

**STATE OF MINNESOTA**  
**BUREAU OF MEDIATION SERVICES**  
**IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN**

DULUTH ISD #709, DULUTH, MINNESOTA,

EMPLOYER,

-and-

N.C. FIREMEN & OILERS, LOCAL 956,

UNION.

ARBITRATOR'S AWARD  
 BMS Case NO. 14-PA-1159  
 GRIEVANCE ARBITRATION

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ARBITRATOR:	Rolland C. Toenges
DATE OF GRIEVANCE:	January 8, 2014
DATE ARBITRATOR NOTIFIED OF SELECTION:	April 14, 2014
DATE OF HEARING:	September 16, 2014
DATE OF POST HEARING BRIEFS:	October 15, 2014
DATE OF AWARD:	October 20, 2014

**ADVOCATES**

**FOR THE EMPLOYER:**

Trevor S. Helmers, Attorney  
 Rupp, Anderson, Squires & Waldspurger, P.A.  
 527 Marquette Avenue, Suite 1200  
 Minneapolis, MN 55402

**FOR THE UNION:**

Mike Wood, General Chairman  
 National Conf. of Firemen & Oilers  
 188 Haley Lane  
 Walton, KY 41094

**WITNESSES****FOR THE EMPLOYER:**

Kelly Leider, Property & Park Manager  
 Ken Willms, Transportation Manager  
 Harrison Dudley, Human Resources Manager  
 Bill Hanson, CFO/Ex. Dir. of Business Services

**FOR THE UNION:**

Joe Killian, NCFO #956  
 James Guzzo, NCFO #956  
 Gary Vezina, NCFO #956  
 Sam Michelizzi, Pres. #956

**ALSO PRESENT**

Tim Sworsky, Human Resources Manager, Duluth ISD #709  
 Phil Finkelstein, Observer

**ISSUE IN DISPUTE**

**I. Is this dispute arbitrable?**

**II. If so, did the District individually bargain with the Grievant and provide him additional benefits outside the Collective Bargaining Agreement (CBA) by agreeing to pay him for snow days when it placed him back into his School Bus Driver II position, effective September 16, 2013, and then violate that agreement by failing to pay the Grievant for snow days that occurred on January 6 and 7, 2014.**

**JURISDICTION**

The instant matter came on for hearing pursuant to the Grievance Procedure in the Collective Bargaining Agreement between the Parties (CBA). Relevant provisions of said Grievance Procedure are as follows:

**“ARTICLE 4, GRIEVANCE PROCEDURE:”**

**“Section I – Purpose** The purpose of this procedure is to provide a method whereby employees who are members of the appropriate bargaining unit may present their grievances concerning the interpretation or application of the terms of this Agreement. Grievances concerning the interpretation or application of Civil Service rules shall first be brought to the attention of the

Director of Business Services or his/her designee of the School District and then directed to the Civil Service Board for consideration.”

“Section 2 – Definitions

- A. A “grievance” is an action instituted under this Article by an aggrieved employee of the Union in the belief that there has been a violation, misapplication or misinterpretation of the terms of this Agreement by the School District, School Board, its employees, agents or contractors.
- B. The aggrieved employee is an employee within the bargaining unit as defined by PELRA who has been directly affected by an alleged violation, misapplication, or misinterpretation of the terms of this Agreement.
- C. The term “days” when used in the grievance procedure shall refer to calendar days, except that when the last day for doing any act under this grievance procedure falls on a Saturday, Sunday or such holidays as provided in this Agreement, the next calendar day which is not a Saturday, Sunday or such holiday shall be the last day for doing that which is required or is to be done under the terms of this procedure”

Section 4 – Procedures

Step 1: The aggrieved employee shall present his/her grievance orally to his/her supervisor of Maintenance and Construction, Building Operations, or Transportation, within five (5) days of the time the aggrieved employee knew or should have known of the act, event, or default of the School District, the School Board its employees, agents, or contractors, which is alleged to be a grievance.

The supervisor shall, within three (3) business days, inform the aggrieved employee and the Director of Business Services or designee of the decision on the grievance.

