

IN RE ARBITRATION BETWEEN:

NEW RICHLAND HARTLAND GENEVA EDUCATION ASSOCIATION

and

ISD #2168, NEW RICHLAND SCHOOLS

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 07-PA-0251

JEFFREY W. JACOBS

ARBITRATOR

October 8, 2007

IN RE ARBITRATION BETWEEN:

New Richland Hartland Geneva Education Association,

and

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 07-PA-0251
Snow days Grievance

ISD #2168, New Richland Public Schools,

APPEARANCES:

FOR THE ASSOCIATION:

William Garber, attorney for the Association
Julie Economy, Member rights chair
Terry Anderson, teacher, grievant
Julie Hansen Schley, teacher

FOR THE DISTRICT:

James E. Knutson, attorney for the District
Richard Lorenz, former Superintendent
Paul Sparby, principal

PRELIMINARY STATEMENT

The hearing in the above matter was held on August 23, 2007 in the Offices of ISD #2168 in New Richland Minnesota. The parties filed post-hearing Briefs dated September 21, 2007 and reply Briefs dated September 26, 2007 at which point the record was considered closed.

ISSUE PRESENTED

The parties were unable to agree on a statement of issue. The Association stated the issued as follows: Whether the school District violated the Collective bargaining Agreement when it failed to pay grievants for work they performed? Whether the school District violated the CBA when it required the grievants to make up work without pay and allowed at least one other teacher under similar circumstances to make up work with pay?

The District stated the issues as whether the school District violated Article XIII, section 2 by deducting one day's salary from the grievants when they did not work on the June 5, 2006 make up day as set forth on the 2005-06 school calendar due to a day lost because of severe weather and not allowing Grievants to make up the day on some other day after the end of the school year or by working additional hours during the school year?

The issue as determined by the arbitrator based in the facts and argument presented is as follows: Whether the District violated the agreement between the parties when it deducted one day's salary from each of the grievants where they did not work on the make up day of June 5, 2006 under these facts and circumstances? If so what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2005 through June 30, 2007. Article XIV provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. There were no procedural or substantive arbitrability issues raised by the parties.

ASSOCIATION'S POSITION:

The Association's position was that the District violated Article XII, Section 2, when it deducted one day's salary from each of the grievants for failing to work on the designated make up day of June 5, 2006. The Association argued that they had in fact made up the work either after that day or before it and should be paid for the work they did rather than for not working on an arbitrarily set make up day. In support of this the Association made the following contentions:

1. The Association noted that the underlying facts were undisputed. There were 4 days when the schools were closed due to inclement weather. The Board decided that 3 of those days would be made up and added 3 days to the school year. The original school calendar showed the last day of the year for students was May 30, 2006. May 31st was to be the teacher workshop day where teachers would clean their rooms, do final grades and essentially close down their rooms for the summer.

2. Due to the added days because of weather, however the District unilaterally decided that the last student contact day would be June 2, 2006 with the teacher workshop day being June 5th, a Monday. This was done largely for the convenience of the students so they did not have to come back for one day.

3. The grievants knew that having 4 snow days was highly unusual and made plans to be gone on June 5th. Ms. Schley was to go to Mexico and she had purchased tickets for that trip and would be gone June 5th. Mr. Anderson teaches at a local community college and had committed to beginning his teaching commitment on June 5th and could not break that engagement. Both felt safe that they would not be required to work on June 5th since they had never had to do so in the past but the Association acknowledged that they both knew there was some outside chance another snow day could occur and that the make up day could well be June 5th.

4. When the snow days occurred Ms. Schley realized that she would not be there for the June 5th workshop day so she requested a leave of absence to work on June 12th when she returned from Mexico. This was denied.

5. She submitted her grades on June 2, 2006 and so did the same work that the other teachers were going to perform on June 5th. She then returned on June 13th and finished performing all of the tasks that the other teachers did on June 5th.

6. Mr. Anderson completed all of his required tasks early as well. He simply stayed late or worked on break time to clean his room and complete grades and any other last minute tasks by June 2nd.

7. The real issue here is that other teachers were allowed to make up their work on paid time whereas these two grievants were not. The Association pointed to the situation of Kathy Meyer, a part-time teacher in the District, who normally worked Monday through Thursdays with Fridays off. None of the 4 days occurred on a Friday and Ms. Meyer's students all lost class time on each of the 4 snow days. She was allowed to take a leave of absence for June 2, a Friday, and was allowed to make up her days in May of 2006. (There was some dispute about whether she made up the day on May 19th or May 26th but the Association argued that this was academic since she was allowed to make up the day with pay.)

