

**IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN**

MINNEAPOLIS SPECIAL SCHOOL  
DISTRICT NO. 1,

EMPLOYER

-and-

EDUCATION MINNESOTA,

UNION.

ARBITRATOR'S AWARD  
BMS Case No. 05-PA-532  
(Teacher Compensation)

ARBITRATOR:	Rolland C. Toenges
DATE OF GRIEVANCE:	November 10, 2004
DATE ARBITRATOR SELECTED:	December 16, 2004
HEARING PROCEDURE:	Submitted on Written Briefs Received April 2, 2007
GRIEVANTS:	Lorie Shiels Bernadette Bowden Rufus Bess
DATE OF AWARD:	January 31, 2008

**ADVOCATES**

FOR THE EMPLOYER:

Patricia A. Maloney, Attorney  
Ratwik, Roszak & Maloney, P.A.

FOR THE UNION:

William F. Garber, Attorney  
Education Minnesota

**ISSUES**

**Whether the Employer violated the Collective Bargaining Agreement (CBA) when it failed to pay the Grievant's salary from the beginning of the school year to the point where they were laid off by the action of the school board? [Union submission]**

**Is the question of whether teachers are entitled to be paid under Minn. Stat., Section 121A.41 pending recall or final Board Action on their proposed terminations grievable?** [Employer Submission]

**If it is, did the School District violate Minn. Stat., Section 121A.41 when it failed to pay Grievants until they were either recalled or final Board action on their proposed terminations occurred?** [Employer submission]

### **JURSDICTION**

The matter at issue, regarding interpretation of terms and conditions of the Collective Bargaining Agreement (CBA) between the Parties, and applicable laws, was submitted to arbitration pursuant to the grievance procedure contained in said Agreement. Relevant provisions of the Grievance Procedure (Article XIV) and Transfer, Reassignment and recall (Article XVI) provide as follows:

“Article XIV. GRIEVANCE PROCEDURE. Section A. Definitions:

GRIEVANCE. “Grievance” means a dispute or disagreement as to the interpretation or the application of any term or terms of any contract required under Minnesota Statutes.

GRIEVANT. “Grievant” means an individual teacher or the exclusive representative alleging a grievance. Grievant shall also mean an individual teacher who has been discharged due to a lack of pupils and discontinuance of position and who retains recall rights as provided in Article XVI, Section G of this Agreement; provided, however, that such teachers may grieve only alleged violation of Article XVI, Section G of this Agreement. [Emphasis Added]

“Article XIV, GRIEVANCE PROCEDURE. Section C, Subd. 4 Level IV: Arbitration Level.

- a. Within ten (10) days of the date of the mediation meeting if the grievance is not resolved during mediation arbitration may be requested by serving the District with a written notice of the intent to proceed with arbitration.

- b. The employer and the grievant shall endeavor to select a mutually acceptable arbitrator to hear and decide the grievance. If the employer and the grievant are unable to agree on an arbitrator, they may request from the Director of the Bureau of Mediation Services, State of Minnesota, a list of five (5) names. The list maintained by the Director of the Bureau of Mediation Services shall be made up of qualified arbitrators who have submitted an application to the Bureau. The parties shall alternately strike names from the list of five (5) arbitrators until only one (1) name remains. The remaining arbitrator shall hear and decide the grievance. If the parties are unable to agree on who shall strike the first name, the question shall be decided by a flip of the coin. Each party shall be responsible for equally compensating arbitrators for their fees and necessary expenses.
- c. The arbitrator shall not have the power to add to, subtract from, or to modify in any way the terms of the existing contract.
- d. The decision of the arbitrator shall be final and binding on all parties to the dispute unless the decision violates any provision of the laws of Minnesota or rules or regulations promulgated there under, or municipal charters or ordinances or resolutions enacted pursuant thereof, or which causes a penalty to be incurred there under. The decision shall be issued to the parties by the arbitrator, and a copy shall be filed with the Bureau of Mediation Services, State of Minnesota. [Emphasis Added]

Article XIV, GRIEVANCE PROCEDURE, Section D. General.

Subd. 3. Teacher Rights: Nothing herein shall be construed to limit, impair or affect the rights of any teacher, or group of teachers, as provided in state statutes.

Article XVI, TRANSFER, REASSIGNMENT AND RECALL, Section G.

Section G. Staff Adjustment, Bidding, and Placement.

- 1. Positions created as a result of enrollment changes on the adjustment day shall be filled in seniority order by teachers who were excessed on enrollment adjustment day at a time and place mutually agreeable to the Union and the District. Teachers excessed due to enrollment adjustments will meet with the principals and/or other staff members of the schools that have the vacancies in an informational session regarding the specifics of each of the programs. Any remaining vacancies from the enrollment adjustment bidding process shall be filled permanently from the candidate pool unless filled

after the last day of the first semester. All teachers filling vacated positions after first semester shall be excessed at budget tie-out.

2. Vacancies created at a site as a result of resignation/retirement of teachers after the last day of the first semester shall be posted for bidding at the first bidding session, unless the position is filled internally within the site. The internally-vacated position shall be posted unless there is a reduction in positions at the site.
3. Exceptions from the procedures outlined in this Section may occur only with the approval of the Labor/Management Placement Committee.

Article I, AGREEMENT RELATIVE TO TERMS AND CONDITIONS OF EMPLOYMENT, Section D, Definitions, defines “Terms and Conditions of employment” as follows:

“The term “terms and conditions of employment” means the hours of employment, the compensation therefore, including fringe benefits. . . “

The matter in dispute involves interpretation of Minn. Stat. 122A.40 – 41. The relevant provisions provide as follows:

Subd. 4. Period of Service after probationary period; discharge or demotion.

- (a) After the completion of such probationary period, without discharge, such teachers as are thereupon reemployed shall continue in service and hold their respective position during good behavior and efficient and competent service and must not be discharged or demoted except for cause after a hearing. The terms and conditions of a teacher’s employment contract, including salary and salary increases, must be based either on the length of the school year or an extended school calendar under section 120A.415.

Subd. 6. Grounds for discharge or demotion.

- (a) Except as otherwise provided in paragraph (b), causes for the discharge or demotion of a teacher either during or after the probationary period must be:

(5) Discontinuance of position or lack of pupils.

Subd. 12. Suspension pending hearing; salary.

After charges are filed against a teacher, the school board may suspend the teacher from regular duty. If the teacher is suspended or removed after the final decision, the board may in its discretion determine the teacher's salary or compensation as of the time of filing the charges. If the final decision is favorable to the teacher, the board must not abate the teacher's salary of compensation. [Emphasis Added]

Minn. Stat. Section 179A.20, provides in pertinent part:

Subd. 4. Grievance Procedure.

- (a) All contracts must include a grievance procedure providing for compulsory binding arbitration of grievances including all written disciplinary actions. If the parties cannot agree on the grievance procedure, they are subject to the grievance procedure promulgated by the commissioner under section 179A.04, subdivision 3, clause (h). [Emphasis Added]
  
- (d) A teacher who elects a hearing before an arbitrator under section 122A.40, subdivision 15, or 122A.41, subdivision 13, or who elects or acquiesces to a hearing before the school board may not later proceed in the alternative manner nor challenge the termination or discharge through a grievance procedure required by this subdivision. [Emphasis Added]

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

The Parties agreed to forego a hearing and submitted their respective cases by written briefs. The Parties also submitted some 14 exhibits in support of their respective cases.

The Parties have agreed that the Arbitrator may decide the legal issues presented in this case based on the Stipulation and arguments of the Parties.

The Parties briefs were dated March 30, 2007 but did not come to the attention of the Arbitrator until recently due to a routing error.

## **BACKGROUND**

Minneapolis Public Schools, Special School District No. 1, (Employer), in adopting its 2004-2005 budget projected a decline in student enrollment of 4,600 students from the previous school year, calling for a reduction of 210.8 teacher positions.

