

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MENOMINEE TEACHERS EDUCATION ASSOCIATION
and
MENOMINEE INDIAN SCHOOL DISTRICT

Case 46
No. 61185
MA-11839

Appearances:

Mr. David A. Campshure, UniServ Director, United Northeast Educators, appearing on behalf of the Association.

Mr. Robert W. Burns, Davis & Kuelthau, S.C., Attorneys at Law, appearing on behalf of the District.

ARBITRATION AWARD

The Association and Employer named above are parties to a 1999-2001 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned as an arbitrator in a dispute involving the dates of pay. The undersigned was appointed and held a hearing on September 26, 2002, in Keshena, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties filed briefs and reply briefs by November 29, 2002.

ISSUE

The parties did not agree on the framing of the issue. The Arbitrator frames the issue as follows:

Did the District violate the collective bargaining agreement when it failed to pay bargaining unit employees on August 30, 2002? If so, what is the appropriate remedy?

BACKGROUND

The facts are not in dispute. The District pays teachers every two weeks, pursuant to Article X, Section D, which simply states: "Teachers will be paid every two (2) weeks." The dispute follows the 1999-2001 collective bargaining agreement and a successor was not in place at the time of the hearing, but the 1999-2001 contract provides in Article XVIII, Section A, that the provisions of that agreement shall continue until a successor agreement is reached. Bargaining unit members received paychecks on August 2nd and August 16th of 2002 but did not get a paycheck on August 30th. They got their next paycheck on September 13th.

Anticipating a problem with a later date to start school, the District's Assistant Bookkeeper, Esther Schutt, sent a letter on August 8, 2001, to the Unions to notify them about the problem. The letter states:

This state statute (referring to Sec. 118.045) currently reads as follows: (1) Except as provided in subs. (2) and (3), beginning in the year 2000, no public school may commence the school term until September 1. Subsection (3) A school board may commence the school term before September 1 in any school year if it holds a public hearing on the issue and adopts a resolution to that effect in that school year.

The state legislature is considering eliminating Subsection (3). If this happens, our district would be forced to start school no earlier than September 1, by the start of the 2002-2003 school year.

This will cause an issue to arise with payroll for school year employees. For employees who chose to be paid over 12 months, their normal pay scheduled for the upcoming school year will be their first check on August 31, 2001 and their last check (of 26 checks) on August 16, 2002.

With school beginning September 3, 2002, the first payday of the 2002-2003 school year would be on September 13, 2002. This would mean there would be no pay check on August 30, 2002 for school year employees, unless action would be taken immediately to resolve this.

Our suggestion would be that with the authorization of your union members, we would extend the checks for the 2001-2002 school year by dividing the annual contract by 27 pay periods rather than 26, to cover the August 30, 2002. This would mean that the bi-weekly amounts would be less, however there would be no lapse in the bi-weekly pay schedule.

Please forward this to your union members and give a recommendation back to the Business Office no later than August 21st so we have time to make adjustments for the August 31st payroll.

Schutt stated that in the past, teachers had usually started around August 20th or so. With the later start due to the State law change, they would start about seven days later than past years. The District was looking at work performed up to August 23rd for payroll purposes, and teachers were not reporting until August 28th. There was no work performed prior to the cutoff period for the payroll in order to make the late August paycheck. If a teacher left the District and resigned before the first in-service day, he or she would not be entitled to any pay – which has happened about two or three times in the last eight years. The District was able to pay those who actually came to work for the school year by skipping the August 30th paycheck and delaying it to September 13th. However, there were no teachers that started in-service and then quit. By going to the September pay date, the District handled the payroll in the same fashion as in previous years where employees started service before the payroll was issued. The payroll was consistent with the way it had been handled in the past.

The Association voted down the proposal for 27 paychecks of lesser amounts than 26 paychecks and filed a grievance in October of 2001, to try to resolve the issue before it happened. The Association's grievance chair, Jennifer Szprejda, noted that the teachers are usually paid the last paycheck for the year in the middle of August, and the first paycheck of the new year is typically paid at the end of August.

For the school year of 2002-2003, the teachers had in-service on August 28, 29 and 30 of 2002. Students started school on the following Tuesday, September 3rd. The first paycheck of 2002-2003 was made on Friday, September 13th. The last paycheck for the school year of 2002-2003 will be made on August 29, 2003.

School will start on September 2, 2003, and the District plans to pay the first paycheck of the 2003-2004 year on September 12, 2003. Teachers who report for in-service will be working before they have received all of their pay for the previous school year.

THE PARTIES' POSITIONS

The Association

The Association asserts that the District was not required to deviate from the every two week pay schedule, though it claimed it was forced to move the payroll because State law mandated that the school term start after September 1 beginning in 2002. The statute, § 118.045, Wis. Stats., allows employees to begin work before September 1st, and it does not address the payroll practices of a school district.

Teachers reported for in-service on August 28, 2002, for the 2002-2003 school year. The District's statement that it would be paying teachers before they performed any work is therefore inaccurate. And the teachers will complete their 188-day obligation in June but still have five paychecks remaining. Article XVIII, Section C, states that if any part of the

collective bargaining agreement is held to be invalid by law, the parties will enter into immediate negotiations for the purpose of arriving at a mutually satisfactory replacement for such article or part. Thus, even if the District were required to alter the pay school, it would have to bargain any such change with the Association. But no contract provision was invalidated by law.

The Association contends that it is irrelevant that it refused to have the salary spread over 27 pay periods. There were 26 bi-weekly periods between August 31, 2001, and August 16, 2002. This was not one of the occasional instances in which there were 27 bi-weekly periods within a 12-month period.

The contract language is clear and unambiguous, the Association maintains. Article X, Section D, states that teachers will be paid every two weeks. When the District did not pay the payroll on August 30, 2002, it violated the collective bargaining agreement. There is no room to interpret the clear language of this contract. As a remedy, the Association asks that the District make its members whole by issuing a paycheck to replace the one they should have received on August 30, 2002.

The District

The District submits that management has the right to determine when the payroll period commences. The school calendar is tied directly with the payroll. In the past, the first check has always been made on the first payday of the year after teachers have worked at least one full week. For example, teachers attended in-service on August 21, 2001, for the 2001-02 school year. Students started school on August 23, 2001. Teachers received their first paycheck on Friday, August 31, 2002, over a week after they started teaching. Because the commencement of services was altered by action of the State, the corresponding pay periods were adjusted to fit the school schedule. In-service began for the 2002-03 school year on August 28, 2002, and ran through Friday, August 30th. Instruction for students started on September 3, 2002. The Association claims that teachers should have received their first paycheck on August 30, 2002, but it was impossible to pay teachers on the 30th. Friday payroll needs to be entered into the computer system and completed by Wednesday of that same week. The District could not possibly obtain new staff information or make changes to existing staff records by August 30th. As Schutt testified, they have problems getting new employees set up for deductions, withholding and changes for current employees that come in.

Also, the District argues that teachers have never been paid for services they have not performed. The District was not obligated to resume payments until services commenced for the next school year. There was no obligation for the District to issue paychecks on August 30th when in fact teachers did not perform any services before August 23rd. Paying for services not rendered would create problems, such as recouping wages paid to employee who decided to modify or terminate their contract prior to the start of or during the first couple of

weeks of school. The Association also questioned why the District did not pay teachers on the next available Friday – September 6th. The September 13th payroll correlates with the District’s bi-weekly pay schedule for all employees, and it is a sound business decision to process payroll for 102 teachers at the same time as the payroll is administered for the remaining staff at the District.

The District asserts that the Association is estopped from seeking relief because it rejected the option of receiving a check on August 30th. The support staff bargaining unit opted for the choice of 27 paychecks rather than 26. Had the Association opted for their paychecks to be spread over 27 weeks, they would have received a check on August 30th.

By contract, the District has the right to determine the methods, means and personnel by which school systems operations are to be conducted. The commencement of services was altered by the State, and the District adjusted the pay periods to correspond to the change in the law. The District continues to pay teachers on a two-week basis, and there is no contract violation. Management has the authority to make new or revise existing rules provided they are reasonable and/or do not conflict with the contract language. There is nothing in the contract that requires the District to make bi-weekly payments on a specific date. Teachers have been and continue to be paid on a bi-weekly basis to the full extent of their contracted amount. Therefore, the grievance should be denied.

In Reply, the Association

The Association replies to the District arguments by stating that there is nothing in the record to support the District’s statement that the initial payment for each new school year has always been on the first payday after teachers worked at least one full week. The District provided no evidence that it ever deviated from the every two-week payroll schedule called for in the contract.

The Association objects to the District’s argument that it has the right to determine when the payroll period commences. The District is asking the Arbitrator to ignore plain contract language and change Article X, Section D, to read: “Teachers will be paid ever two weeks, commencing each school year one week after the teachers have worked at least one full week.” Moreover, it was not impossible to have a payday on August 30th, it was merely inconvenient.

While the District contends that it cannot pay teachers prior to performing work, teachers pay a penalty if they sever employment with the District after July 1st of any year. So teachers are required to pay if they leave before performing work but the District is not required to pay them until after they perform work. Further, teachers already would have worked three full days of in-service if the payroll had been issued on August 30th. As of September 13th, teachers worked 13 days or 6.91% of their contract. On that first payday,

they received 1/26th or 3.85% of their annual pay, or 1/22nd and 4.54% if they so elected. When teachers completed their 188-day obligation in June, they still have about five paychecks remaining. Therefore, the District's aversion to issuing a payroll until a full week of work has been performed amounts to a double standard, asserts the Association.

The Association also takes issue with the District's argument that the Association was estopped from grieving the matter because it rejected the District's proposal to pay 2001-2002 salaries in 27 pay periods. The calendar contained 26 two-week pay periods, and the 27th was entirely a creation of the District. The rejection of the proposal did not constitute a waiver of the clear contract language. Furthermore, the District had no obligation to alter the payroll scheduled because of the State's actions. The District states that there is nothing in the contract which states payroll is to begin on a specific week, but once Article X, Section D, was included in the contract, the District had a duty to issue payroll every two weeks until otherwise negotiated.

In Reply, the District

The District takes issue with the Association's contention that payroll should continue on a two-week basis, no matter when or why teachers commence in-service or instruction. The issue is not that simple. The District did not have an "extraordinary" reason to start the school term before September 1st under State law, and despite the Association's belief, the timing of commencement of teaching services is crucial to the outcome of this case. The fact is that the law changed and the District was required to conform to that change. There is nothing in the contract, which specifically states when paychecks are to be issued. What if the law required school districts to start school on October 1st? Would the Association argue that teachers would be entitled to be paid for the entire month of September? The District does not believe the language carries such a promise. The Association is basically arguing that the language reads: "Teachers are to be *continually* paid every two weeks." Teachers are to be paid for services rendered for the entire year, and they will be. The timing of the payment is strictly tied to the commencement of those services.

DISCUSSION

Both parties argue that the Arbitrator would have to add words to Article X, Section D, in order for the opposing party to prevail in this case. I disagree. Article X, Section D, is as plain and clear as any contract language can be. It states: "Teachers will be paid every two weeks." There is nothing ambiguous about that, nothing that needs to be added to it. The Association is correct in this case. There should not have been any break in the two-week payroll schedule, as the break in that schedule would clearly violate Article X, Section D. While the District asserts that the Association wants the sentence to read: "Teachers are to be *continually* paid every two weeks," the two-week mandate means the same thing – they get

paid every two weeks, no break in the action. I agree with the Association that the District's interpretation would mean adding something to the language of Article X in order to tie it to the start of the school year or the commencement of services.

While the District argues that the first payroll of the school year should be tied to the commencement of services, the contract says nothing about that. It may be logical, but the parties were in a hiatus period with no successor contract in place at the beginning of the school year for 2002-2003. The District does not dispute the Association's point that Article XVIII, Section A, requires that the provisions of the Agreement continue until a successor agreement is reached. The Agreement contains the clear mandate in Article X, Section D, that teachers will be paid every two weeks. Moreover, the District was aware of that obligation and continued the two-week payroll for the prior school year of 2001-2002. While the District argues that the contract does not contain a starting date for paying every two weeks, the parties were already a year into the hiatus period where paychecks were paid every two weeks. The District could not suddenly take a break from that schedule.

The claim that the District had to change the payroll date due to the change in State law is rejected. The law did not deal with pay dates, and while the District believes that payroll should start after teachers teach for awhile, the contract does not call for that. The law did not invalidate anything in the contract. It may have made it more difficult – from a bookkeeping perspective – but it did nothing to change the payroll.

The District claims it would be difficult to get all the information needed to issue a payroll when teachers have not started working. The Arbitrator is confident that the District can figure out how to manage its own business in order to meet its contractual payroll obligations. Although the District has concerns about teachers leaving the District and having to recover a paycheck already issued to those teachers, it has not shown this to have been a hardship in the past. It only speculates that those teachers who are paid before starting to teach and who then resign would not voluntarily return money they didn't earn. Hardly says much for integrity.

In conclusion, I find that the District was contractually obligated to continue paying teachers every two weeks under Article X, Section D, and that its failure to do so by skipping the August 30, 2002 payroll violates the contract. A remedy will be ordered accordingly.

AWARD

The grievance is sustained.

The District violated the collective bargaining agreement, specifically Article X, Section D, when it failed to pay bargaining unit employees on August 30, 2002. The District is ordered to pay bargaining unit employees for the paycheck missed on that date as soon as feasible. The Arbitrator will hold jurisdiction until February 21, 2003, for the sole purpose of resolving any disputes over the scope and application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 23rd day of December, 2002.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator