

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

BARNUM INDEPENDENT SCHOOL
DISTRICT NO. 91,

EMPLOYER,

-and-

ARBITRATOR'S AWARD
BMS Case No. 06-PA-05
Grievance Arbitration

EDUCATION MINNESOTA –BARNUM

UNION.

Arbitrator	Rolland C. Toenges
Date Grievance Filed	May 19, 2005
Date Arbitrator Selected	September 20, 2005
Date and Place of Hearing	December 15, 2005 Barnum, Minnesota
Date Hearing Closed	March 9, 2006
Date of Award	April 7, 2006

ADVOCATES

FOR THE EMPLOYER

Joseph E. Flynn, Attorney
Knutson, Flynn & Deans, P.A.

FOR THE UNION

Anne F. Krisnik, Attorney
Education Minnesota

Greg Miller, Field Rep.
Education Minnesota

WITNESSES

David Bottem, Superintendent

Billie Jo Steen, President
Randy Myhre, Grievant
Lynn Kempf, Teacher

ISSUE

Did the Employer violate the Collective Bargaining Agreement when the Grievant was reassigned and not provided the hour of scheduled time for his Activities Director duties that was provided in his previous assignment?

JURISDICTION

The matter at issue, regarding interpretation of terms and conditions of the Collective Bargaining Agreement (CBA) between the Parties, came on for hearing pursuant to the grievance procedure contained in said Agreement. The Grievance Procedure (Article XIV, Section) defines a grievance:

“A ‘grievance’ shall mean an allegation by a teacher resulting in a dispute or disagreement between the teacher and the School district as to the interpretation or application of terms and conditions contained in this Agreement.”

The Grievance Procedure also sets forth terms and conditions for the arbitration of unresolved grievances.¹

¹ **Article XIV, Section 8, ARBITRATION PROCEDURES:** In the event that the teacher and the School Board are unable to resolve any grievance, the grievance may be submitted to arbitration as defined herein:

Subd. 1. Request: A request to submit a grievance to arbitration must be in writing signed by the aggrieved party and such grievance, must be filed in the office of the Superintendent with ten days following the decision I Level III of the grievance procedure.

Subd. 2. Prior Procedure Required: No grievance shall be considered by the arbitrator, which has not been first duly processed in accordance with the grievance procedure and appeal provisions.

Subd 3. Selection of Arbitration: Upon the proper submission of a grievance under the terms of this procedure, the parties may within ten days after the request to arbitrate, attempt to agree upon the selection of an arbitrator. If no agreement on the arbitrator is reached, either party may request the Commissioner of the Bureau of Mediation Services to submit a panel of seven arbitrators to the parties, pursuant to the PELRA, provided such request is made within twenty days after request for arbitration. Within ten days after receipt of the panel, the parties shall alternately strike names and the remaining name shall be the arbitrator to hear the grievance. The order of striking will be determined by lot. The request shall ask that the panel be submitted within ten days after the receipt of said request. Failure to agree upon an arbitrator or the failure to request an arbitrator from the Commissioner within the time periods provided herein shall constitute a waiver of the grievance.

The Parties selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The Arbitration hearing was conducted as provided by the terms and conditions of the CBA and the Public Employment Labor Relations Act (MS 179A.01 – 30). The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute. The Parties were also afforded full opportunity to examine and cross-examine witnesses. The Arbitrator swore all witnesses upon oath.

Subd. 4. Hearing: The grievance shall be heard by a single arbitrator and both parties may be represented by such person or persons as they may choose and designate, and the parties shall have right to a hearing, at which time both parties will have the opportunity to submit evidence, offer testimony, and make oral or written arguments relating to the issues before the arbitrator. The proceeding before the arbitrator shall be a hearing *denovo*.

Subd. 5. Decision: The decision by the arbitrator shall be rendered within thirty days after close of the hearing. Decisions by the arbitrator in cases properly before the arbitrator shall be final and binding upon the parties, subject however, to limitations of arbitration decisions as provided in the PELRA. The arbitrator shall issue a written decision and order including findings of fact, which shall be based upon substantial and competent evidence presented at the hearing. All witnesses shall be sworn upon oath by the arbitrator.

