

IN RE ARBITRATION BETWEEN:

STEWARTVILLE UNITED EDUCATORS, EDUCATION MINNESOTA

and

ISD 534, STEWARTVILLE PUBLIC SCHOOLS

DECISION AND AWARD OF ARBITRATOR

BMS 15-PA-0250

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ARBITRATOR

March 16, 2015

IN RE ARBITRATION BETWEEN:

Stewartville United Educators, Education Minnesota,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 15-PA-0250
Overload pay Grievance

ISD 534, Stewartville Public Schools.

APPEARANCES:

FOR THE ASSOCIATION:

David Aron, Association Staff Attorney
Cheri Stageberg, teacher, Union Co-president
Sharon Prunty, teacher, Union Co-president
Laura Shearer, former District teacher
Jean Thompson, former District teacher
David Honsey, teacher
Tim Bestor, teacher

FOR THE DISTRICT:

Eric Quiring, Ratwick, Roszak and Maloney
Steve Gibbs, High School/Middle School Principal
Dr. Dave Thompson, Superintendent of Schools

PRELIMINARY STATEMENT

The hearing in the above matter was held January 23, 2015 at the District Board Room in Stewartville, MN. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted briefs dated February 27, 2015.

ISSUE PRESENTED

The Association stated the issue as follows:

Was the district's assignment of a sixth class to 20 Middle School teachers for the 2014-2015 school year a "teaching overload" within the meaning of Article VIII, Section 4 of the collective bargaining agreement?

Did the District violate Article VIII, Section 4 by failing to obtain each teacher's consent to the additional assignment and by failing to pay overload compensation?

If so, what is the appropriate remedy?

The District stated the issue as follows:

Did the District violate Article VIII, Section 4 of the 2011-2015 collective bargaining agreement by developing a Middle School schedule with teachers assigned to teach six classes, while maintaining prep time and a supervisory period, and not providing overload compensation?

The District raised a timeliness issue at the hearing and asserted that the matter was not procedurally proper under the grievance article.

The arbitrator framed the issues as follows:

Is the grievance timely?

If the matter is determined to be timely and procedurally proper, did the District violate Article VIII, Section 8.4 when it refused to pay overload pay to the affected Middle School teachers assigned to teach a sixth class in the 2014-2015 school year? If so, what should the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering July 1, 2011 through June 30, 2015. Article XV provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE VIII—EXTRA COMPENSATION

Section 4. Teaching Overload

- A. In the event there is a teaching assignment that cannot be filled by staff and it would be unreasonable to hire additional staff, a teacher may be asked to teach part or all of his/her preparation time or in lieu of a supervisory period. This does not apply to the occasional use of substitutes as described in Article XII, Section 6.
- B. Such assignment as an addition to a teacher's schedule will be done only upon mutual consent of both the teacher and the School District.
- C. In the event the teacher agrees to the "overload," the compensation will be based on 1/7th per year of the teacher's rate of pay. Compensatory time may be earned in lieu of pay based on the preceding formula.
- D. This provision does not apply to independent study or to special areas such as media, music, counselor, social worker, etc. Any extra class meeting less than (5) hours per week will be prorated.

ARTICLE XV—GRIEVANCE PROCESSING

Section 1. Definitions and Interpretations

- C. Days: Days mean calendar days excluding Saturdays, Sundays and legal holidays as defined by Minnesota Statutes.

Section 3. Time Limitation and Waiver:

- A. Grievances shall not be valid for consideration unless the grievance is submitted in writing to the School Board's designee, setting forth the facts and the specific provision(s) of the Agreement allegedly violated and the particular relief(s) sought within 20 days after the date the event giving rise to the grievance occurred, or through reasonable diligence should have had knowledge of the occurrence.

ASSOCIATION'S POSITION:

The Association's position was that the District violated Article VIII, Section 4 when it failed to get consent from the affected teachers assigned to teach a sixth period and that it further violated that section of the CBA when it refused to pay overload pay for the sixth class to the affected teachers. In support of this position, the Association made the following contentions:

1. **TIMELINESS** - The Association asserted that the matter was timely filed, even a bit early given the facts of how the Association became aware of the District's position regarding overload pay and the 2014-15 schedule.

2. The parties agreed to an MOU, discussed more below, regarding the 2013-14 class schedule and additional compensation of teachers working the new 6-class schedule. That by its terms expired after one year on June 30, 2014. There was no new MOU ever agreed upon by the parties. Association representatives attempted to meet with administration to determine if the District was going to go back to the 5-1-1 schedule, i.e. teaching 5 classes, with one prep period and one supervisory period, for the upcoming year. The District's administrators delayed making a decision about the middle school schedule for several months despite repeated requests from the Union. Ms. Stageberg first contacted Principal Gibbs on March 19, 2014 to inquire about the future of the middle school schedule. See Association exhibit 2.

3. District representatives, including the Middle School Principal, would not give the Association a definitive or straight answer even though they met as early as the spring of 2014 to get clear on what the schedule was going to be for the following school year. Principal Gibbs continued to say things like “I don’t know” in response to direct inquiries about the class schedule. Thus the Association asserted that it simply did not know whether the school was or was not going to revert to the old schedule or implement the new schedule. There was no definitive answer as to compensation of the class schedule – which is the focus of this grievance until much later.

