

TIME REQUIRED TO RENDER AWARD: 60 DAYS

IN THE MATTER OF THE ARBITRATION BETWEEN

EDUCATION MINNESOTA,  
 INVER GROVE HEIGHTS,  
  
 Union,  
  
 and  
 INDEPENDENT SCHOOL DISTRICT  
 NO. 199 (INVER GROVE HEIGHTS),  
  
 Employer.

DECISION AND AWARD  
 OF  
 ARBITRATOR

APPEARANCES

For the Union:

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For the Employer:

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On September 26, 2006, in Inver Grove Heights, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by denying the application of the grievant, Barbara L. Malisow,

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for health insurance covering retirees. Post-hearing briefs were received by the arbitrator on October 16, 2006.

#### FACTS

The Employer operates the public schools in Inver Grove Heights, Minnesota. The Union is the collective bargaining representative of the Teachers who are employed in the Employer's schools.

On January 4, 2006, Tom Kirchner, Chairman of the Union's Grievance Committee, initiated the present grievance by sending the following memorandum to Deirdre Wells, the Employer's Superintendent of Schools:

On December 22, 2005, Tom Kirchner and Kathy Tonoli met with Dr. Wells regarding the status of a probable grievance regarding Barb Malisow and ISD 199. As suggested by Dr. Wells, Barb Malisow met with Joshua Alexander, her immediate supervisor on January 4, 2006. Barb Malisow, a member of Education Minnesota Inver Grove Heights was informed by Joshua Alexander that she will not qualify for the retirement incentive. The union believes that this denial is a violation of Article XIII, Section 10, Subd. 3 of the 2003-2005 Agreement. The Union contends that Ms. Malisow qualified for the Retirement incentive and should receive the insurance benefit upon retirement.

Although the grievance alleges violation of the 2003-05 labor agreement, the parties have used the text of their 2005-07 labor agreement (sometimes, "the current labor agreement") in their presentation of evidence and argument. Accordingly, the references I make below to the contract provisions at issue come from that agreement.

The title of Article XIII of the current labor agreement is "Retirement Incentive." In the labor agreements that preceded the parties' 1997-99 agreement, Article XIII established

the terms under which a Teacher could obtain early retirement; it did not provide a health insurance benefit for retired Teachers. In bargaining for the 1997-99 labor agreement, the parties agreed to provide what that agreement refers to as "Retiree Health Insurance," adding several subdivisions to Section 10 of Article XIII.

The first two subdivisions of Section 10 of the current labor agreement set a \$700,000 maximum on the Employer's obligation "under this article" for the two-year biennium, and the evidence indicates that a similar cap has been set by past labor agreements.

The language primarily at issue in this case appears in Subdivision 3, Paragraphs (a) and (b), of the labor agreement, first added to the parties' 1997-99 agreement. Paragraphs (c) and (d) also appeared first in the 1997-99 agreement, but the parties added Paragraph (b1) in the 1999-2001 agreement. (For ease of reference, I may hereafter refer to Article XIII, Section 10, Subdivision 3, as "Subdivision 3.") Subdivision 3, which, except for some re-lettering of the Paragraphs, has been substantially the same since thus added, is set out below:

Effective September 1, 1997 a teacher retiring pursuant to this section shall be eligible for single coverage only, Retiree Health Insurance, as defined in Article VIII - GROUP HEALTH INSURANCE, as provided below:

- a. Retiring teachers service Inver Grove Heights Community Schools must have been full time [sic].
- b. Retiring teacher must have reached the TRA Rule of Ninety (90) and retiring teacher must have twenty (20) continuous years of employment in the School District.

or

- b1. Retiring teacher must have twenty-five (25) continuous years of employment in the School District.
- c. Retiree Health Insurance benefits shall not be granted to a teacher whose employment is terminated under M.S. 122A.40.
- d. Payment made to the eligible teacher from Section 10 shall not exceed a period of seven (7) consecutive years. If a retiree obtains employment with an employer other than the School District and such retiree is covered by a health insurance plan or HMO, such coverage shall be considered primary.

Article III, Section 3, of the labor agreement defines

"full-time teacher," thus:

Full-time Teacher: The term "full-time teacher" shall mean a teacher whose contract specifies performance of service during the entire basic day as specified in Section 1, Article X, herein [eight hours including a thirty minute duty-free lunch period].

