IN RE ARBITRATION BETWEEN:

MINNEAPOLIS FEDERATION OF TEACHERS

and

SPECIAL SCHOOL DISTRICT #1, MINNEAPOLIS PUBLIC SCHOOLS

DECISION AND AWARD OF ARBITRATOR

BMS 23-PA-0632

JEFFREY W. JACOBS
7300 METRO BLVD.
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EDINA, MN 55439

ARBITRATOR

June 26, 2023

IN RE ARBITRATION BETWEEN:

Minneapolis Federation of Teachers,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 23-PA-0632
Grievance

Spec. School Dist. #1, Minneapolis Public Schools.

APPEARANCES:

FOR THE FEDERATION:

Deb Corhouse, Association Attorney
Lynn Nordgren, Retired Federation President
Lauren Overhiser, Kindergarten Teacher
Greta Callahan, Federation President
Jane Swatosh, Federation Business Agent
Mike Leiter, Teacher Federation Business Agent

FOR THE DISTRICT:

Margaret Skelton, District's Attorney
Steve Bennett, Former District negotiator
Mary Pat Cumming, Principal FAIR School
Dr. Aimee Fearing, Sr. Academic Officer
Alicia Miller, Director of Employee Relations
Candra Bennett, Sr. Officer of Human Resources

PRELIMINARY STATEMENT

The matter was heard on April 26, 2023 at the Davis Center in Minneapolis. The parties presented testimony and documentary evidence in support of their respective positions and the record closed on that date. The parties submitted post hearing briefs on June 9, 2023.

ISSUE PRESENTED

The Federation stated the issue as follows:

Is the parties' One Meeting a Week MOA binding when it does not contain a sunset date and the parties have mutually recognized its continued applicability for six years (three contracts)?

The District stated the issues as follows:

1. Whether this grievance is arbitrable under Article 13?
2. Whether the Memorandum of Agreement, MOA, signed on July 15, 2016 could continue in effect without mutual agreement of the parties and in violation of Minn. Stat. 179A.20, subd. 3?
3. Whether the Employer violated any term of the collective bargaining agreement or a past practice of the parties by discontinuance of a practice of limiting site administrators or other instructional leaders to one meeting (including professional development) per week with teachers?

The arbitrator, after a review of the transcript, evidence, documents and arguments of counsel framed the issues as follows:

Is the grievance arbitrable? If so, did the District violate the MOA dated July 15, 2016 or past practice when it discontinued the practice of limiting site administrators or other instructional leaders to one meeting (including professional development) per week with teachers? If so what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering July 1, 2021 through June 30, 2023. Article 13 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 1 Collective Bargaining Agreement, Publication, Duration and Board Rights

1.3 Duration of Agreement

1.3.2 **Effect:** This Agreement constitutes the full and complete Agreement between the Board of Education and the Minneapolis Federation of Teachers representing the teachers of the District. The provisions herein relating to terms and conditions of employment supersede any and all prior agreements, resolutions, practices, school District policies, rules or regulations concerning terms and conditions of employment inconsistent with these provisions.

1.3.3 **Finality:** Any matters relating to the current contract term, whether or not referred to in this Agreement, shall now be open for negotiation during the term of this Agreement.

1.3.4 **Severability Clause (Agreements Contrary to Law):** If any of the provisions of this Agreement or the 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.

1.5 Board of Education Rights

1.5.1 **Management Rights and Responsibilities**: It is the right and obligation of the Board of Education to efficiently manage and conduct the operation of the school District within its legal limitations and with its primary obligation to provide educational opportunity for the students of the school District.

1.5.2 **Effect of Laws, Rules and Regulations**: All employees covered by this Agreement shall perform the teaching services as agreed in this contract. The Board of Education and its duly designated officials have the right, obligation and duty to promulgate rules, regulations, directives and orders from time to time as deemed necessary by the Board of Education and its duly designated officials insofar as such rules, regulations, directives and orders are consistent with the terms of this Agreement. The Board of Education, all employees covered by this Agreement, and all provisions of this Agreement are subject to the laws of the State Board of Education, and valid rules, regulations and orders of State and Federal governmental agencies. Any provision of this Agreement found to be in violation of any such laws, rules, regulations, directives or orders shall be null and void and without force and effect.

1.5.5 **Managerial Rights Not Covered By This Agreement:** The foregoing enumeration of Board of Education responsibilities shall not be deemed to exclude other inherent management rights and management functions not expressly reserved herein, and all management rights and management functions not expressly delegated in this Agreement are reserved to the Board of Education.

Article 2 Teacher Assignments and Schedules

2.4.2 **Professional Meetings:** An important function of a teacher is to work with students on an individual basis and to work with the families. To facilitate this goal, a longer teacher's day may occasionally be necessary. Moreover, meetings may occasionally necessitate a longer workday. Extension of the teacher's day shall not be regularly assigned (see 2.4.1 in this section for voting mechanism to extend the workday). If frequent or lengthy extension of the workday is required, a teacher shall be paid at the hourly flat direct instruction rate, or an alternative duty schedule shall be arranged by mutual agreement between the teacher and the principal/supervisor.

Union stewards shall be provided up to fifteen (15) minutes at staff meetings to report on official Union and/or labor/management business.

The school District shall recognize Wednesday after school and evening as a time reserved for Professional Organization meetings. Every reasonable effort shall be taken to reserve this time. Such meetings may be scheduled during the defined teacher day on non-student contact time. Contractual issues are appropriate matters for staff meetings.

2.5 Length of the School Year

2.5.1 Teacher Duty Days:

a. For the 2021-2022 school year, the teacher duty year will be, and up to 195 paid duty days, which include the six (6) paid holidays within the regular school year. For the 2022-2023 school year, the teacher duty year will be made up of 195 paid duty days which include the six (6) paid holidays within the regular school year.

Article 5 – Professional Development

Addendum 1 (relevant portions): Successful professional development and reflection requires dedicated time throughout the year. The following is a list of possible ideas for finding time:

11. **Reduce Number of Meetings:** Cut back on the number of overall meetings at your site. Decide what activities or committees could be combined or eliminated or postponed. Are there other ways to accomplish what you want besides having a meeting or committee?

Article 13 Grievance Procedure:

13.1 **Definitions:**

Grievance: A dispute or disagreement as to the interpretation or the application of any term or terms of any contract required under Minnesota Statutes.

13.3.4 **Level IV: Arbitration Level**

c. Modification of the Agreement: The arbitrator shall not have the power to add to, subtract from or to modify in any way the terms of the existing contract.

RELEVANT SECTIONS OF THE MOA DATED JULY 15, 2016 (NB – The parties occasionally referred to this as the ONE Meeting A Week MOA)

Weekly Meetings, QComp Commitments

This Memorandum of Agreement (MOA) is made and entered into by and between the Minneapolis Public Schools (District) and the Minneapolis Federation of Teachers (MFT).

WHEREAS, During negotiations of the 2015-2017 k12 teacher CBA, the parties reached agreement regarding the items specified below. The purpose of this MOA is to formally capture the understanding reached.

NOW THEREFORE BE IT RESOLVED THAT the District and the Union hereby agree to:

A. **Weekly Meetings**: Meetings convened by site administrators or other instructional leaders (including Professional Development) will be limited to one (1) per Week to ensure there is enough time to prepare for instruction and student support.

B. **Committee/Task Forces/teams/Instructional Leadership Team Meeting Commitments:** Teachers/RSP's's may decide if they wish to participate while also understanding the impact of not participating. Committees, task forces, teams may also determine how often they want/need to meet.

1. Stipends for Q-Comp position – participants will be paid for each full semester of participation.
2. Instructional leadership Team (ILT) – if a participant on the ILT needs to step down, an effort to find a replacement is important so representation remains intact. ILT participants will be paid for each full semester of participation.

BE IF FURTHER UNDERSTOOD AND AGREED THAT to the extent that this Memorandum of Agreement may be construed as a deviation from the terms of the 2015-2017 Collective Bargaining Agreement between the District and the Union, it shall not form the basis of any precedent that may be cited by any teacher in any grievance that may be filed.

PARTIES' POSITIONS

FEDERATION'S POSITION:

The Federation's position is that the matter is substantively arbitrable and that the District violated the MOA dated July 15, 2016 and relevant sections of the CBA when it discontinued the practice of limiting site administrations and instructional leaders to one meeting per week with teachers. In support of this position, the Federation made the following contentions:

1. **ARBITRABILITY:** The Federation argued that the matter is arbitrable since the MOA set forth above is a written agreement executed by both parties. Further, the grievance procedure specifically defines a "grievance" as any "dispute or disagreement as to the interpretation or application of any term or terms of *any contract* required under Minnesota Statutes." (Emphasis added.) The use of the term "any contract" does not limit the definition of "the contract," referring only to the main CBA, but rather to any contract between the parties, including any MOA or other written agreement between the parties.

2. Clearly the MOA is a contract and is thus covered by the definition of the word "grievance." Further, the MOA is effectively as much a part of the main CBA and as such, remains subject to the grievance procedure.

3. The Federation noted too that the District repeatedly acknowledged at the hearing that the CBA contains multiple references to "meetings," and the MOA simply provides more specific limitations, modifying those broader goals. See e.g. Article 5 addendum 1, paragraph 11 and Article 2.5.1.

4. The Federation further asserted that if one accepts the District's argument it would effectively mean that if the District violates the contract or any part of it, included an MOA, it will mean that the contract no longer exists and cannot be subject to the grievance procedure.

5. The Federation characterized that as a perverse argument that runs contrary to well-established principles that highly favor arbitrability. See Minn Stat. 179A.03, providing that "Unresolved disputes between the public employer and its employees are injurious to the public as well as to the parties" and which favors resolution of such disputes through the grievance process. See also, *Independent Sch. Dist. No. 88, New Ulm v. School Service Employees Union, Local 284*, 503 N.W.2d 104, 107 (Minn. 1993) where the Court held that "In fact, both federal and state case law precedent indicate that there is a presumption in favor of arbitrability."

6. The Federation also cited *United Steelworkers of Amer. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1352-53 (1960) which held that "Doubts should be resolved in favor of [arbitration] coverage." See also*, AT & T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986) where the Supreme Court also held that there is a strong presumption in favor of arbitrability. Thus, the Federation argued that the matter must be decided on the merits.

7. **MERITS:** the Federation first pointed out, as it did during the hearing as well, that the MOA does not have a sunset or expiration clause. The Federation submitted several other MOA's between these parties that do contain such language and noted that if and when the parties agree to sunset an MOA or provide for its expiration they certainly know how to do that.

8. The Federation noted that there are several such MOA's attached to the current CBA that have very specific sunset/expiration language see pages 245, 247, 248, 250, 251, 252, 254, 258 and 263 of the current CBA, showing various MOA's that have very specific sunset language in them.

9. Such language is easily drafted yet no such language exists in the MOA at issue here. Thus, the MOA has not expired and continues to be in force. The intent behind it was obviously that it would remain in effect unless and until the parties themselves negotiated a different MOA or agree that it would expire.

10. The Federation also asserted that the longstanding practice between the parties is that MOA's continue unless there is a specific sunset clause and that even though some MOA's are not attached to a CBA, the understanding is that they continue in force.

11. The Federation also countered the claim by the District that MOA's are not subject to the grievance procedure due to the language found at the end which provides that "to the extent that this Memorandum of Agreement may be construed as a deviation from the terms of the 2015-2017 Collective Bargaining Agreement between the District and the Union, it shall not form the basis of any precedent that may be cited by any teacher in any grievance that may be filed." The Federation noted that this is "standard" language that was merely intended to address the fact that the MOA was modifying a current agreement and that there may be a potential for a challenge if the language of the MOA conflicted with the current CBA.

12. The Federation asserted that the language at issue here only applies to any "deviation" from the CBA itself. There is no such "deviation" here since there is no other provision regarding the issue in the MOA in the CBA. Further, if the "deviation" language were to be construed as a sunset provision, the sunset provisions that appear in many other MOA's would be unnecessary. Thus, that language cannot apply.

13. The Federation also noted that the so-called zipper clause does not present a bar to arbitrability either. That language is not sunset language either and the MOA at issue here is still in force and is thus enforceable.

14. Further, there is nothing in the MOA or in the record to suggest that the parties intended the MOA to be a short term pilot project of any kind. It was intended to continue until the parties themselves negotiated something different or mutually agreed to end it. There was no such agreement here and the MOA continues to be a valid agreement between the parties.

15. The Federation also countered the claim that PELRA itself acts as a sunset provision to the MOA and asserted that PELRA does not require that the MOA sunset after two years. Federation witnesses indicated that the MOA has been used since 2015 over the course of 3 different 2-year contracts and that the District's position is unclear at best.

16. The Federation noted that the District changed its position on this question at the hearing and conceded that PELRA does not require that an MOA expire after two years. The District appears to be arguing that the MOA needed to have a clause calling for it to last longer than 2 years. See Tr. at page 70 where the District indicated that it was not making the argument that PELRA does not allow the parties to extend an agreement for more than 2 years.

17. The Federation also noted that these parties have routinely included sunset clauses in MOA's where that is the agreement to do so, as noted above, and that if an MOA automatically expires at the end of a CBA, there would never be a need to include a sunset provisions that corresponds with the end of the CBA itself – even though that has been done frequently. The Federation argued that the overall record establishes that unless there is a sunset provision, the intent is that the MOA does not expire with the expiration of the CBA. Further, as noted, this MOA was seen as valid over the course of at least 3 CBA's even though there was no sunset clause in it and no additional negotiation over it. It was thus clear that the parties agreed that the MOA continued in effect.

18. The Federation asserted that the "contract in effect" provision of Minn. Stat. 179A.20 specifically allows for the extension beyond 2 years and allows for contracts to continue in effect after their stated expiration date. Here of course, there is no sunset or expiration date and the parties agreed that the MOA would continue until a successor agreement was negotiated or they agreed to sunset it. The District cited *Minneapolis Federation of Teachers v. Minneapolis Public Schools*, PERB Case No. 79-PN-984-A (Miller 1980) and *Special Sch. Dist., No. 1 and Minneapolis Federation of Teachers*, BMS Case No. 10-PA-0859, (Imes 2010) both of which stand for the proposition that the parties' MOA's continue in effect and do not end when the CBA's term expires.

19. The Federation asserted that MOA's are part of the contract and there is nothing in PELRA that requires that an MOA without sunset language in it expire after 2 years. See also, *In re ISD No. 810 v. Plainview Educ. Ass'n,* BMS Case No. 84-PP-571-A (Rotenberg 1984) for a similar ruling.

20. The Federation also cited *Education Minnesota-Greenway, Local 1330 v. Independent Sch. Dist. No. 316*, 673 N.W.2d 843, 851-52 (Minn. Ct. App. 2004), *rev. denied*, (Minn. April, 20, 2004)a and asserted that the courts have already addressed a similar contention and held that Union's should not have to re-negotiate wages and benefits that are already in place.

21. Here the parties have had several grievances and other opportunities to discuss this very MOA and the Federation noted that the District has never taken the position it takes here in those prior grievances even though the issue arose well after the expiration of the 2015-2017 contract. In October 2017, the District addressed a grievance over the enforcement of the MOA without making any argument that it was no longer in effect. In 2018 the District tried to negotiate a sunset to the MOA, but was unsuccessful. The Federation asserted that the District is now trying to gain through arbitration what it was unable to gain through negotiation. Moreover, the District made no effort to sunset the MOA in the 2019-2021 contract negotiations or to add a sunset provision to it.

22. The Federation pointed to this history as clear evidence that the District regards the One Meeting a Week MOA as valid and that its arguments now must be rejected. If the District wants to change the MOA it must do so at the bargaining table.

23. In October 2020, the District again reiterated its commitment to the MOA and issued a memo to its principals limiting them to one mandatory meeting per week. Only a month later, in November 2020 the District again conceded that the One Meeting a Week MOA was enforceable and binding. Finally, , the District negotiated for the 2021-2023 CBA without making any claim that the MOA was no longer in force

24. Later in 2018 the District communicated to its principals the need to follow the One Meeting a Week MOA after the Federation members complained that some principals were not following it.

25. In the Fall of 2019 the parties specifically discussed the MOA again and the parties agreed that it was still in force. The District made no claim then that the MOA had somehow expired.

26. The Federation also asserted that the District's attempt to "repudiate" the MOA is not valid. The practice of One Meeting a Week is not rooted in some sort of past practice argument, but is instead rooted in specific negotiated language between the parties. The Federation cited Bornstein and Gosline, *Labor and Employment Arbitration*, @ 10.03[2], p. 10-21 (2003), as follows: "Clear notice given during negotiations that one party intends to discontinue a past practice that is not rooted in ambiguous or general contractual language or protected by contractual language maintaining prior practices is generally deemed to effectively terminate the past practice as of the conclusion of the prior agreement." It is clear that a past practice rooted in a practice only may be repudiated, but that because the one meeting per eek agreement was protected by contract, it cannot be repudiated unilaterally.

27. The Federation also cited Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements,* 59 Mich. L. Rev. 1017, 1041 (1961), who observed that a past practice that clarifies ambiguity "can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc." Id. at 1041. See also Elkouri & Elkouri, *How Arbitration Works*, BNA Books, 7th Ed at Section 12-16 for the proposition that "repudiation of a practice that gives meaning to ambiguous language in the written agreement would not be significant—the effect of this kind of practice can be terminated only by rewriting the language." The Federation asserted that the practice here clarifies an ambiguity and that one party cannot simply repudiate a practice that comes directly from negotiated language.

28. The Federation noted that this is not an interest arbitration and that the District is asking for the unilateral right to repudiate agreed upon language in an MOA without negotiation. Thus, the question is not whether the One Meeting a Week limit should or should not be in place, but rather whether the parties have agreed to it. Thus, the District's evidence regarding student achievement are simply not relevant or controlling here. The question is not whether this is a "good idea," but rather whether the parties agreed to it and whether the language must be changed through negotiation only.

29. The Federation also requested that the MOA's limits on meetings be enforced and that the "flat hourly rate" language in the CBA be applied here to allow any teacher to submit for payment. The Union is requesting that its teachers to allowed to submit for additional hours worked beyond the duty day on days when they were required to attend extra meetings during their non-instructional time in violation of the MOA. The Federation requested this to provide some incentive for the District to not continue to attempt to violate their agreement.

The Federation seeks an award sustaining the grievance, awarding a make-whole remedy by both requiring the District to fully comply with the One Meeting a Week MOA and for an order allowing pay for those who worked outside of the duty day when regular meetings were required. The Federation requested the arbitrator retain jurisdiction to resolve any issues with respect to this award.

DISTRICT'S POSITION

The District's position was that the matter is not arbitrable and that the arbitrator lacks jurisdiction to render an award on the merits. Further, that there was no violation of the CBA or the relevant MOU in this matter. In support of this position, the District made the following contentions:

1. **ARBITRABILITY.** The District asserted that the matter is not arbitrable since the MOA at issue in this case expired at the end of the 2015-2017 CBA, under which that MOA was negotiated. While there was no specific sunset clause contained in that document, the District asserted that by law it expired when the applicable contract expired. Thus, the MOA is no longer part of the parties' contract and is thus not subject to the grievance procedure contained at Article 13.

2. The District noted that during the negotiations for the current CBA, the District made it clear that the MOA was not to be included in the contract and was specifically excised from it. Thus, there is no "dispute or disagreement as to the interpretation or the application of any term or terms of any contract required under Minnesota Statutes" as required by Article 13. The MOA is not part of the CBA and was never intended to be. The District countered the Federation's claim that the MOA remains a "contract" between the parties any longer.

3. **MERITS**: Initially the District argued that the MOA expired as a matter of law pursuant to Minn. Stat. 179A.20, subd. 1 which specifically limits public sector contracts of this nature to 2 years. The District noted that the Federation's position is inconsistent with that specific statutory language and would y mean that a contract entered into in 2016 remains in place in perpetuity.

4. PELRA contains very specific language that limits contracts governing the terms and conditions of employment for teachers to "a term of two years, beginning on July 1 of each odd-numbered year." See, Minn. Stat. 179A.20, subd. 3. This language is not limited to CBA's only, but also to "any contract between a school board and an exclusive representative of teachers."

5. The District asserted that this means any CBA, MOA, MOU, or any other contract between a school board and the exclusive representative of teachers. Any contract to the contrary would be void and unenforceable. Citing *Lunde v. ISD # 255, Pine Island*, 543 N.W.2d 703, 706 (Minn. App. 1996).

6. Moreover, the MOA contains very specific language referencing the "2015-2017" contract. That can only mean that it was intended to expire when that contract expired and the fact that there is no specific sunset clause is of no force and effect because the intent is clear with the reference to the 2015-2017 contract.

7. The District countered the Federation's claim that the so-called "contract in effect" provision of PELRA allows the MOA to remain in force and effect for more than 2 years and noted that 179A.20, subd. 6 ensures terms and conditions of public employees to remain in place until the right to strike matures. However at that time, the employees have the right to strike, and the employer has the right to unilaterally implement their last position. The statutory language is clear, however, that the contract does not remain "in effect" after the right to strike matures unless the parties agree. Here, as noted, the parties agreed to keep the MOA in place for some of the successor agreements, but specifically did not agree to keep it in place for the 2021-2023 contract, as discussed more below.

8. The District cited *Central Lakes Educ. Ass'n v. Ind. Sch. Dist. No. 743, Sauk Centre*, 411 N.W.2d 875 (Minn. App. 1987), where the Minnesota Court of Appeals held that the teachers' right to strike "matures" after the labor agreement expires and the parties have mediated for thirty (30) days, regardless of whether the teachers have issued a notice of intent to strike. There, the Union argued that a contract remains "in effect" until the Union serves a notice of intent to strike under PELRA. The court rejected that argument.

9. The District also countered the Federation's citation to *Special School District No. 1 and Minneapolis Federation of Teachers*, BMS Case No. 10-PA-0859 (Imes 2010), and asserted that Arbitrator Imes' award is distinguishable on numerous grounds. The pay system at issue in that case was specifically incorporated in the CBA in the case before Arbitrator Imes. In addition, there was specific language indicating that the agreement would remain in effect to a specific date and, significantly, "thereafter until a new agreement is reached." No such language appears in the MOA nor was one ever contemplated.

10. Moreover, there was no issue of a right to strike before Arbitrator Imes. Here, the contract expired when the right to strike "matured" and the teachers actually went out on strike. There is no evidence that the parties considered that the MOA remained in effect after the strike. In fact, as noted herein, the Federation specifically asked that the MOA be included in the 2021-2023 contract, but that was rejected by the District and the Federation signed it without that provision in it.

11. Further, the "deviation" language found in the MOA's final sentence also clearly and unambiguously indicates that the intention of the MOA was to impose a limit of one meeting per eek during the period of the 2015-2017 CBA. The District asserted that there is only one reasonable way to interpret this language in the MOA and that reference to extrinsic evidence is unnecessary. Citing Elkouri and Elkouri, *How Arbitration Works*, BNA Books 8th Ed. at p. 9-13 (2016), citing *Carrolton Board of Education.*, 126 LA 783 (Allen 2009).

12. The District noted too that if there is any ambiguity in the language, such ambiguity must be construed against the Federation since their representative drafted it. The District's witnesses all indicated that they assumed that the MOA would expire with the 2015-2017 contract and that any extension of it would need to be done by specific negotiation or agreement.

13. The District also acknowledged that the Federation brought up the MOA during the negotiations for the 2017-2019 contract and through mediation, it was agreed to continue it. The District was quick to point out that it was through mediation and a specific agreement to continue it, rather than an acknowledgement that it would have continued on its own.

14. The District also noted that the MOA was not mentioned at all during the negotiations for the 2021-2023 contract. The District also pointed out that several other MOA's expired upon such matters as the District returning to in-person learning following the COVID pandemic, for example.

15. The District asserted that it specifically repudiated the practice of One Meeting a Week and the MOA during the negotiations for the 2021-2023 contract. That notice provided as follows:

Notice of Discontinuance of Weekly Meetings, QComp Commitments MOA

> Pursuant to Minn. Stat. §179A.20, the Weekly Meetings, QComp Commitments MOA is limited to a term of two years. The District does not intend to continue with the MOA for the 2021-2023 contract. To the extent that the terms of this MOA have become a past practice, the District hereby puts the MFT negotiations team on formal notice that it intends to discontinue and no longer recognize the practice. Unless negotiated into the contract, this practice will be discontinued upon ratification of the 2021-2023 Master Agreement.

16. The District asserted that such repudiation of a practice is specifically allowed to end any claim to a past practice during negotiations. It is then up to the party that seeks to keep the practice to negotiate specific language into the contract. The Federation, as noted above, never mentioned the MOA during the negotiations for the current agreement and thus whether the MOA expired in 2017 or not, it was specifically repudiated and has now expired. It is incumbent on the Federation now to negotiate it back into existence.

17. After a short strike by the teachers in 2022, the parties ultimately negotiated a successor CBA that did not include any reference to the MOA at issue in this case. Moreover, the current CBA contains a very specific and tightly worded “zipper clause” that provides that the written agreement contains the entire agreement between the parties and supersedes all prior agreements of any kind.

18. The District also pointed out that even after the strike and the successor agreement was argued to the Federation refused to sign the new contract since the One Meeting a Week MOA was not attached to the contract and never has been. The District specifically refused to include it and informed the Federation that the practice had been repudiated and that the MOA was no longer valid. See, Tr. at page 204. The Federation signed the agreement without the MOA attached, knowing that the practice had been discontinued and knowing that the MOA had been rejected and that the District would not agree to including it in the 2021-2023 agreement. The District argued that the Federation is now effectively trying to gain through arbitration what it was unable to gain through negotiation. Citing See Elkouri and Elkouri, Id at section 9-27.

19. The District cited *LELS and City of Blaine*, BMS Case No. 15-PA-0671 (Jacobs 2016) and *AFSCME, Local 707 and Ramsey County*, BMS Case No. 22-PA-0561 (Jacobs, 2022) for the proposition that a past practice can be repudiated by one party notifying the other than the practice is being repudiated and will no longer be recognized unless there is a specific agreement to continue it. This is precisely what occurred here when the District informed the Union, in writing and during the negotiations of the 2021-2023 CBA. As noted, not only did the Federation not negotiate the inclusion of the MOA into the 2021-2023 CBA, following the strike in 2022, the Federation specifically asked for it to be included and the District refused. The Federation signed the CBA anyway.

20. The District offered an alternate theory for the discontinuation of the One Meeting a Week practice. The District noted that the underlying purpose of the MOA and the practice it contained was to try to give teachers more time for student preparation by holding fewer meetings, with the ultimate goal of improving student instruction and student outcomes and increase student achievement and get better test scores.

21. The District’s witnesses indicated that this has unfortunately not occurred and the One Meeting a Week practice was thus not achieving the goals it was supposed to and the practice now has to change. The District's witnesses noted that even before COVID, test scores were not improving and the District became increasingly concerned that the MOA was not resulting in the desired increase in student achievement.

22. District witnesses also indicated that upon reflection and analysis, over time it was determined that the MOA was actually having a negative impact on student achievement and test scores because instructional leaders found that they did not have the ability to do what is necessary to increase student proficiency. See, Tr. at pages 183-184. Thus, the underlying reason for the practice, even if one assumes that there was a past practice of some sort, was no longer in effect. The District noted that one of the established ways to find that a past practice no longer exists is if the underlying reason for it has gone away or changed.

23. The District outlined the history of the negotiations that led to the One Meeting a Week MOA in 2016 and noted that its negotiator was clear that the intent behind negotiating the MOA was only for the term of the 2015-2017 contract and no longer. He explained that the parties decided to put this One Meeting a Week agreement in an MOA rather than the CBA itself because both of its limited duration and since it was something of an experiment and would allow for flexibility in trying different approaches to address the problem of falling student achievement.

24. The District noted that it could be extended only by mutual agreement, but that there was no such agreement in this case. In fact there was a specific agreement to the contrary. As noted above, the District specifically notified the Union that it would not agree to continue the MOA in the 2021-2023 contract and that it was repudiating any past practice associated with it.

25. The Union received and responded to this notification and was well aware that the new CBA did not contain the MOA and that the practice had been repudiated. See District exhibit 8 and 9. The Union initially refused to sign the 2021-2023 CBA, attempting to strong-arm the District into including the MOA in the CBA, even though both the District and Union had approved a tentative agreement - that ended the teachers' strike - but did not include the MOA. See Tr. at pages 204-205.

The District seeks an award denying and/or dismissing the grievance in its entirety.

DISCUSSION

FACTUAL BACKGROUND

The parties negotiated a MOA during the 2015-2017 contract negotiations as set forth above. The stated purpose of this was to reduce the number of meetings teachers were expected to attend to give more time to classroom instruction and preparation. The hope was that this might have a positive impact on student achievement and test scores by giving teachers more time to teach and to prepare lessons and give assistance to students who had questions or who were struggling with their lessons. See Tr. at pages 17-20.

There was evidence that there was a joint belief and hope that limiting the number of meetings to one per week would give teachers the extra time needed to prepare for instruction and student support. At the time, there were communications devoted to making sure that the effort to give teachers more time to devote to instruction and student contact was expected. The Superintendent and the then Federation president exchanged communications regarding their apparent mutual belief that limiting the number and duration of meetings might help student achievement.

One of the main factual disputes was whether the intent of the MOA was that it be a pilot project or temporary in nature. The District negotiator, Mr. Barrett, testified that his understanding was that the MOA was for a limited period and that it would expire with the 2015-2017 contract. It could be extended by mutual agreement if it appeared to be accomplishing the goals regarding student achievement that underlie the MOA in the first place.

He testified credibly that the parties understood at the time the MOA was negotiated that the MOA would not be included in the CBA. He also testified credibly that the reason that the District and Union entered into MOA's, as opposed to negotiating specific contract language, was the limited duration of the MOA and as a means of trying different approaches. See Tr. at pages 137-139. If the approach set forth in the MOA seemed like it was working, the language would either be continued into an MOA in the next contract term or become contract language. At the time the MOA was negotiated, the parties agreed that it might be helpful to improve student academic performance. See Tr at page 143 and Federation Exhibit 4.

The Federation President, Ms. Norgren, on the other hand testified that she would never have agreed to the MOA if there had been any understanding that the MOA was a pilot project or temporary in nature. She testified that the Federation had been working toward the goals set forth in the MOA and would not have agreed to anything that was of short duration. See Tr. at pages 29-30.

However, as noted, the MOA was not included in any of the CBA's at issue in this matter even after there were specific discussions about it during bargaining for subsequent CBA's. On this record the District's testimony was determined to be more persuasive and that the understanding was that the MOA could be extended, but only by mutual agreement in subsequent contracts. This conclusion is also supported by the clear evidence that the parties did in fact negotiate in subsequent rounds to keep the MOA in place and that it was because of that fact that the MOA was enforceable in the 2017-2019 and 2019-2021 contract periods. As noted below though, that changed dramatically for the 2021-2023 contract negotiation.

As discussed more below, the MOA at issue did not have a specific sunset or expiration date. Instead there was a specific reference to the "2015-2017" contract. The MOA was drafted by the Federation business representative and signed on July 15, 2016. The MOA was never attached to the CBA itself; apparently due to an oversight, but was never attached to any other contract either even though there were discussions about it during subsequent bargaining for successor agreements.

This factual disagreement was of course at the very heart of this entire dispute and the resolution of that depended on the language of the MOA itself and some of the extrinsic facts as discussed below.

There was evidence that the Federation took steps to enforce the MOA not only during the 2015-2017 contract period, but also in subsequent periods. In 2016 there were communications regarding the intent of the MOA. That timing though was clearly within the period of the 2015-2017 contract and on this record did not control the ultimate issue of whether the MOA expired or not.

In October 2017, the Federation grieved a communication that allowed Principals to call for more than one meeting per week at certain schools. There was no evidence that the District took the position at that time that the MOA had expired in July of 2017 and the MOA was apparently complied with. As noted below, there was a specific agreement to continue the MOA as part of the negotiations for the 2017-2019 contract.

There was also evidence that during the negotiations for the 2017-2019 contract, the District raised the issue of discontinuing the MOA altogether. See District Exhibit 4 and Federation exhibit 14. The Federation rejected the District's proposal to sunset the MOA at that time. Ultimately, during mediation for that contract, the District withdrew the proposal to sunset the MOA and the parties agreed to continue the One Meeting a Week practice set forth in the MOA. The MOA was not attached to the 2017-2019 CBA and the overall record showed that the MOA was a specific item of bargaining at that time. Later in 2018, there were discussions regarding the One Meeting a Week practice and the Federation asserted that the MOA does not have a sunset and noted the mediated agreement to continue the MOA.

On this record, while it was not completely clear if the parties discussed the specific issue of whether the MOA expired with the 2015-2017 contract at that time, it was clear that the reason the practice memorialized in the One Meeting a Week MOA continue was due to the mediation and the agreement reached during bargaining to have it continue. The MOA was enforced though even though the MOA was not attached to the CBA.

The MOA was not discussed at all during the negotiations for the 2019-2021 contract and the MOA was again not attached to or incorporated into the CBA for that term. as noted above, the overall record established that h MOA was to be renegotiated if mutually agreeable and that the MOA was never placed in the contracts or attached to it at any point.

It was also of some significance, that the language of the MOA is silent with respect to a sunset or expiration date. It was also clear that it did not contain any language, similar to that which is in other MOA's between these parties, that the MOA would continue in effect or words to that effect. Again, the overall record showed that while the MOA was not considered a pilot project, there was a clear understanding by the District at least that the MOA would need to be renegotiated in subsequent contract years if the facts warranted it. Thus, there was merit to the District's assertion that the MOA did not "automatically" renew as the Federation asserted.

The most significant set of facts occurred during the negotiations for the 2021-2023 contract. Several pieces of evidence were important. First, the District sent a repudiation notice to the Federation that clearly indicated the District's intent to not continue the MOA into the 2021-2023 contract term, irrespective of whether the MOA expired by operation of law or not. That notice was clear in its content that the District did not intend to continue the MOA or the practice contained within it. It also specifically referenced any potential past practice and repudiated that as well.

There was no evidence that the parties specifically negotiated new language into the CBA nor to negotiate for any extension of the MOA. The Federation apparently relied on its position that the MOA was to continue into perpetuity unless there was a specific agreement to end it, not the other way around and that the MOA did not need to be included in or attached to the new CBA for it to continue.

The parties had difficulty getting to agreement for the 2021-2023 contract. So much so that the teachers went on strike in the Spring of 2022. The strike lasted several weeks and the parties ultimately reached a tentative settlement and the teachers returned to work in March 2022.

The record showed that some MOA's were incorporated into the new contract, but the One Meeting a Week MOA was not. Neither was there evidence that the parties had agreed to extend or continue it. The tentative agreement reached following the 2022 strike was approved by a vote of the Federation membership and the School Board

Significantly, when the actual tentative agreement was sent to the Federation for signature, the One Meeting a Week MOA was not included and the Federation refused to sign the new agreement without it. The District refused to insert it and referenced the notice indicating that the MOA and its practice had been repudiated and was no longer in effect. The record showed that there was a specific request by the Federation to include that MOA into the new agreement.

The District informed the Federation that it would not do so and that the MOA was no longer in effect and that any practice based on it had been repudiated. The Federation signed the new contract without the MOA included and with the full knowledge of the District's position with respect to it. This as discussed below was the most significant piece of evidence in this case and demonstrated a clear understanding by the Federation what it was signing and what the import of that was.

Unfortunately too, there was evidence that student achievement did not rise despite the MOA. COVID certainly likely had something to do with that, but there was evidence that the student test scores were not rising as expected or hoped for even before the pandemic struck the country in early 2020. While that fact was not controlling there was some evidence that the underlying basis for the MOA in first place did not materialize as hoped for.

The District began scheduling more than one meeting per week and the Federation grieved the matter in a timely manner pursuant to the grievance procedure. There were not procedural arbitrability issues raised, although there was a substantive arbitrability issue raised that will be discussed first. It is against that general factual backdrop that the analysis of the matter proceeds.

ARBITRABILITY

Initially, it must be noted that the great weight of arbitral precedent shows that there is generally a strong presumption in favor of arbitrability and a hearing on the merits. See, *Village of Alsip and Illinois FOP,* (Benn 2012) citing *Steelworkers v Warrior and Gulf,* 363 U.S. 574 (1960). See also, Elkouri, 8th Ed BNA books 2012 at 5-29 where the authors noted that if "there are ambiguities in the wording of contractual time limits, or uncertainty as to whether time limits have been met, all doubts should be resolved against forfeiture of the right to process the grievance."

The Court in *Anheuser Busch, v Teamsters #783, 626 F.3d 256 (6th Cir. 2010)*, recognized this presumption as well and noted as follows:

> In deciding whether a particular dispute is arbitrable, the court 'begin[s] with the presumption that national labor policy favors arbitration.' *United Steelworkers v. Cooper Tire & Rubber Co.,* 474 F.3d 271, 277 (6th Cir. 2007). Under this strong policy favoring arbitration, the court uses four guiding principles:
>
> 1) a party cannot be forced to arbitrate any dispute that it has not obligated itself by contract to submit to arbitration; 2) unless the parties clearly and unmistakably provide otherwise, whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is a question for judicial determination; 3) in making this determination, a court is not to consider the merits of the underlying claim; and 4) where the agreement contains an arbitration clause, the court should apply a presumption of arbitrability, resolve any doubts in favor of arbitration, and should not deny an order to arbitrate unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

> Id. at 277-78 (citing *AT & T Techs. Inc. v. Commc'ns Workers,* 475 U.S. 643 (1986)). The presumption of arbitrability is particularly applicable in cases involving broad arbitration clauses. *Cummins,* 434 F.3d at 485-86. In such cases, arbitration will be denied only where the parties have expressly excluded the grievance from arbitration. Id. at 486.

It is clear that any doubts or ambiguities are to be resolved in favor of hearing the matter on the merits unless it is abundantly clear that the parties agreed that certain issues are not to be subject to the contractual grievance procedure.

The Federation's argument regarding the definition of the grievance set forth in the CBA had merit. It refers to "any contract" between the parties. That would certainly include an MOA, such as that which is under examination here. While there was considerable dispute about whether the MOA was still in effect, the initial question here is whether that question can be considered on the merits.

The question of the validity of this MOA must be considered on the merits and based on the overall record. Otherwise, a party could simply contend that a MOA or MOU is no longer in effect and avoid any consideration of the case on the merits. That would result in a somewhat tautological argument that a contract is no longer in effect and that it is therefore not subject to the grievance procedure even though there remains a dispute about whether the contract really is in effect or not.

Whether there was a violation of that agreement is not at issue in regard to whether the matter can be reviewed and determined by an arbitrator. That is a separate question from arbitrability.

Here, it is clear that there was at one point a valid MOA and that there was discussion about it at several points in time during various contract terms and during various contract negotiations for successor agreements. Thus, the matter must be considered on the merits.

MERITS

It should be noted initially that having determined that a matter is arbitrable does not mean that the grievance is necessarily valid or that it has merit. The overall record must be considered before making that determination.

There were several issues to be determined in this entire matter. Initially the starting point for any case involving disputed language is the language itself. The main disagreement here is whether the MOA remained in effect past the expiration of the 2015-2017 contract.

The District maintained that the reference to the 2015-2017 k12 CBA in the MOA itself is a sunset date. On this record, that specific argument was not persuasive.

There was a mediation held for the 2017-2019 contract during which it was agreed to extend the MOA. The District took the position that it meant that unless there was such a mediated or negotiated agreement the understanding was that the MOA expired – otherwise there would have been no need to specifically negotiate for its extension. There was some merit to that assertion based on these facts and the credible testimony of the District's negotiator who negotiated the MOA initially.

The problem for the Federation occurred in the negotiations for the 2021-2023 contract and the event as described above following the 2022 strike.

The District told the Federation negotiators that it intended to sunset the MOA itself and that it was repudiating any claim to a past practice of limiting meetings to one per week. That much is clear. What is also clear is that the Federation specifically asked for the MOA to be included in the 2021-2023 contract and even briefly refused to sign the new contract even though it had been approved by a vote of the Federation's membership and the School Board until the MOA was included.

Significantly, the District refused to include it and again informed the Federation that it would not include the MOA in the contract, would not extend it into the new contract period and that the practice which it memorialized had been repudiated and would no longer be continued. Despite all of that, the Federation signed the agreement with that full knowledge.

On these somewhat unique facts, that amounted to an agreement that the MOA was not to be included in the new contract and that the practice would no longer be followed. In effect, that *was* the agreement to sunset the MOA; whether it had expired by its terms in 2017 or not.

The Federation argued too that a party to a labor agreement cannot unilaterally repudiate part of the contract. That is certainly true, but as noted, the MOA at issue in his case was never made part of the contract and was always considered a separate agreement that had to be renegotiated with each new contract.

The District appeared to be "hedging its bets," as it were, by both clearly telling the Federation that it would no longer agree to extend the MOA any longer in the 2021-2023 contract year and it repudiated any practice (or more accurately, any *past practice* based on the One Meeting a Week practice.) In so doing the District made it clear that the MOA and any practice limiting meetings to one per week would not be included in the contract and that unless the Federation specifically negotiated the MOA's renewal both the MOA and the practice would expire. As noted too, the Federation signed the new agreement with that full knowledge on these unique facts.

Finally, while zipper clauses can sometimes be obviated or negated by clear past practice, this language was clear and unambiguous. The language provides that the Agreement constitutes the full and complete Agreement between the parties and that the provisions herein relating to terms and conditions of employment supersede any and all prior agreements, resolutions, practices, school District policies, rules or regulations concerning terms and conditions of employment inconsistent with these provisions. While there was no evidence that the MOA was inconsistent with any of the provision of the CBA, the clear intent of that language is to foreclose any agreements that are not contained in the agreement itself.

As the Minnesota Supreme Court found in *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981) a zipper clause can be negated by a clear past practice. Here though, the facts showed that the parties' actions following the 2022 strike demonstrated an intent that the MOA was not to be included in the agreement. On different facts, i.e. without those events, the result might have been different, but on these facts the result is clear and the zipper clause was clear.

REPUDIATION OF A PAST PRACTICE

Some discussion of the notion of repudiation of the practice is appropriate given these facts. Initially, it was not entirely clear if the practice was really a "past practice," which is typically a practice that is not found in the contract itself, but which has grown out of custom and practice of the parties and is longstanding, consistent, clear and mutually accepted. See Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy 30 (S. Pollard ed. 1961).[1]

As the Court in *AFSCME v Ramsey County*, cited at the footnote below, held; A past practice is thus nothing more, or less, than a custom or an accepted way of doing things as between two parties to a labor agreement that can provide either assistance in interpreting contract language where that language is ambiguous or to actually provide a binding set of terms for matters not included in the labor agreement.

Here, the MOA was once part of the labor agreement despite the fact that it was not attached to it physically. It was clear that the parties intended for this to be in place for at least the 2015-2017 contract term, if not longer. The question though is whether it was properly repudiated if one assumes that the practice was no longer rooted in the MOA, but rather in the parties' practice. On this record, the facts supported the District's position in that regard.

Mittenthal also observed as follows:

> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For … if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

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[1] See also *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the Court upheld an arbitrator's award based on past practice and held as follows: "past 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 Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, *in Arbitration and Public Policy 30* (S. Pollard ed. 1961)

> That inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of the new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding." Citing Mittenthal, *Past Practice and the Administration of Collective bargaining Agreements*, proceedings of the 14th Annual Meeting of the NAA. See also Elkouri and Elkouri, *How Arbitration Works*, BNA Books 6th Ed. at p. 643-44,

On this record, Mittenthal's observations have particular cogency. During the negotiations for the 2019-2021 contract, the record showed that the parties did not discuss the MOA much, if at all. Under the above theory, that would imply that the practice continued for the life of that contract. Indeed, it appeared to be based on the facts presented here.

Other cases have come to similar results. *SEIU Local 284 and ISD 272, Eden Prairie Schools*, BMS CASE # 03-PA-819 (Jacobs 2003). There the parties had an admitted past practice of paying overtime during weeks in which the employees were paid for holidays and vacation etc. and where they were paid for more than 40 hours. The contract language was quite clear and was to the contrary of how the actual practice had been operating.

During negotiations however, the District sent a letter to the Union advising it of the intent to terminate the practice of paying overtime in those eeks where a holiday or other paid time off fell. The Union took the position that the practice would continue on after the contract unless there was a change in the contract language.

No change was made to the existing contract language despite the notice from the District that it would discontinue the practice of paying overtime as set forth above upon the signing of the new agreement. Based on the almost unanimous line of arbitral authority, the practice was allowed to be discontinued on those facts. See also, *National Tea Company*, 94 LA 730 (1990) wherein the arbitrator held that past practices do not necessarily continue ad infinitum, but may be repudiated by either party through timely and proper notice on intent to do so before or during negotiations.

In *Gillette Company*, 1996 W.L. 874463 (Fogelberg 1996) the arbitrator discussed a fact scenario very similar to that presented in Eden Prairie Schools. There, he found that management had fulfilled its obligation to put the Union on notice of the intention not to continue the practice which had been in existence for several years during the negotiations for the labor agreement. The Union thus had the obligation to bring this up in negotiations and place language regarding the practice into the agreement. The Union did not do that and instead chose not to address the matter at all, arguing later that the practice continued unless there was a change in the contract language. The arbitrator found that the exact opposite was the case and held that the company had successfully repudiated the practice. "Once placed on notice of the timely repudiation of the practice, the obligation switched to the Union to bargain over this subject at the next round of negotiations. Yet this was not accomplished, and consequently the 'practice' was properly eliminated by Management." *Gillette Company* at slip op page 4. See accord, *Copaz Company and UFCW Local 7A*, 1993 W.L. 790196 (Traynor 1993). See also *LELS and City of Blaine, Minnesota, MN* BMS 15-PA-0671 (Jacobs 2016) where the Union sent a repudiation notice to change a practice and attempted to insert different language into the agreement, but withdrew its proposals in exchange for other concessions. That case is somewhat similar in that the District repudiated the practice and the Federation asked to insert the MOA in the agreement, but failed to get that through negotiations.

As noted, things changed with the negotiations for the 2021-2023 contract and the question now is whether the MOA and the practice it gave rise to are still in effect. The District clearly did send notice to the Federation that it did not intend to continue the MOA, past practice or not and would not agree to include it in the new agreement. This was made even clearer after the strike and the Federation specifically asked for it to be included in the new agreement and the District refused.

On this record, the District's repudiation had the effect of discontinuing the practice and the MOA and it was incumbent on the Federation to insert language into the CBA or get a specific agreement to extend the life of the MOA or the practice. As noted above, even after it refused to sign the tentative agreement, the District maintained its position and the CBA was signed without it. Thus, the most reasonable conclusion to be reached is that the parties' intent, based on that fact scenario, was to exclude the MOA from the agreement and to discontinue the practice of One Meeting a Week.

At the end of the day, the ultimate determination in any contract interpretation matter is to divine the intent of the parties. This is done through the words and language of the agreement and their actions and communications to each other. Here, that intent was clear - the District did not want nor did it agree to continue the MOA or the practice that had grown up based on it into the new contract.

Finally, there was insufficient evidence to establish that this position was in retaliation for the strike itself. It was clear that the repudiation notice was sent prior to the teacher strike and was consistent with that notice. Thus, on this record, the District's position, (which had also been stated in earlier negotiations) was not shown to be retaliatory for the decision to strike in March 2022.

THE CASES CITED BY THE PARTIES

Given the findings here it is not necessary to discuss each and every case cited, but all were reviewed and several of them warranted discussion. First it was noted that the Miller decision from 1980 was an interest case whereby the arbitrator was charged with setting the parties' contract pursuant to PELRA. As such, it is inapplicable.

The Imes decision was also distinguishable. As the District noted, the provisions at issue was in the contract itself before arbitrator Imes; here, of course, it was not. Moreover, there was a provision in the agreement that allowed for the extension of the contract beyond its stated expiration date. Thus, that case did not control the result here either. There was also evidence before her that the parties incorporated the disputed language into the agreement

Finally, the Rotenberg case also contained similar language. See slip op at page 2. Language allowing for the contract to remain in effect beyond it stated expiration date. For one thing this MOA contains no such language and as discussed above, may well have extended beyond the expiration of the 2016-2017 contract and quite possibly other contract as well given these facts.

The basis of this decision though is the evidence of what occurred in the Spring of 2022 where the District sent notice that it would not agree to the extension of the MO nor of the practice and the parties did not place any additional language in the CBA. Then as noted, the District refused to add the MOA to the CBA even in the face of the Federations; specific request and the threat not to sign the tentative agreement. On these facts, the cases relied upon by the Federation did not control this result.

DOES PELRA LIMIT THE MOA TO A 2-YEAR TERM?

As noted, the District took the position that no MOA can extend beyond 2 years given the language of Minn. Stat. 179A.20 limiting these types of agreements and contracts to a 2 year duration. This issue is largely moot since the evidence on this record established that the intent was clear that the District did not wish to continue the practice based on the MOA nor to place it into the 2021-2023 contract. Clearly, the parties can mutually agree to extend the life of an MOA past the two year limitation provided for in Minn. Stat. 179A.20 and, for a time, they did.

There was frankly merit to the District's assertion that the *Central Lakes Education Association* case cited above controls this result. The Minnesota Court of Appeals held that the teachers' right to strike "matures" after the agreement expires and the parties have mediated for thirty (30) days, regardless of whether the teachers have issued a notice of intent to strike. In *Central Lakes Educ. Ass'n*, the teachers' union argued that a contract remains "in effect" until the union serves a notice of intent to strike under PELRA. The court rejected that argument, holding that the Union's argument would effectively mean that "teachers could keep a contract in effect indefinitely merely by not filing a notice [of intent to strike]." The teachers engaged in a strike in 2022 and thus, the "right to strike' had matured and the contract was likely no longer in effect once that occurred.

However, given the other determinations on this unique record no specific decision is necessary on the District's statutory claim that the MOA expired by operation of law.

CONCLUSION

The Federation's position is both understandable and well stated. Both parties were well intentioned and wanted student achievement to improve and for teachers to have adequate preparation time to provide the best educational experience for students as possible. On that score there was no disagreement.

However, as the parties themselves pointed out, this is not an interest case. Thus, the question of whether the MOA *should be* in effect is not at issue in this matter; the question is whether it *is still in effect* given the overall record, including the events of the Spring of 2022 as discussed above. The record showed that the MOA was discontinued through negotiations and/or specific repudiation by the District. Thus, the sole manner in which this MOA can be changed or renewed is at the bargaining table. Accordingly, on this unique record, the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: June 26, 2023

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Jeffrey W. Jacobs, arbitrator