BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SOUTHERN DOOR EDUCATION ASSOCIATION

and

SOUTHERN DOOR SCHOOL DISTRICT

Case 30
No. 57462
MA-10636

Appearances:

Mr. David Brooks Kundin, Executive Director, Bayland UniServ, on behalf of the Association.

Davis & Kuelthau, S.C., by **Mr. William G. Bracken**, Employment Relations Services Coordinator, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "District", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Brussels, Wisconsin, on January 14, 2000. There, the parties agreed I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and both parties filed briefs that were received by March 15, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

> Did the District violate Article VII, Section F, of the contract when it denied the grievants' requests for approval of a three-credit course entitled "Health and Nutrition" and, if so, what is the appropriate remedy?

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BACKGROUND

Pursuant to Article VII, Section F, of the contract entitled "Professional Improvement" (reproduced below), grievants Wendy Day, Karen Derenne, Michelle Van Lieshout and Susan Schmitz (a fifth grievant, Tricia Claflin, withdrew her grievance at the hearing), submitted written requests in September and December, 1998, which sought approval for a graduate course entitled "Health and Nutrition" to be taught at Viterbo College in the summer of 1999. Van Lieshout's request was accompanied by a two-page description of the course that included course topics and objectives. The other four requests explained on a District-supplied form how the course would improve the grievants' teaching and/or impact student learning. District Administrator Joseph Innis had previously approved the identical course in 1995 when it was taken by teacher Duane Lardinois. (It is unclear whether he also granted similar approval to teacher Glen Van Vander.)

In response to their requests for course approval, Innis by memo dated December 11, 1998, (unless otherwise stated, all dates herein refer to 1998) informed the grievants:

. . .

> I received your request for approval of Health – Nutrition (Edu 786).
>
> Our district priorities at this time center around Standards, Assessment, and Technology with the idea of raising the expertise of all staff in those areas.
>
> Attached is information regarding a course through UW-Superior that centers on the above that I would like you to consider in place of your request. I am sure there are others.
>
> Please give me a call so we can discuss this.

. . .

Innis at that time did not deny or approve the course. The UW-Superior course he suggested cost $549 and exceeded the $160 maximum cost the District is required to reimburse under the contract for a three-credit course ($60 a credit). The requested Health and Nutrition course cost $480, thereby saving each teacher $69 if they took the latter course rather than the former.

By memo dated December 15, grievant Schmitz informed Innis:

> Thank you for your quick response to my request. I received your information on the course offered through UW-Superior. The scheduling of the course is not workable with my schedule. Another consideration is that the course fee is considerably higher than the course I requested.
>
> I am also working towards a Master's Degree in Education through Viterbo College so I want to take a class that I'm sure will apply to the program. The course has been approved and taken by several other teachers who spoke quite highly of the class.
>
> According to our contract, Article 7.F.1 – The credit must be graduate credits earned from an accredited college which offers a graduate degree program, and Article 7.F.4 – the credit must be earned in the teaching field or allied area or applicable courses in the field of education or psychology, so I feel this course is appropriate for my professional development.

Innis by memo dated December 18 informed the grievants that he was denying approval for the Health and Nutrition course. The grievants then filed the instant grievances and their grievances were all denied at the first step of the grievance procedure on December 22.

After the Association appealed the denial of the grievances, Innis by memo dated January 8, 1999, informed grievance chair Laurie Connell:

> I would like to meet with you on Thursday, January 14, 1999, @ 3:15 p.m. in the district office to discuss the grievance request submitted on January 6, 1999.
>
> When the credit requests were submitted, I asked each person to contact me so I could get additional information. I received a written note from one.
>
> Please bring the following information with you:
>
> 1. How the material presented in this course would be used in the classroom. Be specific in terms of the curriculum areas taught by these teachers, any Standards and Benchmarks it would apply to and examples of how lesson plans and assessments would be changed or developed to incorporate this material.
>
> 2. Are the teachers currently taking the course?

If you have questions prior to the January 14, 1999, meeting, please contact me.

Grievant Day spoke to Innis about the course between December 11-18 and grievant Van Lieshout unsuccessfully tried to telephone Innis to tell him about the course and left a message for him on his telephone answering machine. Innis never returned her call. The other grievants stated they did not respond to Innis' inquiry because he had already denied the course, because they were too busy, and/or because the Association did not believe such information had to be supplied.

Asked why he had approved the very same course in 1995 but not in 1998, Innis replied: "times have changed. We have more focused District goals. We definitely have more-higher standards to meet. We have better-defined standards and benchmarks. I think we have better-defined curriculum." Innis added that he denied the course in part because the grievants had failed to discuss the course with him after he asked them to do so.

Teacher Richard Engel, the Association's chief negotiator, testified about the bargaining history surrounding Article VII, Section F. He said the parties last negotiated over that provision in 1986 when, in Engel's words: "We decided it had to be there because somebody has to sign the certificate so Mr. Hansen [the then-superintendent] said: 'Somebody has to sign it. I'll sign it. As long as they take a course from a university that offers a graduate degree program, it will be approved, as long as it's submitted in advance." Engel said he was unaware of any instances where teachers were denied approval to take graduate courses and that he was unaware of any grievances ever being filed over that issue.

Dr. Thomas F. McEvilly, III, taught the Health and Nutrition course in issue. Called as an Association witness, he testified that the course was very important to a K-12 environment "because a lot of the issues we have with students right now are health-related." He explained:

> If you take a look at my syllabus, we talk about AIDS awareness, talk about food additives and how they affect children, we talk about attention deficit disorder and how food and nutrition and exercise can relate to that. We talk about exercise and behavior, stress, how to read food labels, what's in foods. We talk about dieting, the issues that relate to students in a K-12 environment. We have many students that have anorexia nervosa, as well as bulimia, in the education system. We talk about how to identify this. We talk about the biochemistry of fat. We talk about women's issues and how advertising affects women. We talk about disease transmission, not only AIDS, but we talk about cancer, hepatitis, everything from colds and viral transmission. We talk about whether being a vegetarian is safe, because we have many young people in

schools that are vegetarians without understanding how that works. We go into the full biochemistry of food. We talk about fats and oils, sodium, sugar and how sugar affects students. We do exercises that have activities that talk about the amount of teaspoons of sugar in Mountain Dew, the caffeine, the other stimulants that affect children. We talk about carbohydrates and the difference between complex and simple carbohydrates. We talk about the benefits of calcium. We talk about vitamins and minerals and how they affect students. We talk about and compare the food pyramid to the four food groups. We pretty much talk about everything as it relates to students and their behavior. We talk about the percentage of students that come to school without eating breakfast and how that affects their behavior, their attention span, their ability to do well on tests. We talk about how it affects them as far as headaches and stomach aches and absenteeism. Everything we do in this class talks directly on how students can survive in a K-12 environment and what teachers can do to help them survive and benefit their stay through health and nutrition. We talk about the benefits of exercise, how that can focus on students. We talk about concentration exercises. It's a very, very in-depth course.

He added:

Inside this class we talk about study skills and how to prepare students to best – to do their best on a test, what foods to eat, what foods not to eat. So we talk about sleep, sleep deprivation. We talk about water intake. We talk about foods that can actually benefit brain absorption, memory skills. We talk about all the things that benefit students to take – in taking tests as it relates to health and nutrition.

Asked why a health teacher could not provide this kind of information, he replied:

Because teachers don't always have access to a health teacher. Not all school districts teach health directly in their classes, and every teacher is dealing with issues relating to health with their students. More and more teachers are being used to distribute medications to students, anything from giving Ritalin to a student to doing a tracheotomy and a cleanout. We've had teachers do that. Teachers are being asked to do all kinds of medical procedures as well as observational skills. To understand what food does to students really makes a difference. Teachers have found that just by changing what snacks are allowed in the classroom, what snacks are given during celebrations can really affect behaviors with students. And this affects all teachers. It also affects the

> teacher's health too. If teachers eat well, they miss less school, their attitude stays stronger. Same for students. So it benefits both, teachers as well as students.

Grievants Day (a seventh-grade language arts teacher and coach), Derenne (a fourth-grade teacher), Schmitz (a fourth-grade teacher and coach), and Van Lieshout (a first-grade teacher), all gave detailed testimony as to how the course helped them and said they were unaware of any prior instances where such graduate courses had been denied in the past.

POSITIONS OF THE PARTIES

The Association contends that the District violated Article VII, Section F, of the contract because the "superintendent exceeded his authority" when he refused to approve the Health and Nutrition course; because the "canons of statutory construction support the Association's interpretation"; and because the Health and Nutrition course was "clearly relevant" to the grievant's classroom. As a remedy, the Association asks that grievants Day, Derenne and Schmitz be reimbursed $160 each and that they and grievant VanLieshout be given full credit on the salary schedule for taking that course.

. . .

The District, in turn, asserts that the grievances must be denied because the "clear and unambiguous language gives the District Administrator the authority to approve or deny credit reimbursement"; because the superintendent's "past history" in denying approval for other courses supports its interpretation; because "Arbitrators have supported the District's ability to approve or disapprove credit reimbursement"; because the Association has not met its burden of proving that the District's superintendent "acted in an arbitrary, capricious or discriminatory manner"; because the Association has not met its burden of proving "clear, discernable and recognized past practice"; and because the grievants and Association's failure to provide requested information "was unreasonable and should not be condoned by the Arbitrator."

DISCUSSION

This case involves the interplay between the Preface to the contract and Article V, entitled "Board Functions", on the one hand and Article VII, Section F. on the other hand. The former two provisions in essence provide that the District retains all of its rights and functions to manage the school system and that the exercise of such rights is "limited only by the specific and express terms of the agreement."

The Association maintains that Article VII, Section F, expressly limits the District's prerogatives because it provides:

> F. Professional Improvement. Payment for graduate credit including payment for summer school. For qualifying credits above basic degrees, the payment shall be as follows:
>
> 1. The credit must be graduate credits earned from an accredited college/university which offers a graduate degree program.
>
> 2. The credits must be approved in advance by the Superintendent.
>
> 3. The college must verify as to the number of graduate credits, date earned, course number, and descriptive name.
>
> 4. The credit must be earned in the teaching field or allied area or applicable courses in the fields of education or psychology and including courses accepted toward the earning of the next degree in the teaching field.
>
> 5. The responsibility for filing application shall rest with the teacher.
>
> 6. Teachers originally hired to work under provisional certification shall not be reimbursed for the costs of coursework to become fully certified. Except when the district requests or requires an employee to obtain provisional certification, the district will not pay the fee for certification, but will reimburse for required coursework at the rate specified in number 7 below.
>
> 7. Summer school graduate credits earned or credits earned during the regular school year shall be allowed at the rate of $60 for each approved graduate credit to a maximum of nine (9) credits during the summer and three (3) credits during each semester of the regular year.
>
> 8. To receive payment, the teacher must be under contract and on duty in the Southern Door Schools. To receive payment for summer school, the teacher must have taught in the Southern Door Schools the preceding year.

> 9. Payment will be made with the September, February or June payroll checks following presentation of transcript. (Emphasis added).

The key proviso here is paragraph 2 which states: "The credits must be approved in advance by the Superintendent."

The District argues that this sentence in effect should be read as stating: "The credits must be approved in advance by the Superintendent <u>who has complete discretion to either approve or deny the credits, provided only that he/she does not act in an arbitrary fashion</u>." The problem with this claim is that paragraph 2 does not state what the District claims it states.

For its part, the Association asserts that the proviso in effect should be read as providing: "The credits must be approved in advance by the Superintendent <u>who must approve the credits if they meet all of the other requirements set forth in paragraphs 1, 3, 4, 5, 6, 7, 8 and 9 herein</u>." But again, paragraph 2 does not state this.

Since this part of the contract does not expressly spell out what discretion, if any, the District Superintendent has under this language, and since the contract does not elsewhere specifically address this issue, I find that Article VII, Section F, (2), is ambiguous on its face and that it is necessary to consider parol evidence to ascertain its meaning.

Turning first to the practice that has been followed under this language, Innis stated that he denied credit reimbursement to teachers Joann Boettcher, Becki Swanson, Tom Mueller, Nora Kanzenbach, Glen VanderVelden (twice), Ann Sonkowski and David LeBrun when they sought approval for various courses. (District Exhibit 11). He said he denied one course because VanderVelden could only receive reimbursement for nine credits rather than the 12 credits he requested; that he denied LeBrun's course, called "Tweeners", which dealt with inter-generational issues because it "wasn't relevant" to his work as a technology education teacher; that he denied technology and education teacher VanderVelden's request for a course on storytelling because it was not relevant; that he denied Sonkowski's request to take a Methods Labs course because it was not relevant; that he denied Kanzenbach's request to take a High Level Wellness course because it "did not mention anything about children"; that he denied music teacher Mueller's request for a science course because "I just didn't see the fit . . ."; that he denied language arts teacher Swanson's request for the Health and Nutrition course because there was "No match, you know"; that he denied elementary teacher Baumgarten's request to take a weight reduction course because "it was more an individual, not about how it's going to apply to the classroom. . ."; that he did not recall why he denied Boettcher's request to take a business workshop; and that all were denied pursuant to the discretion he has under Article VII, Section F(2).

If the Association were aware of these denials, there would be merit to the District's claim that Innis' "past history regarding credit reimbursement supports the District's interpretation of Article VII, Section F." But to find a binding past practice, it is necessary for there to be "mutuality" between the parties – i.e., that the practice be so well-known and open that it represents a tacit recognition and acceptance of whatever is being done. That is why "past practice" has been defined as "a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action." (*The Common Law of the Workplace: The Views of Arbitrators*, St. Antoine, Ed. (BNA, 1998), pp. 81-82. Here, there was never any such "understanding of the parties" or mutuality because chief negotiator Engel and the grievants testified without contradiction that they were unaware of any courses ever being previously denied. Absent that "understanding of the parties", there was no mutuality or past practice. See too, *How Arbitration Works*, Elkouri and Elkouri, pp. 632-633 (BNA, 5th Ed., 1997), where the need for mutuality is addressed.

That leaves bargaining history as the other parol evidence tool. Since the District did not rebut chief negotiator Engle's testimony that then-District Superintendent Hansen agreed in the 1986 negotiations that all courses had to be approved if they met the other contractual criteria, and since what is said across the bargaining table often represents the best way of interpreting ambiguous contract language and what the parties meant when they agreed to it, Article VII, Section F, (2), must be interpreted pursuant to the understanding reached between the parties in 1986 - i.e., that the District's superintendent must automatically approve all requests for graduate credits if they otherwise meet the requirements of Article VII, Section F, (1), (3), (4), (5), (6), (7), (8) and (9). (That is true not only here, but also for all other requests that might be made in the future under the current contract language.) By failing to do so here, Innis violated the contract when he denied approval for the Health and Nutrition course and when he denied reimbursement to those grievants who were entitled to the $60 a credit provided under the contract.

In so ruling, I find no merit to Innis' claim that he denied approval in part because the grievants did not supply him with enough information. Thus, the record establishes that: (1), he approved the identical course in about 1995, thereby showing that he already must have had some knowledge about the course and how it could be used in the classroom; (2), he never returned grievant Van Lieshout's telephone message, thereby showing that he was not really interested in talking to her about the course; (3), he had the opportunity to learn more about the course when he spoke to grievant Day; (4), he denied the grievant's requests for course approval before he asked for additional information; and (5), he still insisted at the hearing -- even after the grievants gave their detailed testimony and even after Dr. McEvilly gave his detailed explanation as to how his course could be integrated into the classroom (which I find highly credible) -- that he still did not have enough information to determine whether the course should be approved.

Lastly, the District claims that arbitral law supports its position because other cases hold that a school district retains the discretion to either approve or disapprove credit reimbursement. See NORWAY-RAYMOND JT. SCHOOL DISTRICT NO. 7, MA-5791 (Gallagher, 7/90); COLEMAN SCHOOL DISTRICT, MA-6299 (Schiavoni, 4/91); JOINT SCHOOL DISTRICT OF NEW HOLSTEIN, MA-2529 (Schiavoni, 12/82); HORICON SCHOOL DISTRICT, MA-7850 (McGilligan, 7/94).

None of these cases, however, contained the undisputed bargaining history found here – one showing that former District Superintendent Hansen expressly agreed in the 1986 negotiations that there would be automatic approval for all courses that otherwise met the criteria set forth in Article VII, Section F. Moreover, this case stands in contrast to SCHOOL DISTRICT OF NEW HOLSTEIN, supra, where the school district asserted that the union's negotiators acknowledged in contract negotiations that the superintendent had the explicit right to deny credit reimbursement expenses. Here, the very opposite is true. This case also differs from COLEMAN, supra, which centered on whether an "out-of-field" course should have been approved by the superintendent. "In-field" courses were automatically approved.

In light of the above, it is my

AWARD

1. That the District violated Article VII, Section F, of the contract when it denied the grievants' requests for approval and/or reimbursement for the three (3) credit course entitled "Health and Nutrition".

2. That to rectify that violation of the contract, the District shall immediately make whole the grievants who took the "Health and Nutrition" course by approving that course and/or by reimbursing those grievants who are entitled to the $60 a credit to which they are entitled under the contract.

3. That in order to resolve any questions that may arise over application of this remedy, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 20th day of June, 2000.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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