The grievant was hired by the Employer on August 31, 1970.

She is licensed to teach in several fields by the State of Minnesota and now teaches seventh grade classes in the Employer's Middle School. Though the grievant has taken several leaves of absence since 1970, she has taught actively for at least twenty-six years, and, in all of those years, she has been a full-time Teacher.

The grievant has had the following leaves of absence.

From February 16, 1979, till the start of the next school year in August of 1979, she was on approved medical leave -- termed "sick leave" in the labor agreement -- after she was injured in a traffic accident. From the start of the school year in August, 1983, till the start of the following school year in August, 1984, the grievant was on an approved "general leave for

medical reasons" during and after pregnancy and delivery. From January 16, 1986, till the start of the next school year in August, 1987, the grievant was on an approved family leave of absence. During the summer preceding the start of the school year in August of 1987, the grievant requested an "extended leave of absence," which was granted by the following letter to her dated August 4, 1987, from Kirby A. Lehman, Superintendent of Schools:

At a regular meeting of the Inver Grove Heights School Board conducted on August 3, 1987, you were approved for an extended leave of absence of three to five years from your position as secondary social studies teacher, pursuant to Minnesota Statute 125.60. Your leave is effective with the beginning of the 1987-88 school year. You will be eligible to return to a teaching position in District 199 at the beginning of the 1990-91 school year, providing you indicate your intention to return no later than February 1, 1990.

The grievant returned from this statutory "mobility leave" at the start of the 1991-92 school year, with the approval of the Employer. From February 19, 1994, till the end of the school year in June of 1994, the grievant was on an approved medical leave after she was injured in an accident.

#### DECISION

The Union makes the following primary argument. The grievant has met all of the eligibility requirements for Retiree Health Insurance, as established in Subdivision 3 -- first, that she has "reached the TRA Rule of Ninety," i.e., that she is eligible to retire under the criteria established by the Minnesota Teachers Retirement Act, second, that she has at least "twenty (20) continuous years of employment in the School

District," and third, that she has always been a full-time Teacher during the twenty-six years when she was actively teaching. As the Union reads the phrase, "continuous years of employment," the grievant meets the requirement of twenty such years because she has remained an employee of the school district during all of the thirty-five years since she was hired in 1970 -- even during the times she was on a leave of absence.

The Employer makes the following primary argument. It agrees that the grievant has "reached the TRA Rule of Ninety" and that all of her twenty-six years of active teaching have been full-time. The grievant, however, was not a full-time Teacher during the years she was on a leave of absence. The pre-requisite that appears in Subdivision 3(b) -- that she have "twenty (20) continuous years of employment in the School District" -- must be read in conjunction with the pre-requisite that appears in Subdivision 3(a) -- that her "service [in] Inver Grove Heights Community Schools must have been full time." Even if, as the Union argues, the grievant's leaves of absence did not interrupt her status as one who had continuous employment, the leaves did interrupt her status as a Teacher whose service was full-time. In addition, the meaning of "service" in Subdivision 3(a) appears to be the same as the meaning of "employment" in Subdivision 3(b). The grievant fails to qualify for the Retiree Health Insurance benefit because she has not had twenty continuous years of full-time employment.

Thus, the issue presented by the grievance is one of contract interpretation -- whether the leaves of absence the

grievant has taken since she was hired in 1970 cause her not to meet the requirements of Subdivision 3 -- that her service "must have been full-time" and that she have "twenty (20) continuous years of employment."

Though this issue requires interpretation of Subdivision 3, the parties' arguments make the following additional provisions of the labor agreement relevant to the dispute. The Union argues that the parties used the word "consecutive" in several places in the labor agreement, and in doing so, indicated an intention to attribute a different meaning to the word "continuous." Thus, the Union notes that Subdivision 3(d), which is set out above in full, uses the phrase, "shall not exceed a period of seven (7) consecutive years" to limit the number of years that a qualifying Teacher can receive the Retiree Health Insurance benefit. The Union argues that, by so using "consecutive" in Subdivision 3(d), the parties showed an intention that the seven years would occur one after another, without interruption, whereas, when they used the word "continuous" just above in Subdivision 3(b), they showed an intention that the twenty continuous years of employment need not be consecutive years of actual teaching, but could occur by continuing in an uninterrupted status of employment, notwithstanding the taking of leaves, and without twenty consecutive years of actual teaching.

