

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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**Minneapolis Public Schools,**

**Employer**

**OPINION AND AWARD**

**and**

**BMS Case No. 05-PA-383  
(M. Lynch Termination  
Grievance)**

**American Federation of State  
County and Municipal Employees  
(AFSCME) Council 5, Local 56**

**November 14, 2005**

**Union**

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**Appearances**

**For the Employer**

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**For the Grievant/Union**

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## Jurisdiction

The American Federation of State County and Municipal Employees (AFSCME), Council 5, Local 56 (hereinafter “Union” or “Local 56”) filed a grievance on behalf of Ms. Mary Lynch (hereinafter “Grievant”), a licensed practical nurse, on June 14, 2004. Local 56 filed the grievance to challenge the Minneapolis Public Schools’ (hereinafter “Employer” or “District”) decision to terminate the Grievant’s employment. The Employer denied the grievance by letter dated June 22, 2004. The parties processed the grievance through the various steps of their grievance/arbitration procedures. Local 56 requested a panel of arbitrators from the Bureau of Mediation Services (BMS) and the parties selected the undersigned arbitrator to hear this matter. The parties notified the arbitrator of his selection by letter dated April 29, 2005. The parties selected July 25, 2005 for the hearing in this matter. The hearing was held on that day in the District Administration Building at 807 N. E. Broadway Avenue in Minneapolis. The parties had a full and fair opportunity to present evidence in the form of direct and cross-examination of witnesses and the introduction of documents in support of their respective positions. At the close of the hearing the parties elected to file post hearing briefs. The parties agreed to exchange briefs on August 29, 2005. The arbitrator received the briefs as agreed. The Employer and Union agreed to have the hearing transcribed. The arbitrator held the record open until the parties submitted a copy of the transcript of the hearing. The transcript was received on September 20, 2005 and the record was closed on that date.

The collective bargaining agreement gives the arbitrator the authority to hear and decide the grievance and specifically states: “[t]he arbitrator shall not have the power to modify in any form whatsoever any provision of this Agreement. (See, *Agreement Between Special School District No.1 and Board of Education Employees Local No. 56 American Federation of State, County and Municipal Employees, Council 14*, July 1, 2002 through June 30, 2004, p. 38, hereinafter “Agreement”)

## Issues

The general issue to be decided is whether the Employer violated the collective bargaining agreement when it terminated the Grievant's employment. In order to resolve the general issue, it will be necessary to determine whether the Grievant was a probationary or permanent employee on the termination date. The more specific issue is whether the probationary period defined in the collective bargaining agreement includes only days on which the Grievant was present on site performing services or days at work plus paid holidays. In addition, the arbitrator must determine whether the Union submitted a timely grievance and demand for arbitration.

### Collective Bargaining Agreement Relevant Provisions

#### **ARTICLE III. Definitions**

**I. PROBATIONARY PERIOD:** An employee is deemed to have passed a probationary period in a classification upon the successful completion of one hundred thirty (130) duty days on the payroll in a permanent assignment. A probationary employee will be eligible to use his/her accrued vacation and sick days when the employee has reached the minimum total hours necessary to qualify under the civil service formula to use accrued vacation and sick leave.

#### **ARTICLE XI. Holidays**

There shall be eleven (11) paid holidays during a year: New Years Day, a day designated by the employer for observance of Martin Luther King's birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and the following Friday, Christmas Day and Christmas Eve Day and New Year's Eve Day if the employee is scheduled to work on either of these two days. Independence Day and Labor Day shall be paid holidays for employees who are scheduled to work the day before and the day after said holidays regardless of whether the employee is classified as a "twelve month" or "school year" employee. The arbitration award regarding Christmas Eve and New Year's Eve holidays shall remain in force for the term of this Agreement.

#### **ARTICLE XII. Vacation**

**A. CALCULATION OF VACATION ALLOWANCES**

2. Employees on initial employment probation shall not be eligible to use accrued vacation until they reach the minimum number of accrued hours calculated by the following formula: 130 days X .0462 hours accrued X number of hours worked per day.

**B. USE OF ACCRUED VACATION:**

1. Employees on probation must accrue the number of hours defined in Section A, 2 of this Article before being eligible to use accrued vacation.

**ARTICLE XIII. Sick Leave**

**A. SICK LEAVE ACCRUAL:**

2. Employees on initial employment probation shall not be eligible to use accrued sick leave until they reach the minimum number of accrued hours calculated by the following formula: 130 days X .0462 hours accrued X number of hours worked per day.

**ARTICLE XIX. Grievance Procedure**

The District and the Union desire that each employee have a means by which grievances may be given timely, fair and continued consideration until resolved.

A grievance shall be defined as any controversy arising over the interpretation of or adherence to the terms and provisions of this Agreement in all disciplinary actions.

- A. TIME LIMITATION AND WAIVER:** Grievances shall not be valid for consideration unless the grievance is submitted in writing as outlined in this grievance procedure, setting forth the facts in the specific provision of the Agreement allegedly violated and the particular relief sought within twenty (20) work days after the event giving rise to the grievance occurred. Written notice by the employer or its designee to an employee giving notice of prospective action shall constitute one such event giving rise to a grievance. Failure to file any grievance within such period shall be deemed a waiver thereof. Failure to appeal a grievance from one level to another within the time periods hereinafter provided shall constitute a waiver of the grievance. If the district fails to reply in writing within the stated time periods, the grievant or the grievant's representative may move the

grievance to the next step outlined in the procedure below. Time lines listed in the grievance procedure may be waived by mutual written agreement of the parties.

**B. ADJUSTMENT OF GRIEVANCE:** The employer and the grievant shall attempt to adjust all grievances which may arise during the course of employment of any employee within the School district in the following manner:

**Step 1.**

- a. The employee may, with or without her/his union steward, informally discuss the grievance with their principal or immediate supervisor.
- b. If the grievance is not resolved at the time of the Step 1 informal discussion, it shall be reduced to writing by the Union Representative and submitted to the principal or supervisor with a copy to the Labor Relations Department. The written grievance shall set forth the nature of the grievance, the specific facts giving rise to the grievance, the specific provisions of this Agreement alleged violated, and the specific remedy sought. The written grievance must be submitted within twenty (20) work days after the event giving rise to the grievance. The supervisor shall respond in writing to the grievance within five work days following submission of the written grievance.

**Step 2.**

- a. If the supervisor's written answer is not acceptable to the Union, the Union will forward a copy of the written grievance along with the reasons why the Step 1 response is not acceptable to the Labor Relations Department, Contract Administrator within ten (10) work days following receipt of the Step 1 response. A meeting will be scheduled among representatives of the District and the grievant or the grievant's representative within five (5) work days following submission of the written grievance to the Labor Relations Department.
- b. Within ten (10) work days following the Step 2 meeting, the District shall submit a written reply to the grievant and the grievant's representative. If the District fails to reply in writing, the grievant or the grievant's representative may request arbitration in accordance with Step 3 of this procedure.

**Step 3.**

If the grievance is not resolved in Step 2, the grievant or the grievant's representative may refer the matter to arbitration. Any request for arbitration shall be in writing and must be received by the other party within ten (10) work days following receipt by the grievant or the grievant's representative of the District's written reply to the grievance.

Either party may submit the grievance to non-binding grievance mediation through the Bureau of Mediation Services before proceeding with selection of the arbitrator.

The District and the grievant or the grievant's representative may select a mutually acceptable arbitrator. If not able to do so, the Union may request a list of at least seven (7) names of qualified arbitrators from the Bureau of Mediation Services, State of Minnesota. The District and the grievant or the grievant's representative shall determine who is to strike the first name from the list by the toss of a coin. Each party will then alternately strike names until only one remains, who shall be the arbitrator who shall hear and decide the grievance. The arbitrator shall not have the power to modify in any form whatsoever any provision of this Agreement. Fees and expenses of the arbitrator shall be divided equally between the District and the grievant or the grievant's representative. The time limitations set forth herein relating to the time for filing a grievance and demand for arbitration shall be mandatory. Failure to follow said limitations shall result in the grievance being waived and it shall not be submitted to arbitration. In the event the District does not reply to the grievance as required in Step 2, and the time limits contained therein are not extended by mutual consent, the grievance shall be referred to the next step. The time limitations provided herein may be extended by mutual written agreement of the District and the grievant or the grievant's representative. Nothing in this bargaining agreement shall prevent an employee from pursuing both a grievance under the Collective Bargaining Agreement and other remedies including, but not limited to, a Charge of Discrimination brought under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, or the Equal Pay Act.

#### **ARTICLE XX. Employee Discipline**

- A. The District shall discipline employees only for just cause. All discipline may be appealed through the discipline procedures as contained in Article XIX of this Agreement.
- B. The principle of progressive discipline shall be applied when appropriate.

#### **Findings of Fact**

The Employer hired the Grievant on October 16, 2003. The Employer informed the Grievant in the letter of employment that she would be a probationary employee as defined by the Agreement and that she could be released from employment without cause during the probationary period. (Employer Ex.1) The parties defined the end of the probationary period as the completion of one hundred and thirty (130) duty days on the payroll in a permanent assignment. (Agreement p. 3)

The Employer hired the Grievant into the permanent assignment of a licensed practical

nurse (LPN) to serve the Lake Harriet Upper and Lower School sites. As an LPN, the Grievant was responsible for the general health of the students, including those with physical and emotional challenges. (Transcript of Hearing at p. 37, hereinafter "T") The Grievant performed adequately during most of her probationary period. However, toward the end of the probationary period the Employer became concerned about what it viewed as the Grievant's consistent errors in protocol.

The Lake Harriet sites have a significant population of medically fragile students with specific needs. (T. 37, 54) The sites are home to a program for Developmentally Cognitively Delayed ("DCD") students who require a high level of medical support. (T. 54) There are a number of students with emergency health plans for unique needs such as students with brittle bones or severe allergies and those with G-tubes and feeding pumps. (T. 55) The Grievant assisted those students. Some of the students were suffering from chronic illnesses that required the administration of medication such as asthma and ADHD. The Grievant provided specific services to medically fragile students, such as administering rectal valium to students with frequent seizures and monitoring feeding tubes and G tubes. (T. 54-56) The District felt the Grievant exhibited serious performance problems even though she had been training and received some guidance with regard to her duties.

The specific performance issues documented by the Employer were as follows: (1) improper medication administration and documentation. (2) Inadequate care of students with asthma or failure to perform physical assessments on students with asthma. (3) Failure to respond positively to request from building staff for assistance with health concerns. (4) Failure or inability to perform multiple tasks required of the job including health office duties, attendance and clerical functions. (Er. Ex. 11)

The District provided the Grievant with assistance and periodic instruction on how to accomplish the duties of the LPN position. The record reveals that the assistance was minimal and provided while the Grievant was not just on duty but very busy with required tasks. The trainers' written comments describing the time spent with the Grievant show that less than two hours were spent on October 24, 2003. The trainer began at approximately 2:00 p.m. that day and

instructed the Grievant on the proper procedures for assessing students with asthma. The trainer reported “Many interruptions in Health office so even though I was there until 4:00 p.m., didn’t get through meds and how to use.” (Er. Ex. 12) On November 5, 2003 the trainer reported “Visit to Lake Harriet Lower. Started to review SHOAR again but had to quit because she had just learned how to do attendance and was preoccupied with getting it done.” (Id)

The record shows that the District arranged to have individuals assist the Grievant with understanding the proper procedures for performing some aspects of her job. Those individuals did not inform the Grievant of any performance deficiencies that might put her at risk of losing her job. For example, on November 14, 2003 the trainer reported that the Grievant failed to remember some of the information from the previous meeting. She also said that she and the Grievant focused on the proper procedures for using medications. The trainer also reported that the Grievant asked for orientation on breath sounds. (Id.) The trainer did not report that she had informed the Grievant that her job was in jeopardy and that improvement on all tasks was required by a date certain in order for the Grievant to survive the probationary period.

On January 3, 2004, the trainer visited with the Grievant again to review procedures for completing forms and distribution of medications. The trainer said the Grievant “seemed to be able to do what I asked without much prompting from me.” (Er. Ex. 13) On January 14, 2004, the trainer returned with breath sounds tapes and compact discs for the Grievant to use for orientation on breath sounds. (Er. Ex. 12) On March 19, 2004 another District registered nurse spent the day evaluating the Grievant’s performance. The trainer did not inform the Grievant of the District’s concerns regarding her performance but actually reported:

“My assessment is that ***her skills are safe***, she continues to build proficience (sic) in balancing the attendance/health office needs. She is outspoken on a few subjects, and I have spoken to Marsha about this. These issues are more related to recess issues. We also talked/agreed that she is very nervous during observations. She has verbalized that she is much more comfortable with the technical and knowledge base needed w/the special education group. ***I think it would be beneficial to spend another half/whole day with her. Yesterday was the first time that we had a chance to spend 1:1 with things like immunizations. At the lower campus, they are expecting 130 new kindergartners. We talked about the need to be efficient at assembling new charts etc.***” (Emphasis added. Er. Ex. 14)

So, while the District was observing and providing the Grievant with some training it was not communicating what it perceived as grave performance issues. The Grievant did not know that the individuals offering her training were in fact reporting to the District about her performance. As late as April 2004, less than one month before the District informed the Grievant of its decision to recommend termination, no one had informed the Grievant that her performance was jeopardizing her ability to successfully complete the probationary period. The District had not conducted a formal performance evaluation as required by the civil service rules and failed to provide the Grievant with a performance improvement plan or even a deadline for improving her performance. (See Er. Exs. 12-20, T.47)

The City of Minneapolis imposes some requirements on the District with regard to the treatment of probationary employees. (See Er. Ex. 2, MPS0132) The City requires the District to provide the probationary employee at least one formal review of job performance at which time the employee is to be informed of deficiencies that must be corrected in order to successfully complete probation. The Minneapolis Civil Service Commission's Rules and Charter Provisions state that the probationary period is the final step in the selection process before the employee gains permanent status. The Rules and Charter Provisions include the following:

“The primary objectives of a probationary period are training and evaluation of the new employee's job performance. There should be ongoing training and informal review and feedback of job performance at which time the employee is clearly informed of any deficiencies in performance that must be corrected in order to successfully complete probation. Such formal review shall be scheduled to allow adequate time for the employee to correct any deficiencies before the end of the probationary period. Any employee whose performance is unsatisfactory after reasonable time has been allowed for improvement should be released during the probationary period.” (Er. Ex 2)

The District failed to provide the Grievant with either a formal review or a deadline for erasing any deficiencies. Nevertheless, on May 6, 2005, the District met with the Grievant and informed her of its decision to terminate her employment due to the performance issues described above. The District decided it did not want to invest additional time and training to

assist the Grievant with her performance problems and moved quickly to terminate her employment by way of the process available to it with regard to probationary employees. Curiously, the District required the Grievant to work after announcing its decision to terminate her employment because of poor performance. (T. 49)

The parties' Agreement calls for the successful completion of one hundred and thirty (130) duty days on the payroll in a permanent position in order to be entitled to the just cause and progressive discipline procedures contained therein. As noted above, the Grievant was hired on October 16, 2003. The parties introduced evidence demonstrating that the Grievant documented her work hours on time cards and that the corresponding payroll records confirm the number of hours worked, the pay received for those hours as well as the number of paid holidays provided the Grievant during her employment with the District. (See, Er. Brief at p. 9, U. Brief at p.5-6, Er. Ex. 4, U. Ex.3)

The parties acknowledge in their respective post hearing briefs that the Grievant was present and actually performing services for the Employer on one hundred and twenty-four (124) days during her entire period of employment with the District. In addition, both sides acknowledge that the Grievant was paid for eight (8) holidays during her employment with the District. The District paid the Grievant for the following holidays: Thanksgiving Day, the Friday following Thanksgiving, Christmas Eve, Christmas Day, New Year's Eve Day, New Year's Day, Dr. Martin L. King, Jr. Day and President's Day. (Er. Brief at 8-9, 15, 16)

When the District met with the Grievant on May 6, 2004 to inform her of its decision to terminate her employment, it gave her a choice between resignation and termination. (Er. Ex. 11) As noted above, the District's May 6 conversation did not result in the Grievant's immediate removal from the workplace. The District required the Grievant to work the next day. (See Er. Brief at p. 9) Furthermore, even had the District not asked the Grievant to return to work after announcing its decision to terminate her, it is clear that the May 6 meeting was merely a recommendation to the Board. The District submitted its recommendation for termination to the Board. The Board adopted the recommendation and the District informed the Grievant of her termination by certified letter day May 26, 2004. (Er. Ex. 7)

