

IN THE MATTER OF ARBITRATION BETWEEN	}	DECISION AND AWARD
	}	
BLOOMINGTON FEDERATION OF TEACHERS	}	OF ARBITRATOR
	}	
(UNION OR FEDERATION)	}	
	}	
and	}	
	}	BMS CASE: 14-PA-0946
BLOOMINGTON INDEPENDENT SCHOOL	}	
	}	
DISTRICT 271	}	
	}	
(EMPLOYER OR DISTRICT)	}	
	}	

ARBITRATOR:	Eugene C. Jensen
DATE AND LOCATION OF HEARING:	May 22, 2014 Bloomington ISD 271 Education Service Center 1350 West 106 th Street Bloomington, Minnesota 55431
ADDITIONAL SUBMISSION:	The District submitted an agreed to post-hearing affidavit on May 23, 2014.
FINAL SUBMISSIONS:	The parties submitted post-hearing briefs on June 20, 2014.
DATE OF AWARD:	July 17, 2014
ADVOCATES:	<u>For the Union</u> David M. Aron Staff Attorney, Education Minnesota 41 Sherburne Avenue Saint Paul, Minnesota 55103

For the District

David Holman
Attorney at Law for Bloomington I.S.D. 271
220 West 98th Street
Bloomington, Minnesota 55420

GRIEVANTS:

Class Action (Eight [8] Community Education Teachers)

ISSUE STATEMENTS

FOR THE UNION:

1. Did the District violate Section 9.9.3(a) of the collective bargaining agreement by refusing to compensate preschool teachers for required work they performed in excess of their scheduled hours? If so, what is the appropriate remedy?

and

2. Did the District violate Section 9.9.3(a) of the collective bargaining agreement by failing to increase the scheduled hours for preschool teachers after adding assessment reporting and PLCs to their non-instructional job duties? If so, what is the appropriate remedy?

FOR THE DISTRICT:

Did the teachers involved in the grievance get prior approval for the extra time they submitted for payment?

JURISDICTION

In accordance with the Minnesota Public Employment Labor Relations Act (PELRA), the Minnesota Bureau of Mediation Services (BMS), and the 2011 – 2013 Collective Bargaining Agreement (CBA) between the parties, this matter is properly before the Arbitrator.

PERTINENT CONTRACT LANGUAGE

SECTION 2 – RECOGNITION OF EXCLUSIVE REPRESENTATION

2.1 Recognition – In accordance with PELRA, the District recognizes the Federation as the exclusive representative of teachers employed by the District. The exclusive representative will have those rights and duties as prescribed by PELRA and as described in the provisions of this Contract.

SECTION 4 – DISTRICT RIGHTS

4.1 Inherent Managerial Rights – The Federation recognizes that the District is not required to meet and negotiate on matters of inherent managerial policy, which include but are not limited to, such areas of discretion or policy as the functions and program of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel. All management rights and management functions not expressly delegated in this Contract are reserved to the District.

SECTION 6 – BASIC SCHEDULES AND RATES OF PAY

6.1 Schedules & Appendices – The attached schedules and appendices are a part of this Contract. . . .

Schedule D: 2011-2012 & 2012-2013 Community Education Teacher

Hourly Schedule

(1) Step	2011-2012		2012-2013	
	BA	MA	BA	MA
1	24.46	25.05	24.56	25.15
2	25.71	26.37	25.82	26.47
3	26.94	27.58	27.05	27.69
4	28.22	28.94	28.34	29.05
5	29.40	30.13	29.51	30.25
6	30.39	31.15	30.51	31.28
7	31.40	32.18	31.52	32.31
8	32.50	33.31	32.63	33.45
9	33.40	34.23	33.54	34.36
(2) 10	33.70	34.53	34.04	34.86

(1) Initial placement on this schedule will be at the discretion of the District.

(2) For Longevity Pay, see Section 6.3.

SECTION 9 – WORKING CONDITIONS

9.9 Community Education –

9.9.1 Hours of Work: CE [Community Education] teachers are hourly teachers with daily, weekly, monthly, and/or annual hours as established and assigned by the Executive Director of Community Education. Once established, the Executive Director may modify work hours with prior notice. . . .

9.9.3 Community Education Preparation and Other Time:

Preparation, setup, staff and curriculum development, staff meetings and parent/student contact time will be defined as follows:

- a. **Full-Time ECFE:** A full-time Early Childhood Family Education (ECFE) CE teacher will be scheduled for thirty (30) hours per week, which will include ten (10) hours per week of preparation, set up time, staff and curriculum development, staff meeting and parent/student contact time. . . .

- c. **Part-Time:** A part-time CE teacher will have teaching time, preparation time, etc., prorated based on the full-time equivalency (FTE).

SECTION 12 – GRIEVANCE PROCEDURE**12.2 Grievance Procedure –****12.2.1 Grievance definitions and interpretations**

- a. **Grievance:** A “grievance” is an alleged violation, misinterpretation, or misapplication of the terms and conditions of this Contract. . . .

12.2.7 Grievance Level Four/Arbitration: In the event that the grievance is not resolved the grievant may submit to arbitration as defined herein. . . .

- a. A grievance submitted to arbitration will be filed with the Bureau of Mediation Services within ten (10) days of receipt of the Level Three District Grievance Response, with a copy to the Executive Director of Human Resources. . . .

- e. The decision by the arbitrator will be rendered within thirty (30) days after the close of the hearing. Decisions by the arbitrator in cases properly presented will be final and binding upon the parties, subject, however, to the limitation of arbitration decisions as provide in PELRA as amended.

EXHIBITS

JOINT EXHIBITS:

1. 2011 – 2013 Collective Bargaining Agreement for BFT Teachers.
2. Correspondence between the District and teachers relating to time sheet requests.
3. Grievance correspondence.

UNION EXHIBITS:

1. 2011 – 2013 Collective Bargaining Agreement for BFT [Bloomington Federation of Teachers] Health Services Staff.
2. Memorandum of Understanding between the Union and the District related to Q-Comp and PLCs.
3. News article related to Bloomington's Early Childhood Education Programs.
4. Marcia Hjerpe's documents.
5. Katie Dahlman's documents.
6. Bridget Schwandt's documents.
7. Jennifer Hurlburt's documents.
8. Kathrine Peterson's documents.

9. Jill Swanson's documents.
 - a. Additional Jill Swanson document - dated 11/20/2011.
10. Gaye Lynn Sarff's documents.
11. Joleyne Presthus's documents.
12. Assessment documents used by Pre-Kindergarten teachers in Bloomington Public Schools (190 pages).

DISTRICT'S EXHIBITS:

1. Early Childhood Family Center - Staff Policies/Procedures/Information, Dated: August 13.
2. Non-Instructional Hours Breakdown.
3. Non-Instructional Hours Breakdown: 3/1/2013.
4. School Readiness budget document.

BACKGROUND

Independent School District 271 is the public school system in Bloomington, Minnesota. Most of the District's employees are covered by union contracts. In this case, the Union is the Bloomington Federation of Teachers. The Union is the "exclusive representative" for the Teachers/Grievants involved in this arbitration, as per the Minnesota Public Employment Labor Relations Act (PELRA).

The Parties were operating under their 2011 – 2013 Collective Bargaining Agreement (CBA)¹ at the time the grievance was filed. The Parties finalized negotiations on the subsequent 2013 – 2015 CBA on May 12, 2014, and the language remained consistent.

Seven of the eight Grievants in this matter taught pre-school in the District prior to the 2011 – 2012 school year, and they all testified that their non-instructional duties increased significantly at the beginning of the 2012 – 2013 school year. The reasons for this increase were primarily attributed to two new duties: 1) Professional Learning Committees (PLCs)², and 2) a new, more extensive format for assessing students.

Professional Learning Committees – Alternative teacher professional pay systems (Q-Comp) were authorized by the Minnesota Legislature for districts and unions that approved of its use.³ This new alternative pay system provided additional monies to teachers who successfully participated in the program. The MOU requires weekly PLC meetings that average fifty (50) minutes in length.

New Format for Assessing Students - The new format was much more thorough than its predecessor. Although the actual assessment is done during instructional time, the analysis and report preparation is done using non-instructional time.

¹ Joint Exhibit 1

² These weekly meetings focus on “best teaching practices” and are part of the Q-Comp program

³The enabling MOU is Union Exhibit 2

In October and November of 2013, the Grievants submitted timesheets that reflected their increased non-instructional time. These timesheets were rejected by the District, and the stated reason for the rejections was consistent: “not pre-approved hours,” based on a District policy⁴.

The Union filed a grievance on behalf of the eight (8) teachers that had requested additional hours of compensation. That grievance was processed through the Parties’ grievance procedures and is at bar in this arbitration.

WITNESSES AND THEIR TESTIMONIES

For the Union:

Wendy Marczak

President of the Bloomington Federation of Teachers
School Social Worker

- All (fifteen) ECFE teachers (pre-school teachers) are licensed.
- Schedule D of Article 6.1 spells out the Hourly Schedule for Community Education Teachers.⁵

⁴ District Exhibit 1, page 6

⁵ Located on page 35 of the Collective Bargaining Agreement (CBA)

- In the most recent negotiations with the District, the Union was unable to negotiate the inclusion of the Pre-School Teachers on the salary schedule of the K-12 teachers.
- Full-time ECFE teachers are scheduled for thirty (30) hours per week of which 10 hours are allotted for preparation, set-up time, etc.⁶
- These teachers have had additional responsibilities placed on them, including assessment of students and Professional Learning Communities (PLCs). These responsibilities are not listed in 9.9.3a.
- PLCs involve groups of teachers with similar assignments getting together to discuss “best practices.”
- Identified the Q-Comp MOU⁷ as an agreement between the parties regarding professional standards and compensation for achieving those standards. PLC meetings are part of the Q-Comp MOU, and they are scheduled for fifty (50) minutes each week.⁸

⁶ Section 9.9.3a of the CBA

⁷ Ratified by the Union April 20, 2012, to be effective the beginning of the 2012-2013 school year.