8. The Association argued that the District is being duplicitous here by allowing a part-time teacher to make up the teacher workshop day with pay. Moreover, the Association argued that there was no hard evidence that Ms. Meyer had any student contact on the day she made up, which was a Friday and normally not a student contact day for her. Association witnesses testified that even though she was in the building on her make-up day in May, Ms. Meyer did not in fact have any student contact that day.

9. The Association also pointed to another situation that was eerily similar to Ms. Schley's, which occurred in 1996 involving Cathy Stringfield, another teacher in the District. Ms. Stringfield also requested and was granted a leave that extended past the teacher workshop day for the end of that school year. Ms. Stringfield agreed that the 9 days she missed from May 17 through May 30, 2006 due to being in Europe would be unpaid. Indeed they were. However, the notations in the record for her leave of absence showed that she was paid for May 31st, which was the teacher workshop day that year. Further, her leave indicated that she would be gone until June 3rd of that year thus supporting the assertion that she was in fact gone on the teacher workshop day, May 31st. The record according to the Association showed that Ms. Stringfield missed the teacher workshop day yet she was apparently paid for that day.

10. The Association argued that it should make no difference when the work is performed as long as it is. Here it was undisputed that the teachers performed all required work. They submitted their grades, (even did so early), cleaned their rooms and did all the tasks that the teachers who were at work on June 5th did. They simply did that work on a different day. The essence of any employment relationship is that the work gets done; it does not and should not make any difference when that happens as long as it does. Here all required was done.

11. The Association did not question the right of the District to establish the calendar or to establish which days would be made up but argues that the District does not have the right to require teachers to work without being paid.

12. The Association also acknowledged that the contract provides for 182 days of work but argued that at least Ms. Schley was actually there 182 days. She was merely there on June 12th for her 182nd day rather than June 5th. Mr. Anderson did only “work” on 181 days but performed all of the work the other teachers did on their 182 days by working extra time earlier in the year. In essence he also worked that extra day by making up for it before, rather than after, the student contact year was finished.

13. The essence of the Association’s argument is twofold. First that the teachers were asked to perform work for which they were not paid and that no so-called management right ever grants an employer the right to require work for which no pay is granted. Second, that in two very similar situations the District either paid a teacher where that teacher missed the teacher workshop day at the end of the year, (Ms. Stringfield) to allowed the teacher to make up her lost day with pay earlier in the year (Ms. Meyer). The District is employing a double standard here and must not be allowed to do so.

The Association seeks an award ordering the District to pay the grievants for the work they performed and to make them whole for the deducted day’s salary.

DISTRICT'S POSITION:

The District's position was that there was no contract violation and maintained that the management rights clause gave it the unfettered right to establish the make up day of June 5, 2006. Since it was undisputed that neither of the teachers in question worked that day they cannot be paid for that day. The District also argued that the two other situations upon which the Association relied were distinguishable and did not change the right of the District to establish the make up day nor did it establish any sort of binding precedent requiring that these grievants be paid under these circumstances. In support of these positions the District made the following contentions:

1. The District noted that there were few if any factual disputes as to these grievants. The District argued essentially that the grievants rolled the dice and lost. Both grievants knew and acknowledged at the hearing that the calendar clearly shows that June 5th could well be the teacher workshop day and that they knew that well in advance of making plans to be gone that day. Both acknowledged that the District has the absolute right to establish and change the school calendar where necessary and to designate which days, if any, will be made up due to weather related school cancellations during the year.

2. Here the school calendar shows 182 days required to be worked as teacher duty days and 173 student contact days. It also specifically shows that the make up days would be June 1, 2, and 5th if necessary. The grievants and the Association all knew that well prior to April 1, 2005.

3. Four days were lost due to weather in the 2005-06 year, including March 13 and 16, 2006. As noted above, the District determined that May 31st would become a student contact day. May 31st had been the originally designate teacher workshop day but the Superintendent changed that date following the lost days. In addition, June 1 and 2 were designated as student contact days and the teacher workshop day was simply moved to June 5th a Monday to avoid having the students all come back for one day of school.

4. Despite this, both teachers gambled that there would be no more snow days in March and made plans to be away from school on June 5th. They gambled and they lost.

5. Ms. Schley was even told prior to her trip to Mexico that her leave of absence would be denied. She went anyway even though the contract does not allow for leaves of absence in that circumstance. See CBA Article X Section 6, subd. 3. That she came back on June 12th is of no consequence since she did not have permission to do this as a paid day and she knew that as well.

6. The facts are even less compelling for Mr. Anderson. He never did come back and in fact only worked 181 of the required 182 days. His argument is that he performed the work the other teachers did but did it faster or by working later and during break times.

7. The District noted that the contract requires teachers to be at work or on some approved leave 182 days. See, Article XIII, Section 1, subd. 2. He worked only 181. There is no set of facts that allow him to be paid for a day he did not work. The District also pointed out that teachers frequently work later or come in early as a part of their jobs and are not paid extra for that. It is a part of the job; an occupational hazard if you will and no teacher would seriously expect to be paid extra simply because they got their grades done a day early if they did not appear for work on a day on which they were required to appear for work.

8. The District argued that there is no contractual language allowing the recovery sought by the Association here. Quite the contrary. The management rights clause clearly gives the District the unfettered right to establish the schedule or to change it. Mr. Anderson acknowledged that what he and the Association are essentially asking for is the arbitrator to change the contract. Clearly that cannot be done.

9. The District distinguished the Kathy Meyer situation by noting that she was a part-time employee and she too had to make up the snow days. She worked the required number of days in her contract and worked them when directed to by the District. She asked to work on May 26th rather than June 2nd because that was going to be the last day of school and, as we all know, not much instruction happens on that day. She and her building principal felt it would be better for the students and the District if she worked earlier in order to give instruction to the students rather than to simply baby-sit them on the last day of school. Moreover, the District argued that she did have student contact that day since she assisted in the media center with student projects and computer aided research. She performed very valuable services that day despite the Association's assertions to the contrary. The District argued that her situation is thus quite different and that Ms. Meyer in fact worked the number of days she was required to making her situation nothing like these grievants.

10. With regard to the Stringfield situation, the District argued that the records in fact show that she worked on the teacher workshop day in question, May 31, 2006 and was paid for it. No one from that era testified so we are left with the official payroll records maintained by the District. Ms. Stringfield left from May 17 through May 30, 1996, to go to Europe and took 9 days off without pay. The record shows however that she was paid for May 31st and, significantly, apparently worked it. Thus, the fact that her original request for leave showed her returning the week of June 3rd does not control the result here. The leave was approved through May 30, 2006 and on this record it appears that is when it ended.

11. The District argued most strenuously that the Association wants to use this case as a precedent for allowing teachers to work whenever they want to. Even though the Association asserted that it would not, the District argued that reliance on the Stringfield scenario establishes that this is exactly what they want. The District cautioned that this arbitration is being used to establish a past practice to allow teachers to ignore the school calendar or the directives of the Superintendent and allow them to chose to simply be gone on the designated workshop day and to walk back into the school any time they want. This simply cannot be allowed.

12. The District also relied on a prior award in the Redwood Falls School District where the arbitrator denied a similar grievance and determined that the language there allowed the District to determine which days would be worked and what duties would be performed. The language in that contract is the same as this one.

13. The District also relied on a similar award involving the Cottage Grove/South Washington County School District, ISD 833, in which the arbitrator again reaffirmed the right of the District to establish which days are to be worked and what duties must be performed that day. See also, *Morris Teachers Assoc. and ISD 769* and *Spring Lake Park Education Association and ISD 16*, both of which reach similar results and established the right of the District to set or modify the school calendar and that teachers must work on the days designated to be paid for those days.

14. The essence of the District's argument is that these teachers knew the risks inherent in making plans to be away from school on June 5th and they lost their bet. The District has the absolute right to establish the school calendar and exercised that right in accordance with the contract and the Management Rights clause of that contract. The Association does not dispute that and in so doing undercuts its own argument here, which is essentially that the teachers have the right to ignore the calendar and simply decide on their own which days they will work. No arbitrator who has dealt with this or any similar situation has acknowledged that right and there is simply no contractual provision in this agreement allowing it.

The District seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

The Contract in this case is clear and unambiguous and establishes the unfettered right of the District to establish and modify the school calendar. Article XII Section 2 provides in relevant portion as follows:

Modifications in Calendar. Length of School Days:

Subd. 1. In the event of energy shortage, severe weather, or other emergency, the school District reserves the right to modify the school calendar, and, if school is closed on a normal duty(s), *the teacher shall perform duties on such other day(s) in lieu thereof as the school board or its designated representative shall determine, if any.* (Emphasis added) ...

