

OPINION AND AWARD

OF

DAVID S. PAULL

In the Matter of the Arbitration Between

EDUCATION MINNESOTA - Moorhead

AND

**INDEPENDENT SCHOOL DISTRICT NO. 152 of
Moorhead, Minnesota**

(Selection of Department Chair)

**Date Issued: October 25, 2011
BMS Case No. 11-PA-0608**

OPINION

Preliminary Matters

The Arbitrator was selected by mutual agreement from a list provided by the Minnesota Bureau of Mediation Services. On August 16, 2011, a hearing was conducted in Moorhead, Minnesota. Education Minnesota-Moorhead (Union) was represented by Meg Luger Nikolai. Independent School District No. 152 (District or ISD 152) was represented by James E. Knutson. Ms. Luger Nikolai and Mr. Knutson are lawyers with offices in the Minneapolis/St.Paul metropolitan area.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. No stenographer was present.

After the witnesses were heard and the exhibits were presented, the parties agreed to present simultaneous initial arguments in writing by the close of business September 2, 2011. The parties also agreed to submit simultaneous responding position statements by the close of business September 14, 2011. All briefs were timely received. Thereafter, the case was deemed submitted and the record was closed.

Issue

The parties failed to agree on a precise statement of the issues to be presented. However, they stipulated to authorize the Arbitrator to formulate the issues, after reviewing the evidence and considering the positions of the parties.

Having considered the matter, the Arbitrator determines that the issues to be resolved in this dispute are as follows:

Was the grievance filed in compliance with the time limits set out in the collective bargaining agreement?

Did the District violate the terms of the collective bargaining agreement when it selected teachers to serve as Department Chairs for the 2010-2011 school year and if so, what is the appropriate remedy?

In the event the grievance was not filed in a timely manner, does the Arbitrator lack jurisdiction to resolve the dispute?

Relevant Contract Provisions

The following contractual provisions are deemed pertinent to this grievance:

ARTICLE 1: RECOGNITION

Section 1. **Statement** – The School Board hereby recognizes Education Moorhead as the sole and Exclusive Representative for all licensed personnel in the bargaining unit as defined in the PELRA.

Section 1. **Statement** – The School Board agrees not to negotiate with or recognize any teachers' organization other than the Exclusive Representative initially recognized during the period this Contract is in force unless the initial Exclusive Representative is decertified, loses its status or another teacher organization is certified pursuant to the PELRA of 1971, as amended.

ARTICLE 3: SUCCESSOR NEGOTIATIONS

Section 1. **Statement** – It is further agreed that the scope of this Contract sets forth limits as well as enabling measures, but is governed by other limitations provided by Minnesota law and that if any part of this Agreement is contrary to law then such provisions or applications shall not be deemed valid and subsisting except to the extent permitted by law, but all other provisions or applications shall continue in full force and effect.

Section 2. This Contract shall include all teachers as defined in this Contract.

Section 3. This contract shall be binding upon both parties, including successor School Boards, the Exclusive Representative and all teachers for the duration of the Contract, and shall not be subject to expansion, revision, or deletion unilaterally. Any amendment shall be subject to ratification by the School Board and Exclusive Representative in the same manner as required by the law for adoption of this original Contract provided that the bargaining committee shall be empowered to effect temporary accommodations to resolve special problems.

Section 4. **Negotiation** – When the Exclusive Representative desires to meet and negotiate a new contract, written notice shall be given to the School Board and the State Director of Mediation, and a mutually acceptable date to begin negotiations shall be suggested not more than 150 days preceding the expiration of this Contract. In the notice to the School Board the Exclusive Representative will certify the teachers' negotiator(s), not to exceed five (5), who are designated by the Exclusive Representative as the "Teachers Negotiating team."

ARTICLE 5: EMPLOYER'S RIGHTS AND OBLIGATIONS

Section 5. **Negotiations** – The School Board shall not be required to meet and negotiate on matters of inherent managerial policy, which includes 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, direction and number of personnel.

ARTICLE 6: MAINTENANCE OF STANDARDS

Section 1. **Statement** – This Contract shall not be interpreted or applied to grant or deprive teachers or the School Board of professional advantages heretofore enjoyed unless expressly stated herein.

ARTICLE 11: CONTRACT GRIEVANCE

Section 1. **Time Limits** – All time limits herein shall consist of school days except that when a grievance is submitted on or after June 1, time limits shall consist of all weekdays so that the matter may be resolved before the close of the school term, or as soon as possible thereafter. Such time limitations may be extended only by mutual consent. The number of days indicated at each level should be considered a maximum, and every effort should be made to expedite the process.

Section 3. **Procedure** – The parties acknowledge that it is usually most desirable of the Exclusive Representative and the appropriate representative of the Board to resolve problems through free informal communication.