⁸ Section 7.1 of the Q-Comp MOU offers K – 12 teachers the ability to adjust their work schedules by 30 minutes each week to use for the PLC meeting times. Community Education teachers are not eligible for this provision.

- She met with some of the teachers regarding their work schedule concerns and suggested that they meet with their supervisors to attempt resolution of the problem. She indicated that this did not result in any positive change. She then recommended that they do a time study; that study revealed that the teachers were working many hours over what they were assigned. She then suggested that they “time card” the extra duties.
- She identified Joint Exhibit 2⁹. These 3 documents were summarized by her as the District’s refusal to compensate the teachers for their additional hours because they had not secured prior approval from their supervisors.
- Joint Exhibit 3 was identified as the grievance that the Union filed due to the District’s denial of the teachers’ time card requests. The Union requested two possible reliefs for the grievance: “The contracted pay rate for additional hours worked beyond yearly allocation. OR Immediate termination of workload that requires teachers to work overtime.”
- The Union did not request any relief based on the Fair Labor Standards Act (FLSA).

⁹ The District’s response to the teachers’ time card requests for additional compensation.

- She was not aware of the Board policy regarding pre-approval for additional hours worked. The policy was not bargained with the Union, even though it covers terms and conditions of employment.
- Introduced Union Exhibit 1.¹⁰ She read from page 5 of the agreement: ‘6.6.1 Additional Hours: Additional hours beyond the health service employees’ scheduled work day or week will require the prior approval of the Supervisor of Health Services.’ She concluded that these employees need prior approval for additional hours and the Pre-School Teachers do not.
- Introduced Union Exhibit 3: An article summarizing a visit by Human Services Commissioner, Lucinda Jesson, with the Early Childhood Education program of the Bloomington School District. She was quoted as saying, “What you’re doing here is remarkable.”¹¹

Marcia Hjerpe

Early Childhood Pre-School Teacher

- Thirty-four (34) years with District. Twenty-three (23) years as a Pre-School Teacher, focused on Special Education.

¹⁰ July 1, 2001 – June 30, 2013, CBA between the District and Health Services staff.

¹¹ Mike Hanks, writer.

- Referenced Union Exhibit 4. Page 2 of the document was her class schedule. She is paid for thirty-one and one-half (31.5) hours per week: twenty (20) hours for class time; ten (10) hours for non-instructional duties; and one and one-half (1.5) hours are for special educational duties.
- Duties have increased dramatically in the non-instructional areas of her employment, including assessments and PLC meetings. Assessments have increased due to more accountability to the District for test results. PLC meetings are fifty-five (55) minutes per week, and if you are the presenter, even more time is required (30 – 60 minutes). These meetings are mandatory, and she felt she would be disciplined if she did not attend.
- She also referenced Union Exhibit 12¹². These tools are used to evaluate students. Pre-School Teachers conduct the evaluations, interpret the data, and finally they report the results. The subject matter includes literacy, numbers, shapes, sizes, letter identifications, letter sounds, picture drawing skills, count objects, sort objects, patterns, colors, and more. Three times per year the teachers are required to make these assessments. The non-instructional time required for each assessment window is approximated thirty (30) minutes per child. She has eighteen (18) children in her classes, and she estimates that she spends nine (9)

¹² A volume of assessment tools used by Bloomington Pre-School Teachers.

hours for each assessment window, or approximately twenty-seven (27) hours per school year.

- Union Exhibit 4 contained her timesheets, requesting additional compensation for the extra hours she had worked, and notes describing the nature of the extra work.
- Her supervisor, Kay Miller, denied her request to be paid for several additional hours she documented in Union Exhibit 4.
- No supervisor told her that pre-approval was necessary, although she did receive the policy “years ago.”¹³
- She did receive additional pay for approximately five (5) hours during the 2012-2013 school year.

Katie Dahlman

Kinderprep Teacher

- Employed for two (2) years. Authorized to work thirty-seven and one-half (37.5) hours per week. Twenty-five (25) hours of classroom time and twelve and one-half (12.5) hours of non-instructional time.

¹³ District Exhibit 1

- Attends PLC meetings each week for fifty (50) minutes. She believes that she would be disciplined if she did not attend these meetings.
- She identified the assessment binder, Union Exhibit 12, and said she had to assess her thirty-four (34) students in a manner consistent with the previous witness.
- Student assessments require thirty (30) minutes per student over and above her scheduled time. This occurs three times per year for a total of fifty-one (51) hours ($34 \times .5 \times 3 = 51$).
- She introduced Union Exhibit 5: her time sheets and notes that supported her claim for additional hours of compensation.
- She was unaware of any requirement for pre-approval of hours by a supervisor.

