BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL DISTRICT OF FLORENCE COUNTY

and

FLORENCE EDUCATION ASSOCIATION

Case 20
No. 59948
MA-11469

(Vocational Certification Grievances)

Appearances:

Ms. Carol J. Nelson, Director, and **Ms. Demetrice Davis,** Staff, Northern Tier UniServ-East, P.O. Box 9, Crandon, WI 54520, appearing on behalf of the Florence Education Association, referred to herein as the "Association".

Davis & Kuelthau, S.C., by **Attorney Robert W. Burns**, 200 South Washington Street, Suite 401, P.O. Box 1534, Green Bay, WI 54305-1534, appearing on behalf of the School District of Florence County, referred to herein as the "District".

ARBITRATION AWARD

The Association and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding. This agreement provides for the final and binding arbitration of certain disputes. The Association requested, and the District agreed, that the Wisconsin Employment Relations Commission appoint an arbitrator to hear and decide the instant dispute between the parties. The undersigned, Steve Morrison, was designated as the Arbitrator by the Commission. Hearing was held in, Florence, Wisconsin, on September 6, 2001. The hearing was transcribed. Post hearing briefs were exchanged by November 7, 2001, marking the close of the hearing.

ISSUES

The parties were not able to agree on a statement of the issues to be decided leaving it to the Arbitrator to frame the substantive issues in the award.

The Association would frame the issues as follows:

Did the Florence School District violate the Collective Bargaining Agreement when the District unilaterally removed the vocational certification compensation? If so, what shall be the appropriate remedy?

The District would frame the issue as follows:

Whether the School District of Florence County violated the Collective Bargaining Agreement when it non-renewed or laid-off the extra-duty assignment of vocational certification under the Extra Duties Schedule of said Collective Bargaining Agreement with the Florence Education Association.

The Arbitrator states the issues as follows:

Did the School District of Florence County violate the Parties' Collective Bargaining Agreement when it failed to renew the extra duty assignments of Lynn Wahlstrom, Jan Dooley, Tom Beck and Kay McLain for the 2001-2002 school year?

If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II

BOARD FUNCTIONS

A. The Board, on its own behalf and on behalf of the electors of the District hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the constitution of the State of Wisconsin and of the United States.

B. The Board retains the right to make, [sic] grade, subject and activity assignments.

ARTICLE XIV

EXTRA PAY FOR EXTRA DUTIES

A. Vacancies in extra duties available shall be posted by the administrator.

B. No teacher shall be dismissed or non-renewed from an extra duty except for good and sufficient reason.

C. Each teacher may be assigned up to two (2) involuntary extra-duty [sic] assignments. After accepting these assignments, all extra duties shall be strictly voluntary on the part of the teacher. If this position, after being posted, cannot be filled by a bargaining unit member, the Board may fill this extra-duty [sic] assignment with a non-bargaining unit member for said year.

D. Appendix B shall set forth the amounts for extra duties.

E. If anyone receives an involuntary extra-duty [sic] assignment, he/she must notify the building principle in writing within five (5) days after the assignment has been issued. This will provide a written record of the teacher's notice of the involuntary assignment.

ARTICLE XX

COMPENSATION

A. Appendix A containing the salary schedule is hereby made a part of this agreement.

. . .

C. Appendix B containing the extra-duty [sic] schedule is hereby made a part of this agreement.

. . .

G. Placement on the salary schedule shall be in accordance with the teacher's years of experience, highest degree and the number of credits earned beyond said degree.

. . .

ARTICLE XXV

GENERAL PROVISIONS

A. This agreement may be altered, changed, added to, deleted from or modified only through the voluntary, mutual consent of the parties in written and signed amendment to this agreement.

. . .

APPENDIX B
1997-99 EXTRA DUTIES SCHEDULE

. . .

Vocationally Certified	5.0%

. . .

BACKGROUND

Ms. Lynn Whalstrom, Ms. Jan Dooley, Mr. Tom Beck and Ms. Kay McLain are all State certified teachers employed by the School District of Florence County as teachers and were so employed at the time of the events giving rise to this grievance. In addition to their teaching certificates, each held a vocational certification from the Department of Public Instruction in some specific area of endeavor. Dooley held vocational certification in business and office occupations; McLain in a business and industry related area; Wahlstrom in food service; and the record does not reflect the subject of Beck's vocational certification.

The Master Agreement (hereinafter referred to as the "Contract" or the "Agreement") between the District and the Association provides for teacher compensation under Appendix A, a standard "Lane" and "Step" salary schedule. Compensation under this schedule is based upon the type of university degree earned by the employee (Bachelors or Masters) with increases in salary based upon years of experience and university or college course work completed in addition to the aforementioned degrees.

Teachers may earn additional compensation by performing "extra duties." The Agreement contains a list of these extra duties in Appendix B and this list includes "vocationally certified" as one of the extra duties for which a teacher may receive additional compensation. Each extra duty is compensated either by an hourly wage or by a percentage of the base salary. The hourly wage or percentage of the base compensation for each extra duty is set forth in Appendix B. The additional compensation for "vocationally certified" teachers is 5.0% of the base salary.

Mr. Gerald Gerard is the District's Superintendent. Sometime prior to February 27, 2001, the Florence County School Board, to which Gerard reports, asked that he review potential avenues by which the District might reduce expenses without eliminating teachers or student programs. As a result of his review of the matter, he recommended that the Board not renew the extra duty assignments of the four teachers mentioned above for the 2001-2002 school year. On February 27, 2001, Gerard notified each of the affected teachers of the fact that the Board was considering the non-renewal and a meeting with the Board and the teachers was arranged for March 12, 2001, to discuss the matter.

On March 13, 2001, the teachers were notified by letter of the Board's decision to implement Gerard's proposal pursuant to Article XIV of the Contract. The Board action was taken, according to the letter, due to "Budgetary Considerations." This grievance followed in due course.

POSITIONS OF THE PARTIES

The Association

The Association argues that vocational certification enhances the teacher's skills and knowledge and thus their performance as teachers. It says that vocational certification should be treated differently than "extra duty" beyond the school normal day work hours despite the fact that vocational certification is listed on the extra duty schedule and that the compensation for such certification is set forth therein.

The Association takes the position that the payment of additional compensation for vocational certification, which was negotiated in the 1977-78 bargaining process, is a long standing and established practice which may not be eliminated by the District other than through the bargaining process. The Association equates the vocational certification to a Masters degree and argues that teachers who have such certification are entitled to the additional compensation by virtue of having been certified and not because they perform any "extra duties."

The Association admits that the District may non-renew extra duties set forth in Appendix B but argues that vocational certification is not an extra duty because the teachers do not provide services beyond their normal work day and may not, therefore, be non-renewed.

The Association points to the bargaining history of the parties as evidence that the intent of the parties has always been to provide extra compensation to vocationally certified teachers even though they did not provide extra duty services. Also, says the Association, the past practice of paying the additional compensation for vocational certification proves that "vocational certification has never been an inherent part of an extra-duty notion" and that the benefit of the certification to the District is to improve the teacher's skills and knowledge in the classroom.

The Association argues that compensation for increased education is a common practice in the education industry and that the Agreement recognizes this "conventionalism" in Appendix A and "Article XIX." (The Arbitrator believes the Association is actually referring to Article XX.) Article XX provides for advancement in classification as the employee completes necessary credits toward a higher professional level and that placement on the salary schedule (Appendix A) is to be determined by the teacher's years of experience, the highest degree received and the number of credits earned beyond the degree held. The Association

urges the Arbitrator to view vocational certification in the same light as a degree and to grant additional compensation "for the teacher's enhanced knowledge" in the same way that compensation is provided for under Appendix A and Article XX.

Finally, the Association maintains that the District is unable to lay-off or non-renew a certification because it was awarded by the State, not by the District. It also says that the term "layoff" does not apply to these Grievants because they are all still fully employed by the District. The sum and substance of this argument *seems* to be that by complying with the substantive due process portions of Sec. 118.22, Wis. Stats., (relating to the notice and opportunity to be heard provisions regarding the dismissal of teachers) in the process of non-renewing the certification compensation here, the District somehow erred sufficiently so as to cause this grievance to be sustained.

The District

The District argues that it has, and had, the contractual authority to non-renew the Greivants' extra duty compensation for three reasons: first, because Wis. Stats., Sec. 120.12, gives the Board the authority over the "possession, care, control and management of the property and affairs of the School District;" second, because of the language found in Article II – Board Functions of the Master Agreement; and third, because of the language found in Article XIV – Extra Pay For Extra Duties. This authority, says the District, is tempered only by the provision in Article XIV which provides that the non-renewal be for "good and sufficient reason." The District reminds the Arbitrator of the well established doctrine that the clear meaning of an agreement will not be supplanted by meaning given to it by an arbitrator.

The District argues that the Board had "good and sufficient reason," as contemplated by Article XIV, for non-renewing these Grievants' extra duty assignments. It says that the Board, acting under fiscal pressures, undertook to eliminate expenses in a way that would not adversely affect the student programs or result in the layoff of teachers. It conducted a "thorough and comprehensive" evaluation of its expenses following which evaluation it concluded that the elimination of the vocational certification extra duty compensation would most efficiently meet its goals. Once having established this "good and sufficient reason," the District argues that it had the right to non-renew the compensation.

In further support of its action, the District points to other extra duty assignments which have heretofore not been renewed or left vacant. The Association's failure to grieve these actions in the past, argues the District, evidences the fact that the Association's understanding of this issue is consistent with the District's and that this failure can be considered by the Arbitrator in determining the intent of the parties regarding certain language. In this regard, the District further argues that the Association's failure to object in the past amounts to an acquiescence in the actions of the District and constitutes a waiver of the right to object now.

The District maintains that the Arbitrator may not substitute his judgment for that of the District. Referring to Article XXV, which provides that the contract "may be altered, changed, added to, deleted from or modified only through the voluntary, mutual consent of the parties in written and signed amendment," and recognizing that the "responsibility for evaluating the District's financial condition and capabilities must be left to the Board" the District asserts that this Arbitrator may not alter the contract by substituting his judgment for that of the District.

The District does not agree that vocational certification should be treated like, or equated to, a Master's degree. It argues that the contract is clear on the point that the two are to be treated differently and that the parties intended that to be so. The Master's degree is specifically referenced in Appendix A, the salary schedule, and the vocational certification is specifically referenced in Appendix B, the extra duty schedule. As further evidence of this disparate treatment, the extra duty schedule is subject to Article XIV whereas Appendix A is not. This is a substantive difference, claims the District, because it results in two different manners in which Association members are compensated for having a Master's degree and being vocationally certified.

Finally, the District argues that if the Association is to prevail, the Arbitrator must grant vocational certification a status it had not achieved at the bargaining table. This result would violate the rule against securing something through grievance arbitration which a party was unable to achieve through bargaining as well as the provisions of Article XXV of the contract.

Reply Briefs

The Association

In its reply, the Association says that the vocational certification was placed on the Extra Duties Schedule, Appendix B, "as a matter of convenience" (presumably referring to the convenience of the parties as they drafted the agreement). It argues that vocational certification is not an "extra duty" at all, but simply "helped the Grievants meet their obligation" (presumably referring to their obligation to teach). The Association points out that "extra duties concerning vocational certification compensation do not exist" and that because there are no extra duties coupled with vocational certification the compensation must have been intended by the parties as compensation strictly for the status of having attained vocational certification.

The Association also argues that the District's failure to object to the payment of compensation for vocational certification is "incontestable evidence" of the parties' meeting of the minds on the issue that compensation was paid for the *certification itself,* not for extra duties. It concludes by observing that "this case is about the agreed upon compensation for vocational certification" not about extra duty assignments.

The District

The District argues in reply that the Association failed to demonstrate that the relevant contract provisions relating to vocational certification compensation were ambiguous and, consequently, the Association's arguments based upon past practice, industry practice and bargaining history are irrelevant. In support of this argument, it points to this arbitrator's ruling barring the introduction of bargaining history relative to Appendix B in light of the Arbitrator's view that, at that point in the hearing, there was no evidence that the relevant contract provisions were ambiguous.

The District argues that vocational certification is an extra duty under the terms of the contract and that the inclusion of it in Appendix B shows the clear intent of the parties that it be treated as such. Because it is included in Appendix B, says the District, it is subject to the terms of Article XIV – Extra Pay For Extra Duties which give the District the right to "non-renew" it.

The District poses the question that if one assumes, without deciding, that vocational certification *is not* an extra duty, then what is it? It argues that the Arbitrator does not have the authority to move it elsewhere in the contract, or to call it something else, because that would be tantamount to re-writing the contract and contrary to the provisions contained in Article XXV thereof.

The District concludes with a brief reference to its argument that it had good and sufficient reason for it's actions in this matter and asks the Arbitrator to deny the grievance.

DISCUSSION

The underlying facts are not in dispute. The controversy here surrounds the treatment of compensation for vocational certification and an analysis of the contractual provisions therefor.

The contract contains an appendix, Appendix B, entitled "1997 – 99 EXTRA DUTIES SCHEDULE." This appendix appears in the contract for one purpose and one purpose only: to set forth a listing of certain activities which constitute "extra duties" of the teaching staff and the compensation to be paid for each. One of the items listed in Appendix B as an extra duty is "Vocationally Certified." The compensation for this entry is set forth as "5%." This appendix has been a part of this contract, in one form or another, since 1977 and has included the "vocationally certified" entry since that time. It is this document which sets forth the compensation for the performance of each of the activities or entries appearing therein, including "vocationally certified."

There are two references to Appendix B in the contract. Article XIV entitled EXTRA PAY FOR EXTRA DUTIES, provides, *inter alia,* that Appendix B shall set forth the

compensation for extra duty and that no teacher shall be dismissed or non-renewed from extra duty for other than good and sufficient reason. Article XX entitled COMPENSATION, provides for the inclusion of Appendix B in the contract.

The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. RILEY STOKER CORP., 7 LA 764, 767 (PLATT, 1947). To the greatest extent possible, the Arbitrator must ascertain and give effect to the parties' mutual intent. That intent is expressed in the contractual language, and the disputed portions must be read in light of the entire agreement. HEMLOCK PUB. SCH., 83 LA 474, 477 (DOBRY, 1984).

The record in this case makes it quite clear to the undersigned that the parties' intent with regard to the compensation and treatment of vocational certification is now, and has always been, at least since 1977, to treat it as though it were an extra duty. The Association argues that there are no real extra duties, per se, attached to the certification and hence it should be considered to be in some other category. That other category, argues the Association, is one akin to a Master's degree whereby a vocationally certified teacher would be paid an additional compensation simply because he or she has attained it. The difficulty with this argument is twofold. First, the parties clearly did not intend to treat vocational certification like a Master's degree. If they had, they would have placed a reference to the certification in Appendix A, that portion of the contract which specifically sets forth the step and lane grid compensation schedule based upon years of experience and level of professional degree held (i.e. Bachelor degree or Masters degree). In the alternative, the parties could have drafted language placing the vocational certification in a separate category altogether with separate compensatory treatment set forth. They did not do either. They placed it in the list of extra duties found in Appendix B thereby subjecting it to the same treatment as all other items found therein. Second, in order for me to accomplish the result the Association seeks it would be necessary for me to move the vocational certification from the list in Appendix B and put it somewhere else. This course of action presents two problems. In the first instance, this would require me to re-write the terms of the contract which I am not authorized to do, and, second, I have no idea where I would place it if I had the authority. As I have said, it is clear that the parties intended to treat vocational certification in the same way as all other extra duties and for me to unilaterally modify that intent would render that part of the contract language meaningless. "It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect." JOHN DEERE TRACTOR CO., 5 LA 631, 632 (UPDEGRAFF, 1946). Also see RUSSELL, BURDSALL AND WARD CORP., 84 LA 373 (DUFF, 1985); MARITIME SERVICE COMMITTEE, INC., 49 LA 557, 562-63 (SCHREIBER, 1967).

The Association's argument that because the payment of additional compensation for the vocational certification is a long standing and established practice and, hence, may not be eliminated by the District, misses the mark in two respects. First, the contract provides not only for the payment of this compensation, but also for the District's right to *discontinue* that payment for good and sufficient reason. Second, it presumes that past practice may alter the meaning of otherwise clear and unequivocal language of the contract in the absence of any evidence that the parties had agreed to such a modification. To allow the past practices alleged herein to prevent the District from exercising the rights given to it by the clear and unambiguous language in the instant dispute, as the Association suggests, would result in the *de facto* rewriting of the parties' contract and that is not the job of the Arbitrator. If the language of the agreement is clear and unequivocal, past practice will not vitiate it unless there is mutual accord of the parties that they have intentionally modified their contract and that the practice reflects their new agreement. See METRO TRANSIT AUTH., 94 LA 349, 352 (RICHARD, 1990). This record does not contain any evidence that this was the case. "A practice . . . based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is a past practice but rather to the agreement in which it is based. . . . A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice." FORD MOTOR CORP., 19 LA 237, 241-242 (SCHULMAN, 1952).

In the absence of ambiguous contract language evidence of bargaining history or industry practice is likewise irrelevant. See Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 508, (citations omitted) and UNIVERSAL STUDIO TOUR, 93 LA 1, 3 (GENTILE, 1989).

Regarding the Association's argument that the District is unable to "lay-off" or "non-renew" the Grievants from extra duty assignments, the contract specifically and clearly provides for such a right in Article XIV, Paragraph B. Its right to non-renew an extra duty assignment is restricted only by the duty to do so with "good and sufficient reason." The Association does not deny that the District had such good and sufficient reason nor does the record reflect otherwise.

The Association references the District's compliance with the notice requirements of Wis. Stats., Sec. 118.22, as relating to the dismissal of teachers but does not argue that the District's actions in this regard tainted the non-renewal in this case. The Arbitrator simply notes that the record reflects that the District complied with the notice requirements of the statute but does not decide the issue of whether or not it had a duty to do so.

The Arbitrator is not impressed with the Association's argument that the vocational certification was placed on the extra duties schedule "as a matter of convenience" and that the vocational certification "helped the Grievants meet their obligation" to teach. As for

convenience, placing the vocational certification in Schedule A versus Schedule B would have been just as convenient if that had truly been the intent of the parties. As for helping the teachers meet their obligations, the District does not *require* teachers to obtain vocational certification. The testimony of Lynn Wahlstrom, and the documentary evidence associated with it, was not persuasive in this regard. The District *does* require that teachers be certified to teach. The fact that some teachers are willing to obtain industry experience through the vocational certification process is commendable and should be encouraged and these teachers should be lauded for having done so. If the Association and the District are able to come to a meeting of the minds at the bargaining table as to a step/lane manner for providing compensation for the certification then they can modify this contract to so provide, but to provide for that modification through the grievance process is not appropriate.

Finally, the Association's argument that the District's failure to object to vocational certification compensation payments in the past is "incontestable evidence" of the parties' meeting of the minds is curious. In the past, the District had a contractual obligation to make those payments. It had that obligation up until the moment in time that it exercised its contractual right to forego them for "good and sufficient reason." The contractual provisions, as I have stated above, are clear in this regard. It is the clear and unambiguous meaning of the contract provisions which establish the intent of the parties in this case, not the fact that one (or both) of the parties met its (or their) contractual obligations.

In light of the above, it is my

AWARD

The District did not violate the parties' collective bargaining agreement when it failed to renew the extra-duty assignments of Lynn Wahlstrom, Jan Dooley, Tom Beck and Kay McLain for the 2001-2002 school year.

Dated at Wausau, Wisconsin, this 8th day of January, 2002.

Steve Morrison /s/

Steve Morrison, Arbitrator

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