Step 1. – The Exclusive representative will attempt to resolve the complaint through informal discussion with the appropriate school district representative.

Step 2. – If the complaint is not resolved in the initial meeting between the appropriate management department and the Exclusive Representative, and no more than thirty (30) days have elapsed since the occurrence prompting the complaint, then the Exclusive Representative must present the grievance in writing within five (5) days to the Superintendent of schools and/or the Superintendent representative who will arrange a meeting in ten (10) days. The Exclusive Representative, the appropriate management department official and the Superintendent, or his/her designated representative will be present for the meeting.

ARTICLE 16: EXTENDED CONTRACT & EXTRA ASSIGNMENT

Section 1. **K-12 Extended Contract & Extra Assignment** – Letters of assignment for work beyond the normal school year shall be for a flat dollar amount. The amount does

not include payment for department head responsibility. Payment schedules are found in Appendix B.

Section 2. **Assignments** – The offer of employment and actual number of weeks for any of the listed assignments shall be determined by the School Board. The payment shall then be adjusted based on the number of weeks and/or house assigned prior to the issuance of individual extended contracts.

ARTICLE 17: INDIVIDUAL TEACHER CONTRACTS

Section 1. **Contracts** – Any individual contract between the School Board and the individual teacher heretofore executed, shall be subject to and consistent with the terms and conditions of this Contract. Any individual contract hereafter executed shall be in the form provided in Appendix A and shall be expressly made subject to and consistent with the terms of this Master Contract.

ARTICLE 28: EXTRA-DUTY ASSIGNMENTS

Section 1. **Extra-Duties** – If during the term of this contract it is necessary to create, abolish, or modify extra duties for which compensation is paid, the Superintendent will place a temporary salary rate in effect and/or modify the existing salary rate, based on salaries being paid for similar duties in the school system. The administration will discuss with the Exclusive Representative any changes in extra-duty assignment and the respective salary rate.

Section 3. **Payment** – Teachers accepting extra-curricular positions will be paid for those jobs in the following manner: (1) Fall extra-curricular assignments will be paid at the time of the October pay check; (2) Winter extra-curricular assignments will be paid and at the same time as the February pay check; and (3) Spring extra-curricular assignments will be paid at the same time as the May check.

Anyone who has an extra-curricular activity which would go beyond the above-mentioned time line would be paid in equal installments three (3) times per year with the above designated payroll.

APPENDIX A – TEACHER CONTRACT

4. Additional Services: The School Board or its designated representative may assign the teacher to extra-curricular or co-curricular assignments subject to established compensation for such services as are entered in Paragraph 5 at the time this contract is executed. Such extra-curricular or co-curricular assignments (are/are not) part of the continuing contract rights of the parties.

Relevant Facts

The Parties

The District is a political subdivision of the State of Minnesota and a public employer located in Moorhead, Minnesota. A total of five schools are operated by the District located over a geographical area of 216 square miles, including the communities of Sabin and Georgetown. Within these boundaries, 5400 students are served by approximately 380 teachers. There are three large elementary schools – Robert Asp, S.G. Reinertson and Ellen Hopkins – serving approximately 800-900 students. The middle school, Horizon, serves about 1200 students. Moorhead High is attended by about 1550 students. An alternative learning center, Red River, is operated by the District and serves about 90-100 middle and high school students. The District also operates a Detention Center and a shelter care facility.

The Union is the sole and exclusive bargaining representative of all teachers and certain other licensed faculty within the District.

The District and the Union are party to a collective bargaining agreement effective for the period beginning July 1, 2009, and ending on June 30, 2011 (CBA). The parties agree that the CBA applies to this dispute.

Department Chair

The position of Department Chair is work “beyond the normal school year” and an Extra Assignment pursuant to the CBA at Article 16. The CBA at Appendix B lists

department chair positions in eight different disciplines for grades 6-12, including English, Math, Science, Social Studies, Speech/Language Industrial Tech, Business and Special Education. There are positions for Department Chair at the elementary school level as well, designated by grade as well as subject matter. A teacher who serves in the position of Department Chair is paid a set amount per year, over and above that teacher's regular salary.

No formal job description for the position of Department Chair was offered as evidence. The testimony generally established that the duties of the position has included managing the departmental supply budget, ordering supplies, advocating for teachers, discussing building-wide issues and conducting departmental meetings. Department Chairs also prepare meeting agendas and draft minutes. The duties for the elementary department chairs are similar, but usually involve a fewer number of meetings.

In a memo from Horizon Principal Lori Lockhart to all "Current Dept. Chairs" dated June 30, 2009, a more detailed description of the position was provided:

1. Provide leadership in the development and updating of goals based upon data and coordinate the department efforts in accomplishing the goals.
2. Work with the High School Department Chair to communicate standards and data regarding student learning. Work with the High School Department Chair to organize the meeting at the beginning of the school year to establish communication regarding student learning goals and standards.
3. Organize and work with building administration to monitor the budget and communicate with building administration regarding requests for needed supplies, new equipment, and replacement of equipment and repair of equipment.
4. Works with the Assistant Superintendent and building administration to continuously monitor and update the curriculum map for the department.

In addition, Principal Lockhart listed several other activities which she expected department chairs to facilitate:

1. Utilize church Wednesday's for Department meetings (agendas and minutes to admin. with feedback from admin. about the topics and outcomes)
2. Brainstorm ways to utilize our common prep times (ex. LA and Math building-wide)
3. Discuss and create a way to engage PLC's (Professional Learning Communities)
4. Visit the notion of a book study and topic aligned to our building or content goals/needs
5. Continue and facilitate the next steps of our 5 in and 5 out process (creating common assessmentsetc)
6. Others as identified when we meet in the fall to collaborate on a sensible way to utilize your expertise and leadership.

Lockhart Memo of June 25, 2010

On June 25, 2010, Horizon Principal Lockhart sent a memorandum to the Current Department Chairs at Horizon School. Addressing "Dept. Chairs 2010-2011 School Year," the memo stated:

Greetings. I am writing to inform you I will be seeking out other staff members to submit for Department Chair(s). I thank you and appreciate your years of service but I do feel it is a position that needs some rotation and others should have an equal opportunity to apply and serve in the capacity of Dept. Chair.

Attached is the proposal and if you feel strongly about applying again please do, especially if you are a small department and you know no one else is interested. I do feel to be equitable to other staff the position needs to rotate every year or two.

Thanks again for your service. I can appreciate this change may not 'settle' well but my intent is only to be fair to others who might be interested and with new people we'd benefit from new and different perspectives.

Pursuant to the memo, Principal Lockhart solicited applications for several of the various Department Chair positions. She sent out the June 25th memo, accompanied by a list of questions designed to gauge the interest and qualifications of each applicant. The

solicitation also included the duties she expressed and summarized in her memo of June 30, 2009. Principal Lockhart testified that the application form was developed by her to produce candidates that had the certain specific skills she was seeking.

As her memo suggested, Principal Lockhart considered both candidates who currently held the positions, as well as others. Several of the incumbent department chairs were reappointed and several were not. Marilyn Prouix was reappointed in the Department Chair in the World Language Department. Alice Swanson was reappointed for the PhyEd/Health Department. Deb Knutson was appointed as Department Chair in the Art Department. Molly Froemke was appointed as Special Education Department Chair. Char Magin was reappointed as Science Department Chair, as was Brian Cole for the Music Department.

In no case was any incumbent department chair reappointed unless the application was first completed. Principal Lockhart testified that she did not consider reappointing any incumbent who did not submit an application. The failure to submit an application was, in Principal Lockhart's view, an indication that the incumbent chair was no longer interested in the position. All of the selection decisions were made by Principal Lockhart, without teacher vote or process of consensus.

Cheryl Keenan, employed as a teacher for the 26 years prior to her 2010-11 retirement, served as the Horizon Middle School Math Department Chair for the last two years of active service. She, and perhaps several other incumbent Department Chairs, did not submit applications to be selected for the positions they were currently holding. Ms. Keenan testified that, after reviewing the language used by Principal Lockhart in her June 25th memo, she assumed that her application would not be fairly considered. Ms. Keenan

was particularly concerned with that part of the memo that thanked her and others similarly situated for their service and advising that “new people” were being sought.

Principal Lockhart testified that she would have given Ms. Keenan’s application a fair review had Ms. Keenan submitted one. Neither Principal Lockhart nor Ms. Keenan sought out each other to discuss either Principal Lockhart’s intentions or the current incumbent status.

Position Selection Prior to 2010

The record indicates that the Department Chair position has existed since at least 1978. The evidence establishes that prior to the changes referred to in Principal Lockhart’s memo, both department and grade level department chairs were selected by a vote or consensus of all teachers in the department. This method of selection has existed, not only at the Horizon School prior to Principal Lockhart's memo, but at other schools as well.

The Union called several witnesses to confirm that this was indeed the procedure utilized. For example, Chuck Fisher, a high school social studies department chair beginning in 1996 and ending in 2006, recalled that nominations were solicited and the candidate with the highest number of votes was selected. Thereafter, he testified, the information was communicated to the principal of the pertinent school. Mr. Fisher was aware of no instance in which a member of the school administration refused to accept or otherwise challenged a department chair selected in this manner.

