

# IN THE MATTER OF THE GRIEVANCE ARBITRATION BETWEEN

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Education Minnesota -  
Lake Park Audubon, Minnesota

## DECISION AND AWARD OF ARBITRATOR

-and-

**BMS Case No. 15-PA-0051**

ISD No. 2889, Lake Park –  
Audubon Public Schools

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## APPEARANCES

### FOR THE UNION:

Meg Luger Nikolai, Attorney for Education  
Minnesota  
Patty Klatt, Grievant  
Coral Lunde, Grievant  
Mark Richardson, Education Minnesota  
Rochelle Becker, Lake Park Audubon  
Education Association President

### FOR THE DISTRICT:

Kristi A. Hastings, Attorney for District  
Dale Hogie, District Superintendent

## PRELIMINARY STATEMENT

The hearing was held on January 7, 2016, at Lake Park Audubon High School, Lake Park, Minnesota. The parties presented oral and documentary evidence at that time and submitted post-hearing briefs on January 21, 2016, at which point the record was closed.

## **CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement for 2013-2015. Article XIV provides for binding arbitration of disputes, subject to the limitations of arbitration decisions as provided by PELRA. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

## **STATEMENT OF THE ISSUE**

Whether the District violated Article VI, Section 5 of the contract when it failed to grant lane advancement to Coral Lunde and Patty Klatt. If so, what is the remedy?

## **RELEVANT CONTRACTUAL PROVISIONS**

Article VI, Section 5. Placement on Salary Schedule: The following rules shall be applicable in determining placement of a teacher on the appropriate salary schedule:

Subd. 1. Germane: Credits to be considered for application on any lane of the salary schedule must be germane to the teaching assignment as determined by the School District. Additional credits considered germane include courses that increase a teacher's knowledge of their content area, or enhance a teacher's instructional or classroom management skills, or courses required by the Board of Teaching for relicensure, or are a course requirement of an approved advanced degree program, or work to meet District goals.

Subd. 2. Grades and Credits: To apply on the salary schedule, all graduate credits and undergraduate credits beyond the Bachelor's Degree must carry a grade equivalent of B or higher. Undergraduate credits beyond a Bachelor's Degree that provide benefit to the District are acceptable provided the superintendent and teacher agree to a written plan of study prior to enrollment in the program or courses. A "pass" or a "pass/fail" course will be accepted if a letter-grade option is not available.

Subd. 4. Credit Approval: All credits to be considered for application on the salary schedule must be pre-approved by the Superintendent. Approval (or disapproval) of these credits shall be done in writing on the

form included as part of this Agreement as Appendix V within 15 days of the superintendent's receiving the form from the teacher. Any course that is part of an approved advanced degree program or approved by the School District will be accepted for lane change.

If the Superintendent disapproves an application, he will convene within 25 school days of the initial request, a committee consisting of two Lake Park Audubon teacher representatives selected by the Lake Park Audubon Education Association, the Superintendent, and the building Principal. The committee will consider the application and either approve, disapprove, or come to a split decision. The building Principal will notify the teacher of the committee's decision.

The committee's decision to approve or disapprove is final. If the committee arrives at a split decision, the teacher may seek remedy through the Grievance Procedure of this Agreement in Article XIV.

Subd. 5. Effective Date (Lane Change): Teachers may move from one lane to another at the beginning of the fall or spring semesters. Requests for a fall lane change may be made through September 15<sup>th</sup>. Requests for a spring lane change may be made through February 1<sup>st</sup>. Credit must have been earned prior to the September 15<sup>th</sup> or February 1<sup>st</sup> request deadline. Adjustments on the salary schedule will take place the first pay period after the official notification from the granting institution has been received by the Superintendent and approved by the School Board at the next scheduled regular meeting. Requests submitted after September 15<sup>th</sup> or February 1<sup>st</sup> will result in a delay of the lane change until the next September 15<sup>th</sup> or February 1<sup>st</sup> payday.

(District Exh. 1).

## **FACTS AND BACKGROUND**

Grievant Coral Lunde has been employed by the District since 1981. She has worked as a coach, a substitute and a full-time teacher. Since 1995, she has taught Health. Grievant Patty Klatt has been teaching in the District since 2003, teaching high school and college Math.

On November 24, 2014, Grievant Lunde applied for prior approval for five courses at NDSU to achieve a lane change. The request was approved by Superintendent Dale Hogie on November 26.

Grievant Klatt submitted six courses for approval on December 18, 2014. The Superintendent approved the application on the following day.

