean Step placement above Step 1 for a Teacher new to the District, i.e., a scheduled salary placement that did not credit teaching experience outside the District. Though I am satisfied from the evidence that this was, indeed, the Union's understanding, the evidence does not show that the Employer's representatives were informed of that understanding by the Union's representatives as the parties bargained.

The evidence also shows that the Employer's representatives understood the phrase "above the scheduled salary to mean

Step placement above the Step appropriate to all years of teaching experience, including experience outside the District. Though I am satisfied that this was the Employer's understanding, the evidence does not show that the Union's representatives were informed of this understanding by the Employer's representatives.

When the parties agreed to the language of Section 5, each party had a different understanding of the meaning of that language. Their agreement was about the wording of Section 5, but not about the obligation the wording would create. The Union did not understand that, in the Employer's view, placing a Step 6 limit on compensation would not affect the Employer's right to give newly hired experienced Teachers Step placement appropriate to their total teaching experience outside the District, i.e., that the Employer understood the phrase "above the scheduled salary" to mean Step placement above the level justified by total teaching experience. Similarly, the Employer did not understand that the Union intended the Step 6 maximum to be an absolute maximum that was to apply irrespective of the newly hired Teacher's outside teaching experience.

When contracting parties have an agreement about language, but not about the substantive obligations created by that language, contract law may, nevertheless, impose enforcement on one of the parties -- even though that party may maintain that it had no substantive understanding of the obligation created by the language agreed to. Many of the rules of law that resolve such disagreements about substance are fault

based. For example, when contract language is clearly unambiguous, but the disagreement about substance arises from the failure of one of the parties to understand the clear language, that party is charged with the obligation to perform, despite lack of a true substantive bargain. In such a case, an agreement about words rather than substance is enforced against the party at fault for not understanding clear language.

Both parties argue that another fault-based rule should apply in this case -- that ambiguous language should be construed against the party who drafted it, either for the fault of drafting inexact language or for the fault of not fully explaining the language and thus eliminating the ambiguity. The Union argues that the award should not adopt the Employer's interpretation of Section 5 because the Employer drafted all of its text except for the last revision, drafted by the Union, which created the third limitation setting a Step 6 maximum "for this section." The Union argues that the Employer could have eliminated the ambiguity of Section 5 by explaining to the Union that it intended the phrase "above the scheduled salary" to permit new Teachers to have the benefit of teaching experience outside the District. The Employer argues that Section 5 should be construed against the Union because the Union failed to explain when it proposed the Step 6 maximum that it was intended to apply to Teachers with greater teaching experience outside the District.

I rule that either party could have explained how it intended Section 5 to apply when hiring new Teachers with

teaching experience outside the District and that, consequently, this rule of fault-based contract construction should be applied against neither party.

The Union argues that Olson's post-contract dealings with Roisum and Good show an understanding of Section 5 that does not allow the use of teaching experience outside the District when determining what Step placement is "above the scheduled salary." In dealing with Roisum, Olson explained that, because he had five other applicants, he did not think he needed to offer her more than Step 6 by getting School Board approval to pay her in accord with her teaching experience outside the District. In dealing with Good, though Olson illustrated his refusal to offer more than Step 6 by showing her Section 5 of the contract, Good testified that he also told her the School Board would not allow more than Step 6 placement. The latter statement is not inconsistent with Olson's explanation that his conversations with both Roisum and Good was based on his understanding that policy set a Step 6 maximum unless the School Board approved a higher Step, based on outside teaching experience.

The grievance can be interpreted as alleging only a violation of Section 5 as the basis for its challenge to Hartman's hiring at Step 13. Nevertheless, because the grievance can also be read as making the broader allegation that the agreement does not give the Employer authority to hire a new Teacher at that level, I note the following. The evidence that there was a practice permitting hiring of new Teachers at a Step level that recognizes outside teaching experience is not adequate

to establish such a practice. It consists primarily of Olson's hearsay statement that Sletten told him there had been such a practice. Johansen testified that in his five-year participation as a School Board member, there had been no instance of such a practice except the hiring of Hartman at issue in this case.

I note that each party has argued forcefully for the Section 5 interpretation it seeks. The Union, however, has not proposed that Hartman's compensation be reduced to conform to its interpretation -- either in the 2013-14 school year or in the future. Rather, the Union's post-hearing brief makes the following request for relief:

The Union is not asking that [Hartman] experience any change in pay as a remedy. The Union is simply asking for an order upholding the Union's grievance and directing the district to comply with the [labor agreement] going forward.

Thus, the parties seek a declaratory award determining the meaning of Section 5. Accordingly, I make the following award.

AWARD

The bargain the parties reached when they adopted Section 5 was incomplete insofar as it concerns Step placement of newly hired Teachers in hard-to-fill positions with more than five years of outside teaching experience. Nevertheless, Section 5 does state the parties' agreement that the School Board has discretion to set the compensation of newly hired Teachers in hard-to-fill positions at a Step level up to Step 6, irrespec-

tive of teaching experience outside the District. The evidence presented in this proceeding is not sufficient to show that the District has or does not have authority to compensate a newly hired Teacher in a hard-to-fill position at a Step level higher than Step 6. Based on the evidence presented here, it appears that the parties can resolve their dispute about such hiring only through future bargaining.

July 15, 2014



Thomas P. Gallagher, Arbitrator