Bridget Schwandt
Kinder Prep Teacher

- Eight (8) years with District, over four (4) years as a Kinder Prep Teacher.

- Assigned to work thirty-seven and one-half (37.5) hours per week. Twenty-five (25) hours of instructional time, and twelve and one-half (12.5) hours of non-instructional time.
- More time consuming assessments and PLC meetings were assigned at the beginning of the 2012 – 2013 school year with no corresponding increase in her hours of pay. PLC meetings added fifty (50) minutes per week, and non-instructional assessment time averaged thirty (30) additional minutes per student.¹⁴ She also felt that she would be disciplined if she did not attend the PLC meetings.
- She received clerical help for the data entry part of the assessments.
- She identified Union Exhibit 6, which included a timesheet¹⁵ requesting seventeen (17) additional hours, and that same time sheet with the additional time crossed out (denied) by her supervisor (Mary Mische). The denial of her additional hours was due to those hours not being pre-approved.
- She did not know that pre-approval was necessary prior to working additional hours for compensation.

¹⁴ She has 34 total students for a total of 17 additional hours per assessment period

¹⁵ Pages 6 & 7

Jennifer Hurlburt
Kinder Prep Teacher

- Six (6) years with the District as a Kinder Prep Teacher.
- Assigned to thirty-seven and one-half (37.5) hours per week: twenty-five (25) hours instructional and twelve and one-half (12.5) hours of non-instructional.
- Attends a PLC meeting each week for fifty (50) minutes. Feels that she would be disciplined if she did not attend the meetings.
- Identified Union Exhibit 7. Page 2 was a timesheet she submitted for the pay period ending November 30, 2013. She requested three and one-half (3.5) additional hours for work she described on page 3 of the same exhibit. These hours were denied by her supervisor.
- She referred to Union Exhibit 12 and explained that these additional requirements began in the 2012 – 2013 school year. She stated that the scoring for the assessments must be done by a licensed teacher.

- She estimated that it takes her between five (5) to seven (7) hours of additional time per week over each of the three week assessment periods. This would amount to between forty-five (45) and sixty-three (63) hours per school year.
- She was unaware of the District's policy,¹⁶ and she did receive a couple of hours of additional compensation for a curriculum committee.

Kathrine Peterson
Pre-School Teacher

- Eight (8) years with the District; seven (7) years as a Pre-School Teacher.
- Assigned to thirty-seven and one-half (37.5) hours: twenty-five (25) hours of instructional duties and twelve and one-half (12.5) hours of non-instructional duties.
- Attends PLC meetings weekly for fifty (50) minutes, and believes that she would be disciplined if she did not attend.

¹⁶ District Exhibit 1

- Referenced Union Exhibit 8. Once again, this document listed the hours she worked and the supervisor's denial of compensation for any hours worked in excess of thirty-seven and one-half (37.5) hours.
- She calculated that it takes her thirty (30) minutes of additional time for each student she assesses during each of the three assessment periods. In her case, it required an additional sixteen and one-half (16.5) hours, times three, or forty-nine and one-half (49.5) hours per school year.

Jill Swanson

Kinder Prep Teacher

- Six (6) years as a Kinder Prep Teacher.
- Assigned thirty-seven and one-half (37.5) hours per week: twenty-five (25) hours instructional, and twelve and one-half (12.5) hours of non-instructional.
- Attends PLC meetings for fifty (50) minutes each week. She also felt that she would be disciplined if she did not attend.
- Estimated that it took her a little less than thirty (30) minutes per student to complete the assessments outside of the classroom. She is assigned to thirty-one

(31) students, and this required her to do an additional thirteen (13) hours of non-instructional work.

- She introduced Union Exhibit 9, which contained several of her timesheets. When she did seek additional compensation¹⁷ for additional non-instructional hours, they were denied by her supervisor, Mary Mische.
- She stated that she did receive District Exhibit 1, but she did not recall when she received it.

Gaye Lynn Sarff
Pre-School Teacher
MN Reading Coach

- Assigned to thirty-one and one quarter (31.25) hours: twenty (20) hours instructional time and eleven and one quarter (11.25) hours of non-instructional time.
- Attends PLC meetings weekly for fifty (50) minutes. Attendance is taken and she would expect to be disciplined if she did not attend. There was no increase in non-instructional time when the PLC meetings were added.

¹⁷ See pages 3-8 of Union Exhibit 9

- She is assigned to forty (40) students, and she estimates that it takes between twenty (20) and thirty (30) minutes per student of non-instructional time to complete the assessments.
- Introduced Union Exhibit 10, containing her “Employment Authorizations” and one timesheet on which her supervisor, Kay Miller, both crossed out and denied approval of eleven and one-half (11.5) hours of non-instructional time.
- She stated that she may have seen District Exhibit 1 when she was first hired.

Joleyne Presthus

Pre-School Teacher

- Has worked for the District for seventeen (17) years. She teaches two sections of 4 – 5 year olds, and two sections of 3 year olds. She is scheduled for thirty-eight and one-quarter (38.25) hours of which twenty-seven (27) hours are instructional and eleven and one-quarter (11.25) hours are non-instructional.
- She attends PLC meetings every week for fifty (50) minutes, and feels that these meetings are mandatory.
- She spends thirty (30) minutes of additional non-instructional time per child to complete the required assessments.

- She introduced Union Exhibit 11, which contained documents explaining the additional hours she had worked, and a timesheet on which her supervisor had denied her request for payment of those hours. Once again, the reason: lack of prior approval.
- She stated that she had seen District Exhibit 1, however, it was not given to her this past year.

For the District:

Mary Miske
Supervisor

- Two (2) years with the Bloomington School District.
- Supervises Kathrine Peterson, Jennifer Hurlburt, Katie Dahlman, Bridget Schwandt and Jill Swanson.
- She denied the additional hours that her teachers requested because they did not have prior approval.

- She did not receive a copy of the Union's time study.
- A study was done by management, including herself and Kay Miller, and they concluded: "there was adequate time to complete it all [assessments and PLCs]" within the assigned times. Management shared this with the teachers in March of 2014.
- She believes that the pre-approval policy is necessary to control for budgetary concerns.
- She testified that she did not deny the hours because she doubted that the teachers had worked the hours; she denied them solely on the basis of no prior approval.
- She indicated that para-professionals were trained to help with the assessments.

Kay Miller

Early Childhood and Family Center Coordinator

- Twenty-eight (28) years with Bloomington School District.

- She has several supervisory responsibilities, including the direct supervision of Marcia Hjerpe, Joleyne Presthus, and Theresa Davidson.
- The pre-approval policy has been in place for a long time and it is reviewed with the teachers.
- The budget is the main reason for the policy.
- She and Mary Mische concluded, following their study of assignments and hours, that the teachers had time to complete the tasks.
- When asked about the timesheets that the teachers had submitted, she stated that she had 'no reason to not believe them.'

Carol Huttner

Director of Youth and Family Services

- Twenty-five (25) years in current position; thirty-four (34) years with the Bloomington School District.
- She supervises Kay Miller and Mary Mische.

- Introduced District Exhibits 2 and 3: These exhibits represent the results of the time study she and the supervisors conducted to examine the non-instructional hours between March 3, 2014, and the end of the school year (forty-seven [47] class days). They concluded that the teachers were allotted an adequate amount of non-instructional time to complete their assigned tasks.
- An email was sent to both Miller's and Mische's staffs inviting them to meet with them if they saw problems in completing the duties within the allotted time. She stated that none of the staff responded to the email.

Tom Holton

Executive Director Community Services

- Fourteen (14) years with Bloomington School District.
- He oversees all early childhood programs.
- Introduced School District Exhibit 4: School Readiness Budget, and he explained the categories. The School Readiness Program operates with a deficit. Over the past five (5) years he calculated a one point five (1.5) million dollar deficit. These shortfalls are resolved by the transfer of monies from other segments of the School District's budget.

- Although a license is not required for the Community Education programs, the District requires it to insure that they have highly qualified teachers.
- He feels that the District is generous compared to other districts: “I haven’t found a district with a more liberal application of non-instructional time.”¹⁸
- Based on the language in 9.9.1 of the CBA, he is the one who has the authority to modify Community Education Teachers’ work hours.
- He also testified that the K-12 teachers also need to do assessments and PLCs, and they get approximately two (2) hours of non-instructional time in a seven (7) hour day.
- He testified that the School District could opt to terminate the programs.

THE UNION’S ARGUMENT

ARBITRATOR’S NOTE: The following summary of the Union’s argument comes from the Union’s Post-Hearing Brief.

¹⁸ He acknowledged that this was based on “anecdotal information”

- I. THE DISTRICT VIOLATED THE CONTRACT BY FAILING TO PAY THE GRIEVANTS FOR REQUIRED WORK THEY PERFORMED OUTSIDE OF THEIR SCHEDULED HOURS.

Sections 6.1 and Schedule D of the Collective Bargaining Agreement require the District to compensate hourly employees for all the hours they work at a specified hourly rate. . . .

- A. There Is No Dispute That The Grievants Performed Services For The District During The Additional Hours For Which They Requested Compensation.

None of the District's witnesses disputed the fact that the Grievants in this case worked the hours for which they requested compensation.¹⁹

- B. The Work That Caused The Grievants To Exceed Their Allotted Hours Was Mandatory²⁰. . . .

- C. The Ratios In Section 9.9.3(a) Establish A Floor, Not A Ceiling. (18)

- D. The Contract Requires The District To Pay Its Hourly Employees For All Documented And Required Work They Perform. . . .

¹⁹ Union's Post-Hearing Brief (UPHB), pages 15 & 16

²⁰ UPHB, page 16

The District's attempt to require a group of its hourly employees to perform an increasing and potentially unlimited number of non-instructional duties without ever increasing their authorized hours is incompatible with Sections 6.1 and 9.9.3, Schedule D, and the very concept of what it means to be an hourly employee. (19)

The teachers also uniformly testified that they believe they would experience some form of discipline if they do not attend PLCs or complete assessments in accordance with the District mandated binder. (17)

The ratios in Section 9.9.3(a) establish a floor, not a ceiling. . . . [This section] does not prohibit the District from compensating early childhood teachers for additional non-instructional hours they have worked. (18-19)

II. THE DISTRICT VIOLATED THE CONTRACT BY FAILING TO INCREASE THE SCHEDULED HOURS FOR EARLY CHILDHOOD TEACHERS AFTER ADDING ASSESSMENT REPORTING AND PLCS TO THEIR NON-INSTRUCTIONAL JOB DUTIES.

A. The District Significantly Increased The Grievants' Workloads With No Adjustment In Their Existing Duties or Authorized Hours. (21)

- B. The Spreadsheets Introduced By Carol Huttner Are Not A Reliable Analysis Of the Grievants' Workloads. (22)

The Union maintains its objection that these exhibits are inadmissible hearsay, since Ms. Huttner has no first-hand knowledge of the information provided by teachers that led to these calculations. The supplemental affidavit provided by Kay Miller does not cure the defect in these exhibits, since it shows that her calculations are based on the report of a single teacher, Marcia Hjerpe. (23)

- C. The District Must Compensate The Grievants For Their Time Or Eliminate Duties To Fit Within Their Allotted Hours. (24)

ARBITRATOR'S NOTE: TWO SEPARATE ARBITRATION CASES WERE CITED BY THE UNION IN SUPPORT OF ITS POSITION.

- III. THE DISTRICT'S PRE-APPROVAL POLICY WAS IMPLEMENTED UNILATERALLY AND IS NOT ENFORCEABLE. . . . Not only did the District fail to communicate this policy to its early childhood teachers, it failed to negotiate this policy with the Union, making it invalid and unenforceable. (27)

- A. The Pre-Approval Policy Was Not Clearly Communicated To Employees Until After They Submitted Timecards. (27)

B. The District's Attempt To Implement A Unilaterally Adopted Pre-Approval Policy Relating To Compensation Violates PELRA And The Recognition Clause Of The CBA. (28)

C. The District Has Applied Its Pre-Approval Policy In An Arbitrary Manner. (30)

IV. THE DISTRICT CAN AND MUST CONTROL ITS BUDGET WITHOUT VIOLATING THE COLLECTIVE BARGAINING AGREEMENT. . . .

If the District cannot afford to pay teachers for the number of hours it takes to perform the job that is now required, the District must adjust the job or find alternative sources of revenue. (31)

THE DISTRICT'S ARGUMENT

ARBITRATOR'S NOTE: The following summary of the District's argument comes from the District's Post-Hearing Brief.

Since these programs (Kinder Prep and Kids Count) are not mandatory, the funding available to the School District to offer these programs is very limited. The funding includes a small amount of state aid (about \$65 per student), as well as fees paid

by the parents and some donations. Bloomington runs one of the best pre-school programs in the state and does an excellent job in identifying the successes it has achieved by doing thorough assessments of the children. A large part of Bloomington's success comes from the District's willingness to supplement the funding for these programs from the money that would have been used to support its regular education programs. . . .²¹

The Bloomington Community Education teachers are salaried employees of the District. . . . An hourly rate is used to make this calculation because many Community Education teachers work varied hours. They are assigned to teach various classes on specific days of the week. This enables the teachers and the District to accurately compute the salaries for these teachers. (2)

ARBITRATOR'S NOTE: The District then cited the Fair Labor Standards Act (FLSA) to support its position that the teachers are exempt from the law and therefore salaried.²²

Once the salaries of these teachers are set in this fashion by the contract, the District can calculate its cost of offering these pre-kindergarten programs to its parents. . . .

²¹ District's Post-Hearing Brief (DPHB), pages 1 & 2

²² §541.602 Salary Basis, FLSA

The Union appears to be trying to have the Arbitrator re-negotiate their Collective Bargaining Agreement for them.²³

[E]ven if they are considered to be “hourly employees”, they still would not qualify for pay for the extra hours. The Bloomington school district has had a long standing Policy and procedure that required any teacher who sought to work and be paid for more hours than is allowed in the Collective Bargaining Agreement to seek pre-approval from the teacher’s supervisor before they can be paid for the additional hours, (District Exhibit No. 1, p. 6). The policy states on page 6:

“SALARIES

Teachers’ hours are authorized in the fall. They are based on an hourly, weekly schedule. Pay is prorated; annual salary is divided into 24 equal payments starting with the September 5th pay day. At the end of May teachers are given the option of taking the summer’s salary in a lump sum or continued payments through the summer. Hours include prep time, meeting time, special events and conferences. Requests for extra hours must be submitted in writing and be pre-approved by your supervisor. If approved, these hours will then need to be submitted for payment on a time sheet.” . . . (3- 4)

²³ DPHD, page 3

To adopt the Union's contention that the teacher has the unilateral right to determine the amount of time that they can bill the District each week for the performance of their job, would both (1) eliminate the District's ability to control its budget and (2) make irrelevant the negotiation process that occurs between the District and the Union that results in their Collective Bargaining Agreement setting the terms and conditions of the employment of those teachers. (4)

In the present grievance, the testimony showed that while the District knew its employees were working hard, it had no knowledge that they were claiming that they were working overtime hours until they submitted their time sheets in October and November of 2013. (5)

[The supervisors and manager] reviewed the claims of the teachers, and with the help of [a pre-school teacher] they prepared a set of charts (District Exhibits Nos. 2 and 3) to determine if the teachers had sufficient time to complete their work to the end of the school year (June 30, 2014) without the need for extra time. These charts were shared with the staff in a Power Point presentation at a staff meeting. (5)

Carol Huttner testified that, in her opinion, the teachers had sufficient time to perform their required tasks, however she asked the staff if they had any concerns

about the charts or the time needed to complete their duties. No one contacted any of their supervisors with concerns or comments . . . (5)

Additionally, the huge variances in extra hours submitted by the teachers for the same work should also give rise to the inference that the District could not have known about these extra hours. . . . The testimony of the teachers at the hearing was that the extra time was essentially a result of the data entry for the more complex Assessments; and the extra time negotiated for the PLCs. (5)

As for the PLCs, the time required from the teachers for this task was negotiated between the Union and the District and incorporated in the Collective Bargaining Agreement by a Memorandum of Understanding (Union Exhibit 2). At least in the case of PLCs, it appears that the Union is now trying to get the teachers paid for more time than they negotiated with District in this Memo of Understanding. (6)

DISCUSSION

Several questions need to be answered before formulating an award:

1. Which interpretation of Sections 9.9.1 and 9.9.3 (sub-sections a. & c.) shall apply to the Grievants?

2. Does the District's policy (District Exhibit 1) prevent teachers from being paid for additional hours worked when they don't receive prior approval from their supervisors?
3. Are the "Non-Instructional Hours Breakdown" charts (District Exhibits 2 and 3) a valid indicator of the hours required to complete the assigned duties?
4. Does the variance in hours requested by the Grievants make it "impossible to set a standardized, negotiated salary for the same teaching position if no pre-approval was necessary"?²⁴
5. Does the Q-Comp Memorandum of Understanding (Union Exhibit 2) invalidate any attempt by the Union to seek additional compensation for the Grievants?

Which interpretation of Sections 9.9.1 and 9.9.3 (sub-sections a. & c.) shall apply to the Grievants?

The initial two sentences of 9.9.1 state:

CE [Community Education Teachers] are hourly teachers with daily, weekly, monthly, and/or annual hours as established and assigned by the Executive

²⁴ Taken from DPHB, page 8

Director of Community Education (*underlined for emphasis*). Once established, the Executive Director may modify work hours with prior notice.²⁵

When comparing this with the language for K – 12 teachers, the Arbitrator notes that there are significant differences between these two separate groups of employees:

Section 9 – Working Conditions

Community Education: Only Section 9.9 of this Section applies to Community Education (*underlined for emphasis*)

9.1 Teacher Duty Days [K – 12]

Pursuant to M.S. 122A.40, the District will, prior to April 1 of each school year, establish the number of school days and teacher duty days for the next school year and the teacher will perform services on those days as determined by the District, after meeting and conferring with the exclusive representative, including those legal holidays on which the District is authorized to conduct school, and pursuant to such authority as determined to conduct school. The school year will consist of 185 days, including no less than 179 student instructional days.

and

²⁵ Page 20 of the CBA

9.2 Alteration in Calendar, Subsection 9.2.3 Meet and Confer: The District and the Federation will meet and confer concerning any modification of the workday under Section 9.²⁶

On the other hand, the Community Education Teachers' hours and days of work are assigned to them by the District, and those hours can be modified by the District.

The District cites the Fair Labor Standards Act (FLSA) in its argument. The Grievants' classifications are exempted from the Act. That exemption, however, has no impact on the hours of work contained in the CBA. The Parties in this case, have agreed that these educators are "hourly teachers."²⁷ In the past, the District has paid straight-time overtime under some circumstances; the Union is asking that its Grievants be paid in the same manner.

The Arbitrator finds these teachers to be hourly employees. Their hours of work are determined by the CBA, and they are specifically excluded from several of the provisions that their salaried colleagues (K – 12) enjoy.

²⁶ Page 18 of the CBA

²⁷ Joint Exhibit 1, page 20

Does the District's policy (District Exhibit 1) prevent teachers from being paid for additional hours worked if they did not receive prior approval from their supervisors?