The Superintendent testified that the subjects chosen were germane to the courses taught. Each application stated that each course would earn 2 graduate credits at NDSU and that the coursework would be completed in May 2015.

On December 18, Grievant Klatt emailed to the Superintendent the following:

I would like to get more credit for my lane change, and I need approval of the list before I enroll. Could you approve the list today, so that I can get going on these and start over the break? The deadline to get into the class is approaching fast, and Coral took most of these classes so I figured they would be okay. I have attached the approval form, and I will put two copies in your box.

(Union Exh. 1).

Having completed the courses with A grades, on January 8, 2015, each Grievant submitted a request for a salary schedule change. On the same date, the Superintendent sent the Grievants a note requesting a copy of the official transcript which he received on January 13<sup>th</sup>. The Superintendent testified that he was surprised by the speed of the requests for salary change. Accordingly on January 9, 2015, he sent the following memorandum to faculty members:

...

A current faculty member submitted to me a Prior Approval Request Form for 10 graduate semester hours through NDSU. The request was submitted on December 18, 2014 and approved on December 19, 2014. The date listed for completion was May 2015. On January 8, 2015, the staff member submitted a Request for Salary Schedule Lane Change with an Unofficial Transcript from NDSU with 10 semester credits listed.

I thought it was highly improbable to earn 10 semester credits in less than 18 days.

Today I called the NDSU Distance and Continuing Education department. I became aware through the conversation with a staff member that credits

through NDSU may be issued as (1) graduate credit, (2) undergraduate credit, or (3) professional development credit. According to the NDSU staff member I spoke to, professional development credits cannot be counted toward a graduate or undergraduate program of study. In addition the rigor for professional development courses and the time expectation for completion is less than the standards for graduate or undergraduate credits. Credits earned by the LPA staff member and through NDSU Distance Learning and Continuing Education are classified as 'professional development'.

Due to the recent information I have obtained from the NDSU representative, I will not approve requests for courses offered through NDSU Distance and Continuing Education. Requests for other on-line opportunities will not be approved without university assurance that the classes are acceptable within a graduate or undergraduate program of study.

(District Exh. 5, p. 54).

On January 14, the Grievants sent the following message to the Superintendent:

Mr. Hogie:

After receiving your letter January 13<sup>th</sup>, there are some items I want to articulate. When you submerge yourself in a class for sixteen + hours per day, you can achieve a lot. The rigor of the class was substantial, and the topics were relevant to my teaching experience. While you may not understand how one can complete the class so quickly, the flexibility of the program allow[ed] for me to work on the class at my discretion. The classes included reading books, articles, videos and writing five to six papers per class. Spending 16+ hours per day, for weekends and the entire holiday break along, with before and after school time is a considerable amount of time spent on these classes.

(District Exh. 6, p. 59).

Subsequently the Superintendent obtained the academic credit definition from NDSU and that bulletin provided in pertinent part the following:

In accordance with federal guidelines, academic credit hours are determined by the amount of work represented in intended learning outcomes and verified by evidence of student achievement.

The NDSU established equivalency for courses bearing academic credit reasonably approximates and is not less than:

- (1) one hour (50 minutes) of classroom or direct faculty instruction and a minimum of two hours of out of class student work each week for approximately 15 weeks for one semester or the equivalent amount of work over a different amount of time.

(District Exh. 6A).

Based on this memo, the Superintendent made a calculation which demonstrated that three classes per week plus six hours of study a week would be a total of nine hours per week. Over a fifteen week period, it would be a total of 135 hours. His calculation was that 135 hours divided by three equals 45 hours credit. The Superintendent also noted that academic credit for undergraduates was 15 times three or 45 for one credit hour and professional development hour equivalency would have been 15 hours equal to one credit. (District Exh. 6a).

On January 26, the Grievants and Local Union Representative Mark Richardson requested meetings on the subject of the credits they took at NDSU. His response on the same day was:

I had requested evidence of official registration dates and copies of the work submitted for each class. Are they intending to provide the requested items?

The syllabus for each class would also be beneficial for me. I cannot get access to a syllabus unless I register or contact the instructor directly and make a request.

The Master Agreement states 'If the superintendent disapproves an application he will convene within 25 days of the original request, a committee consisting . . .' Are they proposing extending the 25 day window?

(District Exh. 7).

On February 25, a grievance was filed. The grievance was unresolved and submitted to this Arbitrator on October 6, 2015.

