
In Re the Arbitration Between:

BMS File No. 14-PA-0720

Independent School District No. 695,
Chisholm, MN,

Employer,

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

and

Education Minnesota – Chisholm,
Local 1276,

Union.

- Pursuant to **Article XII** of the collective bargaining agreement the parties have brought the above captioned matter to arbitration.
- The parties selected James A. Lundberg to serve as the neutral arbitrator.
- The parties agree that the matter is properly before the arbitrator for a final and binding determination and stipulate that there are no procedural issues before the arbitrator.
- A grievance was submitted on October 16, 2013.
- The arbitration hearing was conducted on June 25, 2014 in Chisholm, Minnesota.
- Briefs were submitted by e-mail transmission on July 8, 2014 and July 13, 2014 and the record was closed on July 13, 2014.

APPEARANCES:

FOR THE EMPLOYER

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FOR THE UNION

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ISSUES:

Union's Issue Statement:

Whether the School District violated Article VI, Section 9 of the 2011-13 collective bargaining agreement when it denied Sick Leave Buy Out to grievant, Dale Gregorich.

If so, what is the proper remedy?

Employer's Issue Statement:

Whether, upon retirement, grievant, Dale Gregorich was eligible for Sick Leave Buy Out pursuant to Article 6, Section 9, of the 2011-2013 collective bargaining agreement.

RELEVANT CONTRACT PROVISIONS:

Step IV of (BMS Grievance Procedure) Appended to and Incorporated by reference in contract.

...The arbitrator shall not have the power to add, to subtract from, or to modify in any way the terms of the existing contract.

ARTICLE VI – BASIC SALARIES AND RATES OF PAY

Section 9. Sick Leave Buy Out:

Any teacher age 52 (effective July 1, 2008) with a minimum of 15 years of service in Chisholm, IDS #695 is eligible to receive Sick Leave Buy Out. The maximum Sick Leave

Buy Out will be 120 days of pay calculated at the daily rate of pay during the last year of service. ...

- 1. Upon separation each teacher will receive a Sick Leave Buy Out equal to the sum of earned, accumulated, unused sick days. ...*

In order to be eligible for the Sick Leave Buy Out, a teacher must notify the District in writing of her/his intent to separate 60 days prior to the date of separation.

FACTUAL BACKGROUND:

The grievant was a teacher with the Chisholm School District for more than twenty (20) years. He was licensed to teach math and science grades 7-12 and held principal and superintendent licenses for grades K-12. There is no dispute over whether the grievant met the age (52 Years) and longevity (15 years) eligibility requirements for Sick Leave Buy Out under the collective bargaining agreement.

On January 25, 2013, Mr. Gregorich met with Superintendent Varichak. During the meeting they discussed Mr. Gregorich's intention to retire in the near future. Following the meeting, Mr. Gregorich sent an e-mail to Superintendent Varichak, which summarized their meeting.

The e-mail sent to Superintendent Varichak dated January 25, 2013 said in part:

I plan to retire the last day effective December 2013...

I understand that replacing an instructor with my credentials or licensure may be hard therefore I've made two alternative offers..."

I also want to acknowledge part of our conversation, where you stated I need to give a 60 day written notice prior to retirement...

The e-mail sent by Mr. Gregorich to Superintendent Varichak included retirement alternatives in the summer of 2013 and at the end of the school year 2014. Each of the alternative plans for retirement expressed concern for the School District's needs. In "Alternative 1" Mr. Gregorich said, "*This [the alternative] would allow the school district ample time over the summer to find a replacement*". In "Alternative 2" Mr. Gregorich said, "*This alternative helps me and helps the district.*"

Mr. Gregorich asked Superintendent Varichak to "*sign and send me [Gregorich] a copy acknowledging receipt.*"

By e-mail dated February 4, 2013 Superintendent Varichak wrote to Mr. Gregorich, "*Please use this response as confirmation of your 'retirement note to Varichak' dated 1-25-2013. I will share it with the personnel committee at the appropriate time.*"

On May 20, 2013 Mr. Gregorich submitted a letter of resignation to Mr. Varichak, wherein his separation was:

subject to the following conditions: I shall receive all compensation due me pursuant to Minnesota Statute and the Master Agreement. I shall receive all retirement benefits I am eligible for under the Master Agreement between Education Minnesota – Chisholm Local 1276 and District #695. I shall retain all my current insurance benefits through August 31, 2013 and thereafter pursuant to the retirement section of the Master Agreement, C.O.B.R.A., and any other relevant state and federal laws.

ISD #695's acceptance of my resignation is indication of the above mentioned condition. If the district dos not adhere to the above conditions, I reserve the right to rescind this resignation.

The minutes of the May 28, 2013 School Board Meeting note that the Board accepted "the letter of resignation from Dale Gregorich as a math/science teacher effective May 30, 2013."

The Business Manager for the School District wrote an e-mail to Mr. Gregorich on June 17, 2013, wherein she informed Mr. Gregorich that his resignation had been accepted and he would not receive the Sick Leave Buy Out. Mr. Gregorich did not receive the e-mail communication. By letter dated September 23, 2013, the Business Manager notified Mr. Gregorich that his Sick Leave Buy Out benefits were being denied because the resignation "*letter was not accepted 60 days prior to the board action on May 30, 2013 accepting your [Gregorich's] resignation.*"

A grievance was filed on October 16, 2013. The parties were unable to resolve the grievance and the matter was brought to arbitration for a final and binding decision.

SUMMARY OF UNION'S POSITION:

There is no dispute over whether Mr. Gregorich met the eligibility requirements of age and longevity necessary to claim Sick Leave Buy Out under **Article VI, Section 9** of the collective bargaining agreement. Mr. Gregorich worked for the School District five years longer than the necessary fifteen (15) years of employment and he meets the age requirement. The dispute is whether Mr.

Gregorich gave the Employer written notice of intent to separate sixty (60) calendar days prior to his date of separation.

The e-mail sent to School Superintendent Varichak by Mr. Gregorich on January 25, 2013 met the sixty (60) day notice eligibility requirement established in the collective bargaining agreement. The notice was written, as required by the collective bargaining agreement. Nothing in the collective agreement requires that the notice be written on paper. The e-mail communication was in writing and Superintendent Varichak acknowledged receipt. While the grievant resigned earlier than he originally anticipated, the e-mail notification was delivered to Superintendent Varichak more than sixty (60) calendar days prior to Mr. Gregorich's separation from the School District. The collective bargaining agreement only requires a teacher to give "notice of intent" to separate sixty (60) calendar days prior to separation. The contract does not require a teacher to resign sixty (60) calendar days prior to separation in order to be eligible for Sick Leave Buy Out. Based upon the plain language of the collective bargaining agreement, Mr. Gregorich was eligible to receive Sick Leave Buy Out and the School District should be required to provide the benefit as required by the collective bargaining agreement.

Mr. Gregorich's notice of intent to separate furthered the intent of the language in the collective bargaining agreement. **Article VI, Section 9** was designed to aid the financial/budgetary and staffing planning of the School District. Not only does the School District need to budget for an up coming Sick Leave Buy Out but the District needs to be aware of future staffing needs. In the case of Mr. Gregorich, math and science teachers are difficult to recruit. It is essential that the School District be

made aware of an upcoming need for a math/science teacher in order to meet student needs. Mr. Gregorich's January 25, 2013 e-mail specifically referenced the sixty (60) day requirement in the collective bargaining agreement and the difficulty in recruiting math/science teachers. The notice was clearly intended to give the School District the kind of "heads up" it requires and to meet the requirements of the collective bargaining agreement.

In his letter of resignation Mr. Gregorich requested all benefits for which he was eligible under the collective bargaining agreement and he stated that he would rescind his resignation, if he was not going to receive them. The School Board accepted Mr. Gregorich's letter of resignation on May 28, 2013 effective May 30, 2013. At no time prior to acceptance of the resignation did the School District notify Mr. Gregorich that he was not eligible for Sick Leave Buy Out or that his January 25, 2013 letter was not considered notice sufficient to meet the Sick Leave Buy Out notice provision found at **Article VI, Section 9** of the collective bargaining agreement. Mr. Gregorich's resignation was conditioned upon his receiving all benefits for which he was eligible and invited a response regarding any benefits to which the School Board believed he was not entitled. The School Board made a blanket acceptance of the resignation letter. No notice of benefit denial was made by the School Board before accepting the resignation. It was not until grievant received the September 25, 2013 letter from the School District that Mr. Gregorich was notified that the School District was denying his claim to the Sick Leave Buy Out. The action of the School Board was irrevocable pursuant to **MSA Section 122A.40**. If, for example, Mr. Gregorich would have been informed that he needed to ask for an

effective date of separation later in the summer to be eligible for all of the benefits under the collective bargaining agreement, he could easily have set the effective date of separation sixty (60) days in the future.

No binding “past practice” exists requiring a teacher to submit a resignation letter sixty (60) days before the date of separation in order to be eligible to receive Sick Leave Buy Out under **Article VI, Section 9** of the contract. A binding “past practice” must be acknowledged and agreed upon by both parties. The Union had no knowledge of the practice claimed by the Employer as a binding “past practice”. In the absence of mutuality, a practice that has been followed is not a binding “past practice” that can be considered a contractual term.

The grievant met all contractual eligibility requirements to receive a Sick Leave Buy Out under **Article VI, Section 9** of the collective bargaining agreement. Hence, the grievance should be upheld.

SUMMARY OF EMPLOYER’S POSITION:

The Employer contends that the January 25, 2013 e-mail sent by Mr. Gregorich to Superintendent Varichak was inadequate to serve as a written notice of intent to separate. The January 25, 2013 e-mail says: “ I [Mr. Gregorich] plan to retire the last day effective December 2013.” The grievant did not say that he was going to retire, only that that he planned to retire in December of 2013. The e-mail also discussed two alternative options that Mr. Gregorich was considering. One alternative was a summer of 2013 retirement, if the district “ buys [him] out”. The other alternative was a summer of 2014 retirement, if he was given classes that he wanted to teach. The e-mail included three (3) potential retirement dates. The

correspondence does not qualify as a written notice of intent to separate, because Mr. Gregorich did not know whether or not he was going to retire. He just outlined alternatives he would consider and what he wanted to explore and/or negotiate. He did not give notice of intent to separate.

The e-mail that Mr. Gregorich sent to Superintendent Varichak was not something the School Board could act upon. None of the possible retirement dates were definite and one of them was more than a year in the future. Without a definite retirement date the School Board could not plan its' budget nor could it begin recruiting a new teacher to fill Mr. Gregorich's position.

The School District asserts accepting the January 25, 2013 e-mail as sufficient notice of intent to separate means that any teacher could express his/her intent to separate ten (10), fifteen (15) or twenty (20) years down the road and not be required to give additional notice, even if the date changed three months later. Allowing **Article VI, Section 9** to be interpreted so broadly would lead to an absurd result and undermine the intent of **Article VI, Section 9**.

Article VI, Section 9 of the 2011-2013 collective bargaining agreement requires that notification of intent to separate be written. The School District asserts that a notice in "letterform" rather than an e-mail is required under the contract.

The evidence establishes that Mr. Gregorich did not decide to retire, until May of 2013. He filled out a supply request form for the upcoming 2013-2014 school year. Normally, a retiring teacher will reserve the classroom budget for the replacement teacher. When Mr. Gregorich completed his supply requisition on April 30, 2013 he clearly did not intend to retire. The January 25, 2013 e-mail to

Superintendent Varichak was merely a summary of their conversation, not a notice of intent to retire. The sudden and unexpected written letter of intent to retire on May 20, 2013 can be attributed to discipline imposed on Mr. Gregorich in May of 2013 or Mr. Gregorich's "incipient anxiety issues." Finally, Mr. Gregorich did not designate in advance "the selected 403b/annuity account" as required by **Article VI, Section 9** of the collective bargaining agreement. Since Mr. Gregorich did not decide to retire until May of 2013, the e-mail he sent on January 25, 2013 does not constitute a notice of intent to separate.

Mr. Gregorich's May 20, 2013 letter of resignation said he was resigning effective at the end of the school year, which was May 30, 2013. While Mr. Gregorich received benefits through the end of the summer of 2013, the school year ended on May 30, 2013.

In the May 2013 letter of resignation Mr. Gregorich reserved the right to rescind his resignation if he did not "receive all retirement benefits he was eligible for under the Master Agreement". Mr. Gregorich never indicated that he wanted to rescind his resignation because his Sick Leave Buy Out was being denied. Moreover, the 2011-2013 collective bargaining agreement does not make the denial of Sick Leave Buy Out a basis for a teacher to rescind his/her resignation.

By looking to the "past practice" of the School District it is clear that a notice in "letterform" including a specific date of separation is the method accepted by the parties by which eligibility for Sick Leave Buy Out is determined. Since 1998 thirty nine (39) teachers other than Mr. Gregorich have retired from the School District. Thirty eight (38) retirees received Sick Leave Buy Out. The one teacher, other than

Mr. Gregorich, who did not receive Sick Leave Buy Out was ineligible, because his written notice of intent to separate was not within sixty (60) days of his retirement date. There is a well established and binding past practice that requires a teacher to submit a notice of separation in letter form with a specific date of separation included in the notice in order to be eligible for Sick Leave Buy Out under **Article VI, Section 9** of the collective bargaining agreement.

The grievance should be denied.