Step 2: In the event that such grievance is not adjusted or agreed upon to the aggrieved employee’s satisfaction, then within fifteen (15) calendar days from the Step 2 decision, the aggrieved employee shall file the grievance in writing with the Director of Business Services or designee of the School District. The written grievance shall state the nature and date of the violation to the best of the aggrieved employee’s knowledge, the Articles of this Agreement alleged to have been violated, misapplied, or misinterpreted, and the relief or action sought by the aggrieved employee.

The Director of Business Services or the School District designee shall immediately set a hearing date within five (5) days of filing and notify the Union and aggrieved employee.

A decision in writing by the Director of Business Services or the School District designee shall be rendered within five (5) days of the hearing and

communicated to the aggrieved employee, the Union and the Superintendent of Schools. Appeal from this decision shall be taken by the aggrieved employee with five (5) days of the communication of the decision to him/her.

Step 3: In the event the aggrieved employee is not satisfied with the decision at Step 2, or at the option of the Superintendent of Schools, the Superintendent or his/her designee shall set a hearing within five (5) days of the filing of the appeal with him/her by the aggrieved employee, or with five (5) days of communication to him/her (Superintendent or his/her designee) of the decision at Step 2, and shall so notify the aggrieved employee and the Union.

The Superintendent or his/her designee shall then proceed to such hearing and notify the aggrieved employee and the Union of his/her decision in writing within ten (10) days of the hearing.

#### Section 5 – Arbitration

- A. The Union, through its appropriate officers, may appeal within (30) days of the communication of the written decision at Step 3. Such appeal shall be in writing and filed with the Superintendent of Schools.
- B. The Superintendent of Schools and the Union shall immediately make written request to the Director of the Bureau of Mediation Services for a list of five (5) arbitrators appointed pursuant to Minnesota Statutes, Section 179A.21.
- C. Upon receipt of such list, and within five (5) days thereafter, the Union and School District shall alternatively strike four (4) names from such list, the first strike to be determined by the flip of a coin, unless the school District and Union can agree on the use of one of the arbitrators from the list. The remaining arbitrator shall be immediately notified of such selection and shall proceed to hearing of the grievance and decision within thirty (30) days of selection. The written decision shall state the facts and Articles of the Agreement on which the decision relies, shall include the conclusions and the relief to be given, if any, and shall be final and binding on the Union and School District.
- D. The arbitrator shall first proceed to the question of arbitrability of the grievance if such issue is raised by the school District, and shall then proceed to hearing of the evidence and testimony on the grievance.
- E. The Arbitrator shall not have authority to amend, alter or in any way change the terms of this Agreement or to make any decision which requires the commission of an act prohibited by law or which is violative of the terms of this Agreement, nor shall he/she have authority to determine whether any of the provisions of this Agreement are unlawful so as to invoke the provisions of Articles 32 and 33 of this Agreement.

- F. The Union and School District may present any evidence or testimony or raise any issues before the arbitrator whether or not presented or raised at any prior step of this procedure.
- G. Either the School District or the Union may request that a verbatim report of the hearing before the arbitrator be taken.
- H. The School District and the Union shall share equally in the expenses and cost of the arbitration, including the taking of a verbatim report, but each of them (the School District and Union) shall pay the costs of their own witnesses, the presentation of their own evidence before the arbitrator, and of any copies of a written transcript of the proceeding it shall request from the arbitrator.
- I. The arbitrator shall permit oral arguments if requested by one of the parties and shall determine whether written briefs may be filed and the time therefore.
- J. The arbitrator shall serve his or her decision by mailing it by certified mail to the representatives of the parties or, if none, to the party. For purposes of Minnesota Statute 572.15 (a), the arbitrator's decision shall be considered delivered when it is received, as evidenced by the certified mail receipt, by the representative of each party or, if none, by the party.

