PENNSYLVANIA BUREAU OF MEDIATION
ARBITRATION BY AGREEMENT OF THE PARTIES
Before
Arbitrator Timothy J Brown, Esquire

Shikellamy Education Support Professional Association, PSEA/NEA	:	
And	:	**BOM Case No. 2019-0489 (Sheena Schaeffer Salary Scale Placement)**
Shikellamy School District	:	

Decision and Award

Appearances:

On behalf of Shikellamy Education Support Professional Association, PSEA/NEA:
Amy H. Marshall, Esquire
PSEA
400 Shiloh Road
State College, PA 16801

On behalf of Shikellamy School District:
Richard B Galtman, Esquire
Levin Legal Group, P.C.
1301 Masons Mill Road
Huntingdon Valley, PA 19006

DECISION

I. Procedural Background

The Shikellamy Education Support Professional Association, PSEA/NEA (referred to as the Association herein) and **Shikellamy School District** (the District) are parties to a collective bargaining agreement (the Agreement or the CBA) with a term on

its face of July 1, 2015 through June 30, 2020 and covering a unit of the District's secretaries, clerical employees and aides. This arbitration arises from a November 14, 2019 grievance filed by the Association asserting that the District improperly placed **Sheena Schaeffer** (Grievant) on the Agreement's salary schedule. The parties were not successful in their efforts to resolve the matter through the formal steps of the Agreement's grievance procedure and selected the undersigned to conduct a hearing on the grievance and render a final and binding arbitration award.

The matter was heard on November 19, 2020 via the Zoom virtual platform due to the world-wide pandemic caused by the COVID 19 virus. All parties were afforded the opportunity for presentation of opening statements, examination and cross-examination of witnesses and the introduction of relevant exhibits. Grievant was present via Zoom for the entire hearing and testified on her own behalf. A transcript of the hearing was taken. Upon the close of the hearing on November 19, 2020, the parties elected to submit written post-hearing briefs, upon the receipt of which by the arbitrator on January 8, 2021, the record was deemed closed.

This Decision and Award is made based upon careful consideration of the entire arbitration record in the matter, including my observations of the demeanor of all witnesses.

II. Issues Presented

The parties stipulated that: (1) there are no procedural bars to the presentation of the matter, (2) the matter is appropriately before the arbitrator, (3) the arbitrator has the authority to render a final and binding decision and award in the matter and (4) the issue or issues to be decided in this arbitration may accurately be stated as follows:

Did the District violate the Collective Bargaining Agreement in regard to placement of Grievant on the salary scale, and if so, what shall be the remedy?

III. Evidence & Findings of Fact

Grievant began employment with the District in November 2017. She was then employed as a 3-hour school cafeteria employee and, as such, was a member of a bargaining unit represented by the Teamsters Union. On or about October 3, 2019 Grievant applied for a position posted by the District for a 6 & ¼ hour Office Aide. By letter from the District's Superintendent dated October 11, 2019, Grievant was informed that; "…you are being transferred from Oaklyn Elementary 3 hr cook, to Beck Elementary 6 ¼ hr Office Aide. You will begin your new duties effective Monday, October 14, 2019."

As a cafeteria employee, Grievant was paid an hourly rate of $11.40. Grievant began working in the Aide position as scheduled on October 14. As of October 14, 2019, Grievant was paid an hourly rate of $12.50. Grievant asserts that her hourly rate should be higher and complains that her rate does not reflect her years of service with the District as required by the plain language of the salary provisions of the Agreement.

The Union filed the instant grievance based upon language in Article VIII of the Agreement which, in part provides:

A. Salary and Wages

Appendix B at the end of this Agreement states the wages for the contract period, July 1, 2015 through June 30, 2020.
Effective July 2015, the hourly rate for employees shall be as follows:

Years of Service	**Hourly Wage-Effective July 1, 2015**
1 (new hires)	$12.50
2	$12.50
3	$15.25
4	$15.60
5	$15.60
6	$16.80
7	$17.15
8	$17.15
9	$18.75
10	$19.10
11+	+$0.45

Individuals hired by the school board prior to March 1 will be placed on Step 2 of the wage scale on the following July 1. Individuals hired March 1 and June 3 will earn starting wage listed for their job category for the ensuing year (July 1 through June 30)

Years of employment for determining entitlement to sick leave and personal/emergency leave days for part-time employees will be consistent with placement on the wage scale.

Wage Scale Freeze effective July 1, 2015
15-16 Employees in their 1st/2nd year - $12.50 – all others will receive $.45 cent raise.
16-17 Employees in their 1st year will receive $12.50 – all others will receive $.45 raise.
17-18 1st year will receive $12.50 – all others will receive $.45 raise.
18-19 1st year will receive $12.50 – all others will receive $.50 raise.
19-20 1st year will receive $12.50 – all others will receive $.55 raise.

The referenced Appendix B sets forth a Salary Scale with years 1 through 11+ listed down the left side of the scale and school years 14-15 through 19-20 listed across the top line, with the corresponding hourly rate in each resulting "cell" of the scale reflecting the amount explained in Article VIII.

Testimony

Grievant testified consistently with the narrative above and also stated that when she completed her paperwork at HR prior to starting the aide job she asked why she was not receiving higher pay due to her years of service with the District, and that in response, the women kind-a looked surprised at her and said something to the effect of; "Oh well, it's because you changed union." When she raised the matter with her new supervisor, the principal of Beck Elementary school, the principal replied he did not know.

Union President Jodell Kovaschetz, testified that based upon the plain language of Article VIII and its reference to "Years of Service," considering that Grievant had already worked two years for the District when she began her aide job, Grievant should have been placed on the scale at step 3 ($15.25 hr.) to reflect that she was in her third year of employment with the District.

Superintendent of Schools Jason Bendle testified that he denied the Union's grievance after inquiring of Superintendent Secretary Beth Ziegler who had 24 years of employment with the District, about 20 of which was a secretary to the superintendent, about the history of the issue. Ziegler reported to him that the District has always considered the "Years of Service" language in the Agreement to refer to the years the employee is in the bargaining unit covered by the Agreement.

Bethanne Zeigler testified that she did advise the superintendent on the grievance. She testified that she had been secretary to the Superintendent and School Board for 21 years, and that prior to working in that position she worked as a library aide

and Special Ed Department access secretary; positions in the Association's bargaining unit. She was president of the Association from 1998 to 2001.

Zeigler explained that there are three bargaining units in the District; one PSEA unit covering teachers, the unit of custodian workers, maintenance workers and food service employees represented by the Teamsters and the unit involved here consisting of secretaries, clericals and aides. She testified that the statement relating to "years of service" to determine an employee's wage rate (although not the chart/scale) has been in the Agreement for as long as she can remember. She testified that the prior bargaining agreement with a 2010 to 2015 effective term (an agreement she identified at the hearing) also had the wage scale in Article VIII, but did not have the Appendix B scale.

Zeigler further testified that the language has always meant years in the bargaining unit. It has always been read that way and, whether during her years as a bargaining unit employee, president of the Association or secretary to the Superintendent and School Board, there has never been a question about it, Zeigler testified. Although the Agreement has changed over the years to include a grid to show wage cells based upon years of service and contract year, the scale has always been described as it is now in Article VIII, referring to the words; "Years of Service." Zeigler testified that over the years, the language has not been raised as an issue in bargaining. Also, during her time in the bargaining unit, as Association president and as secretary to the superintendent and school board, to her knowledge, no one has ever raised an issue with how the language was interpreted, either in a grievance or during bargaining.

Zeigler identified District records showing three examples of employees working in the Teamster bargaining unit who transferred to the secretary/aide bargaining unit and

were not given credit for time worked in the Teamster unit, and one example going the other way. She identified District documents memorializing such Teamsters-unit to secretary/aide unit transfers in 1995, 2012 and 2014. The aide-to-cook example occurred in 2019.

Zeigler also testified that Grievant's pay stubs reflecting the employee's pay following her transfer shows that Grievant was credited for her years of employment with the District for purposes of her sick leave and personal emergency day entitlement. Zeigler could not explain why the employee was credited with such, and deferred to the payroll department.

The 2010 -2015 Bargaining Agreement

The language of Article VIII of the parties prior bargaining agreement covering the period 2010 to 2015, contains the same wage-scale format and "Years of Service" language as the current Agreement. That agreement did not have an Appendix B containing a Salary Scale with hourly wage cells.

IV. Positions of the Parties

The Association

The Association argued that a review of the language of the Agreement shows that "service" can only be a reference to service with the District. Step one of the pay scale in Article VIII includes a notation for "new hires." The District "hires" employees under the terms of the Agreement, the Union does not. The language goes on to explain

that individuals hired prior to March 1 of a year, are then place on step 2 the following July; again, the Association argues, directly referencing time with the District. There is no reference in the Agreement that can be interpreted as aligning years of service to years spent in the bargaining unit.

