

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FALL CREEK SCHOOL DISTRICT

and

WEST CENTRAL EDUCATION ASSOCIATION

Case 24
No. 66898
MA-13676

(Lost Prep Time/Substitution Grievance)

Appearances:

Brett J. Pickerign, Executive Director, West Central Education Association, 105 - 21st Street North, Menomonie, Wisconsin 54751, on behalf of the West Central Education Association..

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Stephen L. Weld**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54202-1030, on behalf of the Fall Creek School District.

ARBITRATION AWARD

The West Central Education Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Fall Creek School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned, Steve Morrison, of the Commission's staff, was designated to arbitrate the dispute. A hearing was held before the undersigned on September 24, 2007, in Fall Creek, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by November 10, 2007. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to stipulate to the issue to be decided by the Arbitrator.

The Association states the issue thus:

Did the District violate the Collective Bargaining Agreement and/or past practice when it ceased paying teachers pursuant to Article VII-A(4) when teachers continue to supervise their own students at activities scheduled during time periods where their students are assigned to a specials teacher? And if so, what is the appropriate remedy?

The District states the issue thus:

Did the District violate Article VII, Section A, Subsection 4 of the Collective Bargaining Agreement when it chose not to provide extra pay to three teachers for attending the Halloween Parade and Veteran's Day Observance? If so, what is the remedy?

The Arbitrator adopts the issue as stated by the Association with one change:

Did the District violate the Collective Bargaining Agreement and/or a *binding* past practice when it ceased paying teachers pursuant to Article VII-A(4) when teachers continue to supervise their own students at activities scheduled during time periods where their students are assigned to a specials teacher? And if so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISION

ARTICLE VII - WORKING CONDITIONS

A. Teacher Assignment

...

4. If any school teacher is absent the principal may perform his/her teaching duties. A substitute teacher will be hired if possible to replace absent teachers. If a teacher is requested to substitute, he/she shall be paid \$8.00 per class if thirty (30) minutes or less, and \$16.00 for any class over thirty (30) minutes.

B. Teaching Load

1. The normal teaching load for all full-time teachers in the school system shall include 120 minutes of preparation time each day. Preparation time can be averaged on a weekly basis using the guarantee of 120 minutes per day x number of days in the week, but

must include a minimum of 90 minutes of preparation time each day. Counseling, music, and full-time library, are the only exceptions to this policy.

In the Elementary School, release time due to music, Phy. Ed., etc., shall be considered as preparation time. Any teaching position assigned 6 or more periods per day at the Middle or High School, is a full-time position.

Preparation time is time during which teachers are not assigned teaching or supervision duties. In the elementary building, the time from 8:00 to 8:30 a.m. is not preparation time if teachers are assigned to their rooms and responsible for the students in the room.

...

3. Teachers, when assigned, may teach or supervise a seventh period in a seven period day, or seven or eight periods in an eight period day. A teacher so assigned will be paid extra as follows:

a. Preparation time between 450 and 599 minutes per week:

- 1/8 additional salary if lost preparation time is due to an additional teaching assignment during an eight period day;
- 1/16 additional salary if lost preparation time is due to an additional supervising assignment during and eight period day;

b. Preparation time below 450 minutes per week:

- 1/4 additional salary if lost preparation time is due to an additional teaching assignment;
- 3/16 additional salary if lost preparation time is due to an additional teaching assignment;

...

F. School Day

A normal school day shall be from 8 a.m. to 4 p.m. or 7:30 a.m. to 3:30 p.m. . . .

G. Extra Pay for Extra Work

Teachers may be assigned to and expected to participate in advising and supervising all activities without extra compensation except those activities enumerated on the schedule set forth as Appendix B, a copy of which is attached hereto and made a part thereof. (Sic)

. . .

BACKGROUND

The operative facts here are not in dispute. The Grievants, Jane Borofka, Kris Jaenke and Mark Grossinger, are all 4th grade teachers employed by the District. Each works an eight-hour work schedule which begins at either 7:30 a.m. or 8:00 a.m. and ends at either 3:30 p.m. or 4:00 p.m. At 1:35 each day each of the Grievants turn their classes over to a specialist who teaches phy. ed., music, art or library for the rest of the day. As a general rule the students, once passed from the teacher to the specialist, are then passed directly from one specialist to the other until the end of the student's school day. The Grievants have that time, i.e. from 1:35 p.m. until the end of their day, as prep time.

In October and November, 2006, two special events were scheduled during a portion of the day which would otherwise be spent with the specialists. On October 31, 2006 a Halloween parade was to take place between 2:15 p.m. and 3:00 p.m. and on November 10, 2006 a Veteran's Day observance was to take place between 1:30 p.m. and 2:00 p.m. On both of these occasions the Grievants each escorted their respective students to these two events and supervised them during the events. They then escorted the students back to their classrooms after the events had concluded. After the Veteran's Day observance, the specialist teachers resumed teaching their respective classes.

On November 10, 2006 each of the Grievants filed a request for extra pay for the time spent at the above two events. In the case of Borofka and Jaenke, they requested the pay specifically for "loss of prep" time. Grossinger did not designate the reason for his extra pay request. All three requested pay in the amount of \$8.00 for the thirty minute Veteran's Day observance event and \$16.00 for the forty-five minute Halloween Parade. These payments were initially approved by Elementary School Principal Gayle Holte and subsequently disapproved by District Administrator Craig Hitchens on the grounds that the Grievants had not fallen below the contractual "prep time" allotment and on the grounds that none of the Grievants were contractually entitled to substitute pay. The Administrators denial of the extra pay request resulted in the

present grievance which was advanced through the contractual procedural steps and is now appropriately before the Arbitrator.

THE PARTIES' POSITIONS

The Association

The Contract language specifically states that if a teacher is requested to substitute, he/she shall be paid \$8.00 per class if thirty minutes or less, and \$16.00 for any class over thirty minutes. The language is clear and sets the rate for substitutions. The students did not get turned over to the specialist teachers on the dates in question and so the Grievants were assigned to supervise the students during that period of time. They filled out the appropriate forms for extra pay and the pay was approved by their Principal, as it had been in the past for such occasions. These facts, along with the contractual provision relating to substitution pay, are determinative of this case.

Basic rules of contract construction demonstrates that the District was wrong in denying these claims. For example, one rule of contract construction is that the ordinary or plain meaning of words should be used in favor of overly specific, technical or limiting definitions. The District seeks to create ambiguity in the language by ignoring the basic definition and ordinarily accepted meanings of the words 'absent' and 'substitute'. Regarding the 'prep time' issue, this is either a canard or a misunderstanding of the request for extra pay since 'prep time' is not relevant to the collection of extra pay under Article VII-A(4) of the contract. Sections A and B are not tied to each other. Section A concerns teacher assignments and Section B concerns teaching load. They function independently.

The ordinary meaning of the word absent is "not present; not in company; away; heedless; inattentive to persons present, or to subjects of conversation in company; lacking; non existent." (Citing *Webster's New Twentieth Century Dictionary*, 2nd ed., 1979) Citing the same text, the word substitute means "to act or serve in the place of another: often with for.". The Grievants here were watching the students because the specialist teachers to which the students were assigned were not providing that supervision. They were therefore 'acting in the place' of the specialists who were not 'attentive to the persons' (students) present.

Grievant Borofka testified that she never turned her students over to the specialists teachers at these events and at no time were the specialists engaged in supervising the students. She was providing supervision that was not being provided by the specialists who were assigned to the students at that time. Citing *MENOMONEE INDIAN SCHOOL DISTRICT*, No. 44975 (Gallagher-Dobish, 1991) a teacher may substitute for their own students when they are taking the place of a specialist teacher. A teacher cannot be said to be substituting for themselves when taking the place of a speciality teacher.

Because the language in Article VII-B is more generalized than the language in VII-A, the District may not rely on it to trump the language in A. That attempts to give a priority to general

language over specific language. Such an attempt was rejected in MILWAUKEE BOARD OF SCHOOL DIRECTORS, WERC A/P M-89-96 (Petrie, 1989) and should be rejected here.

Past practice has been to pay these extra wages to teachers for supervising their students at these events. Citing Elkouri and Elkouri, *How Arbitration Works*, 623, 2003, (edition omitted) the Association says “The custom and practice of the parties is the most widely used standard to interpret ambiguous and unclear contract language. It is easy to understand why, as the parties intent is most often manifested in their actions. Accordingly, when faced with ambiguous language, most arbitrators rely exclusively on the parties manifest intent as shown through past practice and custom.” In this case there is no dispute that the past practice has been to pay the teachers for these events. But in this case an interim superintendent, Hitchens, decided to withhold payment because he did not believe the contract provided for such payments and because the teachers were not substituting for anyone. He admitted having no firsthand knowledge of the bargaining history and that his only indication of past practice was consistent with the Association’s position. He asks that his interpretation of the contractual language trump the long standing practice of the parties and, as an interim superintendent, “is not in a place to contradict long time principals and the clear well-established practice of the District.”

Although controversial, there is support for the notion that arbitrators should take into consideration fairness and equity when fashioning a decision and interpreting contract language. Also, where two interpretations are possible, the arbitrator should avoid interpretations that would cause one party to experience a forfeiture. The Arbitrator should consider equity here. The teachers did everything correctly in the instant case. They did not want their students to be left unsupervised and after the events they did what they had always done regarding the request for extra pay. The contract, the past practice, and equity all demand that this grievance be granted.

The District

The contractual provisions regarding lost prep time are not applicable and were not violated. None of the Grievants’ prep time minutes fell below the contractual requirements and even if they had, there is no contractual remedy for payment for lost prep time unless the teacher is teaching or supervising a 7th class period if a 7 period day or an 8th period in an 8 period day and that is not the case here. Further, these teachers were not asked, much less assigned, to take their students to the parade or observance. The Grievants’ requested remedy is based upon the contractual substitution rate of pay acknowledging the lack of a contractual basis for payment for lost prep time.

The contractual provision addressing sub pay was not violated. The contract requires that the teacher being substituted for be absent and that the absent teacher’s teaching duties be performed by the substitute. Borofka testified that the specialists for whom the Grievants claim they were substituting were present, not absent. Association witness Ludwigson, a 25 year middle school teacher with the District, testified that Section A(4) of Article VII applies only when a teacher is “gone” for all or part of the day. Association representative Markwell admitted the Grievants were not substituting for an absent teacher. (Association Exhibit 4 and Joint Exhibit 10)

The Association suggested that the teachers were substituting for themselves but the contract requires the absence of the teacher being substituted for. If the Grievants were absent, they could not also have been present to substitute. Additionally, the Grievants were not engaged in teaching duties as required by the contract. They were providing supervisory duties which the District can require them to do, without extra pay, under Article VII, Section G. The contract, under the substitution section, also provides that a substitute teacher will be hired if possible to replace absent teachers. Ludwigson testified to the standard procedure that is followed when a teacher is absent: if an outside substitute is not hired, the building secretary sends out an e-mail request for an in-house substitute. She then makes the substitute assignment. That procedure was not followed here. If a teacher is requested to substitute then the contract requires the payment of the \$8.00 for thirty minutes or less or \$16.00 for substitutions in excess of thirty minutes. The Grievants were not “requested” to substitute and thus do not meet the contractual requirement for payment.

The District has the right to assign teachers to supervise activities with no extra pay pursuant to Article VII, Section G. This language is not ambiguous. Teachers have an eight hour work day and within that eight hours they can be assigned to, and are expected to, supervise activities without extra pay, even if the contractual prep time standards are not met. The Association acknowledges that the Grievants were supervising, as compared to teaching. In Association Exhibit 4 Markwell states that the Grievants were “asked to supervise students during their prep period” and goes on to request that they be “compensated at the sub rate for the extra supervising that they did.” Also, in Association Exhibit 10, Markwell requests that the District pay the Grievants “at the sub rate for these hours of supervising.” There is no provision in the contract which requires compensation for extra supervision, but there is a clear and specific contractual expectation that the teachers will advise and supervise activities during their workday.

The Association has failed to establish a binding past practice. In order to do so it must prove that “the way of operating must be so frequent and regular and repetitious so as to establish a mutual understanding that the way of operating will continue in the future.” (Citing Elkouri and Elkouri. *How Arbitration Works*, 6th Ed., page 625, citing PPG INDUS., 110 LA 968,969, (Felice, 1998)). The only evidence of past practice here is Borofka’s testimony that, for the past 4 or 5 years she has requested, and received, pay for these events. This testimony is in conflict with the testimony of another Association witness, Ludwigson, an Association bargaining committee member for at least the past 6 years, to the effect that the sub pay provision applies only when a teacher is gone for all or part of the day. So, even within the Association’s own leadership there is no “mutual understanding”, and essential element of a binding past practice. At the 2/27/07 meeting with the Board, the Association cited examples of teachers being paid the sub rate when requested by a principal to substitute for other teachers during their prep time. In each of these examples, however, the teacher being substituted for was in fact absent, appropriately triggering the contractual sub pay provision.

The fact that Elementary Principal Holte initially approved the payments in the past does not establish a binding past practice. When she initially approved the payments she did not review the contract and believed that the teachers would not have asked for the extra pay unless they were entitled to it. Any prior approvals of extra pay for supervising these events were made without

consideration of the relevant contract language and, thus, may not rise to the level of a binding past practice. Citing Elkouri at page 626, the District says that “several arbitrators have noted that errors committed by administrative employees, even when intentionally done, do not alter an established practice or create a new one”. Any practice of providing sub pay for supervising the Halloween Parade and the Veteran’s Day observance was not grounded in the contract and, in fact, there is clear contract language contradicting the alleged past practice. Clear contract language trumps any contradictory past practice.

DISCUSSION

Prep Time Grievance or Substitution Grievance

The parties fundamentally disagree on whether this grievance arises from the denial of extra pay for being assigned supervision duties during the Grievants’ *prep time* period (the District’s position) or the denial of extra pay for providing *substitute teacher* services during this period (the Association’s position) . This distinction is critical because the contractual provisions, on one hand, provide for the payment of substitution services and, on the other hand, do not provide for extra pay for missing prep time. Thus, my initial analysis must focus on this issue. The exhibits in this case are particularly instructive in this endeavor.

Each of the Grievants submitted what the District refers to as an ‘extra pay form’ as the method for requesting the subject pay. The form sets forth the name of the teacher requesting the extra pay, the date of submission of the form, the name of the event attended and the date and start/stop times the event occurred, and the amount of the request for each event. The form is signed by the individual teacher requesting the extra pay and the total amount requested is set forth next to the individual teacher’s signature. The bottom of the form contains a line for the name of the approving authority and the date of the approval. Jeanke and Grossinger’s forms include their work schedules as an attachment, Borofka’s does not. At the outset, I note that the District acknowledges that Principal Holte signed each of the extra pay forms authorizing the requested payments.

Turning first to Borofka’s form (Association Exhibit 2), dated November 10, 2006, under the ‘event’ section she sets forth “Loss of Prep (Halloween Parade) and Vet Day Present.” She claims \$16.00 for the 45 minute Halloween Parade and another \$8.00 for the 30 minute Vet Day Present entry for a total of \$24.00. Nowhere on this form does she refer to services performed as a substitute teacher. Jaenke’s form (Joint Exhibit 11) appears to be a copy of Borofka’s form and, again, refers to “Loss of Prep Time” as the reason for the extra pay and does not refer to services performed as a substitute teacher. Grossinger’s form (Joint Exhibit 12), also dated November 10, 2006, contains entries referring to the Halloween Parade and the Vet Day Present but does not reference “Loss of Prep Time”. His total extra pay request amounts to \$24.00 and, like the other two Grievants, fails to refer to services performed as a substitute teacher.

On December 13, 2006, Sharon Markwell, the Association’s “Personal Rights and Responsibilities” Chairperson, sent a letter to Superintendent Hitchens (Association Exhibit 4) in

response to the Superintendent's denial of the extra pay requests. This letter states in pertinent part:

The teachers were not substituting for an absent teacher, but instead were being asked to supervise students during their prep period. They are asking that they be compensated at the sub rate for the extra supervising that they did. Past practice has been to pay the teachers at this rate for these hours of supervision.

The letter requests a meeting with the Superintendent to discuss the matter.

On January 5, 2007, Superintendent Hitchens sent a letter to Sharon Markwell (Association Exhibit 5) memorializing the discussion the parties had the day before on January 4, 2007. Present at that meeting, according to this letter, were Ms. Markwell and Ms. Ludwigson of the Association and Superintendent Hitchens and Deb Schufletowski with the District. This memorialization stated in pertinent part:

A meeting was held at 3:30 p.m. on Thursday January 4, 2007 to discuss the grievance received on December 18, 2006 under ARTICLE V-GRIEVANCE PROCEDURE concerning a request for pay for alleged lost preparation time, and the request's rejection by the superintendent.

Attending this meeting on behalf of the Association were Sharon Markwell and Nancy Ludwigson. Attending on behalf of the District were Dr, Craig H. Hitchens and Deb Schufletowski.

Following discussion of existing contract provisions, I have reached the following conclusions:

- 1. There was no violation of ARTICLE VII-WORKING CONDITIONS in denying the requests for extra pay.*
- 2. Management re-affirms its right to assign any and all teaching and supervision tasks as agreed under this same ARTICLE VII, Section B, Teaching Load.*

On January 23, 2007, in response to the January 5 Hitchens letter, Markwell sent a letter (Joint Exhibit 10) to the Fall Creek School Board requesting a meeting with the Board to discuss this grievance. This letter states in pertinent part:

The teachers were not substituting for an absent teacher, but instead were being asked to substitute for the specialist that would normally teach the children during that time period. Therefore, it is our position that the teachers were subbing during

their prep time and should be compensated accordingly. Past practice has been to pay the teachers at the sub rate for these hours of supervising.

Finally, on March 21, 2007, following the meeting with the Board as requested in Markwell's letter of January 23, 2007, the Board sent a letter to Markwell (Association Exhibit 7) stating in pertinent part:

At the February 27th meeting the Association contended that the issue had been mis-stated at earlier levels in the grievance process. Specifically, "lost prep time" was no longer the issue but "pay for substituting" was.

The Association contends that the extra compensation was due the three elementary teachers because they had been requested by their principal to take their students to the parade and assembly, thereby substituting for the "specials" teacher.

Examples given by the Association included times when, either as a middle school or high school principal, Mr. Schulner requested the teachers to substitute for other teachers (during prep time). In each of the examples cited, however, the teacher needing the sub was, in fact, absent from his or her assignment.

Consequently, each example cited from the middle school and/or high school seemed to fit the conditions established by the Master Contract, Article VII - WORKING CONDITIONS, A, 4 which states:

"If any school teacher is absent the principal may perform his/her teaching duties. A substitute teacher will be hired if possible to replace absent teachers. If a teacher is requested to substitute, he/she shall be paid \$8.00 per class if thirty (30) minutes or less, and \$16.00 for any class over thirty (30) minutes."

From the above exhibit excerpts one may reasonably conclude that the Grievants were really "supervising" students as opposed to "teaching" them. In order to receive substitute pay, a number of elements must be satisfied and one of them is that the substitute must "teach" in the place of the regular teacher. The evidence clearly shows that these teachers were not teaching, they were supervising. Another element required under the terms of the contract is that the teacher being substituted for must be absent. The record does not support the conclusion that the specialists here were absent. The record, through the testimony of the Association's witness, Ludwigson, establishes that substitutes are used only when a teacher is gone for all or a part of the day (the specialists were not gone for all or part of the day in this case) and that the procedure for hiring a substitute teacher is well established: the secretary sends e-mails to the teachers asking for volunteers to provide substitute services and if a teacher accepts, the secretary then assigns the teacher to substitute for the absent teacher. The Association argues that the teachers here were asked to substitute for the specialists but the record does not support that conclusion. On the

contrary, the record reflects that the well established method for assigning a substitute did not happen in this case and that the Grievants were not “assigned” by anyone to substitute for the specialists nor were they asked to teach the specialists’ classes.

The Association relies on the case of MILWAUKEE BOARD OF SCHOOL DIRECTORS, WERC A/P M-89-96 (Petrie, 1989) and says that the Employer in that case advanced the same argument as the Employer advances here and that such argument was rejected. The Association’s reliance on MILWAUKEE is misplaced. In that case the teachers had been assigned to *teach all or part* of the specialists’ classes and were so assigned because other substitutes were not available. In the words of Arbitrator Petrie:

“While the Employer is correct in its position that elementary school teachers can apparently be assigned to various duties while their classes are receiving instruction from specialty teachers, if they are assigned to teach all or part of a class when the regular teacher is absent they fall within the scope of Part IV, Section B(5) of the agreement.”

Part IV, Section B(5) of the MILWAUKEE agreement is the section relating to substitutes and additional pay for being assigned to teach classes in the absence of the regular or specialist teacher. The MILWAUKEE teachers requested extra pay for teaching a class in the absence of the regular or specialist teacher, not for supervising one. MILWAUKEE supports the line of argument presented by the District here.

Further, Grievant Borofka testified that she and the other teachers’ presence at the events was to *provide supervision* to their own students that was not being provided by the specials teachers. The Association cites MENOMONEE INDIAN SCHOOL DISTRICT, MA-6471 (Gallagher, 10/11/1991) for the proposition that a teacher may act as a substitute for his or her own students. The MENOMONEE case is distinguishable from this case because, in MENOMONEE, the teachers were required to actually *teach* the class for the absent specialist teachers. Arbitrator Gallagher reasoned that because the District contracted to pay the specialist teachers to teach the special classes, and the regular teachers were contracted only to teach regular elementary classes, requiring the regular teachers to teach the special classes constituted extra duty for which they should be paid. Such is not the case here. If it were, the District would have been required to pay the teachers sub pay under Article VII, Section A, (4), a proposition with which the District seems to agree.

For the reasons set forth above, I must reject the Association’s assertion that these teachers were substituting for the specialists in this case and find that they were merely supervising their students during the events in question.

Past Practice

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 work, 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 Association suggests that I essentially ignore Article VII-B, F and G in favor of Article VII-A(4). That argument would make sense if I had accepted the Association's argument that these teachers were acting as substitutes rather than performing supervision duties. If I had, Article VII-A(4) would be the operative contractual language and Article VII-B, F and G would not apply at all. But I have not. I have determined that these teachers were performing supervision duties, and as such, Article VII-B, F and G apply here.

That having been said, a valid and binding past practice of the parties, in this case that teachers be paid the sub *rate* when supervising students during prep time periods, as the Association alleges here, could still result in payment to the teachers under the *payment* provisions of Article VII-4 (even though they were not acting as substitutes) if a binding past practice to that effect exists. However, if the language of the contract 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). I find no ambiguity in the language of Article VII-A(4) or in the language of Article VII-B, F or G. The Association argues, not persuasively, that if we closely scrutinize *Webster's* definitions of the words 'absent' and 'substitute' we can somehow mold the activities of the teachers here to fit within the intent of Article VII-A(4). Where the language is clear, contract construction is not required. The language in this contract is clear. It anticipates the hiring of a substitute teacher in the event a teacher is gone, and it further anticipates that the substitute teacher will teach the class or classes in the absence of the regular teacher. Even if I were to find that the language were ambiguous and resort to past practice as an aid to discover the true intent of the parties, the fact that the District had paid the teachers at the sub rate in the past does not create a *binding* past practice. The District has argued that the Association membership itself is divided relative to the substitution issue. The record fully supports that conclusion and cuts squarely against the existence of a binding past practice since the primary element of mutual understanding or mutual accord is missing. This record does not contain any evidence that there was mutual agreement on this issue. "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). Arbitrator McLaughlin, in PIERCE COUNTY, MA-8316 (1994), re-states the underpinnings of this logic as well as, I believe, it can be stated:

It can perhaps be argued that practice can be a better guide to parties' intent than contract language. Contract language is, however, undeniable evidence of

agreement. Practice is arguable evidence of agreement. Language should not be set aside for a practice in the absence of unmistakable proof of mutual agreement. Enforcing language over practice encourages care in drafting. Enforcing practice over language can serve to encourage litigation over negotiation. (Citations omitted).

The fact that these extra pay forms have been approved in the past does not establish a binding past practice. Principal Holte, the person who initially authorized the payments, testified that she did so without consulting the Collective Bargaining Agreement. She authorized the payments because she believed the teachers would not have submitted them unless they were entitled to the extra pay. Administrative errors cannot create a binding past practice in the face of clear contractual language. The past practice in this case clearly contradicts the plain meaning of the Agreement and if I were to accept the Association's position I would be required to re-write the provisions of that Agreement. I have no such authority.

Consequently, I reject the Association's position regarding the existence of a binding past practice.

Equity and Rational Policy

Finally, the Association argues that equity and rational policy considerations should persuade the Arbitrator to sustain this grievance because to deny it would create a forfeiture. It rightly reminds the Arbitrator that “. . . the law abhors a forfeiture. If an Agreement is susceptible of two constructions, one which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt interpretation that prevents a forfeiture.” And: “In addition to reviewing the various indicia of the intentions of the parties such as past practice, and even arbitral precedents, one arbitrator noted that he could not ‘overlook the equity aspects surrounding (the) grievance . . . which serves to guide him in making for a proper and fair interpretation of the language embodied in (the contract).’ ” (Citing Elkouri & Elkouri, *How Arbitration Works*, 481, (2003) (Edition omitted.)

Because I have determined that this Agreement is not susceptible of two or more constructions, in other words that it is not ambiguous, there is no reason for me to consider equitable or policy considerations here since I do not need guidance in making a proper and fair interpretation of the language. The parties have already done that in negotiations and their intent is clearly set forth in their Agreement. If one of these parties wishes to modify the plain language in this Agreement, they may do so, if at all, through the bargaining process.

In light of the above, it is my

AWARD

The District did not violate the Collective Bargaining Agreement and/or a binding past practice when it ceased paying teachers pursuant to Article VII-A(4) when teachers continue to supervise their own students at activities scheduled during time periods where their students are assigned to a specials teacher.

The grievance is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 8th day of February, 2008.

Steve Morrison /s/

Steve Morrison, Arbitrator