#### Section 6 – Miscellaneous Provisions

- B. The time limits specified herein may be waived or extended by mutual agreement of the parties, and notice to the Union after Step 1 if not a party, but such waiver or extension shall be in writing and signed by the parties following the time of decision at Step 2.
- C. Failure of the appropriate hearing officer to render a decision with the time permitted herein shall be considered a denial of the grievance and permit the aggrieved employee or the Union as the procedure may provide to appeal to the next step within the time limits set, but this shall not apply to the decision of the arbitrator.
- E. Failure at any step of this grievance procedure to initiate or appeal a grievance within the time limits provided herein shall constitute a waiver of the grievance. Where the aggrieved employee has not appealed a decision at Step 1 for whatever reason, the School District shall not be bound by the decision at Step 1 in the case of other grievances on the same or similar issues by other employees in the same employee, or the Union.
- F. In the case of an event, act or default which is of a continuing nature, the employee and Union shall waive their rights to any relief for any period if grievance has not been filed within the time limits specified within this grievance procedure.
- I. Any decision, which is mailed, shall be presumed to be communicated within three (3) days of mailing, properly addressed, and the filing or service of any appeal shall be considered timely if mailed and bearing a dated postmark of the United States mail within the time period specified in this procedure.

The Parties selected Rolland C. Toenges to arbitrate the issues in dispute and bring resolution to the disputed matter.

Arbitration of the instant matter is being conducted in accordance with the provisions of the Minnesota Public Employment Labor Relations Act, as amended, 179A.01 – 179A.30 (PELRA) and The Minnesota Uniform Arbitration Act, 572B.

A hearing on the issues at impasse was conducted on September 16, 2014 in the offices of Duluth ISD 709, Duluth, Minnesota. The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matters at impasse. Witnesses were sworn under oath and subject to direct and cross-examination. The Parties jointly submitted a voluminous binder in evidence, containing documentation concerning the disputed matters. .

There was no request for a stenographic record of the hearing. The Parties agreed to submit Post Hearing Briefs on or before October 15, 2014.

### **BACKGROUND**

Duluth Independent School District #709 (Employer) provides public education to elementary, middle and high school students in multiple locations throughout the City of Duluth. The Student population numbers some 8,0000. The School District operates a student transportation system and employs bus drivers. It is in the transportation system where the instant dispute arises. The grievant is employed by the School District as a School Bus Driver II and has worked for the School District for some 17 years.

National Conference of Firemen and Oilers, Local 956 (Union) is the certified representative of all maintenance and operations employees of the School District, which includes bus drivers. The Employer and Union are Parties to a Collective

Bargaining Agreement, which provides terms and conditions of employment and a procedure for resolution of disputes.

The instant dispute arises based on the Grievant's belief that he is entitled to be paid for certain days [snow days] when his bus was not in operation and his services were not needed. Due to misapplication of the CBA in a promotion the Grievant had been given he was demoted back to his former position of School Bus Driver II. The Employer and Union executed a Memorandum of Agreement (MOA) setting forth the conditions to apply upon the Grievant's return to School Bus Driver II. It is the interpretation of the conditions set forth in this MOA that gives rise to the instant dispute

The Employer position is that the matter at issue is not arbitrable, being both procedurally and substantively deficient. Therefore, the Arbitrator will first address the issue of arbitrability before considering the dispute on its merits.

#### **JOINT EXHIBITS**

1. Collective Bargaining Agreement
2. Step II Grievance
3. Step II Grievance Response
4. Step III Grievance
5. Step III Grievance Response
6. Request for Arbitration
7. July 17, 2013 Letter to Mr. Killian
8. July 25, 2013 Letter to Mr. Killian
9. Adjustment of Grievance placing Mr. Killian in previous position dated August 21, 2013.

10. September 13, 2013, Email to Mr. Killian
11. September 18, 2013 Letter to Mr. Killian
12. Executed Memorandum of Agreement regarding Mr. Killian
13. Time sheets for Mr. Killian

### **ISSUE OF ARBITRABILITY**

#### **EMPLOYER POSITION:**

- The MOA at issue is not subject to the CBA Grievance Procedure
- The right to grieve under the MOA was waived by agreement
- The Employer did not agree in the MOA to provide benefits outside the CBA
- Article 4, Section 2, A only allows grieving those terms set forth in the CBA
- Only an alleged violation of terms set forth in the CBA can be grieved
- The grievance was not filed timely, as required by CBA, Article 4, Section 4
- The event giving rise to the grievance occurred on December 3, 4 and 5, but the grievance was not filed until January, well beyond five days after the Grievant knew or should have known of the alleged violation.

#### **UNION POSITION:**

- The MOA provides that the Grievant retains his seniority and right to work eight (8) hour days.
- The Grievant went back to School Bus Driver II with the understanding he would work eight (8) hours per day and would not have to take vacation.