OPINION:

The parties incorporated into the 2011-2013 collective bargaining agreement the “BMS Grievance Procedure” by reference and appended the procedure to the agreement. As part of the agreed upon grievance procedure, the parties limit the arbitrator’s authority saying: *“The arbitrator shall not have the power to add, to subtract from, or to modify in any way the terms of the existing contract.”* Hence, it is important that the evaluation of this grievance begin with the plain language of the contract. Only if a term is vague or ambiguous may the arbitrator look beyond the four corners of the agreement entered in to by the parties. In this case the contract language is clear and unambiguous.

Article VI, Section 9 says: *“ In order to be eligible for the Sick Leave Buy Out, a teacher must notify the District in writing of her/his intent to separate 60 days prior to the date of separation.”* The elements necessary to be eligible for Sick Leave Buy Out are “notice in writing” of the teacher’s “intent” to separate and the written notice of intent to separate must be given sixty “(60) days prior to the date of separation.”

There is no requirement in the collective bargaining agreement that the notice be

written in a letter, on paper or in “letter form”. There is no requirement that the notice of intent to separate must include a date specific for separation nor does the contractual requirement state that the notice of intent to separate must be made contemporaneously with or be part of a letter of resignation. Finally, the notice provision in the collective bargaining agreement does not say that the notice must be a notice upon which the School Board can take action.

The parties agree that the purpose of the sixty (60) day notice of intent to separate is twofold. First, the School District needs to budget for the Sick Leave Buy Out. Second, the School District also needs to have an opportunity to recruit someone to teach the subjects that were taught by the retiring teacher. The notice given by Mr. Gregorich gave the School District more than ample time to review its’ budget and plan a search for a math and science teacher. It was noted at hearing that the School District was able to fill a teaching position for the fall of 2013. There is no evidence that the School District is or was unable to incorporate the Sick Leave Buy Out in its’ budget.

The e-mail transmission sent to Superintendent Varichak by Mr. Gregorich on January 25, 2013 was written. The writing notified Superintendent Varichak that the grievant intended to retire. At the time the notice was given, Mr. Gregorich planned to leave in December of 2013. He also acknowledged that a departure at the end of the calendar year might make it difficult for the School District to replace a teacher licensed in math and science. Therefore, he explained that he was open to two other retirement options. One of the options was a retirement in the summer of 2013, which is when Mr. Gregorich actually separated from the School District. The

notice did not give a specific retirement date but it met the minimum requirements of notice established at **Article VI, Section 9** of the collective bargaining agreement. It was written, it informed the School District that Mr. Gregorich intended to retire and it was submitted to the School District through the Superintendent more than sixty (60) days prior to any of the grievant's anticipated separation dates.

Mr. Gregorich's notice to Superintendent Varichak included the statement: "*I also want to acknowledge part of our conversation, where you stated I need to give a 60 day written notice prior to retirement.*" In the context of a written notice, wherein Mr. Gregorich specifically requested a copy acknowledging receipt of the e-mail correspondence and wherein Mr. Gregorich said "I plan to retire..." The statement is strong evidence that Mr. Gregorich intended that his e-mail notice be in conformance with the requirements of **Article VI, Section 9** and he believed he was complying with the sixty (60) day notice needed to claim his Sick Leave Buy Out. No alternative interpretation of the statement was offered at hearing.

The grievance was denied by the School District because Mr. Gregorich did not submit his resignation in "letterform" specifying a date of separation sixty (60) days prior to his actual date of separation. The collective bargaining agreement does not grant the arbitrator the authority to change the contract language and add additional eligibility requirements. The contract only requires "written notice" of "intent" to separate sixty (60) days prior to separation and Mr. Gregorich met the minimum requirements. Hence, the grievance should be upheld and the School District must be directed to pay Mr. Gregorich's earned Sick Leave Buy Out, in the manner prescribed in the collective bargaining agreement.

AWARD:

- I. The grievant, Dale Gregorich, gave notice of his intent to retire from his teaching position with Chisholm Independent School District #695 that was sufficient to meet the sixty (60) day eligibility requirement found at Article VI, Section 9 of the 2011-2013 collective bargaining agreement.***
- II. The grievance is hereby upheld.***
- III. The School District is directed to pay the Sick Leave Buy Out earned by Dale Gregorich in the manner prescribed under the collective bargaining agreement.***
- IV. In the event that the parties experience difficulty in implementing this award, the arbitrator shall retain jurisdiction of this remedy for a period of 120 days from the date of the award.***

Dated: July 21, 2014



James A. Lundberg, Arbitrator