Similarly, the Union notes that, in Article III, Section 4, Subd. 1, of the labor agreement, when describing the "status" of part-time Secondary Teachers, the parties stated that "these classes, duties and preparations shall be consecutive," thereby

showing again that they meant that the described work of such a part-time Teacher must occur without interruption.

Article VII, Section 5, Subd. 2, states that "a teacher achieving the National Board Certificate [and earning thereby a \$2,300 bonus] must agree in writing to remain with the School District for at least two (2) consecutive years of service after achieving the certificate." Similarly, Article IX, Section 5, Subd. 7, provides that a teacher who receives a sabbatical leave "must agree in writing to return to the School District for two consecutive years of service after completion of the sabbatical leave." The Union argues that these provisions make a distinction not only between the words "consecutive" and "continuous," but also between the words "service" and "employment." Thus, the Union argues that in these two instances -- when a Teacher receives a bonus for being awarded a National Board Certificate or receives a sabbatical leave -- the parties clearly showed by the use of the word "service" that the actual work of teaching would be required of such a still-active Teacher, whereas, in the provision at issue, by using the phrase "continuous years of employment," they meant to look back to the past career of the retiring Teacher to determine whether there were twenty continuous years during which the Teacher retained employment status, even though he or she may have been on an approved leave of absence during part of that time.

The Union also notes that the words "continuous" and "continuously" appear in other parts of the labor agreement, described below:

Article XV, Section 2, Subd. 4:

"Seniority" means a continuing contract qualified teacher commencing with the teacher's most recent first date of continuous actual service in the School District and shall exclude probationary teachers, and those teachers who are acting incumbents for teachers on authorized leave of absence.

Article XV, Section 5, Subd. 1:

Within thirty (30) student contact days of the beginning of the school year, the School District shall cause a seniority list (by name, date of commencement (hour and minute) of last period of continuous employment, license (including major/minor)), credited years of experience at time of hire, and contract entitlement to be prepared from its records. It shall thereupon post such list in an official place in each school house of the District.

Appendices A and B, which set forth the salary schedules for each year of the labor agreement's duration, establish five extra increments for Teachers who have many years of credited experience -- Longevity Increments A, B, C, D and E. The language that defines each of the five increments is the same except that it requires additional years of experience for each progressing increment. Below, set out as an example, is the language used to define Longevity Increment A:

Teachers with 17, 18, 19 or 20 years of experience credited by the District, the last ten of which have been continuously in District 199, shall be placed on the Longevity A step or shall have their salary increased by the appropriate amount depending on how they qualify for Longevity. Leaves of any kind are to be counted as continuous service, but not as a year.

The Union argues that, here, the parties used explicit language to state that leaves would not break the continuity of service required to qualify for a Longevity Increment, even though a Teacher on leave cannot earn a year of experience for advancement on the salary schedule.

Appendix C to the labor agreement establishes compensation for extra curricular assignments, such as coaching. It provides for increased compensation to Teachers who have performed in such assignments over many years, thus:

ECA Career Stipend 1 - Teachers with ten (10) to fourteen (14) continuous years, absent of any breaks, including leaves, in any extra curricular assignment shall have their individual extra curricular assignment compensation increased by 4% of the amount listed in Appendix C of the Agreement.

The Union notes that in this provision, the parties made explicit their intention that leaves of absence would affect the requirement of "continuous years" in an extra curricular assignment. The Union argues that the parties' clear expression here of the intention that leaves interrupt required continuity shows an intention that, elsewhere in the contract, where such a clear expression is left out, the parties intended that leaves would not interrupt continuity.

The Employer argues that the plain meaning of the language at issue requires the interpretation that leaves of absence interrupt "continuous years of employment." As the Employer reads the language, an employee must have been actively teaching for twenty years in succession to have twenty continuous years of employment.

The Employer cites the following definitions of words at issue, taken from Webster's New Universal Unabridged Dictionary, Second Edition:

Continuous. 1. Joined without intervening space; without cessation or interruption; unbroken; constant; connected. . . .

Employment. 1. The act of employing or the state of being employed. 2. Work; occupation; business; that at which one is employed; . . .

Service. 1. The occupation or condition of a servant. 2. Employment, especially public employment. . . . 6. Work done or duty performed for another . . . .

The Employer argues that, as thus defined, "service" and "employment" have the same meaning and that the full-time service required by Subdivision 3(a) should be carried over into the reading of Subdivision 3(b), so that twenty continuous years of full-time employment are required to qualify for Retiree Health Insurance.

The parties make several arguments about bargaining history and past administration of Subdivision 3, proposing thus to resolve ambiguity in its language. Charles N. Mahovlitch testified that he was the chief negotiator for the Union from 1981 till 2001. I summarize his testimony as follows. After trying to obtain Retiree Health Insurance for several years, the Union succeeded in gaining that benefit during bargaining for the 1997-99 labor agreement. It was the intention of the Union's bargaining team that leaves of absence would not interrupt "continuous years of employment," so that Retiree Health Insurance would be available as a career benefit after long service.

Bruce G. Rimstad, the Employer's Business Manager, testified that the Union drafted the language of Subdivision 3, that the parties had no discussion of the effect that leaves would have on the pre-requisites established by that provision except that they agreed that absence for maternity leave would not disqualify a Teacher. At an early bargaining meeting,

before the Union proposed its final draft of contract language, the Union outlined the "Criteria (restrictions)" for Retiree Health Insurance, thus:

1. employee single only coverage.
2. Rule of 90 to participate.
3. Full time teacher
4. 20 years of service in the district.
5. Joint union/district advisory board to administer the plan. To be determined between union and board.

The Union drafted the final 1997-99 version of Subdivision 3, which was substantially the same as it is in the current agreement with two exceptions. First, its paragraphs were later re-lettered, and second, as noted above, the 1999-2001 contract added an alternative to the Paragraph (b) pre-requisite -- "must have reached the TRA Rule of Ninety (90) and retiring teacher must have twenty (20) continuous years of employment" in the district. The new alternative to Paragraph (b), which now appears in Paragraph (b1) requires "twenty-five (25) years of continuous employment in the School District," but without the requirement of having "reached the TRA Rule of Ninety."

In November of 2004, as the parties were bargaining for the 2005-07 labor agreement, the Union proposed to change the wording of Paragraph (b) to require "twenty (20) aggregate years of employment" in the district, rather than "twenty (20) continuous years of employment." The proposal would have retained the requirement of having reached the TRA Rule of Ninety, still stated in Paragraph (b), and the requirement that the retiring teacher's service "must have been full-time," still stated in Paragraph (a). The Employer rejected the Union's proposal thus to amend Subdivision 3.

The evidence about past administration of Subdivision 3 shows that seventy Teachers have retired since the provision became effective in 1998. Of those, only five did not qualify for the Retiree Health Insurance benefit. Joy Grimsrud did not qualify because she had only fifteen total years of full-time service (with no part-time service). Susan Flesvig did not qualify because she had not reached the TRA Rule of Ninety when she retired and had only twenty-two years of full-time service. Cathy Montgomery did not qualify because twenty-three years of her total of twenty-six years of employment were part-time.

Gayle Dalseth retired in 2000 after reaching the TRA Rule of Ninety with twenty-eight years of total full-time service, but she had taken a sabbatical leave in 1981-82. Rimstad testified that he approved her application for Retiree Health Insurance, notwithstanding that her sabbatical leave occurred less than twenty years before her retirement. He testified that he was in error when he did so.

Janelle Embretson retired at the end of the 2005-06 school year, after having reached the TRA Rule of Ninety. She had twenty years of continuous employment without taking any leaves, but the first three years of her employment were as a part-time Teacher. When she applied for Retiree Health Insurance, her application was denied because she had only seventeen years of full-time employment. The Union grieved the denial during 2005, and the case went to hearing before Arbitrator Sharon Imes. Imes issued a decision and award on November 17, 2005, denying the grievance.

The parties disagree whether the Embretson decision should have any precedential effect in this case. The Union argues that the case is not relevant because the issue raised there did not require a determination of the effect that leaves of absence have on eligibility for Retiree Health Insurance -- that the case has limited relevance because it ruled only that three years of part-time service cannot be added to seventeen years of full-time service to fulfill the requirement of twenty continuous years of employment.

The Employer makes the following argument about the Embretson decision. Even though it did not decide the precise issue raised here about how leaves of absence affect eligibility under Subdivision 3, the decision was predicated on the same interpretation of Subdivision 3 that the Employer urges as determinative here -- that the requirement of Paragraph (a) that service "must have been full-time" applies to the requirement of Paragraph (b) to describe the "years of employment" that must be continuous for twenty years.

I resolve the parties' arguments as follows. First, I rule that past administration of Subdivision 3 is too sparse to imply a mutual interpretation of the provision. Only in the Dalseth example did a leave of absence interrupt what otherwise would have been twenty continuous years of full-time service. Though the Employer granted Dalseth's application for Retiree Health Insurance, that one example is insufficient to establish the conditions needed to establish a binding past practice, implied in repeated conduct mutually understood.

Second, I rule that the Union's attempt to amend Subdivision 3 during contract negotiations in 2004 -- by changing the requirement in Paragraph (b) from "continuous" years of employment to "aggregate" years of employment -- should not be interpreted as a concession that the Employer's reading of the language is correct. Rather, the attempted amendment may indicate that the Union thought the provision should be clarified.

Third, I rule that the evidence about bargaining history during negotiations for the 1997-99 labor agreement is not sufficient to show a mutual understanding of what Subdivision 3 would require to be eligible for the new benefit.

Fourth, I rule that the examples in other provisions of the labor agreement in which the parties used relevant words -- "continuous," "consecutive," "service" and "employment" -- do not give conclusive meaning to the language of Subdivision 3. As I describe below, the combined requirements of "full-time" service in Paragraph (a) and "continuous years of employment" in Paragraph (b) appear in Subdivision 3 and not in the other provisions cited by the parties.

I interpret Subdivision 3 as follows. If Paragraph (a) did not appear in the subdivision, I would interpret the Paragraph (b) requirement of twenty "continuous years of employment" to mean what the Union proposes -- that "employment" begins on the date of hire and continues thereafter, irrespective of leaves, until the status of employment is ended by discharge, by voluntary quitting or by retirement. Paragraph (a), however,

does appear in the subdivision, requiring that service "must have been full-time." I agree with the analysis made by Arbitrator Imes in the Embretson decision -- that the phrase, "must have been full-time," refers not to the time of an isolated event such as the time when the Teacher applies for the benefit, but to the continuous years of employment required in the next paragraph.

The circumstances at issue in Embretson were different, as the Union notes. The grievant there had three years of part-time service that she sought to use to meet the requirement of twenty continuous years of employment. It was easily apparent that Embretson's part-time service was not full-time service.

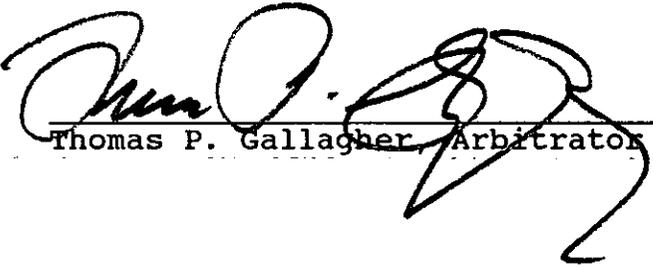
Here, however, an additional issue is presented -- whether a Teacher should be considered as providing full-time service during the time he or she is on leave. The definition of "full-time teacher," given in Article III, Section 3 -- "a teacher whose contract specifies performance of service during the entire basic day" of eight hours -- cannot include a Teacher whose contract allows the performance of no service during a period of leave.

I conclude, therefore, that, because the grievant did not provide full-time service during the years she was on leave, she has not met the requirements of Article XIII, Section 10, Subdivision 3, Paragraphs (a) and (b) -- that her service "must have been full-time" during twenty "continuous years of employment."

AWARD

The grievance is denied.

December 15, 2006



Thomas P. Gallagher, Arbitrator