- There is a history of time limits for filing grievances having been waived by both Parties.

### **DISCUSSION – ARBITRABILITY**

#### **PROCEDURAL DEFICIENCY - TIMELINESS:**

The threshold issue is whether the grievance was filed timely, as set forth in the CBA. To be filed timely, the grievance is to be presented orally to supervision within five (5) days of the time the aggrieved employee knew, or should have known of the event-giving rise to the grievance.<sup>1</sup> The record shows that the event(s) giving rise to the grievance occurred on December 3, 4, 5 in 2013 and again on January 6 and 7 in 2014.<sup>2</sup>

The first written record of the grievance is dated January 8, 2014, when filed at Step 2 by Union Representative James Guzzo.<sup>3</sup> Witness testimony<sup>4</sup> is that the Grievant contacted Union representative Guzzo, who first filed the grievance orally with Ken Willms, Transportation Manager. Guzzo's testimony was that Williams said he did not think it constituted a legitimate grievance. The Employer denied the grievance at Step 1<sup>5</sup> and Guzzo then filed the grievance in writing at Step 2.<sup>6</sup> Thereafter the grievance progressed through the CBA Grievance Procedure, with the Employer denying it at each successive Step.

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<sup>1</sup> Exhibit #1, Article 4. Section 4, Step 1.

<sup>2</sup> Exhibit #13 and Employer Statement of Issues.

<sup>3</sup> Exhibit #2.

<sup>4</sup> Testimony of Witnesses Joe Killian and James Guzzo.

<sup>5</sup> Exhibit #4, pg. 2, para. 6.

<sup>6</sup> Exhibit #2, .

The record is void regarding the date that Guzzo filed the grievance orally with Willms. It is noted that the first occurrence of the event(s) giving rise to the grievance was in the payroll period ending December 7, 2013.<sup>7</sup> The CBA, Article 5, Section 1, Provides as follows:

Article 5, Section 1 – Pay Periods, A, Wages shall be paid bi-weekly two (2) weeks behind pay schedule.

This would place the date the Grievant received payment for the payroll period ending December 7, on or about December 20, 2013. Absent evidence to the contrary, this would have been the first occasion that the Grievant would have known, or should have known, that he did not receive regular pay for the days at issue.<sup>8</sup> Five (5) days later would be December 25. December 25, being a holiday moves the end date for filing the Grievance to December 26.<sup>9</sup> The record shows that the Grievant was not working from December 23 through January 1, 2014, this period being holiday break when the school was not in session. As noted earlier, the record is void on when the Step 1 grievance was presented orally to Willms, or when the Employer denied it at Step 1. It would be fair to assume that the first occasion that the grievance could have been presented was when school resumed on January 2 and Willms was present to receive it. Assuming this was the case, and the Employer denied the grievance in accordance with the CBA,<sup>10</sup> the appeal to Step 2 on January 8, 2014 was well within the appeal period set forth in the CBA.<sup>11</sup>

Several Union Witnesses, including those who hold official positions in the Union, testified that timelines for processing grievances have routinely been extended, as it

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<sup>7</sup> Exhibit #13.

<sup>8</sup> The record is void on whether payroll might have notified the Grievant of his need to use vacation on the days at issue, or charged vacation for these days without consulting the Grievant.

<sup>9</sup> Exhibit #1, Article 4, Section 2, C.

<sup>10</sup> Exhibit #1, Article 4, Section 4, Step 1.

<sup>11</sup> Exhibit #1, Article 4, Section 4, Step 2.

is hard to get a response in a timely manner and both sides have been fairly generous on time lines. Although no single example was cited, the assertion has some credibility due to their extensive experience in Union affairs with the Employer (17, 21, 26 and 29 years respectively).<sup>12</sup>

### **FINDING & AWARD – TIMELINESS**

**The preponderance of evidence suggests that filing of the Step 1 Grievance was in compliance with the intent of terms and conditions set forth in the CBA, therefore timely.**

### **ARBITRABILITY – SUBSTANTIVE ISSUES:**

The Employer argues that the Grievance is not arbitrable for two reasons:

1. The MOA at issue is independent of the CBA and therefore may not be grieved under terms and conditions of the CBA.
2. The Memorandum of Agreement includes a grievance waiver prohibiting a grievance being filed under its terms and conditions.