### **UNION ARGUMENT**

- Plain Language. The Union argues that the plain language of the contract provides that any course that is a part of an approved advanced degree program or approved by the school district will be accepted for lane change. (Emphasis added). Accordingly, the Superintendent's pre-approval required the District to accept the lane change.
- Reliance upon the Superintendent's approval led to expenditures and time commitments by the Grievants which would not have been made but for that reliance.
- The District's current negotiations for the 2015-17 contract are acknowledgement by the District that under the present contract, the Superintendent's position is not supported, that denial of the credits received for the coursework and the language proposed by the District in these negotiations demonstrates that they have admitted to wrongly deciding the Grievants' applications.
- The language of the present contract (2013-15) dropped the language of the previous contract which provided as follows:

Subd. 2 Grades and Credits: To apply on the salary schedule all credits beyond the Bachelors Degree must be graduate or undergraduate credits and carry a grade equivalent of B or higher; or be certified by the college or university as being acceptable toward an approved advanced degree. . . (Emphasis added).

(Union Exh. 21).

- The Union also argued that the NDSU communication of May 19, 2015 stated that:

the purpose of this memorandum is to verify that the courses you registered for and successfully completed during fall semester 2014, are designed specifically for post-baccalaureate professional development purposes to help educators stay current in their fields, meet their communication needs, and achieve their salary advancement goals. A bachelor's degree is a prerequisite for registration.

(Un. Exh. 7).

The Superintendent acknowledged that he might have received this communication from the Union but stated that his decision had not changed.

- Past Practice. The Union argues that a past practice existed to grant credit for professional development courses. Grievant Lunde testified that she had three short courses in 2006, 2008 and 2009 from Professor Walsh, the same professor who taught the Grievants at NDSU. She testified that these courses were taken over the course of three 8-hour days with an hour long lunch each day. The final project took the form of a group presentation and there were no other papers required. Superintendent Hogie pre-approved each of those classes as well as a fourth class for one credit. (Union Exh. 8). In addition the record reflects that the District had approved similar credits to those at the hearing on many other occasions. (District Exh. 11C, pp. 112-114). In fact, District Exh. 11C shows 92 examples, spanning 21 years, of courses that the District believed were professional development graduate credits. Finally, the Union argues that apart from the instant grievance, there had been no other evidence of past professional development credits being denied.

## **SCHOOL DISTRICT ARGUMENT**

- The District stresses that much to the Superintendent's surprise both Grievants completed the courses long before the May 2015 date which was originally placed on their pre-approval application. He immediately raised a question of how that could have been done in such a short period of time. Because of his disbelief that a course of graduate work could be completed in the time taken by the Grievants, the Superintendent contacted the NDSU Distance and Continuing Education office and learned the following:
  1. The courses taken by the Grievants were categorized as 600 level courses;
  2. NDSU credits may be issued either as graduate, undergraduate or professional development credits;
  3. 600 level courses at NDSU are professional development classes, not graduate or undergraduate classes;
  4. the courses cost far less than graduate or undergraduate courses; 600 level courses cost about one-third as much as graduate or undergraduate courses;
  5. 600 level classes do not count toward a graduate or undergraduate program of study;
  6. Professional development classes require only 15 hours of work per credit -- about one-third the effort it takes for graduate courses which require 45 hours of work per credit.
  
- The Superintendent acknowledged that he might have received the Course Descriptions from Grievant Lunde (Union Exh. 9) which specifically refer to an academic level of K-12 professional development for the pertinent coursework. However, he testified that neither the professional development designation nor the coursework listing at an Education 600 level would lead him to believe the coursework was not graduate credit coursework. (See, Union Exh. 9).

- The District argues and the Superintendent testified that had the Grievants not finished their work so quickly he never would have had reason to dig deeper into the nomenclature of “EDUC 600 courses”. The District therefore argues that the Grievants had an obligation to inform the Superintendent and that they should have been aware that they were not consistent with graduate/undergraduate credits. Their failure to do so misled the Superintendent. Therefore the Superintendent, on January 13 advised that the work was not acceptable for lane changes as set forth in District Exh. 5.
- The District also argues that the Union position that graduate level courses should be treated the same as courses which receive graduate credit is without merit. The District argues that the term “graduate level” is not in the union contract, and that the Superintendent had not been told that this work was graduate level and that none of the materials that referred to graduate level were submitted to the Superintendent at the time of the pre-approval request. The District points out that Union Exhibits 3-6, which describe the Distance and Continuing Education courses for independent study at NDSU were not submitted to the Superintendent at the time of pre-approval but were shown to the District for the first time on the day of the arbitration hearing. In any event, the District asserts, the course descriptions contain no information relevant to a resolution of this dispute.
- The District also points to the CBA at pages 33 and 34 both sections of which were part of the contract since 2003 and never changed. On page 33 of the contract is a prior approval request form which includes approval by the

Superintendent, the number of graduate credits expected for the coursework and the justification for the work. All of this was executed in this case. Page 34, Appendix VI is a request for salary schedule lane change which includes a statement of what work was accomplished and what credits were achieved. The form includes a disposition of the request by the Superintendent, which designates whether the lane change request is granted or denied. The District argues that the specificity of page 34 of the CBA permitting a review of the courses taken before approval of lane change clearly is a negotiated position granting the Superintendent the right to review the coursework once it has been completed and approve or disapprove the lane change.

- The District argues that since the courses taken by the Grievants turned out not to be graduate courses and that the union contract limited courses applicable to lane change to only graduate and undergraduate coursework. The Superintendent was justified in believing that he could revoke his prior approval as the courses were not part of an approved degree program.
- Negotiations for the 2015-2017 Contract. The District vigorously objects to the admission of notes from negotiations now ongoing for the 2015-2017 contract. The District argues that negotiations should be a safe place for parties to openly and honestly talk about contract language instead of it being used as playing “gotcha” as done in this case by the Union.
- The School District argues that if a past practice had existed at the District prior to 2013, it had been severed in the negotiations of the 2013-2015 contract. The language of the CBA of 2011-2013 Sec. 5, Subd. 2 provided that all credits

beyond the Bachelor's Degree must be graduate or undergraduate credits or be certified by the college or the university as being acceptable toward an approved advanced degree". (Union Exh. 21). In the 2013-2015 CBA, the language was changed to provide that "undergraduate credits beyond a bachelor degree that provide benefit to the District are acceptable provided the superintendent and teacher agree to a written plan of study prior to enrollment in the program or courses." (District Exh. 1, p. 9).

- Professor Walsh's testimony, the Employer argued, was not persuasive for the Union in that he plainly acknowledged that the courses were not graduate or undergraduate courses and in fact he never taught either graduate or undergraduate courses at NDSU.
- Finally, the District refers to several arbitration awards with particular reliance upon the arbitration of *East Grand Forks Education Assn and ISD No. 595 (East Grand Forks)*, BMS Case No. 05-PA-1093 (Gallagher, 2006), which denied lane change for courses that did not earn undergraduate or graduate credit.

### **ANALYSIS AND AWARD**

As to the Union's argument that there had been a binding past practice in this matter, the concept relies upon a showing of mutual consent, clarity, and consistency over an extended period of time. I find that those elements are absent in this dispute and therefore hold that there is no past practice binding upon the parties.

The *East Grand Forks* case relied upon by the District is inapposite. As stated by the District, the CBA in that dispute did have a requirement that only credit accepted for

a degree would be accepted for a lane change. However, the critical language in the instant case, in Sec. 5, Subd. 4, “. . . or approved by the School District will be accepted for lane change” was not present in the CBA in the *East Grand Forks* case. (*East Grand Forks*, p.9).

With respect to the current bargaining for the 2015-2017 contract, the Union has offered evidence to support their argument that the notes from that bargaining reflect an admission on the part of the District that the language of the present contract does not in fact exclude the courses at issue in this dispute. Bargaining history is customarily admitted when necessary to clarify the language of the contract resulting from those negotiations. The notes from the current bargaining, however, do not reflect bargaining history since the bargaining for the new contract is still in progress and the history has not yet been written. Moreover, in the course of negotiations it is common for a party to push for clarity on language which it had previously deemed clear on its face. That push to clarification does not carry with it an admission that the party's past interpretation was incorrect. The District's objection to the admission of Union Exhibits 10-20 is sustained.

Although the past leading up to this dispute should not replace the plain language of the contract, it does illuminate the parties' positions. The District claims that the Grievants had an obligation to disclose to the Superintendent the fact that the courses did not earn graduate credits, and their failure to do so misled the Superintendent and induced him to grant pre-approval. This claim ignores the past cases in which Grievant Lunde had been granted approval for professional development courses and also ignores the unrebutted testimony of both Grievants that

they were unaware of the difference between graduate level courses and those which earned credits for a graduate degree. For its part, the Union claims that the Superintendent misled them by granting approval after he had been presented with evidence that a course designated as 600 was in fact a professional development designation, not for college credits. This claim ignores the unrebutted testimony of the Superintendent that the designation as a 600 course did not alert him that the course was a professional development course. The Superintendent's testimony was credible and conforms with his contemporaneous memos.

The Arbitrator, therefore, is not presented with a question of credibility on the part of either party, but rather with an analysis of the contractual language. Given the specific facts of this dispute, the issue to be resolved is the apparent conflict between two provisions of the collective bargaining agreement. The first provision, as noted above, appears in Article VI, Sec. 5, Subd. 4 stating that "any course that is a part of an approved advanced degree program or approved by the School District will be accepted for a lane change." The plain language of this provision mandates the lane change approval.

The conflicting provision appears in Appendix VI of the CBA entitled, "Request for Salary Schedule Lane Change" which includes a section for "disposition of request" which clearly provides a sign off by the Superintendent to grant or deny the request.

Based on the facts of this dispute and the reasoning which follows this Arbitrator finds that the mandate of Article VI, Sec. 5, Subd 4 prevails.

As to the Superintendent's understandable concern that the Grievants completed the courses so quickly, there is ample evidence supporting the Grievants'

claims. Certainly, the urgency of proceeding quickly was clearly stated by Grievant Klatt in her pre-approval correspondence to the Superintendent in which she stated:

Mr. Hogie:

I would like to get more credits for my lane change, and I need approval of the list before I enroll. Could you approve the list today, so that I can get going on these and start over the break? The deadline to get into the class is approaching fast, and Coral took most of these classes, so I figured they would be okay. I have attached the approval form, and I will put 2 copies in your box.

Also, I have a couple of old classes that I took before I came to LPA. Is there a chance that I would get them if approved, or am I wasting my time finding them and getting documentation? Just checking.

Thank you for your attention.

(Union Exh. 1).

At the Superintendent's request, Klatt provided him with course descriptions from NDSU on the courses she intended to undertake. The objectives were set forth for the following courses: Teaching in the 21<sup>st</sup> Century Classroom; Learning Differences in Boys and Girls; Internet Content for the Classroom; Understanding Autism; and Learning Outside the Lines. In each course description was noted:

Instruction mode: correspondence  
Academic Level: K12 Professional Development  
NDSU Credit: \$280

(Union Exh. 9).

The Superintendent has acknowledged that the courses are germane and that he mistakenly did not know either the credit fee or the fact that the courses were listed as professional development courses. As stated above, this Arbitrator finds that these were honest mistakes. That finding however also supports the finding that the

Grievants reasonably acted in reliance upon that pre-approval to undertake the effort to work throughout the holiday season to achieve the lane change provided by the contract.

The time and effort to complete the courses and the motivation to do so in time for the salary increases to take effect was convincingly testified to by the Grievants and reflected in their letter to the Superintendent dated January 16 (District Exh 6, p. 59). Their testimony was unrebutted. Moreover, Professor Walsh confirmed that his experience with Lunde and other teachers demonstrated the ability to master the course material in short periods of well focused work.

In his letter to LPA faculty dated January 9, 2015, the Superintendent concluded that:

Due to the recent information I have obtained from the NDSU representative, I will not approve requests for courses offered through NDSU Distance and Continuing Education. Requests for other online opportunities will not be approved without university assurance that the classes are acceptable within a graduate or undergraduate program of study.

(District Exh. 5, p. 54).

By this directive the Superintendent made clear that the power invested in him by Article VI, Sec. 5, Subd. 4 to approve courses not part of an approved advanced degree program would not be exercised to approve professional development courses. In the instant case, the facts are that the Superintendent approved those courses taken by the Grievants. It is beyond the authority of this Arbitrator to impose the January 9 decision retroactively to deny Grievants the previously approved courses. The mandate of Article VI Sec. 5, Subd 4 prevails in this instance. No evidence was offered

that Appendix VI had been used at any time in the past to deny pre-approved coursework. However, there is abundant evidence of the importance that the District and the employees have placed on the pre-approval process.

In this matter, the Superintendent has stated that the courses complied with the rule of germaneness. A reading of the course syllabus confirms that judgment. (Union Exhs. 3-6). The grades of A are also unrebutted.

The District's position that the language in the 2013-15 contract was changed is unpersuasive given that the mandate of Subd. 4 has been retained.

I conclude that the reason given for the denial is far outweighed by the facts of this case and the clear language of Subd. 4.

**AWARD:** Grievance is sustained. The district is ordered to honor its pre-approval of the Grievants' credits at issue in this matter. The pre-approval shall be made retroactive to February 1, 2015, the date upon which Grievants should have received a wage increase. The Grievants' salary increases shall reflect their lane and step advancement.

The Arbitrator retains jurisdiction for 90 days to resolve any implementation questions which may arise.

s/George Latimer

Dated: February 20, 2016

George Latimer, Arbitrator