The procedure to be followed by Minneapolis Schools for reduction of teaching staff is set forth in Minnesota Statutes, 121A.41.<sup>1</sup> The statute calls for notice to the teacher setting forth the grounds for the layoff, right of the teacher to request appeal, and the right to request a hearing, either before the School Board or an Arbitrator.

The School Board issued the required notice of layoff to the three Grievants during the month of August 2004. All Grievants appealed and requested a hearing before an arbitrator, however, available positions were found for two of the Grievants and only one progressed to an arbitration hearing. The hearing officer conducted a hearing on November 11, 2004 and issued Findings of Fact, Conclusions and Recommendations to the School Board dated November 29, 2004. Thereafter, the School Board passed a resolution (final decision) adopting the arbitrator's findings and recommendations.

The layoff notice being issued in August did not provide sufficient time for the appeal process to be completed before the start of the fall 2004-2005 school term. During the period from the start of the fall school term until the completion of the appeal process, the Grievants did not perform teaching duties and were not compensated by the School District. The Union contends the Grievants are entitled to their regular teaching compensation for this period, which is the issue before the instant arbitration proceeding.

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<sup>1</sup> The Minneapolis, St. Paul and Duluth public school systems, being in Cities of the First Class, are covered by Minn. Stat. 122A.41. Other public school districts in Minnesota are covered by Minn. Stat. 122A.40. There are differences between these two statutory sections.

**JOINT EXHIBITS<sup>2</sup>**

- Exhibit 1. Notice of Termination to Bernadette Bowden from Steven Belton, 08/10/2004.
- Exhibit 2. Notice of Termination to Rufus Bess from Steven Belton, 08/10/2004.
- Exhibit 3. School Board Resolution proposing termination of Grievants, 08/10/2004.
- Exhibit 4. Notice of Appeal from Bernadette Bowden, 08/15/2004.
- Exhibit 5. Notice of Appeal from Rufus Bess, 08/18/2004.
- Exhibit 6. School Board Resolution proposing termination of Lorie Shiels, 08/31/2004.
- Exhibit 7. Notice of Termination to Lorie Shiels from Steven Belton, 09/1/2004.
- Exhibit 8. Notice of Appeal from Lorie Shiels, 09/10/2004.
- Exhibit 9. Writ of Certiorari and Petition for Writ of Certiorari, 11/01/2004.
- Exhibit 10. Grievance Report, 11/10/2004.
- Exhibit 11. Transcript of Rufus Bess Termination Hearing, 11/11/2004.
- Exhibit 12. Arbitrator's Finding of Fact, Conclusions & Recommendation, 11/29/2004.
- Exhibit 13. CBA, 2003-2005 between School and Mpls Federation of Teachers Local 59.
- Exhibit 14. Comparison Chart – Minn. Stat. Sections 122A40 and 122A.41, by Deb Corhouse of Education Minnesota.

**JOINT STIPULATION OF FACTS**

Bernadette Bowden, Rufus Bess, and Lorie Shiels (“Teachers”) are tenured teachers who were employed by Minneapolis Public Schools (“School District”) during the 2003-2004 school year.

By resolution dated August 10, 2004, the School District proposed to layoff Bowden and Bess effective August 10, 2004, pursuant to Minn.Stat. Section 122A.41, Subdivisions 6(a)(5) and (7).

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<sup>2</sup> The Parties jointly stipulated to the exhibits.

By resolution dated August 31, 2004, the School District proposed to layoff Shiels effective August 31, 2004, pursuant to Minn. Stat. Sections 122A.41, Subdivisions 6(a)(5) and (7).

The Teachers timely requested a hearing on their proposed layoffs.

The School District did not pay Bernadette Bowden or Lorie Shiels starting at the beginning of the 2004-2005 teacher duty year until the effective date of their recall later that school year.

The School District did not pay Rufus Bess starting at the beginning of the 2004-2005 teacher duty year through its final decision implementing the Arbitrator's findings and recommendation upholding his discharge.

MFT Local 59 filed a grievance on November 10, 2004, claiming that the Teachers should have been paid by the School District pending final determination on their layoff.

The hearing on the Teacher's proposed layoffs was held on November 11, 2004.

The Hearing Officer prepared Findings of Fact, Conclusions of Law and Recommendation dated November 29, 2004.

### **POSITION OF THE PARTIES**

#### **THE UNION SUPPORTS ITS CASE WITH THE FOLLOWING:**

- It is uncontested that Grievants were not paid for the time from the beginning of the 2004-2005 school year to the date of the School Board's final resolution.

- The Union asserts that the CBA requires the District to pay its teacher employees and that Grievants remained employed until a final determination was made.
- Although school districts may “propose” to layoff a teacher, that teacher remains an employee unless that particular person agrees to be laid off or the Board takes final action after a hearing officer’s recommendation.
- The District did not violate the statute when it held hearings after the new school started, but did violate the CBA in that employees were not paid.
- Because the District did not give the Grievants sufficient notice of termination before the beginning of the school year, there was insufficient time to complete the appeal process, causing the Grievants to lose salary for the time each could have worked before the final school board resolution was passed.
- The law continued the Grievants as employees once they were “proposed” for layoff and after they requested a hearing.
- The Grievants were always ready, willing and able to perform their teaching duties but were not assigned any work.
- The Grievants, who under state law remained employees until the final School Board Resolution, should have received the same terms and conditions of employment as every other employee.
- It was the District’s fault that the Grievants were in a non-work status. The District failed to complete requested hearings before the start of the next pay period.

- In Fisher v. ISD, 215 N.W. 2d 65 (Minn. 1974), it was held that school districts are required to plan their actions in such a way as to permit accomplishment of all the prerequisites before a deadline imposed by the amended statute.
- The District must be charged with knowledge that it could not finally layoff any teacher who requested a hearing until after the hearing and that the laid off teacher must be paid once the new school year starts.
- Because the District failed to finalize the layoff until after the new school year began, it must compensate the Grievants during the time they were still employed. The District is not excused from the necessary consequences of its own acts.
- The District could have assigned the Grievants to active teaching until the final result of their layoff status was known.
- When the Grievants requested a hearing they preserved their status as employees until final Board action.
- Because the Grievants remained employees after the 2004-2005 school year began, the District violated the CBA when it failed to pay them.
- The legislature provided a procedure allowing teachers proposed for layoff to remain employed until finally laid off. As continuing employees, they should have received pay from the start of the new school year.

**THE EMPLOYER SUPPORTS ITS CASE WITH THE FOLLOWING:**

- In 2004, under the Tenure Law, the District is not allowed to negotiate a local lay-off plan and can only terminate teachers due to budget reductions in accordance with the statutory provisions of Minn. Stat. 122A.41, subd. 14 (2004).

- A teacher has the right to raise issues related to damages, including back pay, in the hearing before the independent hearing officer regarding their proposed lay-off and again on appeal of the School Board's final decision on the lay-off pursuant to a Writ of Certiorari to the Minnesota Court of Appeals.
- On November 10, 2004, the Union filed a grievance contesting the delay in holding the lay-off hearing and the fact that the teachers had not been paid. Yet, at the hearing on November 11, 2004, the Union did not raise the issue of whether the District had violated Minn. Stat. Section 122A.41 by not paying the Grievants pending recall or final Board action on their proposed terminations. The only issue the Union raised was whether Grievant Bess was entitled to bump another teacher based on his seniority and licensure.
- Although any issues regarding the lay-off of the other two Grievants were moot, because they had either been recalled or accepted another position, the dispute about whether or not they were entitled to back pay was still very much alive. Nevertheless, by not proceeding with a hearing contesting the Board's failure to pay them pending recall, Grievants Shiels and Bowden acquiesced to the Board's action.
- The hearing officer did not rule on the back pay claim because the Union did not raise the issue in regard to any of the three Grievants.
- On December 7, 2004, the Court of Appeals dismissed the Writ of Certiorari on the back-pay claim on jurisdictional grounds. The School Board subsequently adopted the Hearing Officer's Recommendation and retroactively terminated Grievant Bess effective August 10, 2004. The Union did not file a Writ of Certiorari to contest the Board's action.