To understand the nature of the MOA requires inquiry into how it come about. In letters to the Grievant dated July 17 and July 25, 2013, the Grievant was notified that he was being promoted from School Bus Driver II to Receiving and Distribution Clerk effective July 22, 2013. The Receiving and Distribution Clerk position was described as permanent at 40 hours per week (1.0 FTE)/ 52 weeks per year at \$18.21 per hour (pay group 11, Step 3). The Grievant's pay rate prior to the promotion was \$14.79 per hour.

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<sup>12</sup> Witnesses Joe Killian -17 years; James Guzzo – 21 years; Gary Vezina – 26 years; Sam Michelizzi – 29 years;

Thereafter, the Union filed a grievance on behalf of another promotional applicant (Bill Feick) claiming a violation of CBA, Article 22, Section 1, Part C, past practice. The relief requested was to void promotion of the Grievant and follow the cited CBA provisions.<sup>13</sup> A second step hearing was held on August 7, 2013. On August 21, 2013 the Employer issued a response to the grievance asserting the right to select highly qualified applicants, but expressed its desire to settle the grievance, provided it would be non-precedent setting. The Employer's offer to settle was conditioned on a binding agreement from the Union and its members that the settlement would not be grieved or would any legal recourse be sought to reverse action, or claim any damages.

The adjustment called for in the settlement was to rescind the promotion of Grievant, to be effective upon the Employer's receipt of the Union and Grievant's binding agreement to the action. The Grievant was to receive pay at the promotional rate during the time he performed the promotional position, but would not receive seniority credit in the promotional position.

On September 18, 2013 the Grievant was sent a letter from the Employer informing him of his demotion back to Bus Driver II effective September 16, 2013. He was informed that this would be a permanent position at 40 hours per week (1.0 FTE)/ 38 weeks per year at \$14.79 per hour (Pay Group 2, Step 3).<sup>14</sup>

On September 23, 2013 a Memorandum of Agreement (MOA) was executed between the Employer and Union setting forth the conditions applicable to the grievance settlement. The conditions set forth in the MOA included reference to the matter being non-precedent setting and the demotion of the Grievant from Receiving and Distribution Clerk to Bus Driver II. The MOA provided that the Grievant would retain his seniority as a Bus Driver II and work eight (8) hours per day through the

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<sup>13</sup> Exhibit #9.

<sup>14</sup> Exhibit #11.

end of the 2013-2014 school year, or until he is assigned a route commensurate with his seniority, which ever comes first. The MOA further provided that the settlement offer was contingent upon the Union and Grievant accepting this as a binding agreement, and the action will not be grieved nor will the affected unit member or a unit representative on behalf of its member seek any other legal recourse to reverse the Employer action or claim any damages relating to this purposed action.<sup>15</sup>

The above referenced MOA represents settlement of a grievance that had its origin and foundation in terms and conditions of the CBA.<sup>16</sup> The MOA is inherently a part of this grievance settlement, being directly related to the provisions of the CBA grieved (Article 22, Section 1, Part C). The relevance of the MOA with this grievance is clearly reflected in the Subject/Title of the MOA: "Application, Qualifications, Interview Process and Selection for Position of Receiving and Distribution Clerk (HOCH) "A review of the CBA reveals a number of MOA are included, particularly one addressing subject matter similar to the instant matter at issue (demotions).

#### **FIINDING AND AWARD – SUBSTANTIVE ARBITRABILITY**

**The MOA at issue is grievable under the CBA Grievance Procedure, subject to any agreed upon waiver of rights set forth in the MOA.**

**The action addressed in the MOA is directly associated with "an action instituted under this Article [4] by an aggrieved employee of the Union in the belief that there has been a violation, misapplication or misinterpretation of the terms of this Agreement by the School District, its employees, agents or contractors."<sup>17</sup>**

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<sup>15</sup> Exhibit #12.

<sup>16</sup> Exhibit #9.

<sup>17</sup> CBA, Article 4, Section 2, A.

### **DISCUSSION ON MERITS**

As far as the Grievant is concerned, he can be considered a victim of circumstances. He was selected for promotion to Receiving and Distribution Clerk because he was obviously, in the judgment of the Employer, the best qualified of five applicants for the job. The promotion had significant advantages over his previous position of School Bus Driver II. The Receiving and Distribution Clerk was a permanent position at 40 hours per week, 52 weeks per year.<sup>18</sup> A Bus Driver II is employed when school is in session and needed. Hours of work may vary in accordance with the needs of the Employer and benefits are prorated based on hours worked.<sup>19</sup> Further the hourly wage rate for Receiving and Distribution Clerk was \$18.21, a 23% increase over his rate as Bus Driver II.

The Grievant worked in the Receiving and Distribution Clerk position from July 22, 2013 until September 16, 2013 when he was demoted to his previous position of Bus Driver II<sup>20</sup>. The Grievant was demoted as a result of a settlement between the Employer and Union granting the promotion to another employee who was among the top four applicants for the Receiving and Distribution Clerk opening.<sup>21</sup> The Grievant was informed in a letter to him dated September 18, 2013 that he would hold his permanent position as a Bus Driver II at 40 hours per week (1.0 FTE)/ 38 weeks per year at \$14.79 per hour (Pay Group 2, Step 3).

A MOA was executed on September 23, 2013, subject, "Application, Qualifications, Interview Process and Selection for Position of Receiving and Distribution Clerk, HOCH." It was addressed to the Grievant, Sam Michelizzi, President, Local 956 and

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<sup>18</sup> Exhibit #8.

<sup>19</sup> Exhibit #1, Article 31.

<sup>20</sup> Exhibit #11.

<sup>21</sup> Exhibit #9.

Ken Willms, Transportation Manager. Harrison Dudley, Human Resources Manager is listed as the sender. The MOA is signed by Ken Willms, Transportation Manager and Sam Michelizzi, President, Local 956. The MOA contains the following provisions:

“The District desires to settle this prior to a possible grievance by what must be agreed as a non-precedent setting action; that action being the District will revoke its offering of the position of Receiving and Distribution Clerk to Joseph Killian [Grievant] and return him to his former position of Bus Driver II, in the Transportation Department. Mr. Killian will retain his seniority as a Bus Driver and; work 8 hours per day through the end of the 2013-14 school year or until he is assigned a route commensurate with his seniority, which ever comes first. This offer is contingent upon the Unit and the affected Unit member (Joseph Killian) accepting this as a binding agreement, and that this action will not be grieved nor will the affected unit member or a unit representative on behalf of its member seek any other legal recourse to reverse this District action or claim any damages relating to this proposed action.”<sup>22</sup> [Emphasis Added]

A fair interpretation of the above MOA language is that the Employer and Union agreed that, as far as the demotion of the Grievant and promotion of another employee to his Receiving and Distribution Clerk position was concerned, this matter was settled and neither party or employee affected would challenge it further. What is at issue in the instant case however is not a challenge to the demotion or promotion, but an interpretation of the phrase, “Mr. Killian . . . will work 8 hours per day through the end of the 2013-14 school year. . .” It is noted that Harrison Dudley, in a letter to the Grievant on September 18, 2013, referenced his demotion to Bus Driver II as a “permanent position at 40 hours per week (1.0 FTE) /38 weeks per year at \$14.79 pr hour.” The record does not provide any explanation why the reference was to 40 hours per week in the letter of September 18, 2013 and eight (8) hours per day in the MOA, executed a few days later.

The Grievant has 17 years of service with the Employer and ranks seventh highest in Seniority. At the time of his demotion, the bidding for 2013-14 bus routes had

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<sup>22</sup> Exhibit #12.

already been completed and the Employer believed that the results should not be disturbed for the 2013-14 school year. Therefore the Grievant would not be allowed to exercise his seniority to bid a route and would be assigned as needed. In the interest of making the Grievant whole upon his return to Bus Driver II, he was to retain his seniority and “work eight (8) hours per day through the end of the 2013-14 school year, or until he is assigned a route commensurate with his seniority, whichever comes first.”<sup>23</sup>

Although the testimony was to the effect that the Grievant was to be made whole upon his demotion this was not the case, if comparing to Receiving and Distribution Clerk. The Receiving and Distribution Clerk was a permanent full time 40 hour per week position, 52 weeks per year, while Bus Driver II was on as needed basis for 38 weeks per year. In addition to the lower wage rate for Bus Driver II, the Grievant was not allowed to bid a route that would provide him a choice of working time and conditions until after the 2013-14 school year.

