

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 STANLEY-BOYD SCHOOL DISTRICT : Case 56
 : No. 48425
 and : MA-7594
 :
 STANLEY-BOYD EDUCATION ASSOCIATION :
 :

Appearances:

Ms. Mary Virginia Quarles, Executive Director, Central Wisconsin UniServ
Mr. Roger E. Walsh, Davis & Kuelthau, S.C., on behalf of the District.

Council

ARBITRATION AWARD

According to the terms of the 1991-93 collective bargaining agreement between Stanley-Boyd School District (hereafter District) and Stanley-Boyd Education Association (hereafter Association), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to serve as impartial arbitrator of a dispute between them involving the appropriate pay rate for grievant Gloria Steivang's participation in the District's Summer Program. The undersigned was designated arbitrator. Hearing was held on April 19, 1993 at Stanley, Wisconsin. No stenographic transcript of the proceedings was made. The parties filed their written briefs by June 1, 1993, which were thereafter exchanged by the undersigned. The parties waived the right to file reply briefs.

Issues:

The parties were unable to stipulate to the issues for determination in this case. However, the parties agreed to allow the undersigned to frame the issues. The District suggested the following issues statement:

- 1) Did the School District violate the collective bargaining agreement by paying the Grievant \$4.25 per hour as swimming instructor during the period from July 6 through 17, 1992?
- 2) If so, what is the appropriate remedy?

The Union suggested the following issues statement:

- 1) Did the School District violate the collective bargaining agreement by paying the Grievant \$4.25 per hour for teaching swimming during the period from July 6 through 17, 1992?
- 2) If so, what is the appropriate remedy?

Based upon the relevant evidence and arguments I find that the District's issues are appropriately phrased and they shall be determined herein.

Relevant Contract Provisions:

Swimming is not listed in the labor agreement as one of the extra-curricular activities with negotiated pay rates.

ARTICLE VII - TEACHING CONDITIONS

. . . .

A. Definition of the School Year. The school year shall consist of one hundred eighty-nine (189) contract days.

ARTICLE X

. . .

E. Extended Contracts. Base hourly wage shall be determined by a seven (7) hour forty (40) minute day except for those teachers who because of special needs of the school program are placed on an extended contract covering more than the period stated in Article VII, Section A, will be compensated at one hundred percent (100%) of their hourly base wage for every day employed beyond the school year.

FACTS:

Grievant Gloria Steivang has been employed by the District as a Physical Education Teacher and Coach since 1978. Since 1978, Summer swimming lessons have been offered at the City-owned Chapman Park pool. From 1978 until 1988, either the School District or the City offered Summer swimming instruction at Chapman Park pool and during this period, for 9 of 14 years, Steivang worked as a swimming instructor regardless of whether the instruction was offered by the District or the City, in order to maintain her Red Cross Water Safety Instructor certification. Steivang stated that during this period, her pay as swimming instructor was in the \$5.00 to \$7.00 per hour range and that she was not paid her District teacher hourly base rate. Steivang stated that until she filed the instant grievance, she never grieved her Summer swim instructor pay rate.

In 1987, the District appointed District teacher Lee LaFlamme to act as Summer Recreation Program Director and it paid Mr. LaFlamme \$1,500 for the work. This sum bore no relation to LaFlamme's District teacher hourly base rate. LaFlamme served as Summer Recreation Program Director from 1987 through 1992, for which he received the same \$1,500 lump sum payment. LaFlamme never grieved the rate paid to him as Summer Program Director.

During the period 1988 through 1992, the District took control of and responsibility for Summer swimming instruction. In 1988, 1989 and 1992, Steivang worked as a Summer swimming instructor in the District's Summer Recreation Program, along with another District teacher, Micelle Price. 1/ Steivang stated that she earned approximately \$5.00 per hour as a swim instructor in 1988. In 1989, Steivang received \$7.00 per hour to work as head Summer swimming instructor.

Ms. Steivang confirmed that her duties as Summer swimming instructor have not changed since she began teaching swimming in 1978; that the Red Cross dictates the materials to be taught; that the District does not own a pool and has never offered swimming instruction during the regular school year; and that since 1978, she was aware that she had never received her District teacher hourly base rate while teaching Summer swimming.

1/ Ms. Price had also previously worked as a Summer swim instructor at Chapman Park pool. She has never filed a grievance over her Summer swim instructor pay rate.

In 1991, the District began offering some academic classes (normally offered during the school year) during the Summer. The teachers who worked in this portion of the District's Summer Program were paid the hourly rates that were derived from contract formula listed in their teacher contracts for their Summer class work. These teachers were those listed below and the Summer courses they taught in 1992 are listed next to their names as follows:

Lynn Steivang, Computers and Calligraphy
Brenda Petersmeyer, Music
Jan Michelson, Music
Jerome Dirkes, Computers
Mary Kirkes, Elementary Literature
Ruth Hause, Consumer Home Economics
Marvin Opsahl, Math/Science
Chris Pohl, Gymnastics

Although the Union initially disputed the means whereby Steivang became aware of the openings for Summer swim instructors, it did not offer evidence to show that the District had posted an internal notice for the openings. Rather, the uncontested record evidence indicated that the District placed an ad in the local newspaper soliciting for "Summer swim instructors," with WSI certification and First Aid and CPR certifications. Notably, no rate of pay was listed in the ads. At some point after the ads were run, Steivang wrote a note to District Administrator Poulter stating:

I am writing to apply for teaching swimming lessons during the second session. I currently hold a WSI teaching certificate and am registered in Chippewa Falls at the Red Cross.

Mr. Poulter received this note and later orally informed Steivang that she had been accepted as a Summer swim instructor for the second session. Poulter did not mention a rate of pay at the time he orally accepted Steivang's offer to work the second session.

In 1992, Pat Valk, who is not otherwise employed by the District as a teacher, worked as head instructor for the Summer Swimming Program. She was paid \$7.25 per hour. District Teachers Steivang and Price worked as Summer swim instructors in 1992 and they received \$4.25 per hour, the same hourly rate that swim aides Kelly Feltz and Janelle Bielecki received for their work. The District made WRS payments for both Steivang and Price on the wages paid to them for Summer swim lessons. Gloria Steivang filed a grievance regarding her Summer swim instructor pay.

Positions of the Parties:

Union:

The Union has urged that Gloria Steivang should have been paid her hourly District teacher base wage rate for each hour she taught swimming during July, 1992, according to Article X. The Union rejected what it perceived would be the District's argument that Steivang was paid less than her hourly base wage in July, 1992 based on past practice. The Union noted that eight other teachers who taught classes during the District's 1992 Summer session were paid their hourly base wage and that the funding for these courses as well as the swimming courses came from D.P.I. The Union further observed that when District Administrator Poulter indicated Steivang was hired for the swimming class he did not tell Steivang that she was being hired as a swim aide or that she would be making \$4.25 per hour, and that the District never informed the

Union of its unilaterally-set swimming class pay rate. The Union also asserted that it had been completely unaware that Steivang had been paid a non-contractual wage (\$5.00 and \$7.00 per hour respectively) when she taught summer swimming in 1988 and 1989. Therefore, in the Union's view, the elements of knowledge and mutuality were absent on the facts of record so that the Union should not be bound by the arbitrator to the District's asserted past practice.

The Union further contended that Steivang clearly performed professional teaching duties, not aide work, when she taught swimming in July, 1992. The Union analyzed the swim aide position description and found Steivang's Summer duties as instructor of record as well as her experience and Red Cross instructor certification required that she be treated as a teacher of swimming, not as an aide. The Union noted that Steivang was listed on District Summer pay documents as a bargaining unit teacher entitled to and paid a pension. The Union argued, therefore, that Steivang should be treated as a bargaining unit teacher and paid accordingly for her work in July, 1992.

As a remedy, the Union sought to make Steivang whole, it sought an order that the District post all Summer teaching positions and notify all applicants in writing whether they will be employed in these positions, for what periods of time and at what rate of pay.

District:

The District noted that no evidence had been submitted by the Union to show that the Grievant did more than respond to the District's general "help wanted" ad in the Stanley newspaper seeking "swimming instructors for the summer . . . WSI certified with CPR and First Aid required. . ." (with no hourly wage rate listed); Steivang applied in writing and was later told by District Administrator Poulter that she had been accepted as a swimming instructor for the second session in July, 1992. The District further observed that certification or licensing as a teacher is not required for Summer swimming instructors; and that Steivang was not hired as a teacher for this job, although she coincidentally happened to be a certified teacher.

The District down-played its contribution to WRS for Steivang during the Summer of 1992, as a payment that was required by WRS because Steivang happened to be a certified teacher otherwise employed by the District. The District contended that the fact that it does not own a pool and that it has never offered swimming as a part of its regular school program, also support a conclusion that Steivang's work as swimming instructor in 1992 was not intended to be covered by the labor contract.

The District argued that during nine Summers out of the past fourteen, Steivang had accepted work as a Summer swimming instructor through the District or the City (depending upon which entity was then offering the swimming lessons). At no time was Steivang paid her teacher hourly base rate for teaching swimming lessons. Therefore, the District urged, Steivang knew she had not been and would not be paid her teacher hourly wage for swimming lessons in 1992.

The District also pointed to the fact that swimming is not listed in the extra-curricular schedule made a part of the labor contract; and that Article X Section E references only extended contracts necessitated by the "school program." The District distinguished such extended contracts from Summer swimming lessons that have never been offered as a part of any school year program. The fact that the District received D.P.I. funds to help defray the cost of its Summer swimming lessons was immaterial, in the District's view.

Finally, the District pointed out that it has paid not only Steivang but

also former District teachers LaFlamme and Michelle Price non-contractual wages for their past participation in the District's Summer Recreational activities, without Union complaint; that Steivang and Price never filed grievances regarding swimming instructor pay; and that the Union has never sought to bargain regarding the matter, although it could have done so.

The District therefore urged that the grievance be denied and dismissed in its entirety.

Discussion:

Initially, I note that there is no contractual basis for the Union's assertions in this case: The contract does not refer to swimming classes in any way. In addition, I note that no references were made to instructing swimming in the Summer Program in Steivang's or Price's annual individual teacher contracts; that no references were made in LaFlamme's individual teacher contracts to his Summer Director work; that the District does not own a pool and has never offered swimming classes as a part of its regular school year curriculum, although Summer swimming lessons have been offered by either the City or the District since 1978; and that in 1992, the District hired swimming instructors only after it advertised in the local newspaper for swimming instructors. All of these facts support a conclusion that the District never considered Summer swimming classes to be a part of "the school program," pursuant to Article X Section E.

However, I remain unpersuaded that there was a long-established, mutually accepted past practice regarding the District's method of paying Summer swimming instructors. In this regard, the District failed to prove that the Union knew or should have known of the District's policies or procedures regarding its employment of Summer swimming instructors. In these circumstances, I cannot and will not bind the Union to an alleged past practice regarding Summer swimming instructors.

Based upon the relevant evidence and argument herein, 2/ I issue the following

AWARD

The District did not violate the collective bargaining agreement by paying the Grievant \$4.25 per hour as swimming instructor during the period from July 6 through July 17, 1992.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 25th day of June, 1993.

2/ My duty and responsibility in this case is to interpret the collective bargaining agreement and I have done so in this Award. I have no authority to establish or fill in the terms of the individual oral contract for services made between Mr. Poulter and Ms. Steivang. Although I note that the District has offered no explanation why it paid swim instructors \$5.00 per hour in the past but chose to pay them \$4.25 per hour in 1992 (the same hourly rate it paid to those occupying the less responsible swim aide positions), I lack jurisdiction to interfere with the private work arrangements Ms. Steivang made outside the labor agreement.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator