

THE MATTER OF ARBITRATION BETWEEN

ISD 152 Moorhead Minnesota)	BMS Case No. 16-PA-0721
)	
“Employer”)	Issue: Violation of Past Practice
)	
)	
and)	Hearing Date: 08-15-2016
)	
)	Brief Submission Date: 09-02-2016
)	
Education Moorhead)	Award Date: September 21, 2016
)	
)	
“Union”)	Anthony R. Orman,
)	Arbitrator

JURISDICTION

The day of hearing in this matter was August 15, 2016, in Moorhead, Minnesota. The parties appeared through their designated representatives. Both parties agreed the grievance was properly before the Arbitrator. The parties were afforded a full and fair opportunity to present their case. Exhibits were introduced into the record. The parties disagreed to the statement of the issue that was before the Arbitrator. Thereafter the Arbitrator was to define the issue and the matter was to be taken under advisement.

APPEARANCES

For the Employer:

Ann Goering	Attorney
Kirstin Dehmer	Director, Human Resources
Lynne Kovash	Superintendent

Jeremy Larson	Principal, Horizon Middle School
Jacob Scandrett	Former Assistant Principal, Horizon Middle School

For the Union:

Meg Luger-Nikolai	Attorney
Mark Richardson	Field Staff
Kent Wolford	Teacher
Ira Bailey	Teacher
David Kanuch	Teacher
Jeff Offutt	Teacher

I. THE ISSUE

Did the Employer violate the Collective Bargaining Agreement (Here in after referred to as the CBA) and past practice when making work schedule assignments of employees during the teacher’s preparation period as provided for in Article 5, Employer’s Rights and Obligations, Sections 8B, 9B and 10, and if so what should the remedy be?

II. BACKGROUND AND FACTS

A. On November 3, 2015 a Grievance Report Form (Joint Exhibit 5 A) was presented to the Independent School District No. 152 (Here in after referred to as the Employer). The grievance (#1050) stated, “On September 29, 2015 licensed teaching staff were assigned to cover class periods of other teachers at Horizon Middle School. The assignment occurred during the preparation period of the teacher being assigned to cover the classes. Previous to this occurrence, all similar types of coverage had been on a voluntary basis. In this case the teacher was directed to cover the classes. This issue was discussed with administration and a response was delivered on November 2, 2015 (Kristin Dehmer e-mail). That response offered no relief to situation.” The grievance was submitted on behalf of the Exclusive Representative (Here in after referred to as the Union) by Jeff Offutt.

- B. The grievance was denied (Joint Exhibit 5 B) on November 12, 2015 on behalf of the Employer by its Superintendent, Lynne Kovash (Here in after referred to as the Superintendent).
- C. On November 23, 2015 grievance #1050 (Joint Exhibit 5 C) was submitted to the School Board by the Union.
- D. A meeting was held between the Union and the Employer on December 14, 2015 to discuss the grievance.
- E. Sometime on or before December 17, 2015 the Employer informed the Union the grievance was denied.
- F. On December 17, 2015 Jeff Offutt, on behalf of the Union, sent a letter to the Employer stating the Unions position on the grievance and the Employer's actions concerning the denial of the grievance. In addition this letter was electronically sent to the Superintendent (Joint Exhibit 5 D thru F).
- G. On February 3, the Union requested the grievance be moved to arbitration in a letter to the Superintendent (Joint Exhibit 5 G).
- H. The Bureau of Mediation Services provided the parties with a list of Arbitrators (Joint Exhibit 5 H) from which this Arbitrator was selected.

III. RELATIVE COLLECTIVE BARGAINING ARTICLES

A. ARTICLE 5: EMPLOYER'S RIGHTS AND OBLIGATIONS

Section 7. A uniform school day shall be applied throughout the district. A full-time teacher's day will consist of seven (7) hours and fifteen (15) minutes plus a half-hour non-paid duty free lunch.

Section 8. Seven-Period Day

If the School Board determines that a seven-period day for teachers shall be followed at the District's secondary level:

- A. Period length shall be determined by the District.
- B. Secondary teachers shall be provided an uninterrupted preparation period of one (1) period per day. This preparation period shall be scheduled within the student contact day. This provision is subject to modification for alternative learning programs and overload situations.

- C. It is intended that a secondary level teacher's assignment would normally involve five (5) structured classroom teaching periods, one (1) preparation period, and one (1) period of assigned time. Assigned time is defined as those assignments that do not involve structured classroom teaching but may involve teachers in curriculum development, program evaluation, student supervision, working with students on an informal and/or irregular basis, working with selected students as an advisor on an ongoing basis, and/or voluntarily supervising student activity or providing an enrichment activity for students.
- D. A teacher who agrees to teach a sixth class in place of the assigned period described in C above shall be compensated at the rate of 1/7th of the teacher's base salary. If the sixth class is for a portion of the sixth period, or for only a portion of the school year, this extra stipend will be appropriately prorated. This paragraph shall also apply to teachers of 7th and 8th grades who agree to teach a sixth class.

Section 9. Alternative Scheduling

If the School Board determines that an alternative to the 1996-97 daily schedule is to be implemented at the secondary level, the following conditions will apply:

- A. Each period shall be a length to be determined by the School Board after they have received input from the appropriate staff.
- B. Secondary teachers shall be provided an uninterrupted preparation period of at least five (5) minutes for every twenty-five (25) minutes of instruction. The preparation period shall be scheduled during the student contact day.
- C. The length of the workday will not be increased from the 1996-97 school-year levels for the life of this Agreement.
- D. At the secondary level, if a study hall vacancy occurs after full-time staff have been assigned for the semester, that study hall will be offered to any part-time staff member who is contracted for half-time or more during the semester or alternative period in which the vacancy occurs.

Secondary teachers teaching half-time or more will have the opportunity to accept or reject a study hall or study halls to complete a full-time assignment, prior to the assignment being given to an individual at a negotiated rate of pay other than the bargaining unit rate. If the study hall is offered to an individual who is on a teacher contract for any part of the day, that person will be paid at the bargaining unit rate regardless of his/her percentage of full-time equivalency.

Section 10. Elementary Preparation Time

Preparation time at the K-6 level will be (5) minutes for every twenty-five (25) minutes of instruction. For classroom teachers, this may include time

when students are receiving art, music, physical education, keyboarding, languages, and other instructional programs on a daily or periodic basis. Other teaching staff are provided preparation time by reduced contact time. The preparation time shall occur during the student contact day. Preparation time shall occur in no more than two (2) uninterrupted blocks of time during the student contact day.

Section 11. Emergencies

When emergencies require the closing of elementary, middle school, or high schools, and the safety of teachers and students is a deciding factor, neither students nor teachers are required to be present. When weather or other emergencies result in a late start, teachers shall report to work in accordance with what they believe is safe. Weather related travel emergencies are limited to one day of paid time off, which can be used in one half-day increments. If this leave is utilized, for each half day used one day will be deducted from the leave balance, for each full day used two days will be deducted. When selected schools are closed due to emergencies, selected teachers may be required to be in attendance until all students are dismissed and it is determined they have been transported to their destination, or as long as students are in the building.

B. ARTICLE 6: MAINTENANCE OF STANDARDS

Section 1. Statement

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

C. ARTICLE 17: INDIVIDUAL TEACHER CONTRACTS

Section 1. Contracts

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

Section 2. Substitute Compensation for Teachers

Any teacher who is assigned by the principal/supervisor to use preparation time to supervise or conduct a class for an absent teacher shall be compensated at the following rates:

	Year	Rate	Time	Payment for time worked
Skinny	2015-2016	\$30	1 Hour	=\$30

	2016-2017	\$33	1 Hour	=\$33
Block	2015-2016	\$30	1.5 Hours	=\$45
	2016-2017	\$33	1.5 Hours	=49.50

IV. POSITIONS OF THE PARTIES

Union:

The District is not permitted to force teachers to forgo something that the contract says they shall have when it seems convenient to do so. The District must follow the parties’ decades-old practice of asking for volunteers. District witnesses did not deny that the practice has been to ask for volunteers. Nor did the District present language in bargaining for the 2015-2017 contract that would weaken teachers’ entitlement to prep time that is spent for the benefit of improving instruction to students.

Perhaps most importantly, not one of the District’s witnesses had first hand knowledge of the bargaining history of Article 17, and even the superintendent did not offer testimony about the past practice that predated the provision. The District’s primary argument is that the phrase “is assigned” implied limits the scope of its obligation in Article 5, and it has always had the right to dragoon teachers into forgoing prep time but just refrained from doing so all these years. The problem with that testimony is that the only people who offered it either had no knowledge of the bargaining history or the District-wide practice (Dr. Kovash), or were newcomers to – or short-timers in – the District and had no earthly idea how the language came to be or had been applied over the years (the rest of the District’s witnesses). The Union presented unambiguous testimony from individuals who had worked at the primary and secondary levels and who helped to write the language at issue. The Union is the only party who offered evidence as to what the District and the Union intended when they adopted Article 17, Section 2. The testimony was straightforward: The Union did not agree, and would not have agreed, to language that diminished teachers’ entitlement to prep time. Subsequent practice under this article supports this. In any

event, it is hard to know how the Union was supposed to, as a practical matter, challenge an interpretation that the District had never offered and which it had not ever followed despite literally thousands of opportunities to do so over the years.

Ultimately, there is no express language limiting the scope of Article 5, under which teachers are entitled to a period of prep time every single day that must be scheduled within the student contact day. Furthermore, there is no express limitation on teachers' right to refuse proffered sub assignments when, in their professional discretion, they cannot spare the time. In the absence of such language, Article 6 prohibits the unilateral change the District made in the fall of 2015. There is no question that the selection of teachers on a volunteer basis was a routine or procedure, in Dr. Kovash's words, and teachers' right to enjoy a contractual benefit draws separate protection from the District's agreement to maintain the working standards of its employees in the absence of an express agreement to the contrary.

Employer:

It is well settled that school districts have the right to assign employees during the normal work day, absent specific contractual language to the contrary. This inherent right of assignment may only be modified by specific contract language negotiated by the parties placing a limit on the effect of that assignment.

Several Minnesota arbitration decisions addressed an exception to the inherent right of assignment which involved, in each case, specific contract language calling for additional payment for an additional class period or work assigned during a preparation period. In no case was the employer prohibited from making the work assignment.

In the present case, the parties negotiated language to compensate teachers for being assigned to work during their preparation periods.

Substitute Compensation for Teachers

Any teacher who is assigned by the principal/supervisor to use preparation time to supervise or conduct a class for an absent teacher shall be compensated at the following rates:

	Year	Rate	Time	Payment for time worked
Skinny	2015-2016	\$30	1 Hour	=\$30
	2016-2017	\$33	1 Hour	=\$33
Block	2015-2016	\$30	1.5 Hours	=\$45
	2016-2017	\$33	1.5 Hours	=\$49.50

Joint 1, Article 17, Section 2.

The language is clear and unambiguous. Any teacher who is assigned to work during their preparation period will be compensated in accordance with the duly negotiated rate of pay for the time worked. The language does not include any requirement that the District ask for volunteers.

The Master Agreement addresses secondary schedules, including a preparation period in another section as well. “Secondary teachers shall be provided an uninterrupted preparation period of one (1) period per day. This preparation period shall be scheduled within the student contact day. This provision is subject to modification for alternative learning programs and overload situations.” *Joint 1, p. 11*. The assignment of a teacher during their prep period under Article 17 is clearly an overload situation, contemplated by Article 5.

The District’s reading of Article 17 and Article 5 gives effect to both provisions of the Agreement, recognizing the general rule, and the exception under Article 17 in overload situations. According to ordinary principals of contract interpretation, the provisions must be read together. If alternate interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the second would render the other provision meaningless or ineffective, the interpretation giving effect to all provisions is favored. *Elkouri & Elkouri, How Arbitration Works, Ch.9.3.A.iii. (6th ed.2003.)*

The Union's interpretation - that teachers are entitled to a preparation period without exceptions - would render the plain meaning of Article 17, Section 2 ineffective, as well as rendering the "subject to modifications" language of Article 5 ineffective as well. This position must be rejected.

The term "assign" is not defined in the CBA. Accordingly, the Arbitrator must give that term its "plain and ordinary meaning." The term "assign" is commonly understood to mean a supervisor giving work to a subordinate employee that the employee is obligated to perform. Merriam-Webster Dictionary defines "assign" as "to give someone a particular job or task; to require someone to do a particular task; "appoint a duty or task." *Merriam-Webster, n.d. Web 1-Sept. 2016*. Black's Law Dictionary defines right to assign employees as "the right of management to assign employees to positions, locations and shifts." *Black's Online, 2nd Ed.* Oxford Dictionaries defines "assign" as: "Allocate (a job or duty): Appoint (someone) to a particular job, task, or organization. In this case, the "plain and ordinary," "neutral, and acceptable" meaning of the verb "assign" is to "appoint, **direct**, send (a person) to a place." *Oxford English Dictionary*, p. 127 (compact ed. 1971) (emphasis added);¹ *see also Funk & Wagnall's Standard Encyclopedic Dictionary*, p. 38 (1968 ed.) (defining "assign" as to "appoint, as to or for a post or duty"). Likewise, the "plain and ordinary" meaning of the noun "assignment" is "appointment, command, bidding." *Id.*, p. 128.

The Union, however, would have us believe that "assign" is synonymous with "ask for volunteers." That is not the ordinary understanding of the word and should not be imported here. Further, there is no evidence in the record that this unusual definition was understood and agreed to by the parties.

In fact, the authority to assign work is one of the factors under both PELRA and the NLRA use to determine if an individual is indeed a supervisor. *Minn. Stat. sec. 179A.03 Subd. 4; 29 U.S.C. 152*. The difference between the clerical employee sending out e-mails seeking volunteers to cover for absent teachers, and the Assistant Principal having the right to assign teachers if there were no volunteers, is exactly the distinction made by Congress and the Minnesota Legislature.

Other provisions of the CBA also demonstrate that the disputed language gives the District the authority to assign or direct a teacher to substitute during a preparation period.

In this case, there can be no doubt that the word “assign” is meant to be directive, as opposed to optional or voluntary. For instance, when discussing ABE/ECFE teachers, the CBA expressly states that the “duty day, duty week, and duty year shall be *assigned* by the District...” Art. 45, Section 3. There can be no dispute that this language gives the District the authority to set the duty days, weeks, and year, as opposed to having to request that the individual teachers work the specific schedule.

The disputed language reads very similarly. Specifically, it provides that a “teacher who is assigned by the principal or supervisor to use preparation time to supervise or conduct a class for an absent teacher...” Art. 17, Section 2. As District does not have to request that the ABE/ECFE teachers work their “*assigned*” schedule under Article 45, neither does the principal have to request that teachers use their preparation time to substitute an absent teacher’s class under Article 17.

Indeed, even the definitions provision of the CBA demonstrates that the word “assign” is meant to be mandatory. Specifically, the CBA states that “the following terms shall have the *assigned* meanings.” Art. 2, Section 1 (emphasis added). In this context, it would be absurd to construe the word “assigned” as meaning “requested.” The parties meant for the defined terms to have fixed meaning. Thus, when drafting the CBA, the parties understood that the word “assigned” did not mean optional.

Moreover, the CBA expressly distinguishes between “assignments” and optional work. For example, it expressly provides that:

At the secondary level, if a study hall vacancy occurs after full-time staff have been *assigned* for the semester, that study hall will be *offered* to any part-time staff member who is contracted for half-time or more during the semester or alternative period in which the vacancy occurs.

Art. 5, Section 9(D) (emphasis added). This language clearly distinguishes between the District's ability to assign – that is to say, direct or require – staff to certain work, and an offer of optional work to part-time staff after the initial assignments are made.

Likewise, the CBA contains a provision that discusses payment for teachers who “agree” to teach a sixth class. Art. 5, Section 8(D). It also contains a provision for teachers “accepting extra-curricular positions.” Art. 28, Section 3. The words “offer,” “agree,” and “accept” unambiguously connote an option to either accept or reject.

Unlike Articles 5 and 28, the language in dispute does not use the words “offer,” “agree,” or “accept.” Instead, Article 17, Section 2 provides pay for a teacher “who is assigned” to substitute teach during preparation time. If the parties had meant for teachers to have the option to substitute during preparation time, they would have used the words “offer,” “agree,” or “accept” in that clause, as they did in Articles 5 and 28. Instead, the parties used the word “assigned” – the same word that they used when defining the terms on which their entire agreement is founded.

The Union argued that the Maintenance of Standards provision of the Agreement should be interpreted in favor of allowing teachers to reject a work assignment. This provision reads: “This Contract shall not be interpreted or applied to grant or deprive teachers or the School Board of professional advantages heretofore enjoyed *unless expressly stated herein.*” Article 6, Maintenance of Standards. As noted by Dr. Kovash, the Master Agreement does expressly state that the Principal can assign a teacher to “use preparation time to supervise or conduct a class for an absent teacher” making the Maintenance of Standards provision inapplicable.

The Union argues that because the Horizon Middle School secretary sent out e-mails asking for volunteers, and the Assistant Principal, at least during one school year, asked teachers to sign up to substitute, this constitutes a binding past practice requiring that the District can only ask for volunteers. This contention is without merit.

It is rare for a past practice to take precedence over clear contract language. Past practice takes precedence only when the practice is well defined and the circumstances evince a mutually accepted and consistent way of doing things that demonstrates a clear understanding between parties that, despite language of the contract, some other way of doing things is the way it is done. The Minnesota Supreme Court has set forth four

criteria that must be met in order to create a binding and enforceable past practice: 1) mutuality; 2) specificity; 3) specific duration; and 4) reliance.

Here, the evidence shows that in 1996-1997, Dr. Kovash assigned teachers to substitute for other teachers during their prep periods. The evidence further shows that the Union was well aware that teachers were substituting for other teachers during their prep periods and were primarily if not exclusively concerned about how much those teachers were getting paid for the additional work. The Union negotiated language to ensure that the teachers who were assigned to work during their prep periods would be fairly compensated for doing so. There is no evidence that the Union ever objected to teachers working during their prep periods, or with the District having the right to assign them to do so. To the contrary, the Union proposed the expansion of the same contract language as recently as the summer of 2015. *Union I*.

There was no testimony or other evidence introduced that prior to the filing of the present grievance any teacher had ever objected to being assigned to work during a preparation period. Kristin Dehmer, Human Resources Director, testified that no teacher raised the issue with her or her office. Union President Kent Wolford acknowledged that in deciding to file the grievance in this matter, he was unaware of anyone having objected to an assignment. It can hardly be said that there was a mutual, longstanding practice when the issue had rarely been discussed by the parties.

Further, in 2014 the Chief Union Negotiator confirmed to the new Assistant Principal that he did have the right to assign teachers to sub during their prep periods, so long as the manner in which he did so was fair. A list was developed, distributed and discussed with the Horizon Middle School Team leaders, as well as all staff, as to the order in which assignments would be made.

“If a right is explicitly provided for in a collective bargaining agreement, then the non-exercise of that right does not amount to a ‘negative past practice’ and thus become a forfeiture of it when challenged. Even if a party has not done so in the past, the party retains the right to police the agreement at any point.” Elkouri & Elkouri, *How Arbitration Works*, 12-5 to 12-6 (7th Ed. 2012). “In a nutshell, a party may not obtain ‘through arbitration what it could not acquire through negotiation.’ *Id.*, citing *U.S. Postal Serv. v. Am. Postal Workers Union*, 204 F.3d 523, 530 (4th Cir. 2000).

There is no evidence of a mutual agreement or understanding of the parties that the District *cannot assign* teachers to substitute for an absent teacher during their prep period. The mere fact that the District preferred to ask for volunteers first, does not deprive it of its contractually negotiated rights to assign teachers to sub during their prep periods and compensate them for it in accordance with Article 17.

Union witness Jeff Orfutt testified that that it was a violation of state law to assign teachers to work during their prep period. There is no legal or factual basis for this contention. The only applicable state laws are PELRA, which permits the parties to negotiate collective bargaining agreements, and the statute regarding preparation time, which states:

Minnesota Statute 122A.50: Preparation Time

Beginning with agreements effective July 1, 1995, and thereafter, all collective bargaining agreements for teachers provided for under Chapter 179A, must include provisions for preparation time or a provision indicating that the parties to the agreement chose not to include preparation time in the contract.

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. Exceptions to this may be made by mutual agreement between the district and the exclusive representative of the teachers.

The parties did include a provision for preparation time in the contract, thereby meeting the requirements of Minn. Stat. § 122A.50. The statute does not mandate the specific terms of what the parties to a collective bargaining agreement must include, unless the parties fail to agree. The parties agreed, as did many other teachers unions

throughout the state, to receive additional compensation for the additional work assignments. This is not a violation of state law.

V. DISCUSSION AND RESOLUTION

The Arbitrator found that after reading and distilling the positions of the parties from their respective briefs and from hearing testimony a most interesting and complex situation. The parties provided excellent reference material to support their arguments on behalf of their positions. But in the final analysis the Arbitrator is bound by the language agreed to by the parties in the CBA and the practices that ensue from that language.

The foundation for the CBA is the Public Employment Labor Relations Act (Here in after referred to as PELRA). PELRA provides for the rights of both parties and in the Employer's case certain inalienable rights that it may not negotiate away. In the case of the Union PELRA provides the right to negotiate hours, wages and working conditions. As an example the Employer may not negotiate away its right to determine how many employees it hires, but in a reduction of work force the Employer may negotiate how the reduction may affect the work force with the Union such as seniority being the factor for qualified employees. Therefore the Arbitrator must look to the empowering language in the CBA as to how the language has been implemented and practiced.

Article 6 of the CBA entitled Maintenance of Standards Section 1 (Joint Exhibit 1, p. 12) has been cited by both parties on their own behalf and is recognized by the Arbitrator as the empowering language by which the Employer has the right to make assignments. While the term assignment is not defined, and the Employer has gone to great lengths to provide meaningful dictionary definition, the Arbitrator recognizes the term has many different meanings within the CBA. The Employer may create an assignment such as class schedules. An Employee may be assigned by the Employer to a schedule. An Employee may be assigned by the Employer to specific tasks that must be performed within a schedule. In making assignments the Employer must follow rules, regulations and laws of many different agencies and governments. Certifications and licensures must be followed. In the case of the CBA the ability of

the Employer to make assignments may be modified which is allowed under Article 6, Section 1, “This Contract shall not be interpreted or applied to grant or deprive teachers or the School Board of professional advantages heretofore enjoyed **unless expressly stated herein** (Emphasis added).”

The Employer has made the argument that Article 17 Individual Teachers Contracts Section 2 (Joint Exhibit 1, p. 19) gives the Employer an unfettered right to make assignments based on the words, “Any teacher who is assigned by the principal/supervisor to use preparation time to supervise or conduct a class for an absent teacher shall be compensated at the following rates:”. The foundation for the Employer’s argument are based on two points. The first point is based on the language “Any teacher who is assigned...” empowers the Employer to make an alternative assignment during teacher’s preparation time. The second point is based on the fact the teacher is being paid for the alternative assignment. The second point was further addressed by the Superintendent in her testimony that Principals had the right to make such assignment because the teachers were being paid and it was during the contact day. After a review of contract language, reading the briefs and reviewing his hearing notes the Arbitrator is not convinced this language in any way empowers the Employer to make assignments. In the Arbitrator’s opinion Article 17 Section 2 only provides for the remuneration the teacher will receive after the Employer makes an assignment.

While the Employer has the right to make an assignment the language in Article 6 Section 1, Article 5 Employer’s Right and Obligations Section 8B, Section 9B and Section 10 clearly modifies the ability to make some assignments, i.e. teacher preparation periods. Each of these sections contains language describing how preparation time is determined and specifically when such preparation time is to be scheduled. The CBA states, “The preparation period shall be scheduled during the student contact day.” On its own this language seems extremely compulsory. To further determine its meaning the Arbitrator must look to the evidence and testimony of past practice.

The preparation period language was negotiated in the CBA of 1997 through 1999 (Joint Exhibit 4, p. 7 and 8). Testimony by both parties indicated none of the current

Employer representatives or witnesses were involved in the direct negotiations of the 1997-1999 CBA. The Union witnesses David Kanuch, Kent Wolford, Mark Richardson and Ira Bailey testified they were all directly involved in the negotiations of the 1997-1999 CBA. Each testified that the preparation period language was meant as personal time for the teachers to use as each saw fit to prepare for classes and students. In accordance with testimony from the Union witnesses the preparation period language was the result of interest based bargaining. In addition Minnesota Statute 122A.50 required teacher preparation time to be negotiated into any subsequent CBAs. The Arbitrator will address this law in more detail later in this discussion. Both the Superintendent and Union witnesses testified before teacher preparation period language was adopted teachers were assigned outside the contact in various ways and not always paid. The Employer has attempted to use the assignment of teachers before the 1997-1999 CBA as some basis to justify its current position as to its right to make all assignments as it sees fit.

In the Arbitrator's opinion what occurred prior to the 1997-1999 CBA is only relevant when viewing what the practice was in comparison to how the practice changed after implementation of the CBA. All of the Union witnesses testified they negotiated a secure period of time for preparation for the teachers to accomplish what was needed to meet their professional responsibilities in the class room. In the past, prior to the 1997-1999 CBA there was inconsistency the Union wished to eliminate. The Union's position was they negotiated language allowing teachers the ability to turn down assignments offered to them outside the contact day or the teachers could decide to give up their preparation period for the extra pay. The Superintendent testified, while she was not in negotiation of the 1997-1999 CBA, she in fact did assign teachers outside the contact day during their preparation period. When asked by Union Counsel how that had occurred the Superintendent could only remember having made those assignments once during a flood that year.

The Arbitrator must give some weight to the testimony of the Union witnesses who were present at the negotiations, but the witnesses were testifying about meetings held almost twenty years ago and memories tend to become less accurate. The Union witnesses own bias may also affect the accuracy of their own testimony as

to what transpired at those meetings. So too must the Arbitrator view the testimony of the Superintendent. She testified that during the 1997-1999 contract period she assigned teachers during their preparation period to other duties during a flood and a snow storm when she was employed as a principal. The actions by the Employer were more likely empowered by Article 5 Section 11 which addresses Emergencies. This language states, "When selected schools are closed due to emergencies, selected teachers may be required to be in attendance until all students are dismissed and it is determined they have been transported to their destination, or as long as students are in the building." This language essentially the same in both the 1997-1999 CBA (Joint Exhibit 4) and 2015-2017 CBA (Joint Exhibit 1).

The Arbitrator must now look at the actions of the parties to determine a clear meaning to the language for preparation period. From the implementation of the 1997-1999 CBA to the implementation of the 2015-2017 CBA the Union witnesses testified no teachers were forced to give up their preparation period to work in any other assignment. Teachers who gave up their preparation period for other assignments did so voluntarily for extra pay. In further testimony, although anecdotally, Union witnesses testified many teachers refused the extra pay and kept their preparation period. The Union introduced e-mails showing the process and request for volunteers if the teachers could help (Union Exhibit 4). The Employer provided no testimony or evidence to refute the Union's testimony with the exception of the Superintendent's. In fact the Employer's witness, Jeremy Larson, testified that it was not until he chose to change in how teachers were assigned that any mandatory substitutions occurred during preparation period.

Mr. Larson, in his testimony, stated he had been employed from January 1, 2014 to June 30, 2016 as Assistant Principal at Horizon Middle School. He further stated the practice of assigning substitutes was voluntary and the process at that time was to have the secretary send out a message to teachers when a substitute assignments were available. Sometime it was hard to get someone to fill a substitute from the teachers and alternatives needed to be used. While several options were testified to by both parties the only relevance here is to show the Employer had other viable options from which it could choose. Mr. Larson felt he needed another option if he could not fill a

substitute assignment. After reviewing the contract and speaking with Kirstin Dehmer (Here in after referred to as the HR Director) for affirmation of his understanding of the contract Mr. Larson proceeded with a plan to change the practice of how teachers could be reassigned during their preparation period to substitute.

Mr. Larson planned to involuntarily assign teachers during their preparation time to substitute assignments. Mr. Larson testified he spoke with the Union Representative in the person of David Kanuch because Mr. Larson knew this would be a controversial issue. Mr. Larson's view of this meeting was Mr. Kanuch agreed that Mr. Larson had the right to make involuntary assignments if Mr. Larson proceeded in a fair and equitable way. Mr. Kanuch testimony is contrary to Mr. Larson's. Mr. Kanuch testified teachers can only be assigned to substitute during a preparation period if voluntarily. Mr. Kanuch further testified, later in the year, he was involuntarily assigned by his principal after he turned down a substitute assignment. The plan, as described by Mr. Larson, was "rolled" out to teachers through team leaders on September 18, 2014 (Employer Exhibit 2). A list of teachers and their preparation periods was created and posted on Link to Share (Employer Exhibit 3, p. 1 thru 3). When asked who received or viewed the link Mr. Larson testified he did not know. Based on the evidence presented and testimony by the parties, in the opinion of the Arbitrator, the "roll out" was considered to be notice to the Union by the Employer.

In making his decision the Arbitrator looks to three areas, contract language, past practice and Minnesota Statute.

The CBA contains clear and unambiguous language pertaining to teacher preparation periods. In three section of Article 5 Employer's Right and Obligations it states, "This preparation period shall be scheduled within the student contact day." Those sections are Section 8 B, Section 9 B and Section 10. When the Employer assigns a teacher to substitute during the teacher's preparation period to some other assignment outside of the contact day the preparation period is no longer in the contact day. The language above referenced language clearly modifies the right of the Employer to make such assignments as the Employer's right to assign is modified as "expressly stated herein" as provided for in Article 6 Maintenance of Standard.

In its brief the Employer argues the Union has not met its obligation in proving a past practice. The Employer requests the Arbitrator use the following standards as provided for in the Minnesota Supreme Court decision and as defined in an article by the late Arbitrator Richard Mittenthal. The Employer writes, “It is rare for a past practice to take precedence over clear contract language. Past practice takes precedence only when the practice is well defined and the circumstances evince a mutually accepted and consistent way of doing things that demonstrates a clear understanding between parties that, despite language of the contract, some other way of doing things is the way it is done. The Minnesota Supreme Court has set forth four criteria that must be met in order to create a binding and enforceable past practice: 1) mutuality; 2) specificity; 3) specific duration; and 4) reliance. *Ramsey County v. AFSCME*, 309 N.W.2d 785 (Minn. 1981). A more common list of the factors originated in a famous law review article authored by the highly regarded arbitrator Richard Mittenthal, who described past practice as arising from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961)”

This Arbitrator, as do most, subscribe to the principles outlined in the article by Arbitrator Mittenthal. In the Arbitrator’s experience past practice arguments are usually made when the language in the CBA is ambiguous or none existent. In the present case the Arbitrator’s opinion is there is clear and unambiguous language in the CBA. Here the Arbitrator believes past practice can be used to clarify the meaning of the language. Prior to the 1997-1999 CBA teachers were assigned substitute duties which they may or may not have been paid for. The assigning of teachers was very inconsistent as evidenced by testimony from both parties. The Employer and the Union negotiated language that resolved the ambiguity of those circumstances of assignment as well as when the preparation period would occur. Therefore there was mutuality

between the parties by agreeing to the CBA language. In the Arbitrator's opinion it was clear to the Union and the Employer a teacher must be requested to give up preparation period. As further evidence an administrative employee with two year of experience as an employee, Jeremy Larson, testified he was aware of the practice and how controversial the change he was about to make would be. On a consistent basis teachers were made aware of substitute assignments they could volunteer for by school secretaries. The duration of this process existed for eighteen years. In the Arbitrator's opinion a valid past practice existed.

Arbitrators rarely deal with interpretation of statute. The interpretation of statute is the jurisdiction of a competent court of jurisprudents. In the present case before this Arbitrator does not interpret Minnesota Statute 122A.50 but finds it instructive in two ways. First, while the parties engaged in interest based bargaining for the 1997-1999 CBA it was incumbent upon both parties to negotiate preparation periods for teachers beginning with any agreements effective July 1, 1995. Secondly, the language in the 1997-1999 CBA through to the current CBA are similar as if not to be the same as provided for in the statute.

There is one additional area the Arbitrator wishes to address. The Employer, in its brief, stated no teacher objected to the Employer as to the change in the involuntary assignment policy. While that may be true the reason could be varied as to why a teacher would not object to a supervisor. In the present case the Union informed the Employer of the union members' objections to mandatory assignments during preparation periods at a pre-grievance meeting prior to the filing of the grievance. The issue became moot when the Exclusive Representative, the Union, approached the Employer's Representatives and later filed a class action grievance. Grievances are the property of the Exclusive Representatives to resolve or dismiss.

In the opinion of this Arbitrator the Employer did violate the CBA.

VI. AWARD

For the above reasons the Arbitrator sustains the Union's position as of September 21, 2016. Moorhead School District 152 did violate the Collective Bargaining Agreement when it made substitute assignments to teachers during their preparation period. The Employer may not assign teachers during the teacher's preparation period without the teacher's consent outside of the contact day. This award is final and binding. The Arbitrator retains jurisdiction over the case for thirty days for the limited purpose of overseeing the intended implementation of this award,

Issued and ordered on this 21^sday of September,
2016 from Duluth, Minnesota

Anthony R. Orman, Labor Arbitrator