The merits of the instant case rest on what was meant by “work 8 hours per day through the end of the 2013-14 school year or until he is assigned a route commensurate with his seniority, which ever comes first.” While the Employer interprets this phrase as only referencing a 40-hour schedule, the Grievant interprets it as guarantee that he will be paid 8 hours every day of the 40 hour work week, notwithstanding any interruption due to bad weather.

The Grievant’s time sheets are in evidence from September 29, 2013 through January 4, 2014. A review of these time sheets shows the Grievant being paid less than eight (8) hours on the following dates:

September 30, October 2, 7, 8, 11, 15, 21, 23; November 6, 15, 20, 22;  
December 6. (The hours shown on these dates range from 6.25 to 7.75 hours).

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<sup>23</sup> Exhibit #11.

Even though the Grievant was paid less than eight (8) hours on some working days, he was paid 40 hours or more in all weeks due to overtime earnings. In the week of December 1 through 7 the Grievant did not work on December 3, 4 and 5 due to bad weather and was charged vacation in order to receive 40 hours pay for that week. This situation occurred again in the week of January 5 through 11, when the Grievant was charged two days vacation (January 6 & 7). The fact that the Grievant was not paid for eight (8) hours of work on all work-days, but did receive a full 40 hours pay per week, gives credence to the Employer assertion that "8 hours per day," was meant to be in reference to a 40 hour per week schedule. A variation in hours paid is consistent with the CBA, Article 31, Section 2, B, 3, "Hours of work may vary in accordance with the needs of the Transportation Department as determined by the administration."

Testimony was to the effect that some Bus Drivers did work on one or more of the bad weather days the Grievant did not work and was charged vacation to receive 40 hours of pay for the week. The Bus Drivers that worked cleaned snow off buses and moved them so snow could be cleared from the area. The Bus Drivers that worked had signed up for such work, which was the basis for their being called in to work. An Employer witness<sup>24</sup> testified that the Grievant had not signed up for such work. There is nothing in the record regarding whether the Grievant had chosen not to sign up or had been demoted after the sign up had already taken place.

### **FINDING ON MERITS**

The Grievant has not grieved numerous instances where he did not receive a full eight hours of pay as can be observed in Exhibit #13.

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<sup>24</sup> Employer Witness, Ken Willms.

The record shows that some thirteen (13) instances occurred where the Grievant did not receive a full eight (8) hours of pay each working day. However, the Grievant received at least 40 hours of total pay each week, when overtime, holiday benefits and voluntary leave benefits were included.<sup>25</sup>

A fair reading of the MOA at issue, together with the testimony of witnesses, is that the Grievant was to be entitled to all the conditions and benefits of a Bus Driver II, including an eight (8) hour per day, 40 hour per week work schedule, subject to the provisions of CBA, Article 31. The purpose of the MOA was to make the Grievant whole by providing him with a work schedule equivalent to what he would have had if he had bid a 2013-14 route based on his seniority.

The record shows that Bus Driver II is not paid for bad weather (non-working) days, when not needed at work. If the Grievant were to be paid for not working on bad weather days, it would be inconsistent with what he would have received if his promotion/demotion had not taken place, and inconsistent with Article 31 of the CBA and pay policy applicable to all other School Bus Driver II employees.

The record shows that the Grievant might have been able to work on the bad weather days at issue, but did not sign up for such work

As noted earlier, the Grievant, due to no fault of his own, is a victim of circumstances where a misapplication of promotional procedures has resulted in not only losing the promotion, but also leaving him without the ability to exercise his seniority rights to bid a bus route of his choosing. It is understandable that the Grievant feels entitled to special consideration for bad weather days, but the record does not support his assertion.

#### **AWARD ON MERITS**

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<sup>25</sup> Exhibit #13.

**The grievance is denied.**

**The MOA does not guarantee the Grievant 8 hours of regular pay on days he is not at work and not needed.**

**CONCLUSION**

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this day of 20<sup>th</sup> day of October 2014 at Edina, Minnesota.

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ROLLAND C. TOENGES, ARBITRATOR