

PROCEEDINGS BEFORE AN ARBITRATION
TRIBUNAL OF THE STATE MEDIATION
AND CONCILIATION SERVICE

In the Matter of Controversy)	
between)	
)	
PAJARO VALLEY FEDERATION)	CSMCS Case No. ARB-13-0382
OF TEACHERS,)	
)	
Grievant,)	ARBITRATOR'S
)	
and)	<u>OPINION AND AWARD</u>
)	
PAJARO VALLEY UNIFIED)	
SCHOOL DISTRICT,)	
)	
Employer.)	
)	
Re: Mandatory Meetings and the)	
Basic Work Day)	
)	

Before: Morris E. Davis, Esq.
Arbitrator

On Behalf of the Grievant: Robert J. Bezemek, Esq.
Law Offices of Robert J. Bezemek
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On Behalf of the Employer: Louis T. Lozano, Esq.
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This arbitration proceeding arises pursuant to agreement between the **PAJARO VALLEY FEDERATION OF TEACHERS**, hereinafter, "Union," and the **PAJARO VALLEY UNIFIED SCHOOL DISTRICT**, hereinafter, "District" or "Employer," under which Morris E. Davis, Esq. was selected, from a California State Mediation and Conciliation Service panel, to serve as arbitrator, and whose Findings, Opinion and Award shall be final and binding upon the parties. The arbitration hearing was conducted in Watsonville, California, on September 16 and October 10, 2014. Thereafter, the Parties' closing briefs were timely mailed on November 21, 2014.

ISSUE

The Parties could not agree on a stipulated issue and authorized that such be framed by the Arbitrator. The Union proposed the issue as "Is the District prohibited by the contract from requiring faculty to attend mandatory meetings after the basic work day?" The District proposed that the issue be stated as "Whether the clause to the collective bargaining agreement intended to take away the District's right to call mandatory faculty meetings after the basic teacher workday when the Union agreed to a modification of that contract language in a June 5, 2008, tentative agreement?" Thus, the Arbitrator frames the issue as "Whether the District violated Article IV.F. of the 2009-2012 contract by allowing certain principles to require teacher attendance at faculty meetings and in-service training held after the basic 7.5 hour workday?"

RELEVANT CONTRACT PROVISIONS

Article IV.A.

Basic Work Day. Times of arrival and departure shall be set in each school by the principal with the advice of the faculty, provided that the full work day, including the thirty (30) minute duty-free lunch period, shall be seven and one half (7 ½) consecutive hours, (traditional calendar) or seven and three-quarters (7 ¾) consecutive hours (YRE calendar). Individual exceptions may be approved by the immediate supervisor for a given day. The faculty of a school includes all certificated employees assigned to that site. The Union philosophically disagrees with the necessity of specifying the number of hours per day that a teacher must work because it does not acknowledge the professionalism of the teachers of the PVUSD.

Article IV.E.

School Service Duties

1. The principal, in consultation with the teachers, shall determine the number and types of supervisory duties or equitable methods of assignment of these duties, the number and types of duties to be performed outside of the Basic Work Day, which might include one "back to school night," one open house, school and district committee meetings, in-service sessions, supervision of student activities and other school activities or events. All teachers assigned to a school shall

share duties equally unless they can show legal or practical reasons that prevent them from doing so.

If in-service sessions extend beyond the Basic Work Day, attendance shall be on a voluntary basis. Meetings for the purposes of school improvement plans and curriculum planning shall be governed under these provisions.

2. Whenever possible, teacher volunteers shall be used to perform duties outside of the Basic Work Day, provided that, should the principal, with the advice of the faculty, determine that assignments are necessary. Every reasonable effort shall be made to equalize service duty time, and duty time volunteered shall be considered in determining equivalent service duty time.
3. Teachers shall not be required to perform services without pay on non-contract days.

Article IV.F.