Like Mr. Fisher, Ms. Keenan was selected by a vote of the math teachers and her name provided to the principal.

Before her transfer to Horizon, Ms. Keenan was also employed as an elementary school teacher and served as a district grade level chair. She testified that the selection process of district grade level chair positions was also based on a vote of the members or a similar consensus based process.

Fifth grade teacher Jenney McFarlane and high school Industrial Arts instructor Lauren Rood also testified to the utilization of a voting process by the teachers in their respective departments.

The District called several witnesses who recalled selection procedures that did not involve a vote. Jeff Offutt and John Eidsness, teachers of Social Studies and Math at Horizon, testified that the department chairs were selected by responding positively when asked if any teacher was interested in serving. Lynn Johnson, also a Horizon Social Studies teacher, testified that there was no particular process for selection. Janelle Frost-Geiser and Carla Smith, teachers of Social Studies and Language Arts at Horizon, also testified that there was no specific selection process.

However, there was no evidence to suggest that the department chairs at Horizon were ever chosen by the means first utilized by Principal Lockhart for school year 2010-2011, where she alone, or any other member of school administration, made the final selection decisions.

Regardless of the selection method utilized, there is no dispute that the District was notified of the teachers selected and that Department Chair Extra-Duty contracts were issued to those whose names were provided to the school board. This aspect of the procedure existed both before and after Principal Lockhart modified the selection procedure.

The evidence clearly established that the teacher selected to serve as Department Chair served for at least one year. The only extra duty contract offered as evidence was that of Ms. Keenan. It was for one year.

There was evidence that some chairs served for longer than one year. Mr. Fisher, Ms. MacFarland and Ms. Rood testified that in their departments, an election was conducted every two years. Ms. Keenan referred to a three year “commitment.” Mr. Offutt recalled that a Department Chair served to 4 years.

Grievance Process

After she received Principal Lockhart’s memo, the Union was approached by Ms. Keenan. It was Ms. Keenan’s view that she had been improperly terminated from her position as Math Department Chair. Ms. Keenan further testified that she did not reapply for the position because, in her view, it would have been futile. In further support of her opinion, Ms. Keenan considered that she had been dismissed by Principal Lockhart and the selection procedure was now controlled by school administration. The evidence established that neither Ms. Keenan nor Principal Lockhart ever discussed the memorandum of June 25, 2010, or what it might mean.

Thereafter, on July 22, 2010, Union president Jeff Offutt met with Principal Lockhart, taking the position that her action violated the CBA. The formal written grievance was filed on July 28, 2010, the day Principal Lockhart indicated that there would be no change in her position. The District responded to the written grievance in a memo dated August 2, 2010, denying the grievance on the grounds that the issue was not

arbitrable, the grievance was untimely and that Principal Lockhart's actions did not violate the collective bargaining violation had occurred.

Positions of the Parties

The Union

The Union first addresses the District's position that the grievance was not filed in a timely manner. The burden of proof with regard to this contention belongs to the District, the Union argues, and the "presumption of coverage," that is the strong implication that collective bargaining disputes should be resolved on their merits rather than on procedural grounds, must be overcome.

The Union asserts that the grievance was filed in a timely manner and that the CBA unambiguously supports this contention. The Union maintains that there is no need to resort to sources outside the four corners of the agreement given the language contained in the CBA.

The Union takes the position that the District's suggestion that the term "weekdays" must be specifically "contrasted" with the term "school days" is without foundation. The Union asserts that, rather than offer a definition for the term "weekday," the District relies only on a definition for the word "week." The word "weekday," the Union notes, is not equivalent to the word "week."

The Union proposes a definition for the word "weekday," citing authority defining the term as a "day of the week on which people conventionally work . . . as opposed to weekend (Saturday or Sunday)." Regardless, argues the Union, the District failed to provide a definition of the pertinent term, thereby failing to sustain its burden of proof.

In the alternative, in the event the CBA is determined to be ambiguous in this regard, the Union contends that no extrinsic evidence exists supporting the District's position. The District failed to offer any evidence of bargaining intent, such as bargaining history, to support its theory, the Union contends. The term "weekday," the Union suggests, "is not intended to be inclusive of Saturdays and Sundays," but rather was used to "distinguish business days taking place during the regular school calendar – "school days" – from business days occurring during the summer holiday, when the regular school year has ended."

Finally, the Union contends that "sheer logic" should in any event "compel the Arbitrator to reject the District's argument . . . There is simply no reason that the parties would agree to grievance timelines that run more quickly during the summer, when many teachers and administrators are on summer vacation and spending little time in the District."

The grievance was presented 23 weekdays after the incident, the Union declares. Alternatively, the Union suggests that the grievance is additionally timely because the actual harm did not occur until the beginning of the school year, when the new personnel began their duties.

On the merits, the Union first addresses the Maintenance of Standards clause. The District's action was a "significant change" that "inured to the disadvantage" of teachers, the Union maintains. Principal Lockhart admitted in her initial letter that her action was a "change" that "may not 'settle' well," admitting there had previously been a "precedent [as to] how things had been done."

The change was to the teacher's disadvantage, the Union suggests, because the displaced department chairs were deprived of a "professional advantage," that is, occupying a paid position. All bargaining unit members were similarly deprived of their previously held right to elect their own department chairs. The election process, the Union argues, ensured that the department chair had the "trust and backing of his or her peers." Under the present system, the Union contends, bargaining unit members have lost this right of "self-determination . . . [T]he District's action completely undermined bargaining unit members."

The Union takes the position that, in addition to the violation of its negotiated maintenance of standards, the District's action contravenes a long held and binding past practice. Cases are cited in support of the proposition that past practices are enforceable when they are clear, consistent and mutually accepted.

The practice was "clear," asserts the Union, because department heads were previously either elected or served by unanimous consent. There was no evidence to suggest, states the Union, that the District "ever participated in the selection." Similarly, the Union asserts, the process was well understood by teachers "at all levels of education."

The practice was consistent, according to the Union, since for over 30 years teachers engaged in a process that "has always been internal and conducted by teachers . . . uninterrupted at the high school and elementary levels as of the present time."

Evidence of mutual acceptance, contends the Union, exists by virtue of the District's participation and facilitation of the procedure. All of the contracts were approved by the school board, the Union argues, and countersigned by the director of

human resources. In each case, an extra-duty contract was issued. The memorandum of June 30, 2009, seeking information from the then current department chairs, “clearly indicated that it was up to the individual in that role to make the decision to stay.”

The Union takes the position that the teachers that were “inappropriately dismissed” from their Department Chair positions should be “made whole for their losses.” Principal Lockhart’s letter, according to the Union, “was clear in expressing that present department chairs would no longer be welcome.” Principal Lockhart concedes that she did not seek to discuss the change with teachers in the smaller departments that resulted in the retention of some of the prior department chairs. There was no effort, argues the Union, to speak with “Ms. Keenan or the other terminated department chairs.”

Principal Lockhart’s contention that she would have given Ms. Keenan’s application a fair review is belied by her actions, the Union asserts. Principal Lockhart sent out letters thanking the current chairs for their service and advised them that she was looking for “other applicants.” Principal Lockhart indicated that she was looking for “new people,” according to the Union, and used the word “change.”

The Union notes that Principal Lockhart solicited the interest of Mr. Eidsness in the Horizon Math Department in the spring of 2011, “before she had even sent a memorandum sacking the current department heads . . . It is not credible to suggest that Principal Lockhart would have fairly considered Ms. Keenan’s application to remain in the position to which she was entitled when Principal Lockhart had already surreptitiously begun soliciting a candidate to replace her between one and two months before sent the June 25 memorandum.” The notion, held by Ms. Keenan and others, that

her application would not be fairly considered by Principal Lockhart was reasonable, maintains the Union, given this and other evidence.

The Union anticipates that the District will argue that reinstatement is not appropriate because employment contracts cover only a one-year period as set forth in state law *M.S. 122A.40*. In this regard, the Union asserts that the right to serve as a department chair is guaranteed by collective bargaining principles, not individual contacts or state law.

The District did not have the right to unilaterally abrogate the department chair selection procedure, merely because it believed it had good reason to do so, the Union argues. The Union takes the further position that, even if this argument were valid, there was no evidence of a “good reason.” Principal Lockhart, according to the Union, referred to “deficits” in the present system but never explained what they were or raised issues with the current department chairs. There was reference to disenfranchisement as to any teacher who missed a meeting at which an election was conducted, the Union asserts, but argues that Principal Lockhart “had no explanation as to why her unilateral usurpation of the teachers’ right to select their own department chairs was somehow more fair or democratic than their prior practice.”

As a remedy, the Union seeks reinstatement for those teachers currently working to the department chair positions they occupied at the commencement of the 2009-2010 school year. The Union further asks that those teachers be made whole for any losses suffered as a result of the removal.

The District

The District begins its statement of position by addressing the procedural timeliness issue. The term “weekday” is not specifically defined in the CBA, the District contends, and the Black’s Law Dictionary definition of the term “week” applies instead. This treatise defines the term “week” as a seven day consecutive period “beginning on either Sunday or Monday.”

The use of the word “all” in Article II, Section 2 is important, in the District’s view, because “it means no day of the week is excluded.” The grievance is untimely, according to the District, since it was not filed within the prescribed 30 day period.

On the merits, the District first takes the position that its action was justified by its right to make assignments within the teaching staff including the “assignment of specific teachers as DC’s in Horizon.” The action is further justified by Article 5, Section 5, as well as *M.S. Chapter 179A*. The activity, according to the District, was an exercise of its “inherent management right with regard to the selection direction and number of personnel.” What happens in high school, the District suggests, does not control what can occur at Horizon.

The District contends that the assignment letter signed by Ms. Keenan does not support the Union’s position that the assignment was valid for a 3 year period. Further, the District suggests, the assignment was not subject to the continuing contract provisions contained in state law, *M.S. 125.12*.

The District takes the position that Ms. Keenan was not fired from her department chair position. The letter “doesn’t say that,” the District asserts, but sought her application in the event she felt “strongly about applying.” She did not apply, the District

notes, and Principal Lockhart reasonably “understood that to mean that Keenan was no interest in being DC.” The same principle applies to Mr. Kunka and Mr. Johanson, according to the District, since they similarly did not apply. However, the District notes that neither Mr. Kunka nor Mr. Johanson testified and there is “no way of knowing what they relied on except they couldn’t have been very interested.”

The elements of a valid, binding past practice are not present here, argues the District, because there was no “no formal process or protocol that is followed in Horizon for the selection of DC.” In support of this concept, the District relies on the testimony of Mr. Eidsness, Ms. Johnson, Ms. Frost-Geiser and Ms. Smith. The District further suggests that two of the Union’s other witnesses cannot testify to the practices in Horizon because they have no personal knowledge. “[I]n so far as Horizon is concerned,” declares the District, “only the DCs that did not apply and submit the questionnaire and those who asked not to be reappointed were not appointed by Lockhart as DCs.”

The maintenance of standards clause does not apply, according to the District. The only professional advantage was that enjoyed by management “in its authority to select and direct its DCs.” The District reiterates that department chairs have no continuing contract rights and sign a one year letter, giving management the “authority to determine how and who will be assigned as a DC.”

With regard to Extra Duty Assignments pursuant to Article 28, the District asserts that the provision applies only “to the activities listed in Appendix D and E,” which do not include department chairs. Neither Article 28 nor Article 16 applies to department chairs, the District contends. As a consequence, the District maintains, “the assignment

of DCs is left for the building principal, which is particularly true in this case because there had never been a process in Horizon for assignment of DCs.”

In conclusion, the District contends that the grievance should be denied since Ms. Lockhart had the authority to act pursuant to Article 3, Section 1, Article 5, Section 5 and M.S. Section 179A.07. Further, there was no process in place at Horizon school. Those who did not respond to the questionnaire “took themselves out of the process,” according to the District.

Discussion

Timeliness

A resolution of the District's contention that the grievance was not filed in a timely manner is dependent upon the meaning assigned to the word "weekdays." The CBA, at Article 11, Section 3, provides that grievances must be resolved within 30 days of occurrence. Article 11, Section 2 provides that all time limits "shall consist of school days except that when a grievance is submitted on or after June 1, time limits shall consist of all weekdays so that the matter may be resolved before the close of the school term, or as soon as possible thereafter."

The District contends that the word "weekday" includes Saturdays, Sundays and holidays. The parties are agreed that the first evidence of a dispute appeared on June 25, 2010, the day that Principal Lockhart issued the memo. The grievance was filed on July 28, 2010.

Using an interpretation of the word "weekday" that includes every day of the week, the District asserts that the grievance was filed 33 days after occurrence. In support of this contention, the District cites to the definition of the word "day" as contained in *Black's Law Dictionary* and Minnesota law at *M.S. 645.15* and *645.152*. The statute includes Saturdays, Sundays and legal holidays in the definition of the word "day," except when the last day of the period falls on one of those days.

The Union contends that the grievance was filed within 23 "weekdays" of the date of occurrence. The Union contends that the word "weekdays" includes every day of the week except for Saturdays and Sundays. In support of its contention, the Union cites to

an internet address defining the term “weekday” as a “day of the week on which people conventionally work . . . any of the days Monday, Tuesday, Wednesday, Thursday or Friday as opposed to weekend (Saturday or Sunday).”

Unless there is evidence showing that the parties intended some special or particular meaning, it is proper to assign the words used in a collective bargaining agreement “their ordinary and popularly accepted meaning.” *See, California State University*, 86 LA 549, 555 (Koven, 1986). A persuasive line of arbitration awards holds that, so long as the collective bargaining agreement does not call for a specific meaning of a term, the use of a dictionary definition provides a proper, neutral and acceptable meaning of a word or phrase. *City of Duluth*, 100 LA 309,312 (Ver Ploeg, 1992).

In this case, the CBA does not directly or indirectly address the meaning of the work “weekday.” The very reputable English dictionary *Webster’s Third New International Dictionary* (unabridged) (1961), defines the word “weekday” as “any day of the week except Sunday.” Another persuasive dictionary defines the word as “any day of the week except Sunday.” *American College Dictionary* (Random House, 1959). A more recent volume, *The American Heritage Dictionary of the English Language* (3rd Ed. 1992), defines the word as “Any day of the week except Sunday, or often except Saturday and Sunday.”

While the Union’s internet definition may be something of an authority on the latest or most popular definition, the source is perhaps a little too informal to be persuasive in the context of this dispute. There is no contract provision or extrinsic

evidence tending to show that the definition of the term offered by the District, so useful in calculating statutory time limits in legal settings, is applicable to this particular CBA.

It is evident that the parties intended to differentiate “school days” from “weekdays.” Even if calculated using the definition which excludes only Sundays, the grievance must be regarded as having been filed in 28 days from June 25, within the time required by the CBA.

Further, as the Union argues, there is precedent to support the contention that the grievance did not “occur” until the commencement of the 2010-2011 school year, when the removal of the incumbent department chairs became effective. See, *Law Enforcement Labor Services v. City of Oakdale*, BMS 99-PA-1781 (Jay, 2000). Pursuant to this rule, the mere announcement of the intention to modify an alleged right or benefit is not sufficient to constitute an “occurrence.” *Law Enforcement Labor Services v. City of Apple Valley*, BMS 01-PA-805 (Flagler, 2000).

The District requests that the issue of jurisdiction be addressed in the context of its procedural contention on the matter of timeliness. In this regard, the District’s position is well-founded. There are many cases which hold that an arbitrator has no authority to hear or consider a grievance that has not been processed in accordance with the procedure set forth in the collective bargaining agreement.

However, in this case, the issue raised by the District need not be addressed. Applying the ordinary and accepted meaning of the term “weekdays,” it must be concluded that grievance was filed in a timely manner.

Selecting the Department Chair

In this dispute, the District contends that the method used by Principal Lockhart to select the Department Chairs at Horizon School for 2010-2011 was authorized by Article 3, Section 1 and Article 5, Section 5, requiring that the CBA be consistent with Minnesota law and reserving to the District the sole authority to select personnel. The District disputes that the teachers of Horizon School employed any discernible previous process to select Department Chairs. The District contends that Ms. Keenan, as well as any other incumbent Department Chair who failed to participate in the procedure established by Principal Lockhart, is not entitled to a remedy because they “took themselves out of the process.”

The Union takes the position that the Maintenance of Standards provision at Article 6 requires that the selection of Department Chairs be achieved through the process of teacher vote or teacher consensus. The Union further contends that, even if Article 6 did not mandate this result, the prior selection process constitutes a past practice, valid and binding on the District.

Before the positions of the parties can be considered, the nature of the words and phrases used by the parties in the CBA must be evaluated. Where the meaning of a disputed term can be determined without resorting to external sources, that is information not contained within the four corners of the agreement, the language must be applied as written. If a disputed contract term is reasonably susceptible to more than one meaning, the language is ambiguous. In such a case external sources can be considered to determine what the parties intended. *American Oil Co.*, 62-1 ARB, Section 8073 (Boles, 1961); *Armstrong Rubber Co.*, 17 LA 741 (Gorder, 1952).

The contract provisions selected by the District to support its position are ambiguous in the context of the Department Chair issue. The District's position, therefore, cannot be properly analyzed on the basis of the words and phrases used within the four corners of the CBA. Article 5, Section 5 generally provides that the selection of personnel is an "inherent managerial policy." This principal is confirmed by Minnesota law at *M.S. Section 179A.07, Subd. 1* and Article 3, Section 1. However, what constitutes "inherent managerial policy" is a matter requiring the presentation and evaluation of extrinsic evidence.

Further, while the provision clearly applies to the initial selection of teachers for employment, it does not specifically address the issue of whether it applies to the selection of persons who are already employed as teachers. Teachers seeking to be selected for extra duty assignments, such as the position of Department Chair, are not in the same position as a new employee and the provision does not address the issue. Similarly, Minnesota law does not specifically require any particular method of selecting teachers for extra duty assignments.

Appendix A, Paragraph 4 provides that the School board "may assign the teacher to extra-curricular or co-curricular assignment." The provision is not mandatory, however, but permissive in nature. The clause does not require that the District directly participate in the assignment process and does not prohibit alternative methods of selection.

Moreover, the CBA contains no provision which specifies the exact process by which Department Chairs at Horizon or any other school operated by the District are to be selected.