Additionally, Grievant's credit for sick leave and personal emergency days reflects the District's understanding that the years of service language in the Agreement is meant to be interpreted as years of working for the District. The District's admission in this regard is not swept away by the claim that it is a mere payroll function.

The parties have not attempted to change the years-of-service language at any time during bargaining and there is no evidence that the District has previously applied the language to mean years-in-the-bargaining-unit during the time since 2015 when the salary schedule was added to the Agreement. Zeigler's testimony that the District has been consistent in interpreting the years of service language since 1994 is not credible. The documents identified by Zeigler do not reference any step placement and no such salary schedule existed at the time. Zeigler's testimony was an effort to create a narrative that does not exist. There is no long standing practice established by the evidence. At best, the evidence may show that the District has violated the Agreement in the past with other employees, but the issue has never been brought to arbitration.

"Years of Service" in the Agreement refers to service with the District. The grievance should be granted and Grievant should be made whole for the period she has not been appropriately placed on the salary schedule.

The District

The District argued that the grievance is without merit and that, in any event, no remedy is warranted. The Association has the burden of establishing the violation of Article VIII it alleges in its grievance. As a result, to prevail, the Association must prove that its interpretation of the words "years of service" is the interpretation mutually intended by the parties. It has failed to meet its burden.

As reflected by the positions of the parties, the words at issue are susceptible to more than one meaning. As a result, other considerations may be examined to determine the mutual intent of the parties, including the conduct of the parties, context and logic, as well as the wording of the Agreement itself.

The Association, failed to offer any evidence of intent of the parties, and failed to identify even a single instance where the language at issue was applied in accordance with its argued intended meaning. In contrast, the District presented evidence that the language referencing years of service in Article VIII has been consistently applied for many years to mean years in the bargaining unit, and, according to District witness Zeigler, who so testified without contradiction, at no time has the District applied the language in the manner now promoted by the union.

The context of the Agreement is limited. The Agreement applies only to bargaining unit members and absent any language applying the Agreement to other employees, it logically follows that the language of Article VIII applies only to the bargaining unit. In addition, the clerical and aide work performed by employees covered by the Agreement is substantially different from the custodial, maintenance and food service work performed by employees in the unit represented by the Teamsters. The

services performed by the Teamster represented employees are unrelated and completely irrelevant to the work performed by employees covered by the Agreement. There is no logical reason to recognize such unrelated work as clerical and aide service performed under the Agreement.

There is no language in the Agreement supporting the Association's position. Section A of the language describes yearly (school-year) incremental increases for employees based upon a $12.50 starting rate for existing bargaining unit employees. No language in the Article can be read as providing for placement of newly represented employees other than at the starting rate.

Past practice also establishes that the parties mutually intended that the years of service language apply to years of service within the bargaining unit. The evidence establishes that there is an enforceable binding past practice between the parties. The District's prior actions over many years relating to establishing wage rates for transferring employees from one bargaining unit to another are clear, unequivocal and readily ascertainable. As established by testimony, the union has known of the practice, has not grieved the District's conduct and has not sought changes or clarification in bargaining relating to the long-established language.

Finally, if the language should be interpreted as the union asserts, and the language applies across bargaining units, Grievant would have been entitled to a $.55 an hour raise according to the language of Article VIII. As a result, and if the Union is correct in its interpretation of the language at issue, Grievant's initial rate should have been $12.00 an hour, ($11.45 plus $.55) not the $12.50 she received.

The Union has failed to meet its burden and the grievance should be dismissed.

V. Discussion

Introduction

Based upon my careful consideration of the full record, including my consideration of all testimony, documentary evidence, argument of the parties and observation of the demeanor of all witnesses, I find that the Association has failed to meet its burden of establishing that the parties mutually intended that employees transferring into the bargaining unit from other positions in the District should be placed on the wage schedule contained in the Agreement consistent with the years they have worked for the District in any capacity. In reaching this conclusion, I find that the language "Years of Service" is susceptible to more than one interpretation, is consequently ambiguous and that parol evidence may be considered in determining the mutually intended meaning of the words. In concluding that the parties did not mutually intend the reference to years of service to effectively also include the words; "…with the District," I rely primarily upon the duties and obligations of the parties within the context of their bargaining relationship, the language of the Agreement, and the practices of the parties.

