BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

CHIPPEWA FALLS FEDERATION OF TEACHERS, LOCAL 1907, WFT, AFT, AFL-CIO

and

CHIPPEWA FALLS AREA UNIFIED SCHOOL DISTRICT

Case 128
No. 60242
MA-11564

(Summer School Grievance)

Appearances:

Shneidman, Hawks & Ehlke, by **Attorney Timothy E. Hawks,** 700 West Michigan Avenue, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney James M. Ward**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the District.

SUPPLEMENTAL ARBITRATION AWARD

On June 20, 2002, the undersigned issued an award subsequent to a hearing in the above captioned matter, providing, in pertinent part:

> The District violated Article VIII, Section C., Paragraph 2 of the collective bargaining agreement when it employed members of the bargaining unit as teaching assistants at the rate of $15 per hour during the summer school program in the summer of 2001. Therefore, the District shall make all such employees whole according to the provisions of Article VIII, Section C., Paragraph 2.
>
> The undersigned will retain jurisdiction over this matter for a period of 30 days after entry of the Award to address any issues arising regarding the implementation of the remedy.

Subsequent to issuance of the award, a question was raised as to implementation of the award in that the District did not compensate five of the teaching assistants hired in the summer of 2001 according to the terms of the award. The five teaching assistants – Dave Likar, Carol LeDuc, Emily Jessen, Amanda Braden and Heather Kurth, although all certified teachers, were not regular members of the District's faculty. Likar and LeDuc were retired teachers, Jessen was a long-term substitute and Braden and Kurth were teachers in another school district, who were hire by the District for the summer session. The District believes these teachers are not covered under the collective bargaining agreement and, therefore, are not entitled to the remedy. The Union believes the teachers are covered under the terms of the contract and are entitled to the remedy. This Supplemental Award is being issued to resolve the conflict.

PERTINENT CONTRACT LANGUAGE

ARTICLE VIII

Salary and Teacher Welfare

. . .

Section C. – Extended Employment

. . .

2. Summer School
   a. Teachers on the staff shall be given first preference for summer teaching based on their training and experience in the areas offered. In the event of equal training and experience, system seniority prevails. Staff for summer school shall be offered a contract for such employment as early as commitments can be made. Contracts shall be written and state salary, teaching assignments, duration and the number of hours taught daily.
   b. Teachers employed to teach summer school shall be paid a minimum amount according to the following formula: The fraction of the normal teaching day times 1/188 of the contracted salary for the previous semester times the number of summer school days. (The above formula shall be applied to teachers not under contract; i.e., experience, degree and additional credits shall determine the position on the salary schedule). Each approximately 50 minute period taught shall constitute 1/6 of a day. The Fourth of July shall be considered as a paid legal holiday.
   c. Teachers shall be notified of existing and expected vacancies in the summer school program by May 1 of each year and of appointment to the summer school no later than June 1.
   d. Appointment to summer school positions shall be made for a period of one (1) summer.

OTHER RELEVANT LANGUAGE

ARTICLE I

Recognition and Scope

Section A. Recognition

The Board recognizes the Federation as the sole and exclusive bargaining representative for all certified teachers employed by the Chippewa Falls Area School district, excluding supervisors, confidential personnel and substitute teachers. All employees for whom the Federation bargains shall hereinafter be referred to as teachers.

POSITIONS OF THE PARTIES

The Union

The Union asserts that all the teaching assistants were covered by the collective bargaining agreement and should have been paid according to the terms of the award. The Arbitrator's award required payment to all teaching assistants who worked for the District in Summer, 2001. Dave Likar, Carol LeDuc, Emily Jessen, Amanda Braden and Heather Kurth all qualify under this definition.

All the listed persons are certified teachers who were hired as teaching assistants in Summer, 2001. Although none were regular employees of the District during the school year, all were covered by the collective bargaining agreement. The recognition clause includes "all teachers employed by the Chippewa Falls Area School District . . ." as members of the bargaining unit. Further, Article VIII, Section 2, Paragraph b, which sets out the formula for compensating summer school teachers, specifically provides for payment of teachers not under contract. Thus, even though the named Grievants were not employed by the District as teachers during the school year, they were provided for and covered for summer school purposes under the agreement. The language of the contract covering the Grievants is clear and should be interpreted according to its plain meaning. According to that language, the Grievants are entitled to be paid a per diem which assumes placement on the contractual grid according to their experience, degree and additional credits and then applies the formula applicable to other teachers on the regular faculty. The District failed to do this and should be required to do so.

The District

The District asserts that the requested remedy goes beyond the scope of the stipulated issue in the arbitration. That issue merely asked whether the District violated the contract ". . . when it employed members of the bargaining unit as teaching assistants at the rate of $15

per hour . . ." The Union's argument is based on an overbroad interpretation of the recognition clause that assumes that all certified teachers employed by the District, without limitation, are considered members of the bargaining unit. Taken to its logical extreme, this definition would cover certified teachers hired as short-term substitutes, as well as those hired as teachers aides. The complications arising from such a construction make such an interpretation unreasonable.

The District also claims surprise as a result of the Union's argument. Nothing within the framework of the stipulated issue puts the District on notice as to the breadth of the Union's claim. If the Union wants now to come forward and seek redress for theses persons, it should bear the burden of having raised the issue in a clear and timely fashion, which it did not. The omission prejudiced the District because, had there been advance notice of the Union's position, the District could have produced evidence at the hearing bearing on how non-staff teachers have been dealt with in the past. As it was, no such opportunity was given. Thus, the Arbitrator is left to speculate as to the purpose for which the language in Article VIII, Section 2, Paragraph b, was added to the contract and who it was meant to cover.

Under the circumstances, therefore, the Arbitrator should adopt a narrow interpretation of the stipulated issue and not expand upon it. Numerous arbitrators have held that once an issue is stipulated to by the parties, an arbitrator should not expand the inquiry (citations omitted*)*. The award itself restricts its scope to members of the bargaining unit, suggesting that the Arbitrator also adopted a narrow view of the issue, confining the award to only teaching assistants who were otherwise regularly employed by the District. The Arbitrator should not expand that interpretation now.

DISCUSSION

I note at the outset that, as the District points out, the stipulated issue does not raise the issue of whether all the teaching assistants were covered by the collective bargaining agreement. The record also does not contain substantial evidence on this point, but is largely devoted to the principal question of whether the persons in question were, in fact, working as teachers notwithstanding their designation as assistants. I do not find, however, that this indicates subterfuge on the part of the Union. Rather, I view it as a breakdown in communication. It appears that the Union from the outset considered all the assistants to be covered by the agreement based on the contract language and assumed the District agreed. Put another way, it did not consider the question to be disputed and so did not raise it. The District, for its part did nothing to disabuse the Union of this impression. I do not mean to suggest that the District had the burden of raising this issue in the first instance and failed to do so. I do find, however, that the transcript and post-hearing briefs do reflect the fact that the Union considered itself to be asserting the claims of all 13 teaching assistants and the District did not contest this at the time. Again, I do not suggest that this was deliberate on the

District's part, only that at the time of hearing, neither party had reason to believe the question of eligibility to be disputed and so it did not receive the attention from either side that it might have otherwise.

I also decline the District's request to circumscribe the issue so as to eliminate consideration of this question. As framed by the parties, the issue in the arbitration was:

> Did the District violate Article VIII, Section C, Paragraph 2 of the collective bargaining agreement when it employed members of the bargaining unit as teaching assistants at the rate of $15 per hour during the summer school program in the summer of 2001?
>
> If so, what is the appropriate remedy?

As framed, the issue assumes mutual agreement on the meaning of the term "members of the bargaining unit." The raising of this question after the issuance of the award, however, shows that there is no such understanding. Thus, a determination of who is covered under this grievance award falls both within the scope of the issue and the Arbitrator's authority.

In considering the Union's position, it is my view that an interpretation of the recognition clause that includes any certified teacher employed by the District under any circumstances within the bargaining unit is overbroad and does not comport with the intention of the parties in incorporating this language. As the District points out, such a construction would create numerous problems in interpreting and applying several different provisions of the contract. Among other things, it would create confusion over the status of certified teachers employed as aides or in other capacities, who would thus arguably be covered by other collective bargaining agreements, as well. It would also create some possibly interesting permutations regarding teachers, such as some in question here, who are otherwise employed by other Districts during the regular school year. Thus, I do not adopt the broad definition of "bargaining unit member" prayed for by the Union under the recognition clause.

This does not, however, end the inquiry. As pointed out by the Union, the language of Article VIII, Section C, Paragraph 2, specifically provides for summer school teachers who are not under contract. This paragraph sets out a formula for determining the contract rate for summer school teachers using a daily fraction of their contracted salary for the previous semester as the baseline for their summer school duties. The provision anticipates, however, that some teachers will not fit into this formula because they were not under contract the previous semester and so have no established contract rate to base their summer school compensation upon. For such teachers a contract rate is established by using their teaching experience, degree and additional credits to determine where they would have been on the schedule had they been under contract and then imputing that salary level to them. The Union maintains that this language was specifically intended to cover teachers such as those at issue herein. The District argues that the evidence on this point is, at best, inconclusive and that the Union, therefore, has failed to make its case. I disagree.

The specific language at issue states:

> The above formula *shall be applied to teachers not under contract;* i.e., experience, degree and additional credits shall determine the position on the salary schedule. (Emphasis added.)

In my view, and absent evidence to the contrary, the language is clear. It provides that certified teachers who are employed to teach summer school, but who are not part of the District's faculty during the regular school year, and thus not under contract, will be compensated as if they were. This would include all the persons at issue here, whether retired, regularly employed by other Districts or employed in other capacities. For whatever reason, the parties at some time in the past agreed to extend the cloak of the collective bargaining agreement over these employees for this limited purpose and so the Union is likewise empowered, and perhaps obligated, to assert their claims under this section of the contract. If this were not the case, these individuals would have no recourse against the District for failure to honor this provision. I find, therefore, that these individuals, though not technically bargaining unit members under the recognition clause, are protected by the collective bargaining agreement and that the Union properly asserted their claims along with those of the Grievants who are regular certified teachers within the District.

Based upon the foregoing and the record as a whole, therefore, I hereby make and issue the following

SUPPLEMENTAL AWARD

Dave Likar, Carol LeDuc, Emily Jessen, Amanda Braden and Heather Kurth are covered by the arbitration award issued in this matter on June 20, 2002. The District is, therefore, ordered to compensate them according to the formula set forth in Article VIII, Section C, Paragraph 2 of the collective bargaining agreement for their services as summer school teachers in the summer of 2001.

Dated at Fond du Lac, Wisconsin, this 31st day of October, 2003.

John R. Emery /s/
John R. Emery, Arbitrator

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