- The Grievants' claim that they were entitled to be paid under the Tenure Law pending recall or final Board action on their termination is not grievable for two reasons.
  - PELRA expressly provides that teacher terminations under the Tenure Law are not subject to the grievance procedure, and
  - The Grievants' claim that the School District violated their rights under the statute does not come within the definition of a grievance under the Parties 2003-2005 Teacher Contract (CBA).

Although PELRA requires that all CBA's contain a grievance procedure, the CBA grievance procedure is expressly unavailable for a teacher who has a hearing pursuant to Section 122A.41, or who acquiesces to the School Board's action on his or her proposed termination.

Minn. Stat. Section 179A.20, provides in pertinent part:

“(d) A teacher who elects a hearing before an arbitrator under section 122A.40, subdivision 15, or 122A.41, subdivision 13, or elects or acquiesces to a hearing before the school board may not later proceed in the alternative manner nor challenge the termination or discharge through a grievance procedure required by this subdivision.” [Emphasis Added]

Grievants Shiels and Bowden ultimately acquiesced to the Board's proposed action by not proceeding with the hearing before Arbitrator Miller. Grievant Bess exercised his statutory right to a hearing and had an opportunity to raise the back pay issue in that hearing but chose not to do so.

Under Minn Stat., Section 179A.20, subd. 4(d) the Grievants are precluded from raising issues they could have raised in their statutory lay-off hearing through a grievance procedure.

Although the portion of PELRA cited above compels a ruling that the Grievants' back pay claims are not grievable, a similar result is reached under the terms of the negotiated CBA grievance procedure.

The CBA defines a grievance as:

“ . . . a dispute or disagreement as to the interpretation or the application of any term or terms of any contract required under Minnesota Statutes.”

The CBA defines a grievant as:

“ . . . an individual teacher or the exclusive representative alleging a grievance. Grievant shall also mean an individual teacher who has been discharged due to lack of pupils or discontinuance or position who retains recall rights as provided in Article XVI, Section G. of this Agreement; provided, however, that such teachers may grieve only alleged violation of Article XVI, Section G. of this Agreement.

It is important to note that Article XVI, Section G. of the CBA covers Transfer, Assignment and Recall. Article XVI has nothing to do with compensation for teachers proposed for termination due to lack of pupils or discontinuance or position pending final Board action. Article XVI is about what those teachers' recall rights are AFTER final Board Action.

Obviously, teachers do not have the opportunity to raise issues about how the District handled their recall rights at the lay-off hearing because they haven't even been laid off yet.

In the instant case, the Grievants are not claiming that the School District violated the terms of any **contract** required under Minnesota Statutes. Rather, the Grievants are claiming that the School District violated a **statute**, namely the Tenure Law, Minn. Stat, Section 122A.41. Thus their claims do not come within the negotiated definition of a 'grievance' since the parties have not agreed that disputes about interpretations of statutes are grievable.

The CBA does not provide that disputes about the interpretation of the Teacher Tenure Law come with the definition of a grievance.

Teachers discharged for budget reasons may only grieve alleged violations of their negotiated recall rights.

The Arbitrator does not have jurisdiction to decide the merits of the Grievants' back pay claims and the grievance must be dismissed.

The CBA limits the Arbitrator's jurisdiction by the following:

“The Arbitrator shall not have the power to add to, subtract from, or to modify in any way the terms of the existing contract.”

The Parties carefully limited the circumstances in which a teacher, who had been discharged for budgetary reasons, could file a grievance. Teachers who have been terminated for budget reasons may only file a grievance for alleged violation of their **recall** rights under Article XVI, Section G. This distinction makes sense since the **recall** rights are a negotiated term of the CBA and for that reason also come within the Parties' definition of a grievance. [Emphasis Added]

The Grievants were not entitled to be paid under the Tenure Law pending recall or final Board action on their terminations.

Minn. Stat., Section 122A.40, Subd. 18, expressly states that this section of the Continuing Contract Law (that calls for continued pay pending final board action on the teachers proposed discharge), does not apply to any city of the first class (i.e., Minneapolis, St. Paul and Duluth).

The Tenure Law, Minn. Stat., Section 122A.41, Subd. 12, (2004) which applies to the Grievants in the instant case, leaves to the discretion of the Board whether a teacher proposed for discharge is to be paid pending its final decision.

“Subd. 12. Suspension pending hearing; salary. After charges are filed against a teacher, the school board may suspend the teacher from regular duty. If the teacher is suspended or removed after the final decision, the board may in its discretion determine the teacher’s salary or compensation as of the time of filing the charges. If the final decision is favorable to the teacher, the board must not abate the teacher’s salary or compensation.” [Emphasis Added]

In the instant case the resolutions proposing to terminate the Grievants, as well as the notice sent to them, stated they were terminated effective the date of the resolution. None of the Grievants performed any teaching services from the time of their notice of proposed termination until their recall or acceptance of another position (Shiels and Bowden) or final action of the Board following hearing (Bess).

The School District has never paid any teachers proposed for termination for budget reasons when final Board action had not occurred prior to the start of the subsequent teacher duty year, unless they were reinstated as result of a favorable court decision.

None of the Grievants are entitled to be paid under Minn. Stat, Section 122A.41, as the final decision was not favorable to them.

In regard to Grievants Shiels and Bowden, their acquiescence to their proposed termination precludes them from challenging the District’s decision to not pay them pending recall.

In regard to Grievant Bess, the hearing officer recommended that he be placed on unrequested leave (terminated) effective August 10, 2004, in accordance with the Board’s resolution. The Board subsequently adopted the hearing officer’s recommendation as its final decision. There was not further appeal on behalf of Grievant Bess.

The position of the School District is supported by the Comparison Chart prepared by the Union’s attorney (Employer Exhibit 14, page 1), which shows pay while on suspension pending termination hearing is at the Board’s discretion.

Based on the foregoing, the School District respectfully requests the Arbitrator deny the grievance.

### **DISCUSSION**

The issue in the instant dispute is whether the Grievants, who were notified of their proposed layoff in August 2004, are entitled to their regular working compensation from the start of the fall school term until the Board issued its final decision following a hearing in November 2004.<sup>3</sup>

The Grievants were given written notice of their “termination of employment” under the statutory grounds of “discontinuance of position and lack of pupils.” The Grievants were advised of their statutory rights and the procedure to file an appeal. All Grievants filed an appeal, but only one (Bess) appeared for the appeal hearing on November 11, 2004. The other Grievants (Shiels and Bowden) had been recalled or accepted another teaching position.

It is noted that the terms “discharge” and “termination,” as used herein, are statutory terms that include layoff of the Grievants for “Discontinuance of position or lack of pupils.”<sup>4</sup>

#### **CBA Grievance:**

A threshold issue raised by the Employers is that the instant dispute does not constitute a grievance under the CBA.

While it is most common for CBA’s to contain terms and conditions for the layoff of employees, including such things as notice, order, severance pay, etc., in Minnesota these terms and conditions are established by statute for public school teachers. For cities of

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<sup>3</sup> In the case of Grievants Shiels and Bowden the, issue is compensation from the start of the fall school term until they were recalled from layoff or accepted an alternative teaching position.

<sup>4</sup> Minn. Stat., Section 122A.41, Subd. 6, (5).

the “First Class” (Minneapolis, St. Paul and Duluth), the applicable statute is Minn. Stat., Section 122A.41.

Although as referenced above, the terms and conditions for layoff of the Grievants is established by statute, the CBA does contain an Article titled, “Transfer, Reassignment and Recall.” Article XVI, Section G, “Staff Adjustment, Bidding and Placement,” sets forth terms and conditions for filling positions “by teachers who were excessed on enrollment adjustment day,” and “vacancies created at a site as a result of resignation /retirement of teachers after the last day of the first semester.”

Although the CBA definition of a “Grievant” includes a teacher who has been discharged due to lack of pupils and discontinuance of position with recall rights, such teachers may only grieve an alleged violation of Article XVI, Section G.

#### ARTICLE XIV. GRIEVANCE PROCEDURE, Section A. Definitions:

“GRIEVANT: “Grievant” means an individual teacher or the exclusive representative alleging a grievance. Grievant shall also mean an individual teacher who has been discharged due to lack of pupils and discontinuance of position and who retains recall rights as provided in Article XVI, Section G of this Agreement; provided, however, such teachers may grieve only alleged violation of Article XVI, Section G of this Agreement.” [Emphasis Added]

#### ARTICLE XVI, TRANSFER, REASSIGNMENT AND RECALL, Section G.

“Section G. Staff Adjustment, Bidding and Placement.

1. Positions created as a result of enrollment changes on the adjustment day shall be filled in seniority order by teachers who were excessed on enrollment adjustment day at a time and place mutually agreeable to the Union and the District. Teachers excessed due to enrollment adjustments will meet with the principals and/or other staff members of the schools that have the vacancies in an informational session regarding the specifics of each of the programs. Any remaining vacancies from the enrollment adjustment bidding process shall be filled permanently from the candidate pool unless filled after the last day of the first semester. All teachers filling

vacated positions after the first semester shall be excessed at budget tie-out.

2. Vacancies created at a site as a result of resignation/retirement of teachers after the last day of the first semester shall be posted for bidding at the first bidding session, unless the position is filled internally within the site. The internally-vacated position shall be posted unless there is a reduction in positions at the site.
3. Exceptions from the procedures outlined in this Section may occur only with the approval of the Labor/Management Placement Committee.” [Emphasis Added]

A fair reading of Article XVI, Section G, is that it applies only to the how positions resulting from enrollment changes, resignation or retirement are to be filled. Therefore, the Arbitrator does not find Section G relevant to the instant matter, which is if teachers on layoff are to be compensated.

It also noted that the Public Employment Labor Relations Act (PELRA) precludes a teacher, who elects a hearing pursuant to Minn. Stat., Section 122A.41, or who acquiesces to the School Boards action, from later pursuing the matter through a CBA grievance procedure.

Minn. Stat., Section 179A.20, Subd. 4, (d), provides as follows:

“(d) A teacher who elects a hearing before an arbitrator under section 122A.40, subdivision 15, or 122A.41, subdivision 13, or elects or acquiesces to a hearing before the school board may not later proceed in the alternative manner nor challenge the termination or discharge through a grievance procedure required by this subdivision.” [Emphasis Added]

The Employer argues that The Arbitrator does not have jurisdiction to decide the merits of the Grievants’ back pay claims as a grievance. The Arbitrator finds in the affirmative that the matter in dispute is not a “grievance” within the CBA and statutory definition.

Both the CBA and the statutes preclude the instant matter from being pursued as a grievance. Accordingly, the Arbitrator may not rule on the matter in dispute for (1) the CBA precludes any decision by the Arbitrator that would add to, subtract from, or modify

in any way the terms of the CBA, and (2) the Arbitrator is precluded from any interpretation of the CBA that is contrary to state law.

CBA, Section C, Subd. 4, (c).

“C. The arbitrator shall not have the power to add to, subtract from, or to modify in any way the terms of the existing contract.”

CBA, Section I, Section C, 4.

“4. Agreements Contrary to Law. If any provision of this Agreement or any application of the Agreement to any teacher or group of teachers shall be found contrary to state or federal law, then this provision or application shall be deemed invalid except to the extent permitted by law, but all other provisions hereof shall continue in full force and effect. The provision in question shall be renegotiated by the parties.”

### **Minnesota Statutes:**

In addition to the Arbitrator having jurisdiction over the grievance issue, the Parties have also given the Arbitrator jurisdiction over legal issues associated with the disputed matter.<sup>5</sup>

There is no dispute that the Grievants were afforded all their rights under the statute. The record shows they were properly notified of the Employer’s decision to terminate them and discontinue their positions due to a significant budget shortfall and lack of pupils. They were properly notified of their right to request a hearing, given a description of the hearing process and provided contact information in the event they had any questions. .

The record shows all three Grievants filed an appeal, however, only one (Bess) participated in the hearing. The other two Grievants (Shiels and Bowden) acquiesced in participating in the appeal hearing and final action by the School Board. The record shows they had either been recalled or chose to accept another position.

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<sup>5</sup> Employer’s Brief, Page 1. “. . . The parties have agreed that the arbitrator may decide the legal issues presented in this case based on the Stipulation and arguments of the parties.”

With respect to Grievant Bess, the arbitrator found that he was properly laid off and should be placed on unrequested leave of absence effective August 10, 2004.

The Employer argues that, whatever concerns the Grievants had concerning compensation should have been brought before the hearing held by the Arbitrator Miller on November 11, 2004, or before the School Board when its final position was being considered following the arbitration hearing.

The Arbitrator finds that the decision to compensate the Grievants is at the sole discretion of the School Board and therefore was not a matter over which the Arbitrator Miller had jurisdiction. The only reference to compensation in the statute is the following:

Minn. Stat., Section 122A.41, Subd. 12.

“Section 12. Suspension pending hearing: salary. After charges are filed against a teacher, the school board may suspend the teacher from regular duty. If the teacher is suspended or removed after the final decision, the board may in its discretion determine the teacher’s salary or compensation as of the time of filing the charges. . .” [Emphasis Added]

Only if the final decision was favorable to the Grievant is compensation required:

Minn. Stat, Section 122A.4, Subd. 12.

“ . . . If the final decision is favorable to the teacher, the board must not abate the teacher’s salary or compensation.”

The appropriate time and place for the Grievants to have brought their request for compensation was before the School Board when it rendered its final decision following the arbitration hearing. There is no indication in the record that any of the Grievants did so.

The record further shows that the School Board has never paid any teachers who had been proposed for termination for budget reasons when final Board action had not

occurred prior to the start of the subsequent teacher duty year, unless they were reinstated as a result of court decision.<sup>6</sup>

The record shows that the Union filed a Writ of Certiorari, dated November 1, 2004, petitioning the Court of Appeals to order the Employer to provide compensation to the Grievants from September 3, 2004 through the date of final School Board action. Although not a part of the evidence submitted by the Parties, the Employer's Brief notes that the Writ of Certiorari on the compensation matter was dismissed by the Court of Appeals based on jurisdictional grounds, effective December 7, 2004.<sup>7</sup>

The Arbitrator's interpretation of the foregoing statutory provisions is consistent with Joint Exhibit #14, which is a comparison of the statute applicable to cities of the First Class with the other Minnesota cities and states that, "Pay while on suspension pending a termination hearing" [is] "paid at board's discretion."

### **FINDINGS AND CONCLUSIONS**

The matter in dispute does not comport with the definition of a grievance under the Collective Bargaining Agreement and therefore is not grievable.

The matter in dispute, having been appealed to an arbitration hearing under the provisions of Minn. Stat., Section 122A.41, is precluded from being pursued as a grievance under the Parties Collective Bargaining Agreement in accordance with the provisions of Minn. Stat., Section 179A.20, Subd. 4 (d).

The matter of compensation for the Grievants from the time of proposed termination until final decision of the School Board is a matter solely within the discretion of the Board, as the final decision regarding their termination was unfavorable or had been acquiesced.

### **AWARD**

**The Grievance is denied. The disputed matter is not grievable under either the CBA or statute.**

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<sup>6</sup> Employer's Brief, Page 6.

<sup>7</sup> Employer's Brief, Page 6.

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 31<sup>st</sup> day of January 2008 at Edina, Minnesota.

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ROLLAND C. TOENGES, ARBITRATOR