IN THE MATTER OF THE ARBITRATION

between

SHAMOKIN AREA SCHOOL DISTRICT

and

THE SHAMOKIN AREA EDUCATION ASSOCIATION

BOM Case No. 2017-0115 – School Calendar

ARBITRATOR: Diana S. Mulligan, mutually selected by the parties in accordance with the rules and regulations of the Pennsylvania Bureau of Mediation.

HEARING: Held on September 13, 2017 in Coal Township, Pennsylvania at which time all parties in interest were afforded the opportunity to examine and cross-examine witnesses and present documentary evidence. The hearing was closed on October 13, 2017 upon the submission of final briefs from the parties.

APPEARANCES: For the School District

Benjamin Pratt, Esq., Advocate
Jim Zack, Superintendent
Chris Venna, School District Administrator

For the Association

Matthew Cravitz, Esq., Advocate
Tammy Glowatski, Association President
Mark McDade, PSEA Uniserv representative

EXHIBITS: Jt #1: Collective Bargaining Agreement
Jt #2: Grievance Packet

A #1: Revised March 3, 2016 Calendar
A #2: 2013-14 Attendance Calendar
A #3: 2014-15 Attendance Calendar
A #4: 2014-15 Revised Attendance Calendar

SD #1: 2015-16 Calendars
SD #2: PDE Memo
SD #3: January 28, 2016 Letter to Cravitz from Michetti
SD #4: January 29, 2016 Letter to Michetti from Herring

ISSUE: Has the Shamokin Area School District (SASD) violated the terms and conditions of the Collective Bargaining Agreement (CBA or Contract) by unilaterally reducing the school year to 185 work days instead of the contractual 186 days, resulting in the loss of one day's pay?

CONTRACT PROVISIONS

ARTICLE XI
TEACHER EMPLOYMENT – HOURS

B. School Calendar

The school calendar shall consist of a maximum of three (3) days beyond the one hundred eighty (180) days, such days to be utilized for pre-school preparation, orientation, in-service days, post-school closing days, for completing reporting requirements and workshops and/or institutes. Effective with the 2007-08 school year, there shall be six (6) days beyond the one hundred and eighty days. Beginning in 2007-08, at least one of the days beyond the one hundred and eighty will be designated as a teacher work day. The teacher work day is for pre-school preparations and classroom work and shall not include meetings, in-service programs or similar events. Such teacher workday must be completed between July 1 and the first in-service day before the start of the regular school year and my be completed in hourly increments with the approval of the principal.

BACKGROUND

The teachers in the SASD engaged in 2 strikes during the 2015-16 school year. The full instructional school year of 180 days would have been completed by June 30, 2016, in accordance with the Pennsylvania School Code but for the occurrence of a snow storm on February 16, 2016 which necessitated the closing of the schools. Thereafter, on June 21, 2016, the SASD revised the school calendar (SD #1, p. 4) to include only 179 teaching days and reduced the teachers' salary by one day. The Shamokin Area Education Association (SAEA) argues that its members were ready, willing and able to complete the contractual 180 days of instruction and that the Contract contains no language permitting a reduction in salary. As a remedy, the SAEA wants the SASD to compensate its members for the lost day plus statutory interest.

FACTS

Tammy Glowatski, first grade teacher at the SASD for 20 years and current SAEA President, testified that the teachers engaged in 2 strikes during the 2015-16 school year. The CBA (Jt #1) provides for "180 days" plus 6 in-service and other work days not involving classroom teaching. However, the teachers worked for a total of only 185 days in 2015-16, 179 of them teaching, when the SASD revised the school calendar after the schools had to be closed one day because of a February snow storm. Ms. Glowatski is aware that the School Code does not allow for instructional days beyond June 30th, making it impossible to teach after that date. However, according to Ms. Glowatski, the CBA does not specifically state how the 180 days is to be used, and the teachers were willing to come in on July 8th to work the 180th day, but the SASD would not permit them to do so. Ms. Glowatski also testified that, in the 2013-15 school years, there were only 178 instructional days on the school calendars (A # 2, 3 & 4), plus 2 Act 80 days on which only teachers were present, but there was no deduction from their salary.

Superintendent Jim Zack testified that the school calendar had to be revised 4 times in 2015-16 because of 2 teacher strikes. The SASD asked the teachers to return early from the second strike (which began on January 20, 2016) since all snow days had already been used and it was likely that another snow storm would occur. It would then not be possible for the SASD to schedule the full 180 days of instruction by June 30th. The teachers refused to do so and the February 16th snow storm necessitated the closing of the schools leaving no possibility of scheduling 180 instructional days. The SASD lost $90,000 in state subsidies as a result of not being able to provide these mandated days. Even though only teachers are present during Act 80 days, the SASD is reimbursed for those days. Although the CBA says nothing about a reduction in salary, Superintendent Zack equates the instant situation with that of a teacher, having exhausted his/her leave, properly receiving no pay for days not worked. He also assumes that the otherwise undefined "180 days" in the CBA refers to the School Code mandate on instructional days. Although there is nothing in the Contract about withholding pay if the teachers work for less than 180 instructional days, he acknowledged it is possible to negotiate no pay for no work, which neither of the parties proposed during negotiations.

In addition to the testimony, the SASD introduced 3 documents which expanded on this testimony. The first (SD #2) is a memorandum from the Pennsylvania Department of Education (PDE) discussing

a "critical date" when the Secretary of Education can initiate injunctive proceedings if a strike threatens the provision of 180 days of instruction. According to the PDE, if the strike went beyond February 4, 2016, the SASD would be unable to complete 180 days of instruction by June 30, 2016.

The next 2 documents in evidence are letters which were exchanged between Attorney Michetti, representing the SASD, and Attorney Cravitz, representing the SAEA (SD #3); and Attorney Michetti and Attorney Charles Herring from the PSEA Legal Division (SD #4). Both refer to a court order by the Honorable Judge Weist issued on September 23, 2015 wherein the Judge, in sub-paragraph 4, stated that the SASD does not have to amend its school calendar. The genesis of mentioning the school calendar in these letters arises because February 8, 2016 and March 25, 2016 were listed as school closing days. According to Atty. Michetti, in its January 20, 2016 memorandum (SD #2), the PDE erroneously calculated the February 4, 2016 return date as the last possible day the teachers could return to complete 180 days of instruction. The alleged error occurred when the PDE used February 8th and March 25th as strike make up days. The SASD had no intention of altering its calendar to hold classes on those days. Atty. Michetti went on to state that the SASD would file a petition to enforce the September 23, 2015 court order if the teachers did not return to work on February 2, 2016. The SAEA disagreed with the SASD's opinion that the court order mandated a return to the classroom on February 2, 2016, stating (SD #4) that Judge Weist's order does not compel the SASD to alter its calendar but neither does it prohibit such amendment.

These letters also discuss the $90,000 per day in state subsidies which the SASD alleges would be lost if the 180 days would not be completed by June 30, 2016. Atty. Herring, in response to this statement in Atty. Michetti's January 28th letter, states, *inter alia,* that, if the SASD elects not to schedule February 8th and March 25th as school days, it would be "...at its own peril." Atty. Herring further states that, if the180 days cannot be scheduled, the SASD does not pay its staff for days not worked, and the District would not lose money if it did not receive the subsidy. The final calendar revision (SD #1, p. 4 and A #1) * show that the SASD did schedule February 8th and March 25th as strike make up days.

*The SAEA's exhibit shows the calendar was revised on March 15th and the SASD's exhibit shows it was revised on June 21st. This discrepancy is immaterial since they are the identical calendars.

DISCUSSION

The facts in the instant case are straightforward and not in dispute. The resolution of the issue presented for this arbitration depends on the interpretation of Article XI of the CBA, decision(s) of the courts and the advisory opinion of another Arbitrator. In addition to the brief testimony, several documents were introduced into evidence by the SASD upon which it partially relies to support its case.

Among these documents are the 2 letters exchanged between Atty. Michetti (cc'd to Atty. Herring) and Atty. Cravitz (SD #3) and Atty. Herring and Atty. Michetti (SD #4). Both letters discuss an amendment to the school calendar in an effort to schedule 180 days of instruction before June 30th and the potential loss of $90,000 in state subsidies if it would be impossible to do so. Of particular interest is the comment made in Atty. Herring's January 29, 2016 to Atty. Michetti. Atty. Herring states that, if the 180 days cannot be completed, the loss of the state monies would be offset by the SASD not having to pay its staff for days not worked. Citing Danville Area Sch. Dist. v. Danville Area Education Assn., 562 Pa 238, 248 (2000), ("[W]hen discerning the intent of the parties, the arbitrator is not confined to the express terms of the collective bargaining agreement." and "Thus, where there is ambiguity, an arbitrator may attempt to discern the intent of the parties...by considering the actions of the parties as evidence of their interpretation of the terms of a collective bargaining agreement."), the SASD concludes that Atty. Herring's letter is "clear and extrinsic proof that the Association acknowledged and agreed" the SASD would not have to pay teachers for days they did not work (Brief, pp. 5 & 6). This argument initially looks very favorable for the SASD except for 2 things: (1) You cannot cross-examine a letter to discover the motive for Atty. Herring's statement and (2) There is no evidence that the statement was intended as an official interpretation of the CBA.

The SAEA argues that the instant case is analogous with Marion Center Area School District v. Marion Center Education Association (Arbitrator Morgan, 2008). In fact, it is almost identical to Marion in that the Marion teachers engaged in 2 strikes, the 180 instructional days could not be completed by the end of the school year and the Marion School District reduced the teachers' compensation for days they did not work. Arbitrator Morgan found in favor of the School district. Although the SAEA ends its discussion of Marion with the Arbitrator's Award, the SASD's brief shows the case was appealed to the Commonwealth Court (Marion Ctr. Area Sch. Dist. v. Marion Ctr. Area Educ. Assn., 982 A.2d 1041

(Pa. Commw. Ct. 2009)). The Court affirmed the Arbitrator's Award because it was rationally derived from the CBA (the "essence test") and not necessarily because the Court agreed with the Award. There are 3 reasons why Arbitrator Morgan's Award does not dictate the outcome of the instant case: (1) Arbitrator's Awards are not precedential; (2) The parties signed off on a new Contract knowing it was not possible that 180 instructional days could be completed yet did not address deduction in salary for days not worked; (3) the Marion contract has additional provisions which are absent from the instant CBA. In Marion, the CBA had provisions for pro-rating salaries for part time employees and paying an hourly rate for employees who worked in excess of the full time contractual rate.

The instant CBA also has no provision for reducing the pay of employees where the only mention of wages is in the salary schedules which are calculated only for annual salaries. According to the SAEA, by not paying the teachers their full annual salary, the SASD unilaterally changed the terms and conditions of the clear language in the CBA (Brief, p. 3) which it is not permitted to do. The SAEA cites 2 court cases to support this argument. In Delaware County v. Delaware County Prison employees Independent Union, 713 A.2d 1135, 1137 (1998), the Court held that "...when the words are clear and unambiguous, the intent is to be gleaned exclusively from the express language of the agreement." (That case involved a CBA which permitted subcontracting, but the Union argued that this provision did not permit the Prison to subcontract the entire work force. The Union appealed the Arbitrator's unfavorable opinion which was upheld by the Court, citing the "essence test.") Delaware County was also cited by the SASD in support of its position. In Nevyas v. Morgan, 921 A.2d 8, 16 (Pa. Super 2007) the Court held that "When construing agreements involving clear and unambiguous terms, this Court need only examine the writing itself to give effect to the parties' understanding...[and] must construe the contract only as written and may not modify the plain meaning under the guise of interpretation."

Both parties submitted cases addressing ambiguity. The SAEA cited Unit Vending Corp. v. Lacas, 190 A.2d 298 (Pa. 1963). In this case, a diner owner contracted with a vending machine company and died before the debt could be satisfied. The Court found, absent language addressing a successor clause, that a reasonable interpretation of this contract is that it ends with the death of one of the parties. This case was presented by the SAEA, as evidenced in the following paragraph of its brief, to show that the Shamokin CBA contains no ambiguities and its plain language allows for no reduction in annual salary.

The SASD's ambiguity case is found in Greater Nanticoke Area Sch. Dist. v. Greater Nanticoke Area Education Assn., 760A.2d 1214 Pa Commw. Ct. (2000) wherein the Court held that the intent of the parties is found in "what the agreement manifestly expressed, not what the parties may have silently intended." Greater Nanticoke cites Delaware County, which was presented by both parties in support of their respective positions, that express language in a CBA takes precedence over the intent of the parties when drafting a Contract.

Although they may cite the same Court cases, the difference in the arguments of both parties is that, according to the SAEA, there is no ambiguity in the clear language which states that the teachers receive an annual salary with no provision for a reduction in salary due to days not worked or not scheduled to be worked. In addition, Ms. Glowatski testified that the teachers were willing to work on July 8, 2016, which would have been the 186th day, but the SASD would not allow them to do so. It was her opinion that the 180 days was not further defined in the CBA leading to the conclusion that the teachers could have worked a total of 186 days without the necessity for reducing their salary.

According to the SASD, the clear language of the CBA requires that the teachers work 186 calendar days and states further that, "...there shall be six (6) days beyond the one hundred and eighty days." While there is no qualifying language in the CBA stating what "days" means, this ambiguity is cleared up by the School Code which requires that there must be "one hundred and eighty days [of instruction] each year." According to the SASD (Brief, p. 3), PA statute defines instructional time as "the time during the school day which is devoted to instruction and activities provided as an integral part of the school program under the direction of certified school employees." Closure due to storms and strikes are not encompassed in this definition. PA statute also requires that the school year can end no later than June 30th (2000 Pa. Laws 16, Sec. 16.1, 1999Pa. SB652). By law, it was impossible for the SASD to schedule an instructional day beyond June 30, 2016. The law takes precedence over any privately negotiated Contract.

AWARD

The instant dispute is between the Shamokin Area School District (SASD) and the Shamokin Area Education Association (SAEA). The issue is whether or not the SASD violated the Collective Bargaining Agreement (CBA) when it reduced the school year by one day with a concomitant reduction in salary. The SASD did not violate the CBA since it was unable to schedule an instructional day beyond June 30, 2016 in accordance with applicable Pennsylvania statutes. The grievance is denied.

SIGNED Diana S. Mulligan DATE Nov. 12, 2017