PENNSYLVANIA BUREAU OF MEDIATION

In the Matter of the Arbitration Between	
BLOOMSBURG AREA SCHOOL DISTRICT.,	
EMPLOYER	**OPINION**
AND	**AND**
BLOOMSBURG AREA EDUCATION SUPPORT PROFESSIONALS ASSOCIATION, PSEA/NEA,	**AWARD**
UNION	

CASE NO BOM 2017-0118

ARBITRATOR: GERARD G. RESTAINO, MUTUALLY CHOSEN BY THE PARTIES PURSUANT TO THE PROCEDURES OF THE PENNSYLVANIA BUREAU OF MEDIATION

APPEARANCES:

FOR THE EMPLOYER

BENJAMIN PRATT, ESQ.	COUNSEL FOR BOARD
DONALD WHEELER	SUPERINTENDENT OF SCHOOLS

FOR THE UNION

ROBERT CRAVITZ, ESQ.	COUNSEL FOR ASSOCIATION
DONNA CARL	GRIEVANT
JEAN ZELLNER	GRIEVANT
BRIAN STOLZ	PRESIDENT OF ASSOCIATION

PROCEDURAL BACKGROUND

The parties in this dispute are signatories to a Collective Negotiations Agreement (CNA) dated July 1, 2014, through June 30, 2018. The grievance filed by the Bloomsburg Area Education Support Professionals Association, PSEA/NEA, hereinafter referred to as the Association, on behalf of Donna Carl and Jean Zellner, hereinafter referred to as the Grievants, alleges that the Bloomsburg Area School District, hereinafter referred to as Board/District, violated the CNA concerning the above named Grievants.

The grievance was timely processed through the grievance procedure, and a request was made to the Pennsylvania Bureau of Mediation (PA BOM) to submit a panel of arbitrators. On April 13, 2017, the undersigned was appointed Arbitrator.

ISSUE

The parties stipulated to the following issue:

Did the District violate the CNA when Grievants Zellner and Carl, who were promoted, did not receive salary increases? If so, what shall be the remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE II – GENERAL PROVISIONS

Section 2.01 – No Strike/No Lockout

As a condition of the various provisions of this agreement to which the parties have agreed, the Employer pledges that it will not conduct, or cause to be conducted, a lockout during the term of this agreement, and the Association pledges that members of the Association will not engage in a strike (as that term is defined in Act 195, and Article XI-A of the School Code), during the term of this agreement.

Section 2.02 – Savings Clause

Nothing contained herein shall be construed to deny or restrict any employee such rights as he or she may have under the Public School Code of 1949, as amended, or the Public Employee Relations Act (Act 195), or other applicable laws or regulations.

Section 2.05 – Management Rights

The management and control of the School District, including the right to manage and control school properties, policies, structure, curriculum, and standards of education are vested in the Board. The Board has the exclusive right to hire, direct, place, transfer, demote, suspend, reprimand, or discharge any employee consistent with the School Code, an amended from time to time, and other local, state and federal regulations of employment practices and procedures.

The Board will function in agreement with the collective bargaining agreement, the Department of Education Rules and Regulations, the Pennsylvania Public School Code, as amended, and other applicable laws. All powers, rights, and authority vested in this School Board by law, rules, and regulations shall be retained.

ARTICLE III – GRIEVANCE PROCEDURE

Section 3.01 – Definitions

Step 4 – If the grievance is not resolved in Step 3, the aggrieved employee shall refer the grievance to binding arbitration according to Section 903 of Act 195 within thirty (30) days after the decision of the Board.

The decision of the arbitrator shall be final and binding upon the parties. Each case shall be considered on its merits and the collective bargaining agreement shall constitute the base upon which the decision shall be rendered.

The arbitrator shall neither add to, subtract from, nor modify the provisions of the agreement. The arbitrator shall confine himself to the precise issues submitted for arbitration and shall have no authority to determine any other issues not so submitted to him/her.

Grievances involving more than one grievant, but arising under the same circumstances and involving an interpretation or application of the same provision or provisions of the contract may be consolidated.