It would be quite difficult to find employers that totally relinquish control of their employees' additional hours of work. The District, in this case, promulgated several work policies covering a wide variety of issues relating to Early Childhood Family Center employees. One of those policies specifically addresses the overtime issue:

SALARIES

Teachers' hours are authorized in the fall. They are based on an hourly, weekly schedule. Pay is prorated: annual salary is divided into 24 equal payments starting with the September 5th pay day. At the end of May teachers are given the option of taking the summer's salary in a lump sum or continued payments through the summer. Hours include prep time, meeting time, special events, and conferences. Requests for extra hours must be submitted in writing and be pre-approved by your supervisor. If approved, these hours will then need to be submitted for payment on a time sheet.²⁸

The Arbitrator finds this policy to be reasonable and consistent with normal business practices. It is troubling, however, when an employer requires prior approval for work that it has already assigned. The language of the policy (noted above) identifies the work to be considered in

²⁸ STAFF POLICIES/PROCEDURES/INFORMATION (for Early Childhood Family Center Employees), page 6

determining hours of work: “Hours include prep time, meeting time, special events, and conferences.” The hours involved in this matter are primarily related to the assessment of students outside of the classroom and PLC meetings. The Arbitrator finds these duties to be consistent with the normal duties of the Grievants. And, since the District assigned the extra work, why would the Grievants have to seek prior approval? Prior approval is normally required when employees want to work additional hours for a special project or some other employee-initiated activities. Under those circumstances the employer has the right to evaluate the project or activities for their appropriateness, and make a decision to approve or not approve. In the instant case, the District was well aware of the added assignments it had given to the Grievants. Again, why would the Grievants be required to request prior approval for work that the District assigned?

Are the “Non-Instructional Hours Breakdown” charts (District Exhibits 2 and 3) a valid indicator of the hours that the Grievants worked?

The District alleges that the Grievants were allowed adequate time to accomplish all of their assigned duties. They based this on District Exhibits 2 and 3 and the testimony of Carol Huttner. This study and the results are flawed in several ways: 1) the Union was not invited into the process, despite its direct relationship to hours of work; 2) the time period is not consistent with the contractual classification of these employees. As hourly employees, the determination of hours worked in excess of the normal schedule should be done on a weekly basis, not on a forty-seven (47) day averaging basis; 3) this “study” is totally inconsistent with the testimony of the

Grievants. Both supervisors believed that their teachers were working “very hard” and they did not challenge the veracity of their timesheets. They denied the timesheet requests solely on the basis of no prior approval; 4) the study did not directly include all of the teachers; and finally, 5) the message to the teachers that attended the two power point meetings may have been perceived as critical of those teachers who required more time: ‘we know you’re very busy, but on average you have enough time to complete your assigned duties. If you individually are unable to accomplish your duties, we (Huttner and their supervisor) will meet with you to help you prioritize your work.’ It is not surprising that none of the teachers took them up on their offer.

Because of the failings mentioned above, the Arbitrator will give little consideration to District Exhibits 2 and 3 in reaching a decision in this matter.

The Grievant’s testimony and their supportive exhibits were very convincing. Every teacher appeared to be dedicated to their profession and to their students. And, although the supervisory staff came to a different conclusion in the above-mentioned study, they did not challenge the honesty of their teachers in filling out their timesheets.

Does the Q-Comp Memorandum of Understanding (Union Exhibit 2) invalidate any attempt by the Union to seek additional compensation for the Grievants?

The Q-Comp MOU provides “Performance Pay” for teachers who successfully participate in the program. The performance pay is separate from the salaries and hourly wages included in the CBA: “6.1 The Salary Schedule in the Contract will continue in full force and effect.”²⁹

In addition, the MOU spells out the time required for PLC meetings: “7.2 PLCs will meet an average of fifty (50) minutes per week over the school year.”³⁰

There are no provisions in the MOU requiring teachers to surrender certain contractual rights in *lieu* of Q-Comp benefits.

In conclusion, the District did not violate the Collective Bargaining Agreement when it assigned additional duties - that is its inherent managerial right; it did, however, violate the Agreement when it did not provide the Grievants an adequate amount of paid time to accomplish those same tasks. Employers of hourly employees commonly authorize overtime when additional work is required.

²⁹ Union Exhibit 2, page 6

³⁰ *Ibid.* page 6

AWARD

After a complete and thorough examination of the witnesses' testimonies, the exhibits presented, and the arguments of the advocates, the Arbitrator sustains the Union's Grievance. The District shall compensate the Grievants for the extra hours they requested on their timesheets that relate to District-initiated assignments, including attendance at PLC meetings and non-instructional student assessment duties. These compensations shall be completed by the District within a reasonable period of time, and shall reflect each Grievant's hourly rate of pay at the time she performed the work.

The Arbitrator shall retain jurisdiction for ninety (90) days to ensure proper implementation of this award.

Respectfully submitted this _____ day of July, 2014

Eugene C. Jensen
Neutral Arbitrator