The Union filed a grievance challenging the termination on June 14, 2004. (Er. Ex. 5) The Employer denied the grievance by letter dated June 22, 2004. (Er. Ex. 6) The Union and Employer met several times between June 2004 and December 2004. The parties discussed all open grievances including the instant grievance. There is no evidence that the Employer verbally or in writing waived the time requirements for filing grievances and requesting arbitration. It is clear that the Employer continued to discuss the grievance and treat the matter as open for consideration. Testimony established that the practice of the parties is to continue to discuss all open cases with an eye toward resolution. (T. 24-28, U. Ex. 1, T. 92-103) Following the collapse of talks regarding informal resolution of this matter, the Union informed the Employer of its intent to arbitrate the matter on October 23, 2004. (Er. Ex. 9)

### **Positions of the Parties**

#### **Union's Position**

1. The grievance was timely filed in accordance with the requirements of the collective bargaining agreement.
2. The Employer terminated the Grievant on May 26, 2004. The Union filed the grievance on June 14, 2004 within the 20-day period required by the collective bargaining agreement.
3. The Employer did not assert timeliness as a reason for its denial of the grievance and continued to engage the Union in discussion of the grievance for several months. The Union and Employer continued to discuss the grievance over the course of several months also demonstrating that both sides considered the grievance to be timely.
4. The Union offered the only reliable evidence regarding these continued discussions and that evidence should be credited over that of the Employer's vague recollections.
5. The Union's evidence showed that the Employer did not assert timeliness at the meetings and verbally waived the time line at each meeting as they discussed and reviewed data on the case.
6. It was a part of the normal processing of grievances for the parties to continue to discuss grievances with an eye toward resolution over the course of many months. The parties never reduced extensions to writing as called for by the collective bargaining agreement.

7. The grievance remained fluid as a result of demonstrated laxness by the Union and Employer in adhering to contractual time lines, continued discussions regarding the grievance and the Employer's failure, either orally or in writing, to announce its intention to abandon the long-standing practice of informal time line extensions.
8. The grievant had completed her probationary period and was therefore entitled to the just cause and progressive disciplinary protections of the collective bargaining agreement.
9. An examination of both the time cards and payroll check stubs for each pay period will show the exact number of days that the Grievant was on the payroll. Both need to be examined in order to determine whether the Grievant had completed her probationary period. The probationary period includes both days worked and paid holidays.
10. The collective bargaining agreement does not set one standard for duty days as applied to the definition of a probationary employee and another standard for duty days as it relates to calculating sick leave and vacation. Article 13-Sick Leave, Section A-I defines hours in a duty day as per hour of paid employment. Article 12-Vacation, Section A-1 similarly defines a duty day as hours of paid employment.
11. Article 3-Definitions, Section I defines duty as 130 duty days on the payroll. Article 11-Holidays, specifically references the arbitration regarding New Years Eve and Christmas Eve as scheduled work days and therefore, are paid holidays for those employees covered by the AFSCME contracts.
12. All of these Articles and their application of the words duty days as defined by paid hours of employment are uniform and consistent with the Unions position that paid status and not time actually at the job site on any day defines that day as a duty day and that this consistent and uniform meaning is applied equally to sick, vacation or holiday time.
13. The 1983 arbitration decision clarified that the "Eves" were also scheduled work days (duty days). Therefore holidays do count as duty days under the collective bargaining agreement.
14. The Grievant, starting with October 16, 2003 and running through May 7, 2004, her last paid day of employment, counted her duty days on the payroll. Counting all days at the two job sites and all paid holidays as provided for in the contract and the 1983 arbitration decision, the Grievant had 132 days on the payroll in a permanent position and had therefore passed her probationary period.
15. The Employer has the right to release probationary employees and that action is not grievable under the contract. The Employer asked the Grievant to resign her position and

after the Grievant refused to do so, the Employer terminated her employment. If the Grievant was on probation, her resignation would be unnecessary.

16. The Employer acknowledged that it is only when an employee has passed the probationary period that the Board is required to ratify the District's recommendation to terminate. The Board treated the Grievant as an employee who had completed her probationary period by sending the termination recommendation to the Board.
17. Since the Employer terminated the Grievant after she had completed her probationary period it was required to adhere to the just cause provisions of the agreement. Article 20, Sections A and B restrict the Employer's ability to terminate to those situations where just cause can be demonstrated and require the Employer to apply progressive discipline when appropriate.
18. The Employer claims to have terminated the Grievant out of concern for student safety. However, the Employer permitted the Grievant to return and continue serving students following its decision to terminate. The Employer could not possibly have been concerned about student safety and return the Grievant to her position to continue serving students.
19. The only conclusion that can be drawn from this evidence is that the Employer did not have just cause to terminate and that whatever concerns it did have could have been addressed through the progressive discipline process.

#### Employer's Position

1. The Grievance and the Union's request for arbitration were both untimely and therefore the termination should be upheld.
2. It is a fundamental principle of labor arbitration that where a collective bargaining agreement contains clear deadlines within which the Union must process a grievance, it is a violation of arbitral responsibility to ignore those time lines. Minnesota courts have consistently held that failure to timely grieve amounts to acquiescence and waiver of claims. Arbitrators who ignore contractual time lines - in the face of unambiguous language, clear and certain facts, and consistent past practice of strict compliance - can expect to have their awards vacated.
3. Article XIX, Section A states that grievances shall not be valid for consideration unless the grievance is submitted in writing within twenty (20) work days after the event giving rise to the grievance occurred. Failure to file any grievance within such period shall be deemed a waiver thereof. Time lines listed in the grievance procedure may be

waived by mutual written agreement of the parties.

4. Article XIX, Section B states if the grievance is not resolved the grievant representative may refer the matter to arbitration. Any request for arbitration shall be in writing and must be received by the other party within ten (10) days following receipt by the grievant representative of the District's written reply to the grievance
5. Article XIX, Section B also makes clear that the time limitations are mandatory. Failure to follow said limitations shall result in the grievance being waived and it shall not be submitted to arbitration.
6. The grievance was submitted more than twenty (20) days after the Grievant was terminated and was, therefore, not timely. Even if we accept May 26, 2004, the date the School Board accepted her resignation as the date of termination, the request for arbitration came nearly four (4) months after the District denied her grievance in writing and is not timely under the contract terms.
7. The Union has not presented any documentary evidence of a written waiver of the time lines on matters discussed in the contract administration meetings.
8. Accordingly, taking jurisdiction over the grievance would require the arbitrator to modify clear and unambiguous contract language regarding the penalty for violating the time limitations. It is a basic tenet of arbitral law that doing so is outside an arbitrator's authority.
9. The Grievant a probationary employee when she was terminated and therefore the termination should be upheld. The plain language of the collective bargaining agreement states that an employee is deemed to have passed a probationary period in a classification upon the successful completion of one hundred thirty (130) duty days on the payroll in a permanent assignment.
10. Probationary employees are not entitled to any due process and can be terminated within the 130 days without cause. The contract does not specifically define "duty days," but the plain meaning of that term has generally been applied when determining the status of an employee.
11. Duty days are not limited to those on which service is provided to students, but includes all days when an employee provides service to the District. However, duty days do not include paid holidays, but would include staff development days and other days when employees are expected to work.
12. At the point that the Grievant was terminated she had performed only 124 duty days,

which includes all days of training, staff development and days when she provided service to students. Duty days are those days on which she provided some kind of service to the District, either in the form of nursing services, staff development participation or training.

13. The Grievant was also paid for five (5) holidays including Christmas, Martin Luther King Day, President's Day and Thanksgiving. These holidays do not constitute duty days.

### **Opinion and Award**

#### **Timeliness**

The threshold question is whether the grievance was timely filed. Arbitrators are mindful that when the parties honor the steps and time limitations spelled out in their grievance procedures those labor relationships are strengthened. Arbitrators are committed to honoring the language of the Agreement that binds the parties with respect to the processing of grievances. However, arbitrators are also mindful that the parties can and often do alter the plain language of their agreement by their own actions. Depending on the nature of those actions, arbitrators may be more or less inclined to honor the presumption favoring arbitration over dismissal of grievances on timeliness or other technical grounds. (See Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition, p. 206)

Here, the parties' collective bargaining agreement contains a requirement that all grievances be submitted in writing within twenty (20) days of the event giving rise to the dispute. The Agreement further states that written notices by the employer or its designee to an employee giving notice of prospective action shall constitute one such event giving rise to a grievance. (Agreement p. 37)

A review of the record reveals that there are two dates relevant to a determination of whether the Union filed a timely grievance. The first date is May 6, 2004. On that date, the Employer met with the Grievant, informed her of the concerns regarding her performance, offered her a chance to resign, and expressed regret that the District could not recommend her continued employment.

“This letter is to inform you of your probationary release from

employment with Minneapolis Public Schools, effective today, May 6, 2004, due to unsafe and unsatisfactory nursing practice . . . The district decision to terminate your employment is final. As a probationary employee you are not entitled to an appeal process. I regret that I am unable to recommend your continued employment with Minneapolis Public Schools.” (Er. Ex. 3, See also Er. Ex. 11)

The May 6, 2004 meeting represents, at a minimum, notice to the Grievant of prospective action giving rise to a grievance. If the clock began to run on the twenty (20) day period for filing on May 6, 2004 then the Union did not file the grievance in a timely manner. As a practical matter, it is difficult to imagine that the Grievant did not know her job was in jeopardy as of May 6, 2004. However, the Grievant did not communicate that information to her Union representative at that time. (T.89)

The other important date is May 26, 2004. The Employer submitted its recommendation for termination to the School Board for approval. It was the Board’s adoption of the District’s recommendation that officially ended the Grievant’s employment. The Employer sent the Grievant the following termination letter dated May 26, 2004 by certified mail.

“As you know the District has been investigating and reviewing concerns about your performance as a LPN. A summary of these concerns was shared with you at a recent meeting with your supervisors . . . Since you rejected the District’s offer to resign your position the School Board has accepted the Administration’s recommendation that you be discharged effective May 26, 2004.” (Er. Ex. 7)

The official termination letter was dated May 26, 2004 and marked “certified mail returned receipt requested.” (Er. Ex. 3), The earliest the Grievant would have received the letter would have been the next day, May 27, 2004 which was a Thursday. Twenty (20) calendar days following that date would make the deadline for filing June 16, 2004. However, the Union first learned the Employer had terminated the Grievant on May 26, 2004. The Union filed the grievance on June 14, 2004, nineteen (19) days after the clock began to run. (Er. Ex. 5, Tr. P. 19, ln. 20) Therefore, the grievance was timely filed. Even if you assume that the May 6, 2004 date started the clock running on the period for filing, it is clear that the parties regularly engage in on-going discussions aimed at resolving grievances beyond the filing deadline. Both sides testified to the practice characterized by monthly meetings during which all outstanding grievances were

discussed. While, the Employer admits to the practice, it argues that the parties reserve all arguments available to it under the Agreement. However, it is difficult to imagine the discussions having any value if the Employer can first engage the Union in discussions about an outstanding grievance past the time for filing only to invoke the filing deadline once the discussions prove fruitless.

The Agreement states:

“The District and the Union desire that each employee have a means by which grievances are given timely, fair and continued consideration until resolved.”  
(Agreement at p. 37)

Both sides have an obligation to engage in timely, fair and continued consideration of grievances. The earliest discussions between the Union and Employer regarding this grievance took place on May 26, 2004 the day on which the Employer officially terminated the Grievant. (T. 92) The parties continued to discuss the grievances during the months that followed. (T. 90-95) The Union acted upon that knowledge in a manner consistent with the requirements of Article XIX. In other words, the Union filed the grievance within the twenty (20) day period as called for in Agreement and moved to engage the Employer in timely and fair discussions regarding the grievance over the next several months. While it is difficult to imagine that the Grievant did not know her job was in jeopardy on May 6, 2004, it is important to keep in mind that the Employer did not give that prospective notice to the Union. The Agreement imposes an obligation on the Union, not the Grievant, to file the written grievance within the twenty (20) day period. (See Article XIX, Section A, Step1b)

The Employer raised one other timeliness argument. The Employer argues that even if the Union filed the grievance in a timely manner, it did not make the request for arbitration within the ten (10) day period called for in the collective bargaining agreement. The Agreement states:

If the grievance is not resolved in Step 2, the grievant or the grievant’s representative may refer the matter to arbitration. Any request for arbitration shall be in writing and must be received by the other party within ten (10) work days following receipt by the grievant or the grievant’s representative of the District’s written reply to the grievance. (Agreement, XIX Grievance Procedure, Step 3, p. 38)

The Employer denied the grievance by letter dated June 22, 2004. (Er. Ex. 6) On October 23, 2004, the Union requested an arbitration panel from the Bureau of Mediation Services (BMS) and notified the Employer. (Er. Ex. 9) Obviously, the ten-day period expired prior to the Union informing the Employer of its intention to pursue arbitration. The Union explains this time lapse as resulting from the parties continued discussions regarding this and other grievances that were aimed at seeking resolutions. The Union presented credible evidence demonstrating that the parties' normal, regular and accepted practice is to meet regularly regarding grievances and any other matters of mutual importance to both work toward resolution of outstanding grievances and to share other information as necessary. The parties agreed that meetings took place on May 26, June 1, June 16, July 7, July 27, August 23, and November 16 of 2004. (Tr. Pp. 92-95)

The Employer does not deny that these meetings took place but maintains that the meetings do not represent a waiver of the time lines for requesting arbitration as called for in the Agreement. The meetings, according to both sides provided further opportunities to resolve outstanding matters. (T. 24) The Employer maintains that the language of the Agreement is mandatory and cannot be ignored. The Agreement does state that:

The time limitations set forth herein relating to the time for filing a grievance and demand for arbitration ***shall be mandatory***, Failure to follow said limitations shall result in the grievance being waived and it shall not be submitted to arbitration. In the event the District does not reply to the grievance as required in Step 2 and the time limits contained therein are not extended by mutual consent, the grievance shall be referred to the next step. The time limitations provided herein may be extended by mutual written Agreement of the District and the grievant or the grievant's representative. (Er. Ex. 2, p. 38, emphasis added)

However, as stated above, the parties' practice of continuing to meet beyond the deadline for requesting arbitration evidences an intent on the part of the Employer to engage the Union in an honest attempt to reach a resolution short of arbitration. Having so engaged the Union, the arbitrator finds that it is contrary to the plain meaning of "*timely, fair and continued discussions*" to adhere to the deadline for requesting arbitration in this case. The parties' language regarding the deadline for requesting arbitration still stands. It is simply set aside in this case in favor of the language in the Agreement calling for fair and continued discussion of grievances. The

arbitrator accords great weight to the parties' willingness to continue discussions regarding all outstanding grievances even though both were aware of the arbitration filing deadline. Here the Employer acknowledged that it had engaged in meetings with the Union following denial of the grievance in an effort to "settle it short of arbitration." (T. 27) Other arbitrators have similarly recognized that such actions by the parties may result in a waiver of the time lines as well as the waiver of the requirement of a written extension request. See, e.g., Elkouri & Elkouri, How Arbitration Works, 6<sup>th</sup> Ed., p. 222, 274. According to Elkouri & Elkouri there are several cases in which arbitrators have held that a request for arbitration was timely where the union and company engaged in ongoing conversations beyond the period for filing the grievance. See, e.g., *Jackson Electric Instrument Co.*, 42 LA 740, 745 (*Seinsheimer, 1964*), *Lear Siegler, Inc.*, 75 LA 612, 614 (*Greer, 1980*). See also, *Cone Mills Corp.*, 103 LA 745 (*Byars, 1994*) and *Granite Construction Company*, 100 LA 585 (*Richman, 1993*) For all the reasons stated above, the arbitrator concludes that the grievance and the Union's request for arbitration were timely.

#### Probationary Employees and Duty Days

The merits require a determination as to whether the Grievant was a probationary employee at the time of her termination. The parties do not dispute the relevant facts they simply assign different meanings to those facts. The Agreement defines a probationary employee as follows:

An employee is deemed to have passed a probationary period in a classification upon the successful completion of ***one hundred and thirty (130) duty days on the payroll in a permanent assignment***. A probationary employee will be eligible to use his/her accrued vacation and sick days when the employee has reached the minimum total hours necessary to qualify under the civil service formula to use accrued vacation and sick leave. (Agreement, Article III (I), p. 3, emphasis added)

The Agreement does not define duty days. The Union argues that a duty day is simply each day that the employee remains on the payroll in a permanent assignment. The Employer defines duty days as those days on which the employee is providing some kind of service to the District either in the form of nursing services, staff development participation or training. The Union's definition of duty days includes paid holidays whereas the Employer's does not.

The significance of the definition is obviously critical to the outcome of this case. Probationary employees can be dismissed without cause and their dismissal is not subject to the “just cause” provisions or grievance procedures of the Agreement. (Er. Ex.) If, however, the Grievant completed her probationary period, the Employer should not have terminated her employment without complying with the just cause and progressive disciplinary requirements of the Agreement.

Both sides agree that the Grievant served 124 duty days under either definition. The Grievant was present and providing services to either students or the District in some other manner on 124 days between October 16, 2003 and May 7, 2004. (Er. Brief at P. 8-9, 15-16, U. Brief at P. 5-6) Both sides acknowledge that the Employer paid the Grievant for eight (8) holidays during the term of her employment as well. (Id.) The District paid the Grievant for the following holidays: Thanksgiving Day, the Friday following Thanksgiving, Christmas Eve, Christmas Day, New Year’s Eve Day, New Year’s Day, Dr. Martin L. King, Jr. Day and President’s Day. (Id.)

To resolve the differing interpretations of the Agreement arbitrators typically employ several well-established principles. One of those principles is that, absent mitigating or compelling circumstances, arbitrators must honor the plain meaning of clear and unambiguous contract language. Here, the Union urges the arbitrator to find that the parties’ Agreement defines duty days so as to include paid holidays. It asks the arbitrator to reach this conclusion based on the definition of a probationary employee. As mentioned above, the parties did not define duty days in the Agreement. The parties did clearly define when an employee loses the probationary label. The employee moves from probationary to permanent status following the successful completion of *one hundred and thirty (130) duty days on the payroll in a permanent assignment*. What is missing from the language therefore is the formula for calculating when an employee reaches the 130 duty day threshold.

The plain meaning rule will not assist us with our task of defining duty days. The arbitrator understands that principle to mean that a term is not susceptible to more than one meaning. Furthermore, the plain meaning rule implies that there is no need for interpretation.

Interpretation is exactly what is called for here. The parties did not present bargaining history that would shed light on the question of whether there was ever a meeting of the minds with respect to the definition of duty days. However, the Union urges the arbitrator to look to the use of duty days in other places in the Agreement and examine the meanings given there in order to make a determination.

The Union also urges the arbitrator to accept an earlier arbitration award as standing for the proposition that paid holidays are included in the definition of duty days. The issue in that case was whether the employer violated the labor agreement by denying holiday pay to school year employees for the latter half of Christmas Eve Day and New Year's Eve Day. The arbitrator declines to apply the meaning to the holding in that case urged by the Union. The case dealt with the treatment of two different classes of employees within the bargaining unit, school year employees and twelve month employees. That arbitrator did not define duty days in granting the Union's position and this arbitrator can find no language in the decision resolving the matter before us. See *AFSCME, Council No. 14, Local 56 and Special School District No. 1* (Kapsch, 1983) BMS Case No. 83-PP-749-A

The Employer, on the other hand, urges the arbitrator to consider a case involving teachers in another school district in which the term duty day was held to exclude a computer workshop day held prior to the start of the school year. See, *Mora Federation of Teachers v. Independent School District 332*, 352 N.W.2nd 489 (Minn. App.1984) The arbitrator finds that the more relevant approach is to look for consistent usage of the term duty days in the parties' agreement rather than looking to cases from other labor relationships. Other parties are free to define duty days as they see fit and it would be unrealistic to assume that the meaning will be consistent across bargaining units.

Furthermore, the arbitrator believes that the goal of this exercise is to search for the meaning intended by the parties and not one that the arbitrator or anyone outside of the bargaining relationship considers proper. It is common for parties to use a term so frequently that they assume both sides understand its meaning. It is also common for the parties to recognize that the amount of detail necessary to the careful construction of a labor agreement is far too

great to define every commonly used phrase. The parties make reference to duty days in various articles of their Agreement. A careful examination of those clauses will lead us to the correct interpretation based on the meanings provide by the parties.

In doing so, the arbitrator is keeping an eye on other established principles of contract interpretation such as giving words their normal or technical meaning and here especially, keeping the meaning consistent throughout the contract so as not to render any portion of the contract useless or nonsensical. The normal meaning of duty days as it appears in Article III is simply *days on the payroll* in a permanent position. (Agreement, p. 3) Other language in the Agreement suggests this meaning is correct. The simple fact that a day is listed as a paid holiday does not mean that unit employees are not obligated to work or otherwise provide services to the District on those days. The Employer's interpretation suggests that paid holidays are days on which unit employees are not required to provide service to the District. It is the lack of obligation to provide service that is at the heart of the Employer's definition of duty days.

The Agreement does contemplate that unit employees will, from time to time, be required to provide service to the Employer on days that are clearly designated as paid holidays. For example, Article IX, Hours-Overtime includes the following language:

“Bargaining unit employees not typically scheduled to work on student release days may be scheduled to work on release days at the discretion of the Principal or Supervisor.” (Agreement, p. 7)

Even more relevant is the language of Article IX, Hours-Overtime, Section B. That section includes the following language:

“Employees who work on paid holidays (see Article XI) shall be paid for the holiday plus their regular hourly rate for all hours worked on the holiday.” (Agreement, p. 8)

There can be no doubt from this language that the parties contemplated that unit employees would be obligated to provide service to the Employer on days designated as paid holidays. To conclude that duty days do not include paid holidays by adopting the interpretation urged by the Employer would render the language above void. The arbitrator does not have the authority to draw a conclusion that would nullify language in the Agreement.

The Agreement remains consistent throughout by adopting the definition urged by the Union. For example, the language in the vacation and sick leave articles provide mathematical formulas that are used to determine how much vacation and sick leave a unit employee is entitled to following probation. Article XII, Vacation, Section A states:

“Vacation entitlement for employees will be as follows: Vacation with full pay of 0.0462 hours per hour of paid employment (96.09 hours per year for full-time full year employees) for employees with 0-7 years of service.” (Agreement p. 9)

The critical language here is “*per hours of paid employment*” which obviously includes paid holidays. More specifically, Article XII, Section A(2) provides the formula for probationary employees to determine their eligibility to use accrued vacation. For employees on a schedule similar to that of the Grievant (30.03 hours per week) the formula reads: 130 days X .0462 X 6hrs/day. Of critical importance to our task here is the fact that the formula does not say 130 days of actual service it simply reads 130 days. The plain meaning is that 130 days means days on the payroll in a permanent position. There is no language in the Agreement that supports the Employer’s position that duty days do not include paid holidays.

Consider the following language from Article XIII, Sick Leave:

“All permanent employees will be credited with medically unverified sick leave at the rate of .0462 hours accrued per hour of paid employment.” (Agreement, p. 11)

The phrase “*hour of paid employment*” can only mean both days of actual service plus paid holidays if we are to give consistent meaning to several other provisions in the Agreement. The parties use consistent language with regard to nearly every benefit included in the Agreement that requires the passage of a certain number of *days on the payroll* or *pay schedule* before the unit employee acquires access to the benefit. For example, in order to be eligible for insurance benefits the only requirement is that the employee be paid on the *pay schedule* for bargaining unit employees and must be assigned to work twenty (20) or more hours per week. (Agreement, p. 18) Here again, the parties made no reference to actual work days and paid holidays. To accept the Employer’s definition of duty days would require the arbitrator to ignore all of the language quoted above showing that the parties made no distinction between actual days of work and days

on the payroll for purposes of determining the allocation of benefits.

The insurance and benefits article reads in pertinent part:

“The employer’s contribution continues as long as the employee remains on the payroll in an insurance eligible position.” (Agreement, p. 19)

The Agreement is filled with examples of the parties’ desire to avoid the definition of duty days urged by the Employer. Further support for this conclusion can be found in the language regarding leaves of absence. It is worth looking at the actual leave of absence language because it is the most direct evidence that the parties did not intend duty days to be limited to days actually worked. Article XVII, Section A(4) states:

“The probationary period shall be extended by a period of time equal to the total number of duty days on leave.”

This language should leave no doubt that the parties did not intend to define duty days in any other way except as number of days on the payroll. The parties use duty days here to describe the number of days the employee is actually on leave and not obligated to provide service to the Employer. In other words, in this context duty days can only be defined as days on the payroll. The parties simply made clear that duty days accumulated while on leave cannot be used toward the completion of the probationary period. The opposite then must be true. Duty days accumulated while on the payroll and eligible to provide services to the Employer are to be included in the 130 days needed to complete the probationary period. Paid holidays are days on the payroll during which unit employees might be required to and are available to perform services if needed. The only difference is that the duty days accumulated while on leave cannot be used to complete the probationary period.

Upon further examination of the Agreement, it is clear that the parties agreed upon different language to describe actual days worked. For example, in Article XVIII, Section A (4) the parties settled on contract language defining the compatibility period for a permanent employee given a lateral transfer. The language reads:

“Any employee so transferred will be given a thirty (30) *work day* “compatibility period” in the position, during which time either the employee or the person in charge may request termination from the position, subject to the approval of the Human Resources

Department. The parties may agree upon a fifteen (15) *work day* extension of the compatibility period based on their agreement that a reasonable expectation exists that the employee will be successful upon completion of the extension.” (Emphasis added. Agreement, p. 26)

The explicit adoption of the term “work day” rather than “duty day” in order to define the period during which a permanent employee must demonstrate competence in the new position confirms that the parties did have a meeting of the minds on the issue of the proper interpretation to be applied to each.

Based on the foregoing, it is the arbitrator’s determination that the grievance and request for arbitration were timely filed. It is also the arbitrator’s determination that the parties intended the term “duty days” as used in the definition of probationary period to mean “days on the payroll in a permanent position.” The phrase “days on the payroll” include paid holidays. The Grievant, therefore, had completed her probationary period and was entitled to the just cause and progressive discipline protections agreed to by the parties.

### **Award**

#### **The grievance is sustained.**

The Employer is hereby ordered to:

1. Reinstatement the Grievant to her 30 hours per week school year LPN position within the Minneapolis Public School system.
2. Restore the Grievant to the level of seniority she would have attained had her employment not been interrupted.
3. Restore all vacation, sick leave and all other benefits to which the Grievant would

have been entitled had her employment not been interrupted.

4. Pay the Grievant all wages lost as a result of the District's wrongful termination of her employment from May 9, 2004 until the date of reinstatement excluding the 2004 and 2005 summer recess periods.
5. Remove all references to performance problems from the Grievant's personnel file.
6. Provide sufficient training and support to allow the Grievant to reach a satisfactory level of performance.

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A. Ray McCoy, Arbitrator

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November 14, 2005