Faculty Meetings shall be scheduled on a reasonable basis, not to exceed an average of two hours per month. A majority of the faculty may vote to extend the time on a per-meeting basis. Ten (10) minutes in each faculty meeting will be made available to the PVFT Building Representatives to conduct PVFT business. (Joint Exhibit 1)

FACTUAL FINDINGS

This case involves the interpretation of Article IV. F. of the collective bargaining agreement ("CBA" or "contract") between PVUSD ("District") and PVFT ("Union") for 2009-2012, resulting from 2008 negotiations and a June 5, 2008, Tentative Agreement, the provisions of which were incorporated into the CBA. (TR 158-60; DX 1) It is undisputed that the 1998-2001 CBA was the last published prior to the 2009 CBA, which resulted from 2008 negotiations. (TR 127-128, 348-349; JX 1, DX 13-14) It is also undisputed that the basic workday is 7.5 hours, with a duty-free lunch. (TR 30-33, 37-39, 63, 106, 131; JX 1, Article IV. A.)

On October 22, 2013, the Union filed a grievance protesting a faculty meeting of September 24, 2013, alleging it was mandatory and held after the workday at Amesti Elementary. (UX 1-9) A second grievance, filed on November 14, 2013, protested a meeting of October 2, 2013, held after the basic workday at Pajaro Valley High School. (DX 11-12; TR 168-173; UX 4-11) A third grievance was filed on March 12, 2013, asserting that teachers of sophomore students were required to attend meetings during lunch on December 5 and January 30, 2013, and other unspecified dates during September 2012 through January 2013. (TR 153-157; UX 21) The record indicates the Union's informal effort to secure compliance with Article IV. F. prior to the grievances described above. On August 30, 2010, the Union,

through through Chris Kelly, grievance officer, sent an email to the District highlighting the striking of the "beyond the workday" language from Article IV. F. as written in the 2009-2012 CBA. (TR 308-309; UX 35)

The Parties stipulated that certain schools, including Amesti Elementary, conducted mandatory faculty meetings, some or all of which occurred after the basic teacher work day. (TR 31; DX1) Union witness Rachel Hitchcock, a teacher at Amesti Elementary School, testified that the contractual basic workday at Amesti is from 8:20 a.m. to 3:50 p.m.; however, she was required to attend a staff meeting on September 24, 2013, from 3:15 to 4:15 p.m., and had attended other staff meetings on Tuesdays from 3:45 to 4:45 p.m., prior to 2014. (TR 30-33, 38-39, 42; UX 2) Hitchcock further testified that, at times, professional development meetings occurred on Wednesdays at 1:20, after students had been released for the day, until 3:50, the teachers' scheduled release time. (TR 33-36, 43) she also stated that the CBA provides all in-service sessions, held beyond the basic workday, must be voluntary; however, at Amesti some in-service meetings had extended beyond the basic workday, without the teacher's agreement. (TR 37-9) According to Hitchcock, during 2014, staff meetings no longer occurred on Tuesday afternoons. (TR 42)

Pablo Prieto Barrick, mathematics teacher at Watsonville High School, testified that during 2013-2014, the regular weekly staff meeting was held from 3:15-4:15 p.m., after the basic workday ended at 3:15. (TR 61-64; UX 10) According to Barrick, a mandatory one-hour SLC meeting occurred on December 4, 2013, which was grieved (TR 61-66, 69-70; 75-85 UX 10, 12). Barrick recalled other mandatory staff meetings in March, April and May 2013, and testified that they occurred at the time of the arbitration hearing on September 16, 2004. (TR 67-68, 71)

Gregory Tucker, English teacher at Pajaro Valley High School, testified that a mandatory meeting was held after the basic workday on October 2, 2013, which was grieved. (TR 86-92; UX 11) Tucker further testified that he spoke with interim principal about the grievance and the Union's position that meetings scheduled beyond the workday could not be required. (TR 89) After that conversation, meetings were not held after the workday during November 2013, although they resumed in December 2013, when the principal returned. According to Tucker, two (2) mandatory meetings, a staff and departmental, were held monthly for the remainder of the year, with the exception of January 2014, due to the holiday break. (TR 90-98)

Francisco Rodriguez, a teacher with the District since 1996 and President of the PVFT as of 2007, testified that in the 1998 contract, language regarding scheduling faculty meetings changed from that in the 1981-1994 contract, to read, "The faculty meeting shall be scheduled

on a reasonable basis not to exceed an average of two hours per month beyond the basic workday.” According to Rodriguez, this language applied in 2007. (JX 1, p. 6; TR 126-129, 131-3; UX 13, 14) In addition, he testified that prior to his Presidency, Union members had expressed concerns about the extent to which they were required to attend meetings. (TR 133-134)

During the 2008 negotiations, according to Rodriguez, the entire contract, including workload and hours, was subject to negotiation. (TR 134) He testified that the Parties exchanged bargaining proposals regarding faculty meetings as contained in Article IV, Section F, with the Union consistently requesting that “Beyond the Basic Workday” be stricken from the ultimate agreement to protect teachers from being required to attend meetings after the basic 7.5 hour workday. (TR 134, 139-141, 146-147, 410-412, 417-418; UX 29B) Rodriguez testified that at 9:30 p.m., during June 4, 2008 negotiations with District representatives Lou Lozano, Dorma Baker, and Robb Mayeda, the Union presented a proposal to strike “beyond the basic workday” from the language of the prior contract. (TR 136-139; UX 13, 14) He stated that the District responded with agreement at 11:00 p.m. on June 5, 2008. (TR 138-139, 144-145, 323; UX 16, 19) Rodriguez further testified that the Parties reached tentative agreement on June 5, 2008, at 2:00 a.m., with the language “beyond the Basic Workday” removed. (TR 141-142, 323; UX 18; DX 18; UX 29)

Patricia Lerman, Union Field Representative for eighteen (18) years, recalled that she participated in contract negotiations approximately six times, including 2008. (TR 242-245) She testified that her notes were taken during negotiations sessions on February 1, March 18, May 6, and other dates, which reflect her understanding of significant communications and issues. (TR 247-249, 254-256; UX 28, 29 A-D, UX 30) Regarding notes dated May 6, 2008, which were addressed in a May 27, 2008 negotiation session, Lerman recalled discussion of the Union’s intent to limit meetings to occur during the workday. (TR 249-251; UX 28, p. 11) According to Lerman, the next negotiation took place June 1, 2008, with an expected counter-proposal from the Union to the District’s counter-proposal. (TR 268-371; UX 28, p. 19, 21-29; UX 29B)

Ms. Lerman further recalled that the Union’s counter-proposal struck the phrase, “beyond the Basic Workday,” (TR 272-273, 277, 280; UX 28, p. 26, UX 29C) and the Union proposed that no District meetings occur on the second Monday of each month, to allow time for Union meetings. She testified that there was discussion between the parties and clarification of the

Union's proposal, with the Union acknowledging that IEPs could be held on the second Mondays, if needed. (TR 277-278; UX 28, p. 26, UX 29C) In addition, Lerman testified that during negotiations on June 5, 2008, at 9:45 p.m., the Union continued to request striking the language "beyond the Basic Workday," which the District agreed to at 11:15 p.m. that night, and such is captured in the tentative agreement reached and signed at 2 a.m. on June 5, 2008. (TR 285-289, 291, 323; UX 16, 19, 29D)

Peggy Pugne, a 15-year teacher with the District, and former Union member prior to July 1, 2014, when she began working as Assistant Principle for Guidance at Aptos High School, recalled that she was part of the Union negotiating team in 2004-2005, 2005-2006, 2006-2007, and in 2007-2008, when she was the Union's chief negotiator. (TR 323-327) She testified that during the 2008 negotiations, the Union never proposed prohibiting the District from holding faculty meetings beyond the basic workday. (TR 330-331, 336) According to Pugne, the Union's intent in eliminating "beyond the Basic Workday" was to insure that faculty meetings would not exceed an average of two hours per month. (TR 333-336; UX 18) She further testified that after the Parties' tentative agreement, faculty meetings were held beyond the basic workday. (TR 336-337)

On cross-examination, Ms. Pugne testified that during her tenure with the District, a 7.5-hour workday was standard and consistent throughout the District, and that Article IV. A. restricted the time during which the District could require faculty to perform services for the District. (TR 349, 351-353; UX 14) Further, on June 1, 2008, the Union proposed striking, "beyond the basic workday." (TR 356-357; UX 29B, 29C) According to Pugne, initially the District preferred that the language remain. (TR 357-358; UX 29D) However, she also testified that on June 4, 2008, during negotiations at 11:00 p.m., the District's counter-proposal had stricken the phrase "beyond the Basic Work Day." (TR 358-359; UX 16, DX 16) In addition, Pugne testified that during 2013-2104, when she worked as a teacher at Aptos High school, monthly staff meetings were held during the basic workday, for at least part of the year. (TR 360-361)

Margie Jennings, a twenty-seven (27) year physical education teacher at three (3) District schools, and a member of PVFT, was subpoenaed to testify. (TR 377-379) She served on the Union's 2007-2008 negotiating team, and was involved in negotiations, which resulted with the tentative agreement on June 5, 2008. (TR 379-381; UX 18) Jennings testified that "Beyond the basic workday" meant time after 3:15, which intent was reflected in the language stricken from Article IV.F. in the May 7, 2008, proposal. (TR 382-383, 390, 405; UX 29) She further testified

that the intent of the proposal was to limit the number of faculty meetings to two (2) hours a month. (TR 383) According to Jennings, the PVFT negotiating members did not direct their chief negotiator, Francisco Rodriguez, not to hold meetings after the workday. (TR 383) On cross-examination, Jennings testified that CBA, Article IV, provides limits for when the District can require faculty to work, along with specific exceptions, such as Back to School Night and Open House. (TR 395-396) Further, at her current school, Pajaro Middle School, the principal advised Jennings and other teachers that the staff meeting, held on Tuesdays from 3:00-5:00 p.m., would change to 1:30 p.m. due to a grievance filed on the issue. (TR 408-409)

The Parties submitted an Offer of Proof that, if Renee Heinlein were called to testify, she would state that during the 2014-2015 school year, District schools were generally able to conduct staff meetings during the basic workday. (TR 302-306; UX 32, 33)

POSITION OF THE UNION

The touchstone of this dispute is the "Basic Workday" and Article IV.A. Since at least 1981, the parties' collective bargaining agreement has always established the "Basic Workday" or "contract" day for certificated employees ("faculty"). The starting time of this mandatory seven and one-half hour period is determined by the principal at each school site. For thirty years, the Parties' agreements allowed the District to require faculty to attend staff meetings "beyond the Basic Workday." (Article IV.F., UX 13, p. 4 ; UX 14, pp.3-6; DX 1, p. 3-6) There are, and have always been, enumerated exceptions to the Basic Workday in Article IV.E., and in Article IV.F., which changed further during the Parties' negotiations and tentative agreement reached on June 5, 2008.

Prior to June 5, 2008, Article IV.A. plainly defined the mandatory workday of faculty as 7.5 hours. Articles IV.E. and IV.F. contained the enumerated exceptions. Article IV.E. addressed a variety of "school service" duties that occur outside of the Basic Workday, such as attending open house. Article IV.F. dealt exclusively with mandatory faculty meetings and allowed an average of up to two hours of such meetings "beyond the Basic Workday." A principal always had discretion under IV.A. to require faculty to attend faculty meetings during the Basic Workday. Read together, these provisions allowed a principal, prior to 2008, to compel attendance at, for instance, an hour of mandatory faculty meetings during the Basic Workday, and two hours "beyond" the Basic Workday.

Since 2008, attendance at mandatory faculty meetings has not been one of the

enumerated exceptions allowing work beyond the basic 7.5-hour workday. During 2008 bargaining, prompted by the Great Recession, the District proposed significant cuts to faculty compensation. The Union sought, in exchange, various non-fiscal contractual improvements, including one aimed at curtailing time when faculty could be required to work “beyond the Basic Workday.” The Union repeatedly proposed eliminating this exception during the 2008 negotiations. Proposals were presented on May 7, June 1, and June 4, at 9:30 p.m. The District agreed with the Union’s proposal, made at 11:00 p.m. and confirmed orally at 11:15 p.m. on June 4, 2008, which paved the way to an agreement.

At 11:15 p.m. on June 4, 2008, the District’s chief negotiator, Lou Lozano, agreed to