BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL PROFESSIONAL AND EMPLOYEES ASSOCIATION OF KENOSHA COUNTY

and

CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA

Case 26
No. 55725
MA-10079

Appearances:

Mr. Rick D. Moore, Executive Director, Southern Lakes United Educators, 32100 Droster Avenue, Burlington, Wisconsin 53105, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Daniel G. Vliet**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-4285, appearing on behalf of the District.

ARBITRATION AWARD

School Professional and Employees Association of Kenosha County (herein the Union), and Central High School District of Westosha (herein the District) were, at all times pertinent hereto, parties to a collective bargaining agreement, dated February 7, 1996, covering the years 1995-1997 and providing for binding arbitration of certain disputes between the parties. On October 27, 1997, the Union filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration on a salary placement issue and requested a list of arbitrators, which was submitted. The parties jointly selected Thomas L. Yaeger from the list of arbitrators and a hearing was conducted on May 19, 1998. The District filed a brief on June 22, 1998, and the Union filed a brief on June 29, 1998.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties were unable to stipulate to a statement of the issue. Therefore, the arbitrator frames the issue as follows:

Did the District violate the collective bargaining agreement by denying grievant Nichols a lane change in July, 1997?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE V – SALARY AND COMPENSATION

A. BASE SALARIES

Appendix A, Salaries, shall be the basic rates of compensation for all teachers covered by this Agreement.

B. SALARY TRACK CHANGES

1. Professional personnel who earn credits that will allow them to change a salary track shall be allowed to change salary tracks twice within any school year. Such changes shall be able to be effected on October 1 for the first semester and March 1 for the second. If suitable documentation cannot be filed with the administration prior to the October or March date, the adjustment and corresponding increase shall not be effective until the next semester. The administration will implement adjustments to the contract-of-employment upon receipt of the documentation that the credits validating the track change have earned. (sic) Salary payment changes shall be effective on the first pay date for credits filed on October 1 and on the fourteenth pay date for credits filed on March 1. Retroactive payments shall be made to pay dates indicated in the preceding sentence if necessary to implement this section.

2. All credits offered for advanced salary tracks must satisfy one or more of the following criteria:

a. The course is within a graduate degree program culminating in a Masters of Education degree.

b. The graduate course is within a teacher's current subject area.

c. The course is an education course (graduate level) at the current level of the teacher's assignment.

d. The course (graduate level) is related to a teacher's co-curricular assignment, with prior administrative approval.

e. The course is taken at the request of an administrator, or by the request of the teacher with prior approval of the administration, with a copy of the request on file. Any course which falls within the school day or conflicts with inservice must have prior administration approval.

3. It is the teacher's responsibility to keep the Board informed by the submission of transcripts of programs in salary track changes. Teachers planning such a change during the coming school year must notify the Board of their intent by June 1. Failure to comply with this notification means that the teacher must wait to move on the salary schedule until the following school year.

BACKGROUND

The District and the Union were parties to a collective bargaining agreement covering the 1995-97 school years. The salary schedule, contained in an appendix to the contract, provides for step increases for each year of service up to 10 and lane changes for each six credits of graduate work completed up to a Masters degree plus 30 credits. The process for obtaining a lane change is set forth in the provision above. In order to meet the contract's notification deadline requirement, the District prescribes a particular form to be filled out and turned in by the teacher, identifying the course, the subject matter, the dates of the course, the institution offering the course, the number of credits offered, and the total number of credits the teacher would have upon completion. The form must be submitted by June 1 and is subject to approval or disapproval by the District Administrator.

The grievant, Steve Nichols, has been employed as a guidance counselor at Central High School since the 1991-1992 school year and is a member of the bargaining unit. As of 1997, he was in the MA+24 lane on the salary schedule and sought to advance to the MA+30 lane for the coming school year.

On January 6, 1997, Nichols submitted a written request for a personal day on February 19 in order to participate in a credit option program being offered at the annual conference of the Wisconsin School Counselors' Association (WSCA), which was approved by the District Administrator, Gerald Sorensen. (Union Ex. #1). This was the first time course credit was offered at the conference. On February 11, he requested leave to attend the WSCA Conference on February 20 – 21, indicated that the cost incurred would be $180.44, and requested reimbursement, which Sorensen also approved. (Union Ex. #2).

On May 27, 1997, Nichols turned in a form requesting approval of a 3 credit course on Wellness being offered through Silver Lake College later in June. (Joint Ex. #2). He further indicated he would be at the MA+30 level upon completion and added a margin note stating: "This includes the 3 cr. earned during the WSCA conference also through Silver Lake." The District Administrator, Gerald Sorensen, reviewed the form and returned it to Nichols for clarification regarding the institution offering the Wellness course. Nichols provided the requested information and Sorensen approved the request on May 28.

In July, transcripts for the 6 credits Nichols earned in the Wellness course and WSCA Conference were received by Sharon Llanas, the District Comptroller. Upon searching the records, Llanas was unable to find a notification form for the WSCA Conference and informed Sorensen. Sorensen determined that Nichols had not provided proper notification to obtain approval for the credits and, therefore, was not eligible for a lane change in the 1997-1998 school year.

In September, 1997, Nichols was informed he would not receive a lane change for the 1997-1998 school year. Upon inquiry, Sorensen told him that district policy requires that a separate notification form be used for each course taken and the margin note regarding the WSCA Conference was insufficient under the policy to receive credit. Nichols filed a grievance and also submitted a new form for the WSCA Conference, which was approved, and a lane change was granted for the following year. According to the salary schedule, the difference in Nichols' salary as a result of not receiving the lane change in 1997-1998 was $1,243.00.

POSITIONS OF THE PARTIES

The Union

The Union argues that Nichols' actions were consistent with the notification requirements in the contract and, therefore, he should have been granted the lane change for 1997-1998. The Union points out that the relevant clause in the contract does not specify a particular method by which notice must be given, but merely states that notification must occur by June 1 in order to make a lane change in the coming year. The Union takes issue, therefore, with Sorensen's assertion, contained in an October 8, 1997 letter to Nichols, that the lane change denial was due to Nichols' failure to comply with the provisions of the contract.

Testimony was offered from Tom Olszewski and Linda Berns, two teachers who were on the bargaining team which negotiated the relevant language into the contract. Both witnesses testified that the purpose of the clause was twofold: (1) to insure that teachers pursued credits in their subject areas, and (2) to enable the District to do timely budget planning based on accurate salary figures. The Union's position is that Nichols' notification

form satisfactorily met both criteria and complied with the language of the contract. In this regard, the Union notes that the original notice was given in advance of the June 1 deadline and, that once Nichols turned in a separate form for the WSCA Conference in September, 1997, Sorensen approved it.

The Union further disputes the District's assertion that the requirement of separate notification forms for each course was a commonly understood and uniformly applied District policy. Although Sorensen asserts in his October 8 letter, as well as in a September 23 memo, that such a policy exists, the Union points out that this policy has never been reduced to writing. Further, contrary to the District's assertion that the District Comptroller, Sharon Llanas, explains this policy to each teacher who picks up a notification form, as Ms. Llanas in fact testified, the Union states that this was not a commonly understood policy. Testimony was offered from Olszewski and Berns, as well as from a third teacher, Steven Maastricht, to the effect that they had never been told of the one form per course requirement by Llanas or anyone else. Further, the Union notes that Llanas has no specific recollection of telling this to Nichols.

With reference to the uniformity of the policy, the Union offers several examples of incidents where teachers submitted forms detailing multiple courses, which were approved. Evidence was submitted in the form of four multiple course applications for different teachers which were approved between 1989-1991. Thus, the Union argues that even if such a policy did exist, its application was arbitrary and inequitable and therefore, Nichols should prevail.

Finally, the Union argues that the District should be, in effect, barred from denying Nichols' lane change due to the District Administrator's failure to object to the notification form in a timely manner. The Union states that the form was submitted to Administrator Sorensen on May 27 and, at least, contained information from which Sorensen should have concluded that Nichols was including two courses for a total of six credits. Sorensen apparently read the form (although perhaps not the margin note), because he returned it to Nichols on May 28, seeking clarification about the school offering the course, which Nichols provided. Sorensen then approved the form as amended. The Union argues that, if the notice was inadequate, Sorensen should have informed Nichols of this on the 27th when he asked for the clarification and, had he done so, Nichols could have submitted another form for the WSCA Conference credits prior to the June 1 deadline. The Union's position is that Sorensen's failure in this regard should prevent the District from denying the lane change.

For the stated reasons, the Union believes that the District violated the contract by denying Nichols the lane change.

The District

The District argues that it is a longstanding and universally understood policy that teachers seeking credit for course work must fill out and timely submit a standardized form for

the Administrator's approval and that each course requires a separate form. Since Nichols did not comply with this requirement, but included two courses on the same form, he failed to comply with the notification clause in the contract and, therefore, was not entitled to a lane change in 1997-1998.

While the contract does not specifically reference the notification format, or the one course per form rule, the District notes that this has been a longstanding and universally understood policy for many years and cites authority to the effect that the practice of the parties establishes the meaning of contract terms and, once established, should not be revised in arbitration. Here, the District states that the use of the particular form, as well as the rules for its use had, in effect, been merged into the contract by common consent and acquiescence.

With respect to the form and practice, the District offered the testimony of Sharon Llanas, the District Comptroller since 1992. Her duties for the District include budget, accounting and payroll, which also involves tracking salary movement for teachers due to step and lane changes. She testified that each teacher planning on obtaining graduate credit must obtain a notification form from her and that it is her standard practice to tell every teacher that they must turn in one form for each course taken, per District policy. She stated that in preparation for the hearing she reviewed approximately 600 notification forms turned in during her tenure and in no case had any other teacher, or Nichols himself, ever included more than one course on the same form. This, the District states, not only establishes the existence and acceptance of the policy, but also permits the inference that Nichols himself was aware of it and had complied with it in the past.

In further support of its position, the District points to the wording of the form itself, which is drafted in the singular. According to the District, this clearly shows the intent that the form be used only for one course and buttresses the argument that anyone reading the form would understand this. Taken in conjunction with the reminders from Llanas, there could be no doubt as to the proper method of providing notification of an intended lane change.

Further, the District points out that in the past Nichols himself had been denied a lane change because he had not obtained prior approval for a course by timely submitting the form, and did not grieve the matter. Based on this, therefore, he not only knew the proper procedure for obtaining credit, but also apparently was accepting of the policy behind it. In light of this, he should not now be permitted to complain about the application of the policy or argue that he was unaware of it.

Finally, in anticipation of the Union's argument, the District contends that where the teacher failed to comply with the established notification policy the burden to correct the mistake was on the teacher and the District was not under an affirmative duty to discover it and point it out. To this end, the district points out that it is in the teacher's interest to comply with the policy and make sure the proper steps are taken. In fact, District points to the language of Article V, Section B. 3, which states: "Failure to comply with this notification

means that the teacher must wait to move on the salary schedule until the following school year." in arguing that Nichols had a duty to comply with the policy and clearly would not be permitted a lane change if he did not.

The District states that Nichols' notification form violates the policy, not only in that it refers to two different courses, but also in that the reference to the WSCA Conference does not provide all the specified information about the course which the form calls for. In fact, Sorensen testified that when the form was initially submitted he did not even read the margin note, which did not appear to be an attempt to notice an additional course, and was unaware of the credits earned at the WSCA Conference until the transcripts were received in July, when the problem was discovered.

In conclusion, the District argues that there was a longstanding and universally applied policy that required teachers seeking lane changes to turn in notification forms for each course by June 1. Nichols failed to comply with the policy by failing to submit a separate form for the WSCA Conference in February, 1997, and the notice provided on the form submitted on May 27 was insufficient. Because he did not comply with the terms of the collective bargaining agreement, Nichols was not entitled to a lane change in the 1997-1998 school year and the District did not violate the contract by denying it.

DISCUSSION

This case arises out of a dispute over interpretation and application of a clause in the collective bargaining agreement governing lane changes in the salary schedule. The District contends that Nichols failed to give the notice required by Article V, Section B. 3 of the contract in a timely fashion and, therefore, was not entitled to a lane change in 1997-1998. The Union contends that Nichols met the contract requirements and, therefore, the District violated the contract by not granting the lane change.

While Article V, Section B. 3 clearly requires the employe to provide the notice of intent by June 1 in order to make a lane change in the coming year, it is silent as to what form the notice must take. Taking the contract language on its face, therefore, the notice filed by Nichols would appear to be sufficient because it references two separate courses, each worth three credits, indicates that Nichols will be receiving six total credits and will be have accumulated MA+30 credits. Further, it was filed by May 27, thus meeting the June 1 deadline. Assuming that the transcripts certified that Nichols actually received the credits, which they did, based upon the contract language alone, Nichols should have been moved from the MA+24 lane to the MA+30 lane in 1997-1998.

The District argues, however, that its policy, established by a consistent practice over the years, is that teachers must turn in a prescribed form for each course taken, that all District staff knew of this requirement and accepted it. It concludes, therefore, this is the proper construction of the contractual notice clause. In support of this contention the Comptroller,

Sharon Llanas, testified that of the hundreds of forms submitted during her six-year tenure, none listed more than one course, and that she personally instructs all teachers as to this requirement. Also, the District notes that the form itself is worded in the singular, implying that only one course is to be listed.

According to the District, Nichols' margin note reference to the WSCA Conference on the form he submitted on May 27 violated this unwritten policy because it combined two courses on one form and gave inadequate information about the WSCA Conference course to meet the District's requirements. From Nichols' standpoint, however, Sorensen had already approved the WSCA credits in February and no further approval was necessary. Thus, Nichols' note on the May 27 form clearly was a reminder about and explanation for the additional three credits listed, and not another request for approval.

The District's contention that the one course per form policy was universally known and accepted is disputed. In addition to Nichols, three other teachers testified that they had never heard of the policy. Tom Olszewski, a member of the bargaining team which negotiated the language of Article V, had never heard of the one form per course requirement. Likewise, Linda Berns and Steven Maastricht did not know of the policy. Further, both testified that, as members of the Grievance Committee, had they been aware of such a policy they would have explained to Nichols that his grievance was groundless.

It is also disputed that this policy has been universally applied. The Association offered into evidence 1/ copies of approved notification forms listing multiple courses, or forms giving no course specifics at all. All the forms are worded in the singular and, in fact, since 1990 the current form has been in use. On this basis, the Union contends that a past practice has not been established such that the District's one course per form should be treated as an implied term of the collective bargaining agreement. The District refers the undersigned to Elkouri and Elkouri, How Arbitration Works (5th Ed.) in support of the proposition that past practice of the parties can establish the meaning of ambiguous terms in a contract, and, if so, should not be changed by an arbitrator absent compelling reasons. However, in order for that principle to apply it must first be established that the conditions precedent to finding a binding practice exist. In order for a past practice to rise to the level of becoming an implied term of the contract it must be clearly established that the practice is unequivocal and has been acquiesced in by both parties. In BONDUEL EDUCATION ASSOCIATION, CASE 1, NO. 54681, MA-9760 (JONES, 6/19/97), cited by the Union, Arbitrator Jones observed:

> In order to be binding on both sides, an alleged past practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is no obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement.

1/ Diane Pawasarat filed a form on June 1, 1989 listing three separate courses, a form on May 22, 1990 listing two courses, and a form on May 28, 1991 listing four courses, all of which were approved, the latter two by the current Administrator, Gerald Sorensen. Laura Campbell filed a form on November 27, 1991 outlining a thirty-two credit degree program, which was approved by Sorensen. Phillip Knigge filed a form on April 9, 1998, referencing a thirty-two credit Master's program, but providing no detail, which was approved by Sorensen. Pawasarat also filed a form on February 15, 1995, indicating an intention to obtain three credits for an unspecified Summer School course, which was approved by Sorensen.

In the instant case, it is undisputed that the District understands that the procedure established is that teachers intending to take courses and/or make a lane change pick up a form from the Comptroller, which must be turned in before June 1 and approved by the Administrator in order to make a lane change in the subsequent school year. The purpose is twofold. First, it allows the District to review and indicate its concurrence that the course satisfies the requirements of Article V, B. 2, thus eliminating the possibility of a dispute arising after the course has already been taken. Second, it puts the District on notice of an intended lane change and resulting salary increase in advance of the District finalizing its budget so that an adequate amount of money can be allocated for such salary increases in the coming year. The District's witnesses testified that its intention is that teachers fill out one form per course. However, the evidence showed that aspect of the procedure has not always been uniformly enforced over the years, nor was it universally communicated to all faculty. None of the four teachers who testified, all of whom have been in the District for many years, recall ever having been told of it. Of additional significance is the fact that other teachers have in the past been permitted by the current Administration to list several courses on the same form without being denied a lane change. The form, itself, while clear on the deadline, is silent as to how many courses may be referenced. 2/ In fact, the record discloses no prior case where a teacher has ever before been denied a lane change on this basis. Prior to this incident there was nothing on the form or Llanas' oral instructions to indicate that a teacher would be denied course approval and/or a commensurate lane change for including more than one course on a notification form.

2/ The operative language at the top of the notice form is: IN ORDER FOR YOU TO MAKE A SALARY TRACK CHANGE NEXT YEAR, THIS FORM MUST BE SIGNED BY MR. SORENSEN BEFORE JUNE 1, 1997. YOU WILL NOT BE PENALIZED IF YOU FAIL TO MAKE THESE CHANGES, BUT NO CHANGES WILL BE MADE WITHOUT THIS NOTIFICATION. (Emphasis in original)

Thus, the record evidence is insufficient to establish that there was a binding past practice of permitting only one course per form for approval.

The propriety of the credits Nichols earned at the WSCA Conference in February is not in question. When Nichols filed a separate form for the credits in September, 1997, it was approved. Indeed, Sorensen had previously approved Nichols' written request for leave to attend the course and his request for reimbursement for the cost of the course after he had taken it. According to Sorensen, when he approved Nichols' May 27 notice he did not read the margin note regarding the WSCA Conference, and therefore, was unaware that Nichols had obtained six credits for two separate courses until the transcripts arrived in July. Only then did Sorensen realize that Nichols was seeking credit for the WSCA Conference, over a month past the time when notice forms were to have been submitted. As stated in the District's brief, since the grievant had not filled out a separate form for the WSCA course, the District refused to move him on the salary schedule to the MA+30 lane.

Setting aside for the moment the fact that in the past Sorensen had approved notices listing multiple courses and had approved credit where the notices said nothing about the course at all, was the District's action in this case in keeping with the requirements of the contract? The undersigned believes it was not. It is the undersigned's view that the primary purpose of the form is to obtain advance approval for the courses taken. If only one course per form can be approved, the District Administrator does not know by looking at the form he is reviewing for approval whether he has already approved other courses that, taken together with the current request, equal the required number of credits for a lane change. If the credits are approved, the lane change will follow as a matter of course and so the line referring to "Proposed Degree/Total Accumulated Credits" serves only to put the District on notice of the lane change for budgetary purposes. Indeed, by merely referring to the form, the Administrator would have no way of knowing, other than the representations of the teacher by completing the form, that a lane change was warranted.

Further, the District's argument ignores that Nichols had previously provided the District with written information about and received approval, time off and reimbursement for the WSCA workshop. On January 6 he requested a personal day for February 19 to participate in a credit option course at the WSCA Conference. One February 11, he requested leave to attend the conference on February 20 and 21 and also submitted a request for tuition reimbursement. Sorensen approved both of these requests and, therefore, Nichols was entitled to rely on the fact that the District had approved this conference for credit. In his May 27 notice of intent to make a salary track change he included a note by way of reminder that three of the six credits claimed had been earned at the WSCA Conference. This, too, was approved by Sorensen. On the strength of this evidence it is clear that Sorensen had adequate information prior to June 1 regarding the WSCA Conference to conclude that the requirements of Article V, Section B. 2 of the contract had been satisfied. Furthermore, he received notice on May 27, that Nichols believed he would have six credits that qualified him for a lane change. Sorensen could have objected to Nichols' failure to include the WSCA Conference

course on the appropriate form as early as January 6, or February 11 when he initially requested leave to take the course or when he requested tuition reimbursement for the course. Rather, he waited until receipt of the transcripts in July to raise the issue of the sufficiency of the notice about a course he had approved five months earlier.

Therefore, I find that because there was not a binding past practice rising to the level of an implied term of the agreement teachers were not contractually obligated to complete a separate standardized form for each course taken for credit toward salary track advancement. Thus, the District, by denying Nichols' movement on the schedule for failure to do so, after he had otherwise satisfied the requirements of Article V, violated the parties' collective bargaining agreement. Thus, the District should have advanced Nichols to the MA+30 lane. To remedy this violation the District must reimburse Nichols $1,243.00 which is the value of movement to MA+30 lane as Nichols requested.

Based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The District violated the collective bargaining agreement by denying grievant Nichols a lane change in July, 1997. Accordingly, the District is directed to pay to the grievant back pay in the amount of $1,243.00.

Dated at Madison, Wisconsin, this 19th day of March, 1999.

Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator

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