ATHENS AREA EDUCATIONAL SUPPORT PROFESSIONAL ASSOCIATION,	:	
	:	Change in Pay Arbitration
Association	:	Grievance No. 14-15-02
- and -	:	
	:	
ATHENS AREA SCHOOL DISTRICT,	:	
	:	
District	:	

OPINION AND AWARD

I. HISTORY OF THE CASE

By letter dated May 6, 2015, the undersigned was notified of my selection by the parties to arbitrate the above grievance. A hearing was held at the District's Administrative Office, 401 West Frederick Street, Athens, Pennsylvania, on July 30, 2015. James T. Rague, Esquire, represented the Association. John G. Audi, Esquire, and Patrick J. Barrett, III, Esquire, served as counsel for the District. , Association President, and , PSEA UniServe Representative, appeared on behalf of the Association. , Business Manager, , Payroll Coordinator, and , Acting Superintendent, appeared on behalf of the District. An additional grievance, No. 14-15-01, titled "Pay Discrepancy Arbitration" was heard in conjunction with the above-captioned matter. Although these grievances are related, a separate Opinion and Award will be issued for each.

Both parties were given a full opportunity to present any testimonial or documentary evidence that they wished. Following the hearing, counsel indicated that they would present their

closing arguments in the form of written briefs. After both briefs were received, the record was closed, and the matter is now before me for final disposition.

II. ISSUES PRESENTED

After a careful consideration of the evidence presented to me at the hearing on July 30, 2015, and the arguments presented by both parties in their post-hearing briefs, the issues before me for consideration are as follows:

1. Did a past practice exist as an implied term of the parties' collective bargaining agreement, allowing members of the bargaining unit to elect to receive their wages over either a nine (9) or twelve (12) month period?

2. If, in fact, a past practice existed as an implied term of the parties' collective bargaining agreement, did the District properly modify or terminate the practice?

If I determine that violations occurred, I am to craft the appropriate remedy.

III. OPINION

Both parties have summarized their positions in a concise and articulate manner. While the legal guidelines to be applied in a non-disciplinary grievance arbitration are well known to counsel, because of the importance of this matter, I would like to briefly highlight some of the basic principles which I will utilize. The grieving party, in a matter involving a contractual interpretation or application, in this case the Association, bears the initial burden of presenting sufficient evidence to prove its contention. Prominent text writers opine that this burden must be supported by a "preponderance of the evidence." The best guideline interpreting "preponderance" is Webster's New International Dictionary, 2nd Ed., which defines the term in part, as follows: "superiority or excess of weight, influence ... an outweighing."

In addition, I also follow the general principle set forth in the famous United States Supreme Court Case, Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), wherein the Court opined that: "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem." Emphasis added.

Arbitrators give words their ordinary and popularly accepted meaning, unless the contract provides otherwise or extrinsic evidence indicates that the parties intended some special colloquial meaning. The party whose understanding of contract wording, which is in accord with the ordinary meaning of that language, is entitled to prevail. Elkouri & Elkouri, supra, pages 448-449. Arbitrators should follow the "plain meaning" principle of collective bargaining agreement interpretation. Elkouri & Elkouri, supra, 627. When one interpretation would lead to a harsh or absurd result, or one which does not make sense, while an alternative interpretation, equally plausible, would lead to a just and reasonable result, the latter interpretation should be used. See Elkouri & Elkouri, supra, 470-471.

The custom or past practice of the parties is the most widely used standard in interpreting ambiguous and/or unclear collective bargaining agreement language. Where a contract is ambiguous or silent concerning a particular matter, the intent of the parties can be ascertained by their actions, when they meet certain well-established criteria. Elkouri & Elkouri in How Arbitration Works, Seventh Edition, referencing numerous arbitration awards, set forth the generally recognized standards used to determine the existence of a past practice, as follows: "In the absence of a written agreement, 'past practice,' to be binding on both Parties, must be (1)

unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties." The authors also opined that a past practice is binding on the parties only when "the circumstances ensure that it has been understood and accepted by both as an implied term of the contract." If, however, clear contract language exists, the weight of arbitrational authority is that "... it trumps past practice." See Sutter Lakeside Hospital, 132 LA 650 (2013).

It is undisputed from the facts that for approximately forty (40) years District employees have been able to elect to have their wages paid over either a nine (9) month period (the school year) or a twelve (12) month period (a calendar year). Based on these undisputed facts, clearly articulated by Association President ' her testimony, I find that a past practice existed in regard to the election, by members of the bargaining unit, to receive their pay over either a nine (9) month or twelve (12) month period. It meets the three-point test articulated by Elkouri & Elkouri, supra. It has been unequivocal, clearly set forth and acted upon over a lengthy period of time. In addition, as noted by the Association in reference to its Exhibit "1," the District, in a memorandum dated October 12, 2012, recognized that the employee in question had made an "election" to receive her pay over a twelve (12) month rather than nine (9) month period.

Although I have determined that a past practice exists, I must now turn to the question of whether the practice has been appropriately terminated by the District. There is a distinct split in arbitrational authority concerning the termination of a past practice. Many arbitrators believe that if the practice involves a basic function of management, it may be unilaterally terminated. If it is a contractually binding practice, it may only be terminated by the parties at the bargaining

table. See Fairweather's Practice and Procedure in Labor Arbitration, 4th Edition, pages 266-268 and Elkouri & Elkouri, 7th Edition, pages 12-14, 12-15, 12-16 and 12-17.

The District has argued that it has the unilateral right to terminate this practice, contending it is a basic management right. I am not convinced that disallowing an election, which has been afforded the members of the bargaining unit for many years, is a right which, under the facts before me, the District may unilaterally exercise. The language cited by the District in its post-hearing brief, that the collective bargaining agreement refers only to "hourly wages," is not the type of clear, unequivocal language which can be utilized to nullify a practice as to how the wages are actually paid. I do not take issue with the detailed rationale set forth by the District and its auditors for eliminating the ability of the Grievants to make the election in question. However, I have before me a lengthy past practice which has become part of the parties' collective bargaining agreement and, therefore, cannot be unilaterally terminated, however valid the reason.

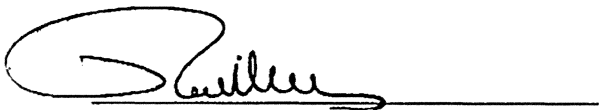
While I have rejected the District's assertion that it could terminate the practice simply by giving notice, I do find that because this practice is filling a contractual void in the parties' collective bargaining agreement, it may be terminated at the end of the agreement by giving due notice of the intent not to carry it over into the successor contract. There is substantial authority to support this interpretation. By notifying the Association President in its letter dated June 10, 2014 (Joint Exhibit 3), the District put the Union on notice of the change in the method in which it would issue its paychecks, that being based on actual hours worked during the payroll period. See also the form letter attached to Joint Exhibit 4, wherein the District notified the individual

employees by letter dated August 13, 2014. In so doing, the District's action was tantamount to giving notice of its intent to discontinue, at the conclusion of the collective bargaining agreement, the practice of allowing employees to elect the time frame over which to be paid their wages. After the District gave notice to the Association that it would no longer agree to the practice, it became necessary for the Association to bargain the practice into the collective bargaining agreement in order for it to be preserved. Unless the parties' new labor contract contains a provision allowing the practice to continue, it is to be considered terminated as of the date the new collective bargaining takes/took effect. To hold otherwise would essentially mean that a practice could never be eliminated once created.

AWARD

The grievance is sustained in accordance with the above Opinion.

Date: December 29, 2015



Richard M. Goldberg, Esquire