4. On June 13, 2014 the Principal met with some of the Middle school teachers and announced that he thought the school would go forward with the 6-class schedule for the 2014-15 year. This was only an informal announcement though and the Association officials were not in attendance at that meeting. They heard about it only afterward from teachers who were there.

5. Association representatives then sent an e-mail to the Principal seeking to schedule a meeting to discuss the matter. See Association exhibit 3. Several e-mails followed and the Principal never gave the Association a firm answer on the question until July 21, 2014 when it was finally announced that the school would both implement the new 6 class schedule and that it would not pay teachers required to teach that extra class any overload pay. The Board did not actually vote on it until July 30, 2014 – which was the “official” notification and action by the District - and the Association noted that the grievance was filed the very next day. Thus, this grievance is timely.

6. MERITS – On the merits the Association asserted that the language of Article VIII, section 4 was first inserted into the CBA in the 1995-97 school year and with the exception of the deletion of two paragraphs that are unrelated to the instant grievance, has remained unchanged. The Association noted that the language was in response to similar instances where teachers were required to teach additional class and filed grievances over it. The District acquiesced in those grievances and acknowledged the need to pay teachers for teaching an extra class.

7. The Association pointed to a 1989 grievance (and the filing of a companion unfair labor practice) and a 1994 grievance during which the Superintendent in 1994 wrote, “I can see now that the assignment of ... a sixth class was not handled properly.” The District stopped the practice of unilaterally assigning teachers a 6th class at that time.

8. The Association and its witnesses described the history of the District going back to the late 1990’s and noted that in 1999 the District was re-aligned to a Middle School from what had been a 7-12 school at the secondary level. At about that same time, a period that had been considered “supervisory” time was renamed to team time. Team time was designed to allow teachers to meet jointly to conduct planning for the educational needs of students. The Association did not challenge this or assert that overload pay was required due to this change because common planning time was seen as a benefit to students and because it did not involve teaching an additional class.

9. The Association maintained that even though team time does not entail actual supervision with students it was always intended to be considered supervisory time since it replaced what had always been supervisory time. Thus, it should be considered supervisory time for purposes of payment of overload pay within the meaning of the language of Article VIII, section 4 above.

10. The Association further asserted that the District has and retains the right to schedule teachers as it sees fit and that this grievance does not seek to undermine that authority. This grievance is however about payment for teaching additional classes, not about whether the District has the authority to alter its class schedules.

11. Further, the conversion of supervisory period to a team planning period in the 1999-2000 school year did not eliminate the practice of compensating teachers when they were assigned to teach in lieu of that period. Between 1999 and 2014 the District followed the language of Article VIII, Section 4 when a teacher was assigned to a sixth class in lieu of either a preparation period or a team planning period.

12. The Association pointed to the MOU and asserted that the mere fact that the District signed it was evidence that it understood the requirement of paying overload when assigning teachers to teach a sixth class in these circumstances. While the MOU by its terms expired and no new MOU has been signed, this fact coupled with the payment of overload pay in similar circumstances in the past is, according to the Association, strong evidence of contractual intent requiring payment of overload due to the loss of the team planning time. The MOU provided for a one-time \$555.55 honorarium for each of the 18 teachers who were assigned a sixth class in 2013-14 – far less than the 1/7th of their annual salary as provided for in the remainder of Article VIII, section 4.

13. There was no agreement by the Association to waive its right to overload pay for teaching a sixth class nor was there any agreement to permanently give up overload pay. The intent was that the District was given a one year reprieve to see if the sixth class experiment would work to increase student achievement but that at the end of the MOU the District would either revert to the old 5-1-1 class schedule or it would then honor its commitment to pay the full overload pay.

14. The Association argued that the language requires overload pay if either of two events occurs – a teacher is assigned to teach during all or part of their preparation time or in lieu of their supervisory time. The Association argued that the team time has always been regarded as supervisory time and when the District took that away and replaced it with a teaching assignment, even though team time is not in the CBA specifically, that amounts to a requirement to teach during supervisory time. Thus, overload pay is due pursuant to the clear language of the CBA.

15. The Association asserted that the term “supervisory period” is ambiguous since it is not defined in the CBA and the parties have long regarded the team planning time as having replaced what was supervisory time prior to 1999. The Association maintained steadfastly that team planning time is in effect supervisory time. The Association countered the claim that team time is not supervisory time because the teachers do no direct supervision of students.

16. The Association argued that bargaining history – which was unrebutted by the District, showed the parties’ mutual intent that “A teacher could be offered an overload, which in the case of a 7-12 teacher would be a sixth teaching period.” The Association’s witnesses testified that teaching a sixth class would result in some additional pay was the clear understanding when the language was negotiated and that the parties have applied it consistently with that understanding until now.

17. The Association asserted that the intent of the language, even though it does not specifically mention team time, discussed more below, is that whenever a teacher is assigned a 6th class during all or part of their prep time or in lieu of supervisory time, they are entitled to overload pay. Further, the use of the word “period” supports the Association, since the teachers’ only other non-instructional period besides preparation time was a team planning period.

18. Moreover, the Association argued that there is a binding past practice of paying overload time whenever a teacher was assigned a sixth class. Such practice is, according to the Association, helpful in giving meaning to ambiguous language. The Association pointed to several examples of teachers, i.e. Mr. Bestor, (on two separate occasions), Mr. Bolan, Mr. Honsey and Ms. Shearer, who were paid overload pay whenever they were assigned to teach a sixth class. The Association acknowledged that in Ms. Shearer’s case she taught in lieu of preparation time but that she retained the same supervisory assignments as did other teachers.

19. The Association argued that all of the necessary elements of a binding past practice are present – the practice was clear and consistent – every time a teacher who was not assigned one of the exceptions contained in the language of Article VIII Section 4 was assigned a sixth class, overload pay was made. The Association put on several teachers it claimed had been paid overload pay under similar circumstances. In contrast, the Association argued that the one example of a teacher who was not paid overload pay was in one of the stated exceptions to overload pay set forth in Article VIII, section 4 D.

20. The practice was longstanding – having been in place from 1999-2000 to the 2012-13 school years. One Association witness indicated that the practice of teaching 5 classes with one supervision period and one prep period has been in place for more than 40 years.

21. The Association asserted that the practice of paying overload pay, or at least additional compensation to teachers teaching a sixth class has been in place and well understood by both parties as the accepted way of compensating teacher for the extra work of teaching a class for years.

22. The Association drew a distinction between a supervisory period and a supervisory assignment and asserted that a “period” is the same length of time as a regular class period, which is about 48 minutes in length. An “assignment,” such as pride time, may be much shorter, or about 30 minutes. Teachers have never been required to lose a supervisory assignment or duty in order to qualify for overload compensation. The Association argued further that the District has conflated the concept of a supervisory assignment or duty with a supervisory period and that the District has incorrectly argued that the overload language exists to protect a teacher’s right to have a supervisory duty, which is additional work. However, the language protects a teacher’s right to teach a maximum of five classes unless the District provides additional compensation.

23. As noted above, the Association maintained that this case is not about the District’s right to schedule teachers – rather it is about the pay to which they are entitled if they are required to teach during all or part of their prep time – which they might be if one considers the former team time to be prep time – or in lieu of a supervisory period – which the team time might be as well since it was in effect meant to supplant supervisory time and was for an entire period.

24. The Association noted that the management rights clause and the hours of service provisions of the CBA do not allow the District to violate the overload provisions. The mere fact that the District may be complying with other provisions, such as the hours of service clause, does not allow the violation of other provisions.

25. Here the Association maintained that the overload provisions require payment of the pay called for if the teacher is required to teach for either all or part of their preparation time or in lieu of their supervision time. The Association also argued that the mere fact that teachers are granted slightly more time for preparation than the minimum required under state law does not change the fact that these teachers were being asked to teach an extra class during what had been team planning time. Whether one calls it supervisory period or all or part of the preparation is immaterial – the fact is that they are being required to do more teaching work for no additional pay.

26. The Association also applauded the increase in student tests and achievement scores but noted that this does not justify violating the CBA negotiated between the parties. The CBA calls for overload pay under the circumstances and conditions set forth above. If the District wishes to continue to implement class schedules to achieve better test scores through smaller class sizes – a result the Association and the teachers all share in – then it must pay the teachers in accordance with the provisions of the overload language.

27. Finally, the Association pointed to Section 4B and argued that the District should have sought these teachers' consent prior to implementing the 6 class schedule. The District violated that portion of the CBA as well by unilaterally implementing this without negotiating the change in pay with the Association. The Association asserted that this is similar if not identical to what the District did in the instances that led up the insertion of the language of Article VIII in the first place.

28. The Association maintained that this should have been negotiated with the teacher's union before unilateral implementation just as the parties did with the MOU. The teachers have tried to work with administration but have been rebuffed and the District has decided to forge ahead without further consultation with or negotiation with the Association.

The Association seeks an award ordering the District to make the affected teachers whole by providing the contractually required overload pay for the 2014-2015 school year as well as any corresponding benefits that accompany the additional salary and to retain jurisdiction over the remedy.

DISTRICT'S POSITION

The District's position was that there was no contractual violation and that the clear provisions of the overload language do not apply to this situation. Further, that the team time was not a supervisory period within the meaning of the language since no student supervision was ever performed during that time. In support of this position, the District made the following contentions:

1. **TIMELINESS** – The District first asserted that the grievance is untimely and should be dismissed without ever reaching the merits. Article XV provides that the grievance must be filed “within 20 days after the date the event giving rise to the grievance occurred, or through reasonable diligence should have had knowledge of the occurrence.” Here the Association and its teachers were told as early as June 13, 2014 that the District was contemplating implementing the 6-class schedule.

2. The time thus began running on June 13, 2014 yet the grievance was not filed until July 31, 2014 – well past the 20-day limit. The District cited several arbitral decisions for the proposition that strict adherence to the time limits in the grievance procedure is required unless there is clear evidence of a waiver or tolling of those time frame. Here there were no such waivers or tolling and the CBA language must be applied as written to bar this matter on procedural arbitrability grounds.

3. **MERITS** – The District characterized this grievance as a direct and blatant attack on the inherent managerial right to establish the class schedules within the District. Citing Minn. Stat. 179A.07 as well as the management rights clause of the CBA, the District maintained that it retains and has never waived or limited its right to establish the work schedules. See CBA at Article IV.

4. The District also characterized the grievance as an attempt to maintain team time in addition to prep time and a supervisory period but noted that team time is never mentioned in the CBA. It argued that teachers are not contractually entitled to team time and that its removal cannot be considered to constitute the loss of a supervisory period.

5. The District further argued that there is no language in the CBA limiting its right to establish a work schedule for the teachers at the any of the schools operated by the District and no past practice otherwise. Since the Association bears the burden of establishing a clear limitation on the otherwise unfettered right of a public employer to set schedules, their case must fail.

6. The District asserted that for the Association to prevail there must be a clear and unmistakable waiver of an inherent right and there is no such language in the CBA. The District cited several prior awards and decisions to that effect and further noted that the waiver of an inherent right cannot be some implication – it must be clear and unmistakable.

7. The District further argued that since there is no language limiting the right to establish schedules. The District further asserted that the language of Article VIII is clear and unambiguous and thus no resort can or should be made to extrinsic evidence, the decision must give effect to the CBA's “plain and ordinary meaning” – the language of the CBA is enough.

8. The District then examined the language of the overload provisions and asserted that that language was meant for a far more limited set of circumstances than the Association asserted. This language was not, according to the District, intended to cover a wholesale schedule change such as was implemented with the new class schedule.

9. Further, the District took issue with the assertion by the Association that team time was supervisory time. The District argued that it is not and never was supervisory time since no students were supervised. The team time was supposed to be planning time but in fact it was not generally used that way; instead the teachers used it as additional preparation time and that time could thus be more properly characterized as prep time under the CBA. See District brief at page 5, Tr. at 110 and District’s opening statement at Tr. page 12.

10. The District focused on the language of the overload provisions and noted that the teachers currently have more prep time than is mandated by state law and asserted that the grievance in effect seeks a sweeping change in the determination of when overload compensation is required. The language was intended and has been applied to very limited circumstances and was never meant to apply to a change in the schedule such as this. Indeed, the district argued, there have been only a few instances of overload pay since its insertion into the CBA which supports the claim that it was intended to cover rare situations only. The District asserted most strenuously that if a teacher maintains appropriate prep time and a supervisory period, there can be no overload and noted that all the teachers involved have both prep time and a supervisory period in their schedule and are not entitled to additional compensation for performing their duties within the contracted duty day.

11. The District asserted that the only times teachers have been paid overload pay is when they were required to teach during their prep time or their supervisory time – and were thus teaching a true extra class. The District pointed to all of the examples brought forth by the Association and asserted that these teachers were paid overload pay because they fit into the language of the overload provisions – they were assigned to teach during their prep or supervisory time.

12. The District asserted that the language of Article VIII section is clear and unambiguous and that no further resort to extrinsic evidence is appropriate or necessary. The District further asserted that clear language cannot be rendered otherwise simply because one party claims it is.

13. In addition, the clear language regarding hours of work calls for the teachers to work an 8-hour day. Other than a duty free lunch and statutorily mandated prep time, there are no other limitations. There are no prescribed number of minutes that class periods may be for example and no further limits on the District's right to mandate more classes to teach as long as those things are maintained – and they are here. Teachers still have more than the statutory minimum prep time, a duty free lunch and the supervisory time. All that has changed is the substitution of a class assignment for the team time, which was nothing more than additional prep time as a practical matter.

14. In the alternative, if the arbitrator finds that the language is ambiguous for some reason, the district asserted that the consistent application of it supports its position here. As noted, the District countered the Association's claims that there is a consistent practice regarding the payment of overload pay. The District argued that each and every teacher who has been paid overload pay has worked during all or part of their preparation time or their supervisory time. Thus, the Association's past practice claim must fail due to lack of evidence to support it.

15. The District pointed to the extraordinary success this new class schedule has brought to the students in the District. Test scores are up and student achievement, completion of homework and other student measures of success are all headed in a positive direction. Clearly the 6-class schedule is working and the District seeks to maintain that success.

16. The District maintained that the overload provisions were never intended or drafted to cover this situation and that it is designed for those unusual situations in which the District needs to cover a class and it would be unreasonable or too difficult to hire a part-time teacher. It was never intended to cover assignments to teach a 6th class as long as adequate prep time is maintained and there is no change in supervisory time.

17. The essence of the District's case is that it retains the inherent right to schedule classes as it sees fit and the Association's grievance is nothing more than an assault on that.

18. Further that the overload pay provisions were never intended to cover this exact situation and in fact has been applied to a very limited set of circumstances that are simply not involved here. Team time is not supervisory time and thus does not fit into the language of the overload pay provisions. Finally, team time, even though it is in reality additional prep time can be taken away as long as there is adequate prep time for the teachers – and there is here. Thus the language does not apply and the parties' practice, albeit limited, does not under any circumstances support a past practice argument.

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

DISCUSSION

FACTUAL BACKGROUND

The grievants are teachers in the Stewartville School District. The District has a Middle School, with grades 6 through 8, and a High School, with grades 9 through 12, as well as two elementary schools. This grievance involves teachers at the Middle School.

The record showed that the operative language of Article VIII set forth above was negotiated into the CBA in 1995 and that it was done in response to grievances over assignments of teachers to teach additional classes. In 1989 the Association, then known by a different name, filed both a grievance and an unfair labor practice, when the District arranged to compensate a teacher for teaching two classes during the class period. After the filing of those the District retracted the agreement.

In 1994 the District again arranged to compensate a teacher for teaching an additional class and the Association again filed a grievance alleging that the District attempted to set compensation without negotiation with of the approval of the Association. Again the District retracted those agreements. These both were now shown to be identical to the situation now and were really more about setting compensation without proper negotiation, as a term and condition of employment, but they were the irritating factors to the negotiation of the language of Article VIII.

There was also evidence of bargaining history and the Association witnesses showed that there was an intent to provide compensation under certain circumstances for teaching an additional class. The record showed that the Association stated during bargaining for Article VIII as follows:

“A teacher could be offered an overload, which in the case of a 7-12 teacher would be a sixth teaching period ... We would want language that made it clear that this would be done in an emergency situation, which from our point of view means a class for which the district would be forced to find a teacher for an hour, as all other people with the needed certification had full time employment with the district, or there was only one teacher in the district with the required certification, and that teacher was already teaching a full five hour load.

There was also clear evidence that until 2013, the “normal” teaching load was 5 classes, along with a supervisory period, team time, preparation time and a duty free lunch. As discussed more herein, this was never negotiated into the CBA but was simply a practice within the District for years.

The evidence showed that the language of Article VIII originally contained two provisions that were subsequently dropped but those were not material to the discussion here. The remainder of the language remains unchanged since 1995.

The evidence also showed that the District reorganized its schools to create the Middle school in 1999 as set forth above. Prior to that time the school had a 7-12 grade configuration. There was no question that the District had the inherent right to do this and the Association did not challenge that. As discussed more below, the Association did not seek to challenge the District’s right to establish class schedules but asserted rather that this case is not about the District’s right to do that but is over the compensation due to teachers for being assigned to teach an extra class.

Also, in 1999, teachers at the Middle School were given what was called “team time,” or “team planning time,” as it was known. Consistent with the Middle School philosophy, team time was meant as planning time for teachers to collaborate on educational matters regarding the students and to provide a more comprehensive approach to the educational needs of the students.

The record showed however that team time was in fact not typically used for this purpose. Instead the teachers used it merely as another prep time. The District acknowledged this in several places, including its opening statement, in testimony and in its closing brief.

The evidence showed that team time was not supervisory time as these parties use that term since there was no supervision of students during that time. The Association argued that when the Middle School was created in 1999, teachers had two supervisions but argued that the team time was in reality meant to supplant supervisory time and was always considered supervisory time for purposes of overload pay.

The evidentiary record did not support that claim however since there was no evidence other than the Association's assumption that it was meant to supplant supervision time. In fact for approximately 15 years team time was in place but used as a practical matter as another preparation period by the teachers. It was thus in reality preparation time.

The essential fact in this case is thus that the additional instruction period simply replaced team time. Also, the District added what is known as "power up" time, which is an additional prep time for teachers and is a time for students to literally power up their computers and charge them so they have adequate battery life to finish the day. The District needed to add the power up time as prep time in order to meet the required preparation time required by state law. There is no question that the District is in compliance with Minn. Stat. 122A.50 and provides adequate preparation time under state law. The parties' contract does not address preparation time, except as mentioned in Article VIII, section 4.¹

In response to low student achievement scores the District contemplated requiring teachers to teach 6 classes instead of the normal 5 and doing away with team time – replacing that with a 6th instructional period. This resulted in smaller class sizes and improved test scores by the students.

The parties discussed the changes prior to the 2013-14 school year. The Association voiced its concerns over this, vis-à-vis the overload language, and after negotiation, the parties entered into an MOU regarding the 6-class schedule. There was evidence that both parties wanted to see if this experiment would work to achieve better test scores and better overall student performance.

The MOU provided for compensation of \$555.55 per teacher per year for the additional class, which was less than the 1/7th per year of the teacher's rate of pay set forth in Article VIII, but the evidence showed that this was part of the negotiated agreement.

¹ That statute provides in relevant part: "If the parties cannot agree on preparation time the following provision shall apply and be incorporated as part of the agreement: 'Within the student day for every 25 minutes of classroom instructional time, a minimum of five additional minutes of preparation time shall be provided to each licensed teacher. Preparation time shall be provided in one or two uninterrupted blocks during the student day.'" The parties have adhered to this language and have not included a separate provision for prep time in their CBA.

The MOU clearly spelled out the parties' respective positions with regard to overload pay, which are essentially the same as they are now, but the parties agreed to compromise and try the 6th class for a year. The MOU also clearly spelled out that it was non-precedent setting and would not create a past practice of any kind and was to expire at the end of the 2013-14 school year.² The MOU was in effect a deferral of this very case.

In the spring of 2014 Association representatives began inquiring about the District's intentions about the following school year, i.e. would it revert back to the old 5 class instructional schedule, negotiate another MOU or pay the overload pay for teaching the 6th class? No definitive answer was provided to the Association in the spring.

On June 13, 2014 the Principal met with a group of teachers at the middle school and announced that he thought the District would continue the 6-class schedule. There was no definitive answer on that question nor was there a definitive answer about the overload pay at that time. The District relied on this meeting as the basis for its timeliness argument but this meeting was not with the Association per se and did not provide sufficient notice of the District's actual position.

The Association continued to inquire throughout June and into early July 2014 but were given only somewhat oblique and non-committal answers, i.e. "I have two bosses" or "I have two schedules" from the principal. On this record these answers and the overall record did not support the claim that the Association knew or should have known of the District's official position during these meetings.

On July 21, 2014 the Superintendent gave a definitive answer that the District was going with the "6-1-1" schedule, meaning that the 6 class schedule would remain in place for the 2014-15 school year. Formal Board action was not taken on this until July 30, 2014.

² It was noted frankly that the MOU provides that the parties were "changing the Middle School class schedule from an eight period day in which a teacher teaches five classes and has two student supervisions and a prep period, as well as a duty free lunch, to a schedule where a teacher teaches six classes and has one student supervision, two blocks of prep time, and a duty free lunch." Even though the record showed that the team time was in effect prep time, the parties, for whatever reason, seemed to refer to it as "supervision" in the MOU they drafted and negotiated. This also provided support for the union's claim since the sole change was the change from team time to instructional time with the new 6-class schedule. Thus, whether team time is called prep time or supervision, the union's claim has merit.

The District did in fact move forward with that schedule and has not paid overload pay to the 20 impacted teachers at the Middle School. It is against that basic factual backdrop that the analysis of the case proceeds.

TIMELINESS/PROCEDURAL ARBITRABILITY

The District asserted that this matter is time barred by the terms of the grievance procedure requiring that the grievance be filed within “20 days after the date the event giving rise to the grievance occurred, or through reasonable diligence should have had knowledge of the occurrence.” The District asserted that as of June 13, 2014 the Association was on notice of the District’s intent to implement the 6-class schedule and should therefore have filed the grievance within 20 days of that. The grievance was filed on July 31, 2014.

The evidence showed that the Principal met with individual teachers on June 13, 2014 and advised them the District was thinking of implementing the 6-class schedule again but the overall record revealed that this was hardly a definitive answer at that point.

The Association representatives, when they heard about this possibility some time later, sought a more definite and clearer answer to that question, especially in light of the MOU that was still in effect at that point. The overall record showed that the District was not completely clear on what its intention was until July 21, 2014 at the earliest and that the official Board action was not taken until July 30, 2014. The grievance was filed on July 31, 2014.

Moreover, if an employer announces that it will change a policy the question arises as to when is the actual “event” giving rise to the grievance. For example, if the employer posts a notice in March indicating that shifts will change effective June 1st is the “event giving rise to the grievance the date of the posting or the date of the change.” Most arbitrators hold that it is the latter date. See, Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at 280. This is based on the notion that the parties might well be able to discuss a possible resolution to the issue before the need to file a formal grievance arises and positions get hardened.

Further, circumstances may change between the two dates obviating the need for a formal grievance as well. Finally, there is the notion that the “event” is the event, not the notice of the event. See also, Simpson on Contracts, West Publishing 1965, at Section 193, p 387-88.

Here both theories support the Association’s claim that the matter is timely and procedurally proper. There was not official notice to the Association until July 30, 2014 at the earliest even though there were discussions about the 6-class schedule prior to that time. More to the point, the 6 class schedule would not have been implemented and the overload pay denied until that actually occurred. Here the filing was within the time limits set forth in the CBA and the matter can proceed to the merits.

MERITS

The difficulty here is that the record showed that the language was placed in the CBA well before the District even created the Middle School and before the team time period was placed in the Middle School class schedule. The other difficulty in this case is that the prep time is not in the CBA and the parties have simply relied on the provisions of state law.

Further, this exact scenario has not arisen during the last 15 or more years and it was apparent that it was not contemplated when the parties negotiated the overload language. While there have been teachers who have been paid overload pay, this precise scenario whereby the District has taken away what was in practice and effect prep time and replaced it with an instructional period has not arisen.

Finally, the bargaining history does not help much in the decision given that the language was drafted at a time before the current situation was in place – perhaps before it was even contemplated. This matter thus presents the thorniest of cases, even though the facts are straightforward, where the language does not “fit” the scenario neatly and resort to several pieces of extrinsic evidence and factors must be used to divine that most ethereal of concepts – contractual intent.

The starting point for any dispute regarding the meaning and proper interpretation of contractual language is the language itself. The operative language is Article VIII, section 4 A, which provides “In the event there is a teaching assignment that cannot be filled by staff and it would be unreasonable to hire additional staff, a teacher may be asked to teach part or all of his/her preparation time or in lieu of a supervisory period.” On its face if a teacher is required to either teach a class during “part or all of his her preparation time or in lieu of a supervisory period, overload pay is due. There is no further limitation in the language; once those conditions are met, the payment is due as set forth in the remainder of the section.

MANAGEMENT RIGHTS

The District argued initially that the grievance is nothing more than a blatant attempt by the Association to infringe on the District’s right to schedule classes. The District maintained that this is an inherent managerial right that cannot be waived without express and unmistakable language

The record and arguments of the parties did not bear that claim out. The Association’s grievance is not about infringing or limiting the District’s right to schedule classes – the Association acknowledged that the District has that right. This case is about the pay for teaching an additional class and whether there is adequate contractual support for additional compensation for teaching that 6th class.

It is well-established that an employer retains those rights inherent to it to select and direct the work force except as limited in the CBA. Where provisions call for certain pay upon certain scheduling of employees exist, those provisions require the pay, even though the right to schedule exists. Thus, contrary to the District’s assertion, the overload pay provisions do not undermine the right to assign a 6th class but require payment for it if the conditions contained within Article VIII section 4 are met.

INTENT OF THE LANGUAGE

The District argued that this language was never intended to cover such a wholesale change in schedule. The first clause of the provision seems to limit overload pay to those situations where the assignment “cannot be filled by staff.” There was very little evidence as to what this means or why it was inserted into the provision. The bargaining history seems to suggest that this was for “emergencies” but neither side argued this point much. Neither is there any definition of emergency in the CBA. What we are left with is the actual language itself and the meaning that can be gleaned from its words in context of other applicable provisions. As noted herein in several places, the words require overload pay if one of two conditions are met – and one of them was.

The record as a whole revealed that overloads have always been filled by existing staff. The practice of using teachers to teach additional classes did not necessarily comport with the first phrase of that cited language above. Teachers who were paid overload pay, and there were several examples of them, were already on staff. Thus, the language reading “a teaching assignment that cannot be filled by staff” was unclear at best and inconsistent with the parties practice.

Irrespective of whether there was a binding past practice, the evidence showed that the parties have not applied the first sentence of Section 4A to obviate the need for overload pay whenever a teacher was assigned to teach an additional class during prep time or in lieu of a supervisory period.

At the end of the analysis, that language has not been applied to undermine the remainder of the language requiring overload pay when there has been an assignment to teach an additional class during all or part of the teacher’s prep time or in lieu of supervisory time. It is thus those two conditions that must be scrutinized in order to decide whether that language calls for overload pay or not.

Further, the parties underlined the second clause of Article VIII, section 4A in the actual MOU and focused on the conditions of preparation time or in lieu of supervisory periods as the conditions precedent to the payment of overload pay. It was clear from that evidence that the focus was to be on those conditions as the determining factors of overload pay.

In addition, there is no limiting language prescribing the amount of preparation time a teacher must have in order to qualify for overload time. The District relied heavily on the fact that the teachers have adequate preparation – actually slightly more than the statutory minimum required. That fact alone however does not change the actual language – which requires overload pay if a teacher is assigned to teach all or part of their preparation time.

It was somewhat curious that the Association did not focus on this as much as it relied on the claim that team time was supervisory time. As determined above, team time was never supervisory time since it never involved supervision. Thus the evidence did not support that theory of the Association's case. The mere fact that team time replaced what had been supervisory time prior to 1999 does not alter the clear fact that team time was not supervisory time. Thus the claim that the additional teaching assignment was “in lieu of a supervisory period” was unpersuasive.

It was however in effect preparation time.³ While it might have been a clearer case if the focus had been on that, one simply cannot ignore the language. There is no further limitation on that nor any language that provides that overload pay is not required if the teacher is afforded the appropriate amount of preparation as provided for by state law. Such language could easily have been inserted into the CBA. Indeed there are other limitations provided for in that section. See Article VIII, Section 4D. It is not for the arbitrator to add to that language or amend it to provide for something it does not say. That must be left to the parties to negotiate for themselves.

It is also clear based on the totality of the evidence that the additional assignment of that 6th class is additional work. At its very heart the District is simply asking teachers to do additional work for no additional pay. The troubling part in this case of course is that the 6-class schedule is working.

³ There is no definition of team time in the CBA but it must be something – and it is not instructional time nor supervisory time and is of course not a duty free lunch. The best fit for team time was that it was, just as the District suggested, preparation. See fn # 2, supra, where it is discussed at the MOU refers to team time as “supervision.”

Student achievement is improving and the district's intention was to improve that for its students. There is nothing in the agreement though that prohibits the District from continuing that schedule. What is required is that they pay the teachers for the additional work they are required to perform now.

It is an axiom of any matter invoking the interpretation of disputed language that the result draws its essence from the collective bargaining agreement. While the language was inserted to cover a somewhat different situation in 1995, the language says what it says – if a teacher is assigned to teach during part or all of his/her preparation time they are entitled to overload pay. An arbitrator is not empowered to change that language no matter how beneficial it is for students or the impact it might have on the budget. The CBA provides for overload pay under one of two stated conditions and at least one of those conditions was met here.

It should be noted that without the language of Article VIII, the Association's argument would fail. It is certainly true that the teachers are not required to work for additional time during the day, i.e. the school day has not been lengthened. There was some dispute about whether the teachers are now required to interact with more students, given the smaller class sizes. On this record, that issue did not control the result. The affected teachers are now being required to teach an additional class. Clearly the language of Article VIII remains in the CBA and has been for 20 years and requires overload pay under the conditions set forth within it, as discussed herein already. Thus, this decision draws its essence from the agreement. See below.

PAST PRACTICE

Both sides argued that the practice was consistent with their own interpretation of the language. The facts and record in this case does not require a full blown discussion of past practice given the determinations above but some discussion of past practice as it affected this case is appropriate.

Perhaps the best-known case in Minnesota was Ramsey County v AFSCME, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties' practice with respect to vacation accrual rates differed from the clear language of the contract. The matter arose when it was discovered that employees had for years been receiving vacation accruals and payments upon their departure from the County that were very different from what the clear language of the contract indicated. The County had argued that the clear language of the contract, and it was, governed the result and that paying the incorrect accrual rates for years was simply a clerical error that had no binding effect. The County also argued that the language of the contract where clear must always govern lest the whole process of negotiations be threatened with too liberal a use of past practice.

The arbitrator ruled in favor of the Union because the practice, even though different from the clear language in the agreement, met all the tests for a binding past practice. The Supreme Court upheld the arbitrator's award as follows:

“[p]ast practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenhal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961).

Thus, the essential feature of any award, whether it is derived from reliance on past practice or not, is whether it “draws its essence from the labor agreement.” See, 709 N.W.2d at 790-91. It appears clear that in Minnesota that custom and practice of the parties may be used to provide interpretation of existing language or it may be used to establish that the practice is binding even in the face of contrary and clear contract language, as in Ramsey County. Here there is a provision requiring overload pay and providing for how that compensation is to be made and in what amount. Teaching additional classes carries with it the requirement of additional pay and Article VIII carries with it the implicit if not explicit intent that the additional teaching assignment be paid as overload pay.

The Association cited several examples of overload pay where they were assigned to teach during their team planning time. See, e.g. testimony of Tim Bestor. On this record these few examples did not rise necessarily to the level of a binding past practice but the examples cited by the Association were persuasive on the question of the parties' intent with respect to the language of Article VII with respect to overload pay when teaching a 6th class.⁴

There were some elements missing from the record that could have formed a basis for a past practice argument. First, this exact scenario has not arisen before. While some teachers have been paid overload pay, the record revealed that those situations were somewhat different. Thus, the notions of consistency and repetition are lacking. Likewise, mutuality was not shown, either way, again since this scenario has not arisen in the past.

The basis of this decision is the language of the CBA itself. The examples of overload pay were somewhat helpful in making this determination, but were not controlling on the result.

APPROPRIATE REMEDY

The arbitrator had little choice in this matter. The language of Article VIII section 4C is clear and requires that teachers be paid 1/7th "per year of the teacher's rate of pay." Even though it is clear that the "power up" time was added to the schedule to meet the requirement of adequate preparation time the actual "loss" of preparation time was approximately 32 minutes. The record showed that team time was approximately 48 minutes and that power up time was 16.⁵

⁴ Given the other determinations in this case, it was not completely necessary to conduct a full blown discussion of the elements of a binding past practice. First, this exact scenario, i.e. the implementation of a new class assignment to this many teachers has not been done before. Thus at least one of the elements of a past practice, repetition, was not present. Further, the record was somewhat unclear as to how consistently overload pay was or was not made when teachers were asked to teach a 6th period. The District argued that when teachers were paid overload pay they gave up a supervisory period or part of their preparation. In some cases that appeared to be true.

⁵ The District asserted that it was 21 minutes but that may have included passing time. The Association asserted that it was 16 minutes long and the record was not completely clear on this point. The arbitrator does not have the power to "split the baby" here or render an award different from the language of Article VIII, Section 4C even though there was not a "loss" of an entire period, but rather approximately 32 minutes – depending on how the power up time is actually counted. Based on the parties' language the compensation set forth in the operative language of Article VIII must be awarded.

Accordingly, the grievance is sustained and the District is ordered to make the affected teachers whole by providing the contractually required overload pay for the 2014-15 school year as well as any corresponding benefits that accompany the additional salary.

AWARD

The grievance is **SUSTAINED** as set forth above. The arbitrator will retain jurisdiction to determine any specific issue with regard to the remedy ordered.

Dated: March 16, 2015

Jeffrey W. Jacobs, arbitrator

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