

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

EDUCATION MINNESOTA

Re: Pay for Extra Assignment

-and-

B.M.S. No. 07-PA-492

INDEPENDENT SCHOOL DIST. 2687
HOWARD LAKE, MINNESOTA

Before: Jay C. Fogelberg
Neutral Arbitrator

Representation-

For the Union: Anne Krisnik, Staff Attorney

For the District: Patrick Flynn, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article XI, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. A formal complaint was submitted by the Union on behalf of the Grievants on September 5, 2006, and eventually appealed to binding arbitration approximately one month later, when the parties were unable to resolve the matter to their mutual satisfaction during discussions

at the intermittent steps. The undersigned was then selected as the Neutral Arbitrator to hear evidence and render a decision from a panel provided to the parties by the Minnesota Bureau of Mediation Services. Subsequently, a hearing was convened in Howard Lake on May 31, 2007. There, the parties were afforded the opportunity to present position statements, testimony and supportive documentation. At the conclusion of the proceedings, each side indicated they would submit written summary statements. They were received on June 29, 2007, at which time the hearing was deemed officially closed. The parties have stipulated that all matters in dispute are properly before the Arbitrator for resolution based upon their merits, and that the following fairly represents a description of the issue to be considered.

The Issue-

Did the Employer violate applicable terms of the parties' Collective Bargaining Agreement when it failed to compensate five middle school teachers with "overload pay" for a sixth class assignment during the 2006-07 school year? If so, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The adduced evidence indicates that the Grievants are all instructors in the Howard Lake/Waverly/Winsted School District (hereafter "District", "Employer" or "Administration"). As such, they are members of the collective bargaining unit represented by Education Minnesota ("Union") who, together with the Administration, has negotiated and executed a labor agreement (Joint Ex. 1) covering terms and conditions of employment for the instructional staff of I.S.D. 2687.

Prior to school year 2004-05, the District operated two basic instructional programs: elementary, which was kindergarten through sixth grade, and secondary, which consisted of seventh grade through high school. Those who taught sixth grade or higher, operated under a 5-1-1 schedule, which called for five periods of instruction, one period of supervision, and one period of preparation, "...during which they will not be assigned to any other duties" (Article VII, Section 4).

In 2004-05, the School Board established a third program, "Middle School" which was comprised of grades six, seven and eight. This configuration continues in effect to date, and retains the same 5-1-1 schedule.

In school year 2006-07, five middle school teachers were involuntarily assigned a sixth class but were not paid any additional monies for the extra

assignment. Believing that this violated both the terms of the Master Contract, and the Memorandum of Understanding dated May 8, 2006, the Union filed a formal complaint on September 5th of last year on behalf of the five instructors, alleging that each of them was entitled to be paid the additional amount of \$2,000 per the terms of Article VIII, Section 5, *infra*. Thereafter, the matter was considered at each of the intermittent steps of the contractual grievance procedure, and eventually appealed to binding arbitration when the parties were unable to resolve their dispute.

Relevant Contract & Memorandum of Understanding Provisions-

From the Master Agreement:

Article VII
Teacher Hours & Teaching Load Policy

* * *

Section 3. All teachers will have a duty free, free from pupil supervision, lunch period, as close as reasonably possible to 30 minutes, which will be included in the basic day. For high school teachers, a full time teaching load shall be defined as five periods of student instruction plus one period of supervision (i.e. study hall, noon supervision) and one prep period.

* * *

From the 2005 Memorandum of Understanding:

* * *

During the term of this MOU, the current CBA language in Article VIII, Section 5 will be replaced with the following:

Section 5. ASSIGNED SIXTH CLASS: Every effort will be made not to have a sixth class assigned in the high school. A sixth class is defined as an instructional period beyond the full-time teaching load as defined in Article VII, Section 3. If emergencies necessitate such an assignment, the teacher will be paid \$2,000 for a full year assignment or a prorated amount for that portion of the year during which the sixth class was taught.

Teachers shall have the option to decline such an assignment unless no licensed teacher in a given field wishes the assignment. In such case, the principal shall have the right of involuntary assignment only under one or more of the following emergency conditions:

- No teacher will be involuntarily assigned a sixth class if a currently-employed, properly licensed teacher is available and indicates he/she wishes to have an extra class. Sixth class assignments will be offered to any part-time teacher before they are offered to full-time teachers.
- If the District needs to assign three or more sixth classes in a licensure area, it will hire a part-time teacher, rather than make sixth class assignments to existing staff.
- When making sixth class assignments, the District will be mindful of the preparation load for each course and will attempt to minimize the number of different preparations assigned to teachers with a sixth class assignment.

First year teachers will not be assigned to teach six classes.

Positions of the Parties-

The **UNION** takes the position in this matter that the District violated Article VII, Section 3, and Article VIII, Section 5 of the parties' Master

Agreement when it failed to compensate each of the Grievants for teaching the additional sixth hour during the 2006-07 school year. In support, the teachers' representative contends that since the establishment of the middle school in the District, the Administration honored the applicable language in the parties' Agreement for two years, and did not assign a sixth class period to any instructor for grades 6 – 8 without paying them the additional stipend. However, for the 2006-07 school year, each of the five Grievants was informed that they were considered Junior High School instructors and therefore ineligible under the terms of Article VIII, Section 5 as their assignments were not part of the high school division. This, in spite of the unrefuted fact that the District ran the middle school program just as they operated the high school's. Further, the master schedules published in the past by the District, along with other similar documents, clearly demonstrate that teachers assigned to grades 6-8 have always been lumped together with the high school. Moreover, the Union argues that the sixth class assignment created a hardship for the Grievants in terms of the preparation time, and the time they were able to give their students individual attention. For all these reasons then, they ask that the complaint be sustained and that the Grievants be compensated for the additional class assignment for the 2006-07 school year.

Conversely, the **DISTRICT** takes the position that there has been no violation of the parties' Labor Agreement when it assigned the sixth hour class to the Grievants for the previous school year. In support, the Employer maintains that up to three years ago there was only elementary, junior high and senior high within the District's educational structure. Indeed, the extra curricular schedule (Schedule "C") routinely appended to the Master Contract, designated "Junior High Coaches" for a variety of sports. The Junior and Senior High were housed in the same building, separate from the elementary schools, and there was a common understanding within the community that they were lumped together. Further, they note that during discussions over a similar grievance approximately one year ago that led to a settlement and a Memorandum of Understanding replacing the language in Article VII, Section 5 of the Contract, this issue was addressed. At that time, the Union attempted to insert specific language in the Memorandum that would have allowed Middle School teachers to be eligible for the sixth class assignment pay. That proposal however, was rejected and the Union cannot now be allowed to obtain the same benefit through the grievance process. For all these reasons then, they ask that the complaint be dismissed in its entirety.

Analysis of the Evidence-

As the grieving party, the initial burden of proof rests with the Union to demonstrate via a preponderance of the evidence that the District's refusal to compensate the Grievants constituted a violation of the terms of the Memorandum of Understanding (which by agreement of the parties, replaced Article VIII, Section 5 of the current Master Contract). Following a careful review of the testimony and supportive documentation introduced into the record, as well as the summary arguments submitted, I have determined that the Union has met their obligation.

The record establishes a number of salient facts that bear directly upon the outcome of this dispute. More particularly, the evidence shows:

- That for approximately twenty years, the District's educational format consisted of elementary schools for students in grades K-6, and a single high school for grades 7-12.
- That nowhere in the parties' Collective Bargaining Agreement is there any reference to the term "Senior High School."
- That the language in Article VII, *supra*, regarding teaching loads for high school instructors, has been included in the Contract for a significant number of years, and defines the teaching day typically to be five periods of student instruction plus one period of supervision and one prep period.
- That the Schedule C ("Extra Curricular Schedule") found in the Master Agreement makes reference to approximately one-hundred assignments where the term "Jr. High" is used.

- That the testimony of a number of witnesses, as well as high school yearbooks, class schedules, listings of home room advisors, and staff meeting agendas (Union's Exs. 1-4) demonstrate that prior to the establishment of the Middle School, the term "High School" included all secondary grades.¹
- That prior to the 2004-05 school year, the practice in the District was to compensate those teachers assigned to either junior or senior high students and given a sixth class, consistent with the terms of Article 8.5 in the Agreement. Teachers with assignments that combined junior and senior high grades, along with those that taught only grades 7 and 8, were given the overload pay as well (testimony of Superintendent Ladd).
- That the District established the Middle School in 2004, and for two years thereafter, continued to apply the overload pay language to those bargaining unit members considered to be secondary school teachers.
- That in terms of classroom schedule, educational focus, daily structure, etc., the Grievants – as middle school teachers - provide a secondary program of instruction to their students (testimony of Chad Gagnon, Jolene Davidson, and Pat Wesloh).
- That in a local newspaper column authored by the Superintendent in the fall of 2002, he specifically identified grades 7-12 as constituting the "high school" in the District (Union's Ex. 6).

This evidence, when considered collectively, demonstrates that the establishment of the Middle School by the District commencing with the 2004-05 school year, essentially replaced what was formerly considered the

¹ *Webster's Universal Unabridged Dictionary* defines the term "high school" to be: either of two schools, one (junior high school) corresponding to the upper grades or grade of the ordinary grammar school together with one or more years of the ordinary high school, and another (senior high school) corresponding to the remainder of the ordinary high school.

junior high grades in the District. Doing so, however, should not have altered the compensation for the sixth class assignment for those who taught at the secondary level last year, pursuant to the agreed upon language of the parties. I am satisfied the consistent practice has been that those assigned to teach at the secondary level in the District – at the junior high level prior to the change, or middle school level currently – are eligible. Whether they were considered a middle school or a high school teacher, they taught at the secondary level and consequently were entitled to the additional salary when their assignments were altered to include another instructional period that took them beyond the full-time teaching load defined in Article VII, Section 3.

In no small measure, the District has relied upon the settlement of a prior grievance involving the same article in the Collective Bargaining Agreement, and the Memorandum of Understanding that resulted. As the Administration points out, during the course of settlement discussions, the Union proposed the following opening sentence to the (new) Article VIII, Section 5: “Every effort will be made not to have a sixth class assigned in the high school, *or middle school*” (District’s Ex. 1; emphasis added). Their proposal however, did not make it into the final version of the settlement, and the Employer argues that the Union is now trying to gain through the

grievance and arbitration process, that which they were unsuccessful in obtaining during bargaining over this same issue previously. Moreover, they assert that to sustain this grievance, the arbitrator would be essentially rewriting the parties' agreement which is clearly beyond the scope of his authority.

It is, of course, a well-settled axiom within the labor relations process that a party to a collective bargaining agreement should not be allowed to gain through the arbitration process, that which it failed to secure in negotiations. *General Aniline & Film Corp.*, AAA Case No. 36-7; *Philadelphia Steel & Wire Corp.*, AAA Case No. 93-2. On more than one occasion, this arbitrator has applied this very principal when reaching a determination that a particular grievance cannot be sustained. Here, however, I find insufficient evidence to conclude that that is what has occurred. Rather, I find that the Union's proposal had more to do with clarification than anything else, and that absent the inclusion of the term, the language was susceptible to varying interpretations which ultimately became the subject of this dispute.

Under direct examination, the Union's Local President, Duane Lichy, offered the following testimony:

Union: "Did you believe that the (proposed) language was clarifying a rule that was already there, or that you were adding a new obligation to the District?"

Lichy: I think it was clarifying.

Q: Did the District agree to adding the language?

A: No.

Q: What made you agree to the Memorandum of Understanding then, without that language there?

A: At the time the Middle School teachers were only teaching five classes and it was closer to a middle school model, so it really wasn't significant then.

* * *

Q: Were you trying to add Middle School or clarify the language?

A: We were trying to clarify it."

Award-

Based upon the foregoing analysis, I conclude that the Union's grievance should be sustained. Accordingly, each of the Grievants are to be forthwith reimbursed in the amount of \$2,000 for having been involuntarily assigned a sixth class in the 2006-07 school year. No other relief is ordered at this time.

Respectfully submitted this 23rd day of July, 2007.

Jay C. Fogelberg, Neutral Arbitrator