The Bargaining Relationship

The Association is the exclusive bargaining representative of the secretaries, clericals and aides employed by the District (the bargaining unit). The right of the Association to bargain with the District and the obligation of the District to bargain with the Association do not extend to employees outside of the bargaining unit. The

Agreement establishes the terms and condition of employment only of the employees within that bargaining unit. There is nothing in the law of bargaining or in the language of the Agreement that could arguably be interpreted as extending the coverage of the Agreement to also establish the terms and conditions of employment to District employees outside of the bargaining unit, including those employees working in food service and covered by the District's bargaining agreement with the Teamsters. Considering the bargaining rights and obligations of the parties in regard to the unit involved, I find that the context of the Agreement and, consequently the context of Article VIII, is limited to the terms and conditions of employees in secretarial, clerical and aide positons. I find that such contextual considerations do not support the Association's claim that the language at issue was mutually intended to apply to service (employment) outside of the bargaining unit.

Language of the Agreement

The language at issue is limited to "Years of Service." The language does not reference years of "service with the District" or years of "employment with the District." The word "District" does not appear in Article VIII. I find the language at issue itself, and particularly the absence of reference to District-wide application, does not support the Association's claim that the parties mutually intended the years-of-service reference to go beyond the bargaining unit subject of the Agreement.

Past Practice

Past practices of parties may be relevant to an arbitrator's consideration of claims of violation of collective bargaining agreements in at least two ways: (1) to show enforceable but unwritten understandings between parties and (2) to aid in the interpretation of existing, but ambiguous, contract language. In regard to the first use of past practice analysis, it is well recognized that a term or condition of employment that may not have been memorialized by the parties in a written agreement may nevertheless be enforceable when it can be shown that the term or condition is an established past practice of the parties. The underlying logic of such a theory of past practice is based upon the continuing nature of the collective bargaining obligation and recognizes that agreements of the parties, although not in written form, may be evidenced by their conduct. However, consistent with the requirements of any enforceable agreement, to establish an enforceable bargaining agreement term or condition based upon past practice theory the evidence must show *mutuality of intent* between the parties. As a consequence, most courts and arbitrators require that to show such an enforceable term based upon past practice the evidence must be sufficient to show that the practice in questions is; (1) adequately long standing, (2) known, (3) unambiguous, and (4) accepted or condoned by both parties.

A second common use of past practice analysis does not involve the recognition of unwritten terms or conditions agreed upon by the parties, but rather is used as a tool of contract interpretation. Thus, it is also well recognized that the mutually intended meaning of ambiguous contract terms may be evidenced by how the parties conducted themselves prior to agreeing upon the language at issue – providing a context for

interpretation of the language - and how the parties have conducted themselves after entering an agreement as a manifestation of their understanding of what they agreed upon.

In the instant matter, I find that the second use of past practice analysis is relevant. In this regard, I credit the testimony of former bargaining unit member, former Association president and long-time secretary to the District's superintendent and Board, Bethanne Zeigler, that the years-of-service language has been in the Agreement since at least the early 1990's, and that in all cases of which she is aware, when employees have been transferred from the Teamster represented bargaining unit to the Association bargaining unit involved here, the employees have been paid the starting wage established by the terms of the Agreement. I find such long standing practice by the District, along with the absence of evidence of any corresponding complaint by employees or the Association, supports the conclusion that the parties mutually intended the words "Years of Service" to reference years of employment covered by the Agreement.

In regard to the past practices of the parties, I am not persuaded that the addition of the salary scale as an appendix to the Agreement in 2015 was intended to change the meaning of the words in Article VIII. In this regard, I find that the appendix scale amounts to a visual aide or manifestation of the words of Article VIII. The pictorial-like representation offered in the Appendix does not change the meaning of the words agreed upon by the parties in Article VIII.

VI Conclusions

Based upon the full record of this arbitration, including all evidence presented and arguments of the parities, I find that the Association has failed to meet its burden of showing that the District violated the Agreement as alleged.

The grievance is denied.

Dated: February 3, 2021

Timothy J. Brown, Esquire
Arbitrator

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Before
Arbitrator Timothy J Brown, Esquire

Shikellamy Education Support Professional Association, PSEA/NEA	**:**	
And	**:**	**BOM Case No. 2019-0489 (Sheena Schaeffer Salary Scale Placement)**
Shikellamy School District	**:**	

Award

The Association has failed to meet its burden of showing that the District violated the Agreement as alleged.

The grievance is denied.

Dated: February 3, 2021

Timothy J. Brown, Esquire
Arbitrator