Like the District's position, the contentions of the Union are not based on any contract provision which unambiguously apply to this dispute and may similarly not be resolved only the basis of information contained within the four corners of the agreement. The Maintenance of Standards Clause at Article 6 clearly relates to this issue. The provision, as agreed to by the parties, preserves all "professional advantages heretofore enjoyed" by the teachers, as well as the District. However, it must be recognized that provisions such as those contained in Article 6 are inherently ambiguous, since no precise established practice or working conditions are specifically listed. Evidence of circumstances that extend beyond the four corners of the agreement will always be necessary to determine whether a practice or a condition can be unilaterally eliminated. *See generally, Stokely-Van Camp, Inc. and IBT Local Union 563*, 74 LA 691 (Stern, 1980); *Celotex Corp. and Steelworkers Local Union 6638*, 68 LA 672 (Boals 1977);

Regardless of whether the analysis focuses on the positions taken by the District or the Union, it appears that the nature of the words and phrases used in the CBA requires the use of extrinsic evidence, such as past practice or bargaining history, as well as pertinent rules of construction.

The elements which must be present to designate a past practice as an implied and enforceable term of a collective bargaining agreement are well established and require little review. Unilateral action is insufficient. The essence of a binding past practice is the mutual and continued acquiescence in clearly discernable activity. As the cases and

the parties have cited, the requisite elements of a binding past practice are (1) clarity, (2) consistency and (3) acceptability. *Harbison-Walker Refractories*, 114 LA 1302, 1305 (Smith, 2000); See also, *Celanese Corp.* 24 LA 168, 172 (Justin, 1954). These elements must also be present where the question is whether or not a past practice is one that must be maintained under “maintenance of standards” type of provision.

The testimony in this case establishes that, since the creation of the position in the late seventies, the Department Chair has been selected by the teachers themselves. It is evident that the selection procedure was not always implemented with total uniformity. There was evidence that some departments conducted an actual vote. Other departments made their selection on the basis of consensus, without the formality of a vote.

However, the distinction between selection by vote and selection by consensus is not sufficient to defeat the existence of the practice. Over the years, the teachers have repeatedly exercised their collective voice to select a bargaining unit member to act as the chair of their respective department. There was no evidence that any school administrator engaged in the selection process in any way, until Principal Lockhart implemented the procedure first outlined in the memo of June 25, 2010.

In addition, the acceptance of the practice by the District was established by persuasive evidence. Proof was submitted indicating that school administration routinely approved the extra-duty contract of any teacher who was selected by their peers to serve as the Department Chair, without actively participating in the selection process.

The evidence further established that the bargaining unit member who was selected to act as the Department Chair advocated for teachers and assisted them in resolving such “building-wide” issues that arose. These activities are clearly in the nature

of “professional advantage[s]” for teachers, qualifying the practice as a working condition that must be preserved under the Article 6 Maintenance of Standards clause.

Having carefully considered the testimony and exhibits received into evidence, as well as the closing written arguments submitted by the parties, it is Arbitrator’s opinion that the District violated the terms of the collective bargaining agreement, and specifically Article 6, when Principal Lockhart unilaterally modified the method by which the Department Chair has been selected at Horizon Middle School.

Those teachers who occupied a position as a Department Chair at the conclusion of the 2009-2010 school year and who are active employees as of the date of the award should be reinstated to their positions.

Any teacher who is entitled to reinstatement and who submitted an application to Principal Lockhart for school year 2010-2011, should be made whole for any wage and benefits lost. The application condition is required by the duty to mitigate damages. It is well established that an employee has a duty to minimize the amount of his or her damages. *See generally, Love Brothers*, 45 LA 751 (Solomon, 1965). A failure on the part of a Department Chair who is eligible for reinstatement to respond to Principal Lockhart’s application invitation must constitute a failure to mitigate damages. At a minimum, employees who claim to be financially damaged by the actions of an employee must make “reasonable efforts to find new employment which is substantially equivalent to the position” to which he or she was deprived. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F 2nd 569 (5th Cir. 1966). Here, the only “substantially equivalent” job available

for school year 2010-2011 was the position of Department Chair offered by Principal Lockhart.

The grievance is *SUSTAINED*.

A W A R D

1. **IT IS THE OPINION** of the Arbitrator that ISD 152 violated the terms of the collective bargaining agreement, and specifically Article 6, when it unilaterally modified the method by which the Department Chair has been selected at Horizon Middle School.

2. **IT IS THE AWARD** of the Arbitrator that those teachers who occupied a position as a Department Chair at the conclusion of the 2009-2010 school year and who are active employees as of the date of the award should be reinstated to their positions. Any teacher who is entitled to reinstatement and who applied for their respective positions of Department Chair for school year 2010-2011 should be made whole for any wage and benefits lost.

October 25, 2011
St. Paul, MN

David S. Paull, Arbitrator