Subd. 6. Expenses: Each party shall bear its own expenses in connection with arbitration, including expenses relating to the party's representatives, witnesses, and any other expenses which the party incurs in connection with presenting its case in arbitration. A transcript or recording of the hearing shall be made at the request of the party. The parties shall share equally fees and expenses of the arbitrator, the cost of the transcript or recording if requested by either or both parties, and any other expenses, which the parties mutually agree are necessary for the conduct of the arbitration. However, the party ordering a copy of such transcript shall pay for such a copy.

Subd. 7. Jurisdiction: The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this written Agreement; nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlined herein; nor shall the jurisdiction of the arbitrator extend to matters of inherent managerial policy, which shall include but are not limited to such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, and selection and direction and number of personnel. In considering any issue in dispute, the arbitrator's order shall give due consideration to the statutory rights and obligation of the public school district to efficiently manage and conduct its operation within the legal limitations surrounding the financing of such operations.

Both Parties submitted comprehensive post hearing briefs and reply briefs received on February 9, 2006. The hearing was held open 30 days pending any further submissions from the Parties. There being no further submissions, the hearing was closed March 9, 2006.

The Parties were not in agreement on wording of the “Issue Statement.” Therefore, the Arbitrator, based on the record, formulated the “Issue Statement”.

BACKGROUND

The Employer is a public school system that provides instruction and extra-curricular activities for elementary and secondary students. The Union represents a bargaining unit that includes all teachers employed by the school system.

The normal work schedule for secondary teachers employed by the school system consists of five (5) instructional periods, one (1) supervisory period and one (1) preparation period in a seven-class period day. If an additional instruction period is substituted for the supervisory period, the teacher is entitled to additional compensation.² Elementary teachers are to receive an equivalent amount of preparation time as that afforded secondary teachers.³

Teachers are also to be available for planning and/or instructional assistance at least 20 minutes before classes begin and 20 minutes after students are dismissed for the day.⁴ In

² **Article IX. Hours of Service.**

Section 5. Teaching Load and Preparation time – Secondary teachers. A normal teaching load for a secondary teacher shall be five instructional class periods, one supervisory period and a preparation period in a seven-class period day. If a teacher is assigned a sixth instructional class period in lieu of a supervisory period, the teacher will be compensated an additional \$200 per year above the regular contracted teaching salary.

³ **Article IX. Hours of Service.**

Section 6. Teaching Load and Preparation time – Elementary teachers. Elementary teachers will receive an equivalent amount of preparation time as that afforded to secondary teachers during the student day.

⁴ **Article IX. Hours of Service.**

Section 1. Basic Day: Teachers will be available for planning and/or instructional assistance at least 20 minutes before classes begin and 20 minutes after students are dismissed for the day. The regular student contact day will not begin before 8:15 a.m. or extend beyond 3:30 p.m. A set time for professional collaboration and planning will be built into the weekly schedule.

addition to the basic school day, teachers may be required to reasonably participate in school activities that extend beyond the basic school day.⁵

The instant grievance matter arose when Randy Myhre (Grievant), who had previously taught “Title One” (No Child Left Behind) kindergarten, was reassigned to teach fifth grade students, for which he has a current Minnesota teaching license. The Grievant, who has some 25 years with the Employer, has taught fifth grade except for several years in the “Title One” program.⁶ The “Title One” program is designed to provide remedial help for students who need special educational assistance. The Employer’s reason given for the reassignment was that the Grievant is not certified as a “Highly Qualified Teacher” under the “Title One” program criteria and because of funding considerations.

The Grievant has, during the past five years, functioned as Activities Director for the school system and also serves as Head Girls Basketball Coach and Head Softball Coach. The Grievant receives additional salary for these duties as specified under the CBA “Co curricular Salary Schedule C.” In the current school year, the additional salary amounts to about \$12,000.

The Grievant filed a grievance stating that the Employer violated Article X, Section 6 of the CBA by taking away the one hour per school day designated for preparation time and assigning instructional time in its place. Prior to the reassignment, the Grievant had one hour of preparation time and one hour to perform duties associated with his Activities Director and Coaching activity. The Grievant claims that he now has to use much of the one-hour preparation period to do his Activity Director and Coach duties, leaving little or no time for preparation work as guaranteed by the CBA.

At times, the Grievant’s Coach duties cause him to be absent from his teaching assignments while traveling with teams. Also, when the need arises, the Grievant takes time out to take care of matters associated with his Activity Director and Coaching activities during teaching periods. Substitute teachers are used to cover the Grievant’s teaching duties when he is absent. The Grievant’s teaching salary is not affected by these absences. When the need arises, the Grievant enlists assistance from the Superintendent’s secretary to make calls, such as notifying parties of event cancellations, etc.

⁵ **Article IX. Hours of Service.**

Section 3. Additional Activities: In addition to the basic school day, teachers may be required to reasonably participate in school activities beyond the basic teacher’s day as is required by the School District. The normal duties for teachers include a reasonable share of extra-curricular, co-curricular, and supervisory activities, as determined by the Principal, Superintendent, or the School District, with pay according to the Co curricular Salary Schedule C.

⁶ The record varies on the number of years the Grievant taught kindergarten (from 5 to 8 years).

David Bottem, who reassigned the Grievant, has been Superintendent of the Barnum School District since 2001 and was an elementary teacher there from 1977 to 1995. He was a Principal in the Hinkley School District from 1995 to 2001.

JOINT EXHIBITS

- J-1. CBA, Barnum ISD #91 & Barnum Federation of Teachers, 2003 – 2005.
- J-2. CBA, Barnum ISD #91 & Education Minnesota – Barnum, 2005 – 2007.
- J-3. Grievance No. A-04-05 by Randy Myhre, dated May 19, 2005.

EMPLOYER EXHIBITS

- E-1. Barnum High School, Schedule of Classes 2005-2006.
- E-2. Barnum Elementary School Lunch and Recess Schedule 2005-2006.
- E-3. Barnum Elementary School Schedule, 2005-2006.
- E-4. Barnum Elementary School Schedule, Cycle A and Cycle B.
- E-5. Randy Myhre Sub. Dates, 2/16/05 – 12/07/05.
- E-6. Explanation of how two-day schedule rotation applies to Randy Myhre.

UNION EXHIBITS

- U-1. Activities performed by Randy Myhre on 10/5/05 through 10/11/05.
- U-2. Minnesota State Plan For Federal “Highly Qualified” Teacher Requirements.
- U-3. ISD #91, Regular School Board Meeting – School Board Agenda, June 21, 2005.

POSTIONS OF THE PARTIES

THE UNION SUPPORTS ITS CASE WITH THE FOLLOWING:

1. The Grievant was denied his contractual preparation time.
2. The CBA requires duty free preparation time for all elementary teachers.

3. Preparation time is necessary for teachers to provide high quality instruction.
4. State Statutes (Section 122A.50) requires teachers be provided a minimum of five minutes of preparation time for each twenty-five minutes of classroom instruction.
5. Preparation time is particularly important to the Grievant as he is returning to fifth grade after eight years as a Title One teacher.⁷
6. Every teacher except the Grievant is provided preparation time.
7. Even teachers assigned a sixth instruction period receive their preparation time.
8. Although the Grievant's scheduled preparation time is comparable to other teachers, his work as Activities Director deprives him of this preparation time.
9. The Grievant has been denied the time he previously had available for his Activity Director duties – one hour for preparation and one hour for Activity Director duties.
10. The Employer has violated its past practice of allowing the Grievant one-hour to perform his duties of Activity Director.
11. Although many of the Activity Director duties can be done outside of the school day, others cannot (i.e. notifications required when a game is cancelled).
12. The High School League office is open for business only during the day and most officials cannot be contacted during the day.
13. The Grievant must respond to coaches, school principals and others during the day and is called to meetings during the day.
14. At each step of the grievance procedure, the Employer responded with a different basis for its decision to deny the grievance.
15. Not one of the Employers grievance responses challenged the Union's statement that the Grievant had been told to use his preparation time for Activities Director duties.
16. Superintendent Bottem has offered no alternative for accomplishing the things the Grievant must do during the day to perform his Activities Director duties.
17. The Grievant lost one hour per day that he previously devoted to his Activities Director Duties.

⁷ It is noted that the record shows the Grievant's time as a Title One teacher from 5 to 8 years.

18. The Grievant is the only teacher not receiving the preparation time shown on his schedule. The CBA must be applied to give all teachers equal benefit of its provisions.
19. The District's arguments for denying the grievance are without merit.
20. The Employer could have left the Grievant in his "Title One" position for an additional year allowing him time to add kindergarten to his license for students grade 1-6.
21. No state or federal law required that he be transferred this year.
22. Even if the "No Child Left Behind" law did require the Grievant to be reassigned, it would not justify elimination of the one-hour he was allowed for his Activities Director duties...
23. The Grievant was not required to meet the "Highly Qualified" criteria until the 2006-2007 school year. Other teachers who do not meet the "Highly Qualified" criteria are working pursuant to a variance from the Department of Education.
24. Although the Grievant does not challenge the Employer's right to reassign him, the Employer's right to reassign does not negate his contractual right to preparation time.
25. The Employer's argument that the Grievant's reassignment was also done for budget reasons is not supported by the facts.
26. Although the Employer estimates that the Grievant's reassignment saved at least \$7,500, this reduction does not appear in any of the budget documents and was not included in the budget approved by the school board.
27. In its level III grievance response, the Employer explained that its action was appropriate stating "notification that a change in past practice has been given."
28. Even if "past practice" is at issue, the Grievant must prevail. Both Parties agree that the Grievant always had one hour to perform Activities Director duties in addition to one hour of preparation time.
29. The Employer unilaterally and without notice changed the practice.
30. It is undisputed that the Employer provided no formal notice to the Union of any intent to make any change in past practice. The only notice was telling the Grievant he had a new assignment.

31. The Union's suggestion that the disputed matter be resolved in bargaining rather than in arbitration was rejected by the Employer.
32. The Arbitrator must make a distinction between a change in assignment and a change in working conditions. Although the Union does not challenge the Employer's right of reassignment, it does challenge its unilateral removal of the practice to allow one hour per day for performance of Activities Director duties.
33. The Grievant's work schedule should be changed immediately to provide an hour during the day to perform Activities Director duties.
34. The Grievant should also be compensated for the loss of his preparation time at the rate of one-seventh of his salary from the start of the 2005-2006 school year until his actual schedule is changed.
35. Loss of preparation time cannot be equated to loss of the supervisory period and the compensated rate for loss of the latter does not apply to the instant matter.
36. The need to compensate a teacher who was required to perform Activities Director duties during preparation time is supported by Independent School District No. 314, Braham and Braham Education Association, where the Employer was required to pay the Grievant for one additional hour of class time. The same must be done here.

THE EMPLOYER SUPPORTS ITS CASE WITH THE FOLLOWING:

1. The clear language of the CBA does not support the Grievant's claim of a contractual violation.
2. The CBA clearly recognizes the Employer's inherent managerial right to direct employees in the performance of teaching and nonteaching services.
3. The CBA in Article X, Section 3, recognizes that teachers may be required to reasonably participate in school activities beyond the basic teacher's day and such duties include a reasonable share of extracurricular, co curricular and supervisory activities with pay according to the Co curricular Schedule C.
4. The CBA defines a seven period teaching day as five instructional class periods, one supervisory period and a preparation period for secondary teachers. By contrast, elementary teachers are to receive an *equivalent* amount of preparation time.
5. There are no structural provisions for the day of elementary teachers in the same detail as for secondary teachers. In fact, the Grievant receives 50 minutes preparation time on an alternating cycle A days and 60 minutes on cycle B days,

whereas the standard preparation time for secondary teachers is generally 50 minutes.

6. The Employer adamantly denies directing the Grievant to perform his Activity Director duties during his preparation time. Further, there was no rebuttal to the Superintendent's testimony as to the Grievant's preparation time as provided daily and documented in Employer Exhibit #1-4.
7. It is clear that assignment of the Grievant is the right of the Employer, leaving only the question as to whether or not the Grievant's contractual rights were violated because of the Activity Director duties.
8. The Arbitrator will find that the CBA does not place any limitations on a teacher's duty day related to extracurricular assignments, for which salaries set forth in Schedule C are paid.
9. The record is devoid of any evidence that would indicate the Grievant did not acquiesce in his extracurricular activities for which he earned an additional 22% over his teacher salary.
10. The Grievant attempts to support his claim by introducing a lengthy narrative detailing his Activities Director duties. Such a list could undoubtedly be prepared by any of the teachers who carry out extracurricular activities compensated under CBA Schedule C.
11. The CBA is not a recipe book that purports to address the kinds of detail that the Grievant would have the Arbitrator involved in. The Parties have confined the Arbitrator to ruling on interpretation of the CBA language as negotiated.
12. The relief sought by the Grievant is beyond the jurisdiction of the Arbitrator. The CBA provides that the Arbitrator's jurisdiction shall not extend to proposed changes the CBA's terms and conditions.
13. The CBA also limits jurisdiction of the Arbitrator in reference to inherent management rights of the Employer in very specific terms.
14. The role of the Arbitrator is to interpret the language of the CBA and does not extend to supervising the activities of individual employees or substituting the Arbitrator's judgment for that of the Employer.
15. There is no room in the language of the CBA for the Arbitrator to become involved in the details of the assignment and direction of employees; rather such matters are reserved to the Employer.
16. The Grievant has failed in his burden to establish a violation of the CBA.

17. The CBA language is clear and unequivocal. The CBA is devoid of any language addressing the relief sought by the Grievant.
18. Undoubtedly, the Activities Director duties require lots of work. It may well be that the Grievant should seek to be relieved of his extracurricular activities.
19. Nowhere in the record is there any evidence that would suggest a teacher can escape their basic duty assignment, or any part of it, because the teacher and Employer have agreed to an extracurricular assignment.
20. Any limitation on performing a teacher's basic duty assignment, when also performing an extracurricular assignment, can only be addressed in CBA negotiations between the Parties. The Grievance Procedure is not designed to be a substitute for negotiation of CBA language.
21. The Braham School Arbitration Award cited by the Union is not instructive in the instant case.
22. The facts in the Braham case are materially different.
23. The CBA in Braham is substantially different from the Barnum CBA.
24. Rightly or wrongly decided, the Braham case is dependent upon the particular facts as emerged in that case, as well as the particular CBA language.
25. The Union would have the Arbitrator rewrite the Barnum CBA to change the compensation for an extra class assignment from \$200 to one seventh of the Grievant's teacher salary, or \$7,000 per year. The Arbitrator is without jurisdiction to do this.
26. The "No Child Left Behind" law is not at issue in the instant case. The Union chooses to develop a "straw man" to deflect from the otherwise weakness of its argument.
27. The Grievant did not object to the reassignment and there is no requirement that the Employer must tolerate substandard qualifications, even if the law permits.
28. The Union's argument relative to the budget matter is irrelevant. There is no rule or law that restricts budget savings to only that which appears in a formal document. Reassignment of the Grievant represents a budgetary consideration, regardless of whether it appears as a line item.
29. The Union has failed in its burden to show that the Grievant has been deprived of his preparation period. The student day (8:30 a.m. to 3:00 p.m.) covers 390

- minutes when students are in attendance.⁸ The duty day of the Grievant is 480 minutes.⁹
30. The record indicates that there is no dispute that the preparation time assigned the Grievant is consistent with the CBA. Further, the Grievant has an additional 25 minutes of preparation time on Fridays.¹⁰
 31. The record clearly shows that there is a regular time of 90 minutes per day that the Grievant has as undesignated time. This should be more than adequate to complete any necessary Activities Director duties that cannot be accomplished before or after the duty day.
 32. CBA, Article X, Section 3, makes it clear that the additional compensation provided in Schedule C is to compensate for school activities beyond the teacher's basic duty day.
 33. The Grievant's testimony amounts to self-serving anecdotal allegations in reference to Activities Director duties on a couple days in the duty year that he suggests interfere with his preparation time. The Grievant fails to account for the rest of the duty day where such activities can be performed outside of his preparation time.
 34. To be noted is that any Activities Director duties the Grievant accomplishes during the regular duty day is a benefit to the Grievant and a loss to the Employer.
 35. Also to be noted is that the Grievant has been accommodated, at additional Employer expense, by providing a substitute teacher when he is away from his regular teaching duties performing Activities Director and coaching duties.
 36. The Union is attempting to accomplish through arbitration what it failed to accomplish in CBA negotiations. In the six months from the time the grievance was filed until the CBA negotiations were completed, the Union could have addressed the instant matter as a bargaining issue, but failed to do so. Instead, the Union is hoping the Arbitrator will reform the CBA rather than having to addressing it appropriately in the negotiations process.

⁸ CBA, Article X, Section 1, and Employer Exhibit #4.

⁹ Employer Exhibit #4.

¹⁰ Employer Exhibit #4.

DISCUSSION

The issues raised by the Parties and to be decided by the Arbitrator may be summarized as follows:

1. Was reassignment of the Grievant to teach fifth grade, per se, a violation of the CBA?
2. Does the Grievant's loss of the one (1) hour time period, previously provided during the school day to perform the duties of Activities Director, constitute a violation of the CBA?

The Employer points out that the right to assign teachers for legitimate business reasons is an inherent managerial right. The Union does not challenge the Employer's right to reassign the Grievant, however questions the Employer's timing and reasons.

The Union points out that the Grievant did not have to be moved out of kindergarten this year, even though he did not have the required certification, because the State had allowed a variance of the certification requirement until next year. The Union also questioned the Employer's use of budgetary reasons for reassigning the Grievant because the budget reduction did not appear in any of the official budget documents, even though smaller amounts did.

The Arbitrator finds that assignment of the Grievant to teach fifth grade did not violate the CBA. Although the Union questions the timing and budget considerations, the Arbitrator does not find these of a nature that materially compromises the Employer's exercise of its managerial right.

The record shows that the Grievant's duties as Activities Director involved scheduling some 400 events each school year, hiring workers and game officials and insuring that State High School League Rules and Regulations were being followed. The record shows that some duties could be performed during his off duty time as a teacher, but other duties (such as cancellation of events and securing substitute officials) often required more immediate action necessitating interruption of his teaching activity, primarily his preparation time.

The record shows that when the Grievant first began work as Activities Director, some five years ago, he was teaching kindergarten and was allowed one hour during the day to perform Activities Director duties. His schedule prior to being assigned fifth grade, in the 2005-2006 school year, was five (5) hours instruction, one (1) hour preparation time and one (1) hour to perform Activities Director duties.

After the Grievant was assigned to teach fifth grade, his schedule has been five (5) hours instruction, one (1) hour preparation time and one (1) hour supervisory time. This is

consistent with the CBA, Article X, Section 5 that establishes this as a normal teaching load for secondary teachers in a seven class period day. Section 6 of Article X provides that elementary teachers are to receive an equivalent amount of preparation time.

The Employer argues that the Grievant is currently receiving what he is entitled to under the terms of the CBA, which is the same as is received by other teachers. The Employer argues that the Grievant receives nearly \$12,000 per school year for his Activities Director and Coach duties, which is in recognition that he will be performing these duties in addition to his regular teaching duties. The Employer also points out that the Grievant is at times absent from his regular teaching duties, to travel with the teams he coaches and attend to his duties as Activities Director. During these absences, the Employer must arrange for substitutes to cover his teaching duties.

The record is not clear on what period was used to provide the one (1) hour for performance of Activities Director duties when the Grievant was assigned to Kindergarten. Using the process of elimination, it appears to have been the supervisory period. The record shows that the Grievant was assigned five (5) instruction periods and one (1) preparation period. This leaves the supervisory period as the only period available for performance of Activities Director duties. This also appears supported by testimony of Superintendent Bottem who stated that the Grievant's replacement in kindergarten has six instruction periods plus a preparation period, which indicates no supervisory period

There is nothing in the record to indicate that the Grievant was paid \$200 per year above the regular teaching salary as called for in the CBA when an instruction period is substituted for the supervisory period. This would appear consistent with the CBA as the Grievant was not assigned a sixth instruction period, but was performing Activities Director duties during this seventh period for which he was receiving additional pay under Schedule C of the CBA.

It is also noted that the CBA provides only the supervisory period can be replaced by a sixth instruction period. There is no provision for replacing the preparation period. In fact, state law requires that preparation time be provided to teachers in a ratio to their classroom instruction time.¹¹ The Union argues that the Grievant was told he would have to do his Activities Director duties during his preparation time, however the Employer disputes this.

The Employer claimed a budget savings of at least \$7,500 resulting from assignment of the Grievant to teach fifth grade.¹² The record indicates that this budget saving is being realized from the Grievant covering the supervisory period in his fifth grade assignment. If the Grievant would continue receiving one (1) hour supervisory time to perform his Activities Director duties in his fifth grade assignment, as he was in his kindergarten

¹¹ Minn. Stat. 122A.50.

¹² Testimony of Superintendent Bottem.

assignment, another teacher would need to be scheduled to cover the fifth grade supervisor period.

It is not difficult to ascertain that while the Employer gained a budget reduction from the Grievant's reassignment, the Grievant lost the one (1) hour of supervisor time he previously had available to perform his Activities Director duties.

The Union emphasized the importance of preparation time for teachers and the need for preparation work to be done during the day, in order to communicate with others in the system. While assigned to kindergarten, the Grievant did not have to compromise his preparation time as he had the supervisory period available for his Activities Director duties.

The Employer pointed out that the Grievant has other times available during the school day (besides the preparation period, such as the lunch period, recesses, etc.) to perform his Activities Director duties and that the Grievant's pay under Schedule C is in consideration that he will be performing his extracurricular activities outside the school day. In fact the CBA, in Article X, Section 3, provides that teachers may be required to reasonably participate in school activities beyond the basic teaching day.

However, there is nothing in the record to indicate that these conditions apply differently, or are different, now that the Grievant is assigned fifth grade than when the Grievant was assigned to kindergarten. The net difference is that the Grievant no longer has one (1) hour during the school day to perform his Activities Director duties as he did before the reassignment.

The record shows what appear to be conflicting statements regarding the position of the Parties during negotiations for their current CBA.¹³ The grievance was filed in May of 2005 while the Parties were in negotiations for their 2005-2007 CBA. The CBA settlement was reached in November of 2005. The Union states that it suggested negotiating a settlement to the instant dispute as a part of the CBA settlement but the Employer wanted to resolve the matter via arbitration. The Employer states that, if the Union wanted to negotiate on the matter it should have done so.¹⁴

The Union argues that the one (1) hour supervisory time that the¹⁵ Grievant was allowed while assigned to kindergarten, to perform his Activities Director duties, is a "past practice" and the Employer may not unilaterally discontinue it without entering into negotiations with the Union.

¹³ The testimony of Union Witness, Billie Jo Steen, was that there were no proposals from either Party in negotiations regarding changing preparation time. The Employer was not interested in dealing with this matter in negotiations and wanted it resolved in grievance arbitration.

¹⁴ Employer's Reply Brief at page 3, D.

¹⁵ Testimony of Randy Myhre.

The Union, in its post hearing brief, references criteria for determining “past practice,” namely: “past practice, to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.” The Arbitrator recognizes this criteria establishing “past practice” as the standard generally accepted by Arbitrators when making such a determination.¹⁶

In applying these criteria to the instant matter, the Arbitrator finds in the affirmative. The practice of allowing the Grievant one (1) hour during the school day to perform his Activities Director duties was in effect for some five (5) years prior to the Grievant’s transfer to fifth grade, having been established by the previous Barnum Superintendent.¹⁷

The practice was clearly unequivocal in that the Employer recognized the budget saving by discontinuing it when the Grievant was reassigned to the fifth grade. It was clearly acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties, for it continued from the time the Grievant was appointed Activities Director until his reassignment some five years later. Each year the Employer developed a schedule that provided for the one (1) hour time period that the Grievant was allowed to perform his Activities Director duties.

In summary, the Arbitrator finds that reassignment of the Grievant was an inherent managerial right of the Employer and does not constitute a violation of the CBA. However, discontinuing the one (1) hour previously allowed the Grievant during the school day to perform his Activities Director duties is a binding “past practice” and may not be unilaterally discontinued.

It is noted that it is not within the Arbitrator’s jurisdiction or inclination to decide what is fair or appropriate. Therefore the Arbitrator’s award is based solely on the terms and conditions of the CBA as negotiated by the Parties and the modification thereto created by their practice.

AWARD

The grievance is sustained.

The one (1) hour time period, previously allowed the Grievant to perform his Activities Director duties during the school day, shall be reinstated within thirty (30) days of receipt of this award and continued until such time as the Parties may negotiate otherwise.

No back pay or time is awarded. The Grievant has received the full compensation called for by the CBA for his extracurricular activities. There is no evidence that the Grievant has suffered more than inconvenience. Further, there is no evidence

¹⁶ See Elkouri & Elkouri Fifth Edition at page 632.

¹⁷ The Grievant’s testimony was that he became Activities Director in year 2000.

that either the Activities Director functions have been unduly compromised or that the quality of the Grievant's teaching has been unduly compromised.

Further, it is not the intent of the Arbitrator to award the reinstated one (1) hour of scheduled time exclusively for the purpose of Activities Director duties if such duties do not require this amount of time. The Arbitrator will retain jurisdiction for sixty (60) days should there be a need for clarification in implementing the Award.

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 7th day of April 2006 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR