

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota**

**SIOUX FALLS EDUCATION
ASSOCIATION,**

HF No. 15 G, 2009/10

Petitioner,

v.

DECISION

**SIOUX FALLS SCHOOL
DISTRICT #49-5 and
BOARD OF EDUCATION,**

Respondent.

The Petitioner, the Sioux Falls Education Association (SFEA), filed with the Department of Labor and Regulation, pursuant to SDCL §§ 3-18-1.1 and 3-18-15.2, a Grievance Petition against Respondent, the Sioux Falls School District #49-5 and the Board of Education (District).

A hearing on the above matter was conducted by the Department on December 8, 2010 and April 19 and 20, 2011. Attorney Anne Plooster represents SFEA. Attorney Sue Simons represents District. Both parties have submitted post hearing briefs and the Department being advised fully, hereby makes this Decision.

Background

The School Board of the Sioux Falls School District No. 49-5 and the Sioux Falls Education Association entered into a collective bargaining agreement (Agreement) effective from 2007 to 2013 governing the terms and conditions of certain employees of the School District. The Agreement includes a grievance procedure whereby the covered employees may seek redress for an alleged violation, misinterpretation or inequitable application of the Agreement.

The grievance procedure includes a provision permitting the SFEA to submit a grievance in writing to the Superintendent if, in the judgment of the SFEA, a grievance affects a "group or class of teachers."

This Petition concerns grievances affecting a group or class of teachers. The grievances were filed directly with the Superintendent on September 26, 2008, all of which were

subsequently denied. The grievances were referred to the School Board on November 19, 2008. SFEA filed additional grievances regarding the 2009-10 school year. The grievances were combined and referred to a third-party fact finder on November 9, 2009. A Fact Finder's Report was issued on March 31, 2010. The following six (6) grievances were combined into a single grievance in front of the DLR.

ISSUES

- I . Whether or not for the 2008-09 school year, the District and/or its agents violated, misinterpreted and/or inequitably applied the negotiated agreement by not following Article VI, Section J – Lunchtime Supervision in constructing teaching schedules.
- II . Whether or not for the 2009-10 school year, the District and/or its agents violated, misinterpreted and/or inequitably applied the negotiated agreement by not following Article VI, Section J – Lunchtime Supervision in constructing teaching schedules.
- III . Whether or not for the 2008-09 school year the District and/or its agents violated, misinterpreted, and/or inequitably applied the negotiated agreement by not following Article V, Section A – Teacher Hours in constructing teaching schedules.
- IV . Whether or not for the 2009-10 school year the District and/or its agents violated, misinterpreted, and/or inequitably applied the negotiated agreement by not following Article V, Section A – Teacher Hours in constructing teaching schedules.
- V . Whether or not for the 2008-09 school year the District and/or its agents violated, misinterpreted, and/or inequitably applied the negotiated agreement by not following Article XIII, Section E – Teacher Planning and Preparation in constructing teaching schedules.
- VI . Whether or not for the 2009-010 school year the District and/or its agents violated, misinterpreted, and/or inequitably applied the negotiated agreement by not following Article XIII, Section E – Teacher Planning and Preparation in constructing teaching schedules.

FACTS

1. The Sioux Falls School District No. 49-5 operates 33 public schools, including 24 elementary schools, 5 middle schools, and 4 high schools. It employs approximately 1,600 teachers.
2. The Sioux Falls Education Association is the sole and exclusive representative of the counselors, classroom teachers, Southeast Technical Institute instructors, speech therapists, social workers, school nurses, librarians, psychometrists, psychologists, and non-administrative special education professional staff members.
3. SFEA and the District operate under a Negotiated Agreement effective from July 1, 2007 through June 30, 2013. SFEA is recognized by District as the formal representative for the teachers employed by District, pursuant to SDCL 3-18.
4. In the early part of the 2008-2009 school year, certain middle school teachers approached officers of the SFEA alleging that the planning periods and lunch periods to which they were assigned were not in compliance with the provisions of the Agreement.
5. The complaining teachers alleged that they feared retaliation if they filed individual grievances and requested that the SFEA pursue the matter for them.
6. No individual teachers were identified to the District regarding scheduling issues until the Level 3 Grievance process where an independent fact-finder was hired to investigate the claims of SFEA.
7. The District operates grades 6-9 in a traditional “middle school model” in that a “core” team of teachers share a common group of students. The core classes are math, science, language arts, and social studies. Any other classes are considered “encore” or supporting.
8. Before the 2008-09 school year all classes were the same length of time, 40 minutes.
9. A long-term study was undertaken by District to study the middle school model. Teachers (both core and encore), administrators, and community members, including parents, took part in the multi-year study.
10. The District adopted the recommendation of the committee which was to change the length of the core classes to 54 minutes while leaving the time of encore classes at 40 minutes.
11. The middle school committee specifically took into account the Agreement before making a recommendation.
12. A Memorandum of Understanding was attached to the Agreement when the recommendations were adopted.

13. The MOU states in whole:

Four major tenets of the Middle School Model are as follows:

 - a. Interdisciplinary teaming that establishes a core group of teachers to work with the same group of students. Included in the interdisciplinary teams are common planning times for collaborative planning and student consultation in addition to individual planning time during the school day.
 - b. Advisory programs that consist of a small group of students assigned to a teacher, administrator, or other staff member for regularly scheduled meeting to discuss topics of concern to students.
 - c. Varied instruction that includes (1) integrating learning experiences, addressing students' own questions and focusing upon real life issues relevant to the students; (2) actively engaging students in problem-solving and accommodating individual differences; (3) emphasizing collaboration, cooperation, and community; (4) seeking to develop good people, caring for others, democratic values, and moral sensitivity (NMSA, 1995).
 - d. Exploratory programs that capitalize on the innate curiosity of your adolescents, exposing them to a range of academic, vocational, and recreational subject for career options, community service, enrichments, and enjoyment.
14. The MOU does not change any portion of the Negotiated Agreement. The intent of the MOU is not written into the language of the MOU. The MOU (a) reiterates that core teachers receive planning time. The MOU does not take away the planning time for encore teachers. The MOU does not infer that the encore classes will receive less class time or that this Middle School Model will change the current scheduling practice for encore classes.
15. The time periods for classes in the middle schools changed in the 2008-09 school year. The class periods are uneven.
16. Because of the uneven class periods, the planning periods for encore teachers were broken into segments and placed at times that fit into the school schedule.
17. All full-time core teachers at the middle schools had at least two planning periods in 2008-09 and 2009-10. The encore middle school teachers had at least one planning period in the same years. The planning periods were not necessarily 40 minutes in length. (See Appendix A).
18. Three high school teachers have a 55-minute planning/lunch period. The presumption is that 30 minutes is their unpaid lunch break and 25 minutes is their planning period.
19. The term "period" is not defined in the Negotiated Agreement. The Agreement does not address whether planning periods must be of consecutive or uninterrupted periods of time or how many minutes goes into a "period."

20. The Negotiated Agreement sets out the number of minutes of instructional time for each teacher. The Agreement sets out a change in minutes starting in the 2008-09 school year. All teachers, within all schools, at all grade levels, may be assigned up to 1450 minutes of instructional time per five (5) days of student attendance.
21. Prior to 2008-09 school year, middle school teachers could be scheduled up to 1335 instructional minutes. This increase was 115 minutes or 23 minutes per day.
22. District had historically averaged the number of instructional minutes over both semesters to determine the existence of an instructional overload. This averaging had generally taken place in the high schools and not the middle school.
23. The teachers sign one year contracts with the District. The schedule is set at the time the contracts are presented to the teachers.
24. The Agreement does not address averaging, although it is a longstanding practice at the District's high schools.
25. The evidence presented shows that the teachers with an overload in the first semester were not scheduled for the full 1450 minutes during the second semester. In other words, District averaged the instructional minutes across two semesters to meet the 1450 minute limitation.
26. The SFEA alleged 28 middle school teachers had instructional minute violations without receiving overload pay. The District reviewed the schedules of all 28 and found 1 with an instructional minute violation after averaging over both semesters. The District agreed to make overload payment to that teacher.
27. The school lunch period for each of the four middle schools is approximately 2 hours long. During these lunch periods, some children are in class and some are taking their lunch break.
28. Many encore teachers teach during this two-hour time frame. These teachers are scheduled for a lunch break either before or after the two hour time frame.
29. No teachers came forward to their administrators to make a complaint about when their lunch time was scheduled in 2008-09 or 2009-10.
30. The SFEA claims that teachers were assigned lunch times outside of student lunch times in violation of the Agreement. The grievance claims that teachers must be assigned to lunch times which coincide with student lunch times.
31. The lunchrooms in the middle schools are open for a short period of time beyond when the children are expected to be return to the classrooms. The lunch care workers eat after the children are expected to return to the classroom.

32. There is no evidence that teachers who made complaints to administration were ever retaliated against by the District.
33. Further facts are set out in the following analysis.

ANALYSIS

The Negotiated Agreement was made for a 5 year period; school years 2007-08 to 2012-13. As of the date of the hearing, there are still two years left on the Agreement. After the first year of the Agreement had passed, the District made significant changes to how the Middle Schools operate in regards to scheduling and class times. The Parties attempted to alleviate the potential problems by drafting an MOU which was attached to Agreement, but the MOU did not change the basic language of the Agreement and any specifics contained therein. The Parties did not restart negotiations on these issues as the 5-year contract does not have a reopener provision. The Agreement was drafted to address future changes, such as the workload hours (discussed in Issues III & IV).

Furthermore, no individual teachers came forward to the administration with any complaints or problems. SFEA filed grievances on behalf of some middle school teachers without evidence that these teachers objected to the schedule variances. SFEA did not know the complete list of which teachers were affected by the change until the DLR Hearing. There still is no evidence that all the teachers affected by the changes to the Agreement have objections to the scheduling.

“The law requires public employers to negotiate matters of pay, wages, hours of employment, or other conditions of employment.” *Sisseton Educ. Ass’n v. Sisseton Sch. Dist. No. 54-8*, 516 N.W.2d 301, 303 (S.D. 1994) (citing SDCL 3-18-3). The law regarding contract construction and interpretation is well-settled. The South Dakota Supreme Court recently wrote:

Trade agreements or collective bargaining agreements are contracts under South Dakota law. Contracts negotiated between teachers and public school districts are like any other collective bargaining agreement. Disputes over collective bargaining agreements negotiated between school districts and teachers are settled by application of general contract principles. Disputes over the meaning of terms in teacher contracts are settled by applying general principles of contract law.

When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subjects that it is expected to cover, there is no need to go beyond the four corners of the contract. When the language of the collective bargaining agreement is ambiguous, we may go outside the four corners of the contract to interpret its meaning.

Hanson v. Vermillion Sch. Dist., 2007 S.D. 9, ¶ 27-28, 727 N.W.2d 459, 468 (internal citations and quotes omitted). To determine whether a contract is ambiguous, the Supreme Court gave this opinion, “We only determine a contract to be ambiguous ‘when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the

context of the entire integrated agreement.”” *Arch v. Mid-Dakota Rural Water System*, 2008 S.D. 122, ¶9, 759 N.W.2d 280, 282 (quoting *Pesicka v. Pesicka*, 2000 S.D. 137, ¶10, 618 N.W.2d 725, 727).

Ordinary principles of contract construction provide that: If and when the instrument is found by the court to be ambiguous, then the admission of parol or extrinsic evidence shall be governed by these rules: If the intention of the parties is not clear from the writing, then it is necessary and proper for the court to consider all the circumstances surrounding the execution of the writing and the subsequent acts of the parties.

Lemmon Ed. Assc. v. Lemmon Sch. Dist., 478 N.W.2d 821, 823 (S.D. 1991) (internal quotes omitted). More recently, the Supreme Court wrote:

Ordinarily, parol or extrinsic evidence may not be admitted to vary the terms of a written instrument or to add to or detract from the writing. When the writing is uncertain or ambiguous, however, such evidence is admissible to explain the instrument. In other words, parol evidence is resorted to where the ambiguity may be dispelled to show what the parties meant by what they said but not to show that they meant something other than what they said.

Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc., 2011 S.D. 38, ¶ 13 (internal quotes and citations omitted).

Issues I & II

Article VI, Section J – Lunchtime Supervision

1. The school lunch period shall be considered the time from when the first class is scheduled to begin lunch until the last lunch period is scheduled to end. A teacher’s duty free lunch period shall be during this time.

After the class schedules were set, none of the teachers assigned to a lunch period outside of the children’s lunch periods, came forward to their administration with concerns about their own lunch period. These lunch periods changed for some teachers at the same time that the Middle School Model went into effect in 2008-09. The teachers who taught their classes during the students’ lunch periods received a one-half-hour break immediately following or preceding the students’ lunch period. SFEA points out that during the 2008-09 and the 09-10 school years, 11 and 16 Middle School teachers respectively were scheduled for lunch break outside of the students’ lunch break. Three teachers at Lincoln High school, both in 08-09 and 09-10, were expected to take a lunch break during their 55-minute planning period.

The District has the right to schedule classes and teachers, within the confines of state law and the Negotiated Agreement. However, when District changed to the Middle School Model, the minutes for core class times increased while the encore classes remained the same. The students are scheduled for lunch for about two hours at each of the 5 middle schools. The lunch workers

are scheduled to take their lunch break following the students' lunch. Because of the schedule change some of the encore teachers were scheduled for their half-hour lunch period immediately following the students' lunch period.

The Agreement states when the teachers are to be scheduled for their lunch break; "when the first class is scheduled to begin lunch until the last lunch period is scheduled to end." The "last lunch period" is not necessarily a "class" lunch period, although when the Agreement was written, there was usually no difference. After the middle school class scheduling changed, this became an issue. During the hearing, one teacher did testify that for the two school years previous to this contract, she did not have her lunch period during the students' lunch period. Although the Middle School Model changed some things, it did not change the fact that some teachers are not scheduled for their lunch periods at the same time as the students' lunch period.

There was testimony that indicated the subsection was written by the negotiations team for the 1992 to 1995 agreement because one of the teachers had a medical condition where she needed to eat at certain times of the day. There is also testimony that indicates that the subsection was not followed by the District when scheduling teachers. The original intent of the subsection is different than the past practice. This information is only relevant if the sentence is ambiguous, which it is not.

Within the subsection, the word "class" is not a modifier of the whole sentence. That sentence does not give the teachers the right to have lunch within the students' lunch period. The intent of the 1991 negotiating team may have been to draft that language, but the sentence structure does not reflect that intent.

SFEA's Grievance on Issues I & II are denied.

Issues III & IV

Article V, Section A – Teacher Hours

2. Within the normal duty day, teachers may be assigned instructional time for each five (5) days of student attendance as follows: high school, 1450 minutes; middle school, 1335 minutes; and elementary school 1440 minutes. Effective the 2008-09 school year, within the normal duty day, teachers may be assigned instructional time for each five (5) days of student attendance up to 1450 minutes.

For the high school teachers, the District has always averaged the number of minutes between the two semesters and scheduled appropriately. For instance, if a teacher is scheduled for less than the maximum number of minutes the first semester, that teacher may be scheduled for more than the maximum number of minutes the second semester. This practice is not written down and is not included in the Negotiated Agreement. It is an uncontested past and current practice of the District for the high school.

When the Middle School Model was adopted by the District, the middle school principals also adopted the high school practice of averaging the teachers' number of teaching minutes over the two semesters. SFEA objects to that practice and would like the contract to be interpreted as applying per semester.

A District teacher signs a new teaching contract each year. The contract contains the teacher's class assignments for the entire year. The teacher does not sign a contract for each semester. This practice did not change with the adoption of the Middle School Model.

The Negotiated Agreement does not speak, within the four corners, as to whether teaching minutes are assigned per semester or may be averaged over the yearly contract period. The Agreement is not just for the Middle School, but for all levels of schooling within the District. Because the interpretation this Agreement section is uncertain, past practice may be used to determine the meaning. Past practices are also subject to negotiation and should be included in any future Agreements.

For those reasons, the Grievance involving the teaching minutes is denied, in general. If there are teachers who teach an average of over 1450 minutes for both semesters of a school year, they are entitled to overload payments. The District and SFEA have looked through the contracts of the teachers listed by SFEA and those with an overload for the year have been compensated, or so the District testified.

Issues V & VI

Article XIII – Section E – Teacher Planning and Preparation

2. Middle School (6-8) Each middle school teacher shall be provided not less than one (1) period of individual planning time and one (1) period of team planning time each day of student attendance. Middle school teachers assigned to more than one (1) building shall be allowed 30 minutes (.1 FTE) for travel time between buildings and preparation. All travel time shall be exclusive of the 30 minutes lunch break.

3. High School (9-12) Each high school teacher shall have not less than one (1) period of planning time per day of student attendance. High school teachers assigned to more than one (1) building shall be allowed 30 minutes (.09 FTE) for travel time between buildings and preparation. All travel and preparation time shall be exclusive of the 30 minute lunch break.

There are no full-time encore teachers who receive less than 1 planning period per day. The core teachers, who are part of a team, also have at least one team planning period. The high school teachers named in the grievance also receive at least 1 planning period per day, although it is a 55-minute lunch/planning period. The Negotiated Agreement does not define "period" or "planning period." Admittedly, some of the teachers get less time than others for planning. Some of the teachers have their planning times spread in 11 minutes increments throughout the day. As

some of the teachers that testified said, they can barely get their next class's lesson plan and assignments taken out before that 11 minute planning period is over.

However, the Department's job is not to do equity, but to determine whether the District has violated, misinterpreted, and / or inequitably applied the policies, rules, regulations, or negotiated agreement of the school district. The encore teachers are not part of a team and this change in the middle school model has affected their teaching style. It has also affected some of the encore teachers' morale, workload, and ability to teach in a most effective manner. The District is or should be aware of the negative and positive effects of the "middle school model" and recent scheduling changes.

There is no definition of "period" in the Agreement, and the District is scheduling teachers while giving them a sole planning period as well as a team planning period to those core team members. SFEA's grievance regarding issues V & VI are denied.

In Conclusion, SFEA's grievances are denied. Many of the issues can be or should be addressed in negotiations for any new Negotiated Agreement. The District should be aware of the effect of the changes on the teachers. The teachers can have their concerns addressed more promptly and efficiently by bringing them to the attention of their administration immediately.

District shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within fifteen (15) days from the receipt of this Decision. SFEA shall have fifteen (15) days from the date of receipt of the District's proposed Findings and Conclusions to submit objections thereto or to submit its own proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, the District shall submit such stipulation along with an Order in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 9th day of September, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR

Catherine Duenwald
Administrative Law Judge