Subd. 3. Prior to modifying the scheduled length of the school day pursuant to subd. 2 hereof, or scheduling more than two make up days pursuant to subd. 1 hereof, the School District shall afford to the Association the opportunity to meet and confer on such matters.

The Association did not question the District's right to modify the school year pursuant to Subdivision 1 of this provision. Neither was there any issue raised regarding the right to meet and confer on this provision or the modification of the school year pursuant to Subdivision 3. The import of this clause could not be clearer: the District, not the teacher, gets to decide what other days are to be worked and what duties the teacher is to perform on those days.

Here, the facts giving rise to this grievance were essentially undisputed as noted above. School was closed on 4 days during the 2005-06 school year due to inclement weather. These were December 14, 2005, February 16, 2006 and March 13 and 16, 2006. The District decided to make up 3 of these days and the superintendent notified the staff that the first 3 of these snow days would be made up on May 31, June 1 and June 2 all as student contact days. The District then moved the teacher workshop day that had been originally scheduled for May 31st to June 5th. There is no question that the staff and the Association were notified of this change in the school calendar.

In early March 2006 the grievants, essentially guessing there would be no further snow days after that, made plans to be gone on June 5th. This was a gamble on their part. There is also no question that the school calendar for 2005-06 showed that June 5th was a possible make up day that they acknowledged and knew could be required of them to work if there were school closings due to emergency or weather. See District Exhibit 1. That calendar provides in the lower right hand section as follows: "Weather related order of make up days: June 1, June 2, June 5." Nobody contended that they did not see this or that they did not clearly know that June 5th was a designated make-up day.

Neither of the grievants worked on June 5th as they had made other commitments, i.e. to be in Mexico in one case or to teach at a community college in the other. Ms. Schley asked for a leave prior to her leaving for Mexico, which was denied based on the above contract language. Her e-mail dated May 18, 2006 shows that she clearly knew that June 5th would be a deduct day. Her message provided "This is going out on a limb but is there a way that I can come back and close up my room the following Monday, put in the time and not be penalized for a pay deduct day??" Significantly, this was even before her principal got back to her and told her that it would be a deduct day. Her building principal then informed her by e-mail dated May 19, 2006 that the Board had designated June 5th as her last day of work. He then told her that to be consistent with the way it has been handled in the past, "it will need to be a deduct day." Again, there was no question that she knew this would be a deduct day well prior to deciding to leave for Mexico.

In Mr. Anderson's case the facts are even more compelling. His request for leave, District exhibit 2, shows that he filled out the form requesting a "deduct day" for June 5th. The evidence showed that the words "personal leave day" were crossed out and the word "deduct" was added to the leave request form. He too clearly knew what the rules were.

As noted, it was clear that the labor agreement does not allow a personal leave day under these circumstances since it would have been the last day of the year. This is significant if for no other reason that it demonstrates a clear intention that the teacher workshop day cannot be made up by having the teacher come some other day to finish any required work. This factor was not by itself controlling here but is another fairly strong piece of evidence in support of the District's argument that the last day of the year, even though it is a make up day and even though it is a workshop day is one that is required to be worked by the teacher in order to be paid for it.

The Association did not claim that the District did not have the right to establish the calendar or to modify the calendar to add make up days to it in the event of a school closing because of weather. However, one of the grievants did acknowledge that in order to prevail, the arbitrator would have to essentially amend the contract. Obviously this is well outside the jurisdiction of an arbitrator to do in a grievance arbitration setting. The question is whether under this language there is any contractual support for the Association's claim. There is not under these facts.

The contract grants the right to the District to establish and/or modify the calendar. It clearly notified the staff and the Association of the possibility that June 5th could be a make up day. Most importantly, the language of Article XIII cited above makes it clear that the District gets to decide what days are to be worked and what duties are to be performed that day.

The Association seems to rest its case on two equity based arguments however. First there is the notion that the teachers in question performed the work therefore they should be paid for it. This argument does not find sufficient support in the language however.

The contract provides for 182 days to be worked and that is in fact the basis for the compensation package. See, Article XII, Section 1, subd. 2. Whether the teachers “do” the work at some other time is not what is at issue. The grievants did what they were required to do. Ms. Schley came back and cleaned her room on June 12th and apparently turned her grades in before she left for vacation. The Association’s position is largely based on an equity argument that Ms. Schley performed her duties and did in fact work 182 days, albeit not on June 5th as directed by the District. That fact, while compelling on one level, does not control the result. What controls the result is the language of Article XIII requiring her to be there on June 5th. She wasn’t and must therefore take the day as a deduct day. To alter that result would take a change in the contractual language. The arbitrator cannot effectuate that change in this setting. It is for the parties to do that.

Mr. Anderson finished his work early but did not appear on June 5th or at any time during the summer. He only worked 181 days. Whatever equity-based argument there might be for Ms. Schley’s case does not apply in Mr. Anderson’s. As noted above, when the contract is read as a whole it is clear that it requires 182 duty days and that the days picked to perform that work resides in the exclusive purview of the District. Thus, the contract does not provide support for the Association’s claims here.

Second, it was apparent that perhaps the most significant reason for the filing of this grievance was due to the Kathy Meyer situation. It was apparent that the Association felt that the District had created a double standard by allowing her to make up the days lost earlier in the year and on a day when she normally would not have had student contact. Ms. Meyer is a part-time employee working 4 days per week normally. She is normally off on Fridays. None of the snow days fell on a Friday so she did not “lose” any days during the year.

She was required to make up the days however and requested that she be allowed to work on May 26th instead of June 2nd, as there would be very little instruction going on June 2nd. Ms. Meyer and her principal felt that it would be valuable for the District and its students to have her there to make up a lost snow day in May. The evidence showed that she worked sometime in May 2006, although the exact date was never firmly established. No matter on this record since it was clear she made up her day on a Friday sometime in May.

There was some dispute about whether she had student contact that day. Normally she would not work on Fridays and Association argued that she must not have had any student contact on her make-up day. This, they argued essentially allowed her to have a much lighter day than she would have and this irked the other teachers. The evidence showed that in fact she was assisting students in the media center with computer research and may well have had a very vigorous day of student contact as many of them were quite busy finishing research projects at that time of year.

The Association argued that allowing Ms. Meyer to make up her lost day in May rather than requiring her to make it up on June 2nd created a situation that compelled the District to allow the grievants to make up their day on some day other than June 5th as they had been directed to. This argument was something of a tour de force by the Association as there is nothing in the contract that compelled the result it sought nor was there anything inconsistent between the way it handled the Meyer situation and the language of the contract

The question is whether allowing Ms. Meyer to make up her day compelled the result the Association seeks here; i.e. to allow the grievants to not work on June 5th and still be paid for it. It does not. For one thing, the evidence showed that Ms. Meyer is required to be at school 146 days. She was apparently there for all of those 146 days and was there on the days assigned to her by the District. She did not seek to make up work on some other day or days.

Perhaps most compelling here is that the evidence showed that while Ms. Meyer did not work on June 2nd, having made that day up in May, *she apparently worked on June 5th*. This fact alone distinguishes her situation from that of the grievants and undercuts any argument that her situation compels the result the Association seeks in this grievance.

The Association pointed to a situation arising in 1996 involving a teacher, Cathy Stringfield who left school early in that year to go to Europe. She missed 9 days of work and took those as unpaid days. Ms. Stringfield's situation in 1996 was closely examined. The Association argued that she did not work the teacher workshop day at the end of 1996 yet was paid for it.

The written record showed otherwise and showed that her leave was approved until May 30, not May 31st, and that she was apparently paid for that day, which was the workshop day that year. It was clear that she was gone from May 17 through May 30 of that year and was not paid for those days. Her payroll records showed that she was paid for May 31, 1996 however. Comparing her approved leave with the payroll records all that can be said on this record is that she may well have come back to complete her tasks on May 31, 1996 and been paid for it in accordance with the contract. No other evidence was presented on this situation other than that written record and there was no evidence that she did not work on May 31, 1996.

It is interesting to note that Ms. Stringfield apparently still works for the District as she is the one who apparently signed the 2005-07 contract on behalf of the Association. That she did not testify to clarify her situation in 1996 was curious but no negative inference can be drawn either way due to that fact. The bottom line is that without more, the written record controls the facts here and those show that she may well have actually worked on May 31, 1996. That being the case; there were insufficient facts to conclude that there was any sort of binding precedent or past practice requiring a change from the clear language of the contract set forth above.

On this record there was insufficient evidence to establish any deviation from the clear language of the contract. As noted above, that contract allows the District the right to establish which days are to be made up for snow days and to establish what duties are to be performed on those days. Moreover, the contract requires that a teacher must work on that day in order to be paid for it. On these facts the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: October 8, 2007

New Richland Education Association and ISD 2168.doc

Jeffrey W. Jacobs, arbitrator