ARTICLE VII – WAGES

Section 7.01 – Wages

A. *Starting Rates: A $10 increase shall be given in years 2, 3 and 4 of this contract based on starting rates enumerated below.*

Upon ratification, the starting rates for employees in the bargaining unit will be as follows:

Custodians	*$8.40 per hour*
Maintenance	*$8.65 per hour*
Secretaries	*$8.65 per hour*
Head Cooks	*$8.65 per hour*
Cooks	*$8.40 per hour*
Cafeteria Workers	*$8.15 per hour*
Classroom/PCA	
Reading/Library Aides	*$8.65 per hour*
Healthcare Aides (CNA)	*$10.40 per hour*
Healthcare Aide (LPN)	*$12.25 per hour*

Upon ratification of this contract current employees earning less than the above starting rates will receive the increase indicated in Section B or be increased to the starting rate, whichever is greater. The District reserves the right to start new employees at a higher starting rate, based on experience, qualifications, and certification who would be making less than the new employee shall be given an increase up to the starting rate of the new employee.

B. *Wage Increase*

Upon ratification, all employees in the bargaining unit will receive the following hourly increases:

Effective upon ratification	*3% or $.20 per hour, whichever is greater*
Effective July 1, 2015	*2% or $.20 per hour, whichever is greater*
Effective July 1, 2016	*2% or $.20 per hour, whichever is greater*
Effective July 1, 2017	*3% or $.20 per hour, whichever is greater*

Section 7.04 – Temporary Pay for Temporary Change in Position

When a higher employee is absent and a lower level employee is assigned or required by the employer to perform the duties of the higher level, for four (4) hours or more in any work shift, the assigned employee shall receive additional compensation equal to the difference between the starting rates of the two classifications for all hours working in the higher assignment.

ARTICLE IX – INSURANCE BENEFITS

Section 9.01 – Medical Insurance

A. *The Board agrees to pay the full premium, subject to the employee contribution provided in Section C below, required to provide each full-time, twelve-month employee; eligible full time PCA, Health Aides and Cafeteria Personnel working 6 or more hours per day; and those school year employees "grandfathered" from the previous contract and eligible dependents with hospitalization/medical insurance coverage.*

ARTICLE XII – DURATION OF AGREEMENT

This agreement shall become effective on July 1, 2014 except as otherwise indicated, and shall continue in effect until June 30, 2018. It shall automatically be renewed from year to year thereafter unless either party shall notify the other in writing by such time as would permit the party to comply with the collective bargaining schedule established under Act 195 and Act 88. This agreement shall not be extended orally, and it is expressly understood that it shall expire on the date indicated.

***IN WITNESS WHEREOF**, the Association has caused this Agreement to be signed by its President and Secretary and the Board has cause this Agreement to be signed by its President attested by its Secretary on the 15th day of September.*

SUMMARY OF FACTS

The instant matter involves the hourly salary paid to Grievants Zellner and Carl, who are both cafeteria employees. Ms. Zellner has been an employee for at least four (4) years as a food service aide and on November 22, 2016, she was appointed to the position of Middle School cook. The food service aide receives $8.15 per hour and works 4.25 hours per day. Grievant Carl has been

employed at least ten years and on November 22, 2016, she was transferred from the position of the Bloomsburg Middle School cook at a rate of $10.03 per hour for 5.0 hours per day to position of Head Bloomsburg Middle School cook at a rate of $10.03 per hour for 6.5 hours per day.

Both Grievants are insisting that they are entitled to an additional $.25 per hour increase. The record reflects that Grievant Zellner received a $.25 per hour increase for pay periods of November 10 and November 25, 2016. That pay increase of $.25 per hour was subsequently rescinded by the District. The record also reflects that Superintendent Donald Wheeler supported the increase in pay.

On January 3, 2017, there was a work session of the District. Exhibit D-3 is a copy of the Minutes of that meeting. Those Minutes show that Mrs. Everhart, Supervisor for the cafeteria employees, recommended that both Grievants receive a salary increase of $.25 per hour. She further explained that when an employee temporarily filled in for a position with a higher hourly rate, he/she received the additional pay for that time. However, as per the support staff agreement, an employee permanently moving into a higher paying classification would not receive that increase.

Mr. Upton, who was the Business Administrator, is referenced in these Minutes, but because he was no longer an employee of the District and even though these are the official Minutes, any reference to the position that he advanced was not admissible because he was not present at the hearing. Therefore, he was not subject to cross-examination.

The Minutes reflect that the Board Members disagreed that the $.25 per hour increase should be awarded to the two Grievants because the current contract would expire on July 1, 2018, and that this issue should be addressed in the next support staff contract negotiations.

On that same date, Exhibit D-4, which is entitled Correction to Pay Increase for Support Staff: Cafeteria shows the following:

"Recommendation to change wage increase – promotions. It is a recommendation from the Board that if a support staff member is moved into a higher level position and the current hour wage is higher than the starting wage, the promoted employee shall receive additional compensation equal to the difference between the starting rates of the two classifications, which is currently $.25.

This would affect Donna Carl, who was promoted to Head Cook at the Middle School and Jean Zellner, who was promoted to Cook at the Middle School, both in November 2016."

Incorporated within that document are the steps that the District and the Association would be involved in with respect to negotiations.

These are the essential, uncontroverted facts in the matter at bar, and the matter now comes to me for resolution.

POSITIONS OF THE PARTIES

For the District

The District contends that the instant matter is not subject to arbitration because Section 7.04 – Temporary Pay for Temporary Change in Position, is not the fact pattern in evidence. These are not temporary positions; these are permanent positions for the individuals. They are not filling in for anyone who was absent for a short period of time or for a long period of time. They are in

these positions for a ten month period 5.5 hours per week for Grievant Zellner and 6.5 hours per day for Grievant Carl.

The District also contends that the language of the Agreement for cafeteria employees and, in particular, Article VII – Wages, in Section 7.01, references cafeteria workers at $8.15 per hour. Most importantly, there is no reference to an increase of $.25 per hour anywhere in the Agreement that the Grievants are seeking. Additionally, the Grievants did not produce any information to support their alleged past practice that any time someone moved into a higher category position they received $.25 per hour increase.

The District contends that the evidence is clear that the Agreement is devoid of any additional compensation, and the four corners of the Agreement are controlling in the instant matter. There is no specificity in the Agreement for the Arbitrator to find any support for the positions advanced by the Grievants and, in fact, the language of the Agreement precludes the Arbitrator from adding to or modifying any provision of the Agreement.

Accordingly, the District asks that the grievance be denied in its entirety.

For the Association

The Association contends that the District is somewhat correct concerning any reference to the $.25 per hour in the Agreement. But, Section 7.04 must be read in context with fair dealing being implied with each contract. It is improper for the District to move somebody into a higher paying position and not grant them any salary increase. The District is maintaining the prior salaries for both Grievants and ignoring the fact that both grievants have higher responsibilities.

Those higher responsibilities were testified to at the hearing and were not challenged and/or contradicted by the District. In fact, the District appreciates the assistance that these employees provide to the District.

The Association also argues that it is standard that when someone moves into a higher classification of employment, they receive an additional salary increase. Support for this can be found by the fact that the Superintendent testified that he was in favor of the $.25 per hour increase and that he did not send anything to the Grievants telling them that he was in error and the $.25 increase would have to be rescinded. Moreover, the Board of Education rescinded the salary increase, which makes it very difficult for the employees to work with administration when they find out that as the administration agrees with the Association, the Board of Education rescinds that action.

Using the position advanced by the Association and with Grievant Zellner (see Exhibit 2) earning $8.65 per hour, a $.25 per hour increase would be to $8.90 and that would be a yearly increase of $275.00. For Grievant Carl, starting at $10.03 per hour and going to $10.28 per hour would be a yearly increase of $325.00.

Therefore, the Association asks that the grievance be sustained in its entirety.

DISCUSSION AND OPINION

As is typically the case in a grievance which involves the interpretation of a provision of an Agreement, both parties insist that the language is clear and

unambiguous, but they disagree as to the meaning of that clear and unambiguous language.

In the instant matter, there is no specific contractual provision that supports the position of the Association. Therefore, does a past practice offer support for the grievants? A past practice cuts both ways; it can support the District or it can support the Association.

Typically, a past practice is often used to implement a separate enforceable condition of employment never touched upon at any point in the written agreement. It is commonly referred to the silent contract. Quite frankly, every past practice is considered a creature of an employer, and if the employer does not consent, there would be no past practice. The practical administration of an agreement obviously creates a past practice. The parties to an agreement sometimes memorialize past practices within either a maintenance of standards or a past practice provision of that Agreement.

Not reducing a past practice to writing is not necessarily a fatal flaw if it can be demonstrated that the actions of the parties over a period of time have allowed that practice to grow and flourish as a condition of employment.

An established past practice suggests, in action, what the parties to the written agreement intended by a word, a phrase, a clause, and their conduct toward that word, phrase, clause or it is a benefit/working condition not set forth in the Agreement but allowed through supervisory practice. In order for a past practice to be binding, it must meet the following standards:

(1) it must be unequivocal;

(2) it must be regularly and uniformly granted;

(3) it must be clearly enunciated, freely and openly allowed and exist over a reasonable period of time;

(4) it must be accepted and acted upon by the parties themselves through their authorized agents in administering the written agreement; and

(5) it must not vary the express provisions of the agreement.

The Association's reliance upon Section 7.04 is misplaced. That provision clearly and unequivocally establishes,

> *"When a higher level employee is absent and a lower level employee is assigned or required by the Employer to perform the duties of the higher level for four (4) hours or more in any work shift, the assigned employee shall receive additional compensation equal to the difference between the starting rates of the two classifications for all hours working in the higher assignment."*

Unfortunately for the Association, that is not the fact pattern in evidence in the instant matter because both employees accepted the transfer/request to go to a higher paying job. Higher paying jobs are open, they were open and these individuals applied for them and received them. Neither grievant was involuntarily transferred to the new positions; they applied based upon discussions with Ms. Everhart. However, those discussions could not possibly bind the District to a higher salary. That requires direct action by the District and not administration.

The $.25 per hour might very well have been something that had happened in the past; however, the Association could only offer one instance where that had occurred, but that was not acknowledged by the District. The Superintendent could not offer any information as to where that had occurred in

the past, even though he was only employed for a ten (10) month period when this issue arose. Nevertheless, the Superintendent was in support of Ms. Zeller receiving the $.25 per hour increase, but that was not his final decision. Under the terms of the Agreement, and in particular, Section 2.05, the Management Rights clause, that authority vests solely with the Board of Education. The Board denied the continuation of that $.25 per hour increase for grievant Zellner, which started in November of 2016 and was utilized for two pay periods.

The language of the Agreement is the controlling factor in the instant matter unless there is a past practice that can be utilized to show that while the language might be vague, the parties agreed to a specific method to implement that language. Notwithstanding the valiant effort of the Association, there was nothing presented that would offer mitigating factors for the Arbitrator to say that the position advanced by the Board was incorrect, and the $.25 per hour must be awarded to both Grievants. Most importantly, any past practices referenced by The Association would contradict the unambiguous language found in Section 7.04 of the Agreement. .

The basis for the Board's rejection of the $0.25 hourly increase was twofold: 1. It is not in the Agreement; 2. The Board did not want to re-open negotiations because the Agreement expires on June 30, 2018.

The Board's action is in compliance with the Agreement and can only be changed with a modification of the current language found in Section 7.04. I can only make a determination based on the facts in evidence, and I cannot, as per Article III – Grievance Procedure, Section 3.07, Step 4, *"add to, subtract*

AWARD

The Bloomsburg Area School District did not violate the Bloomsburg Area Education Support Professionals Association (PSEA/NEA) Agreement when they denied Grievants Carl and Zellner a $.25 per hour wage increase.

Dated: August 31, 2017

Gerard G. Restaino, Arbitrator

State of Pennsylvania)

County of Wayne) ss:

On this 31st day of August, 2017, before me personally came and appeared GERARD G. RESTAINO to me known to be the person who executed the foregoing document and he duly acknowledged to me that he executed the same.

Judith K. Restaino

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Judith K. Restaino, Notary Public
Lake Twp., Wayne County
My Commission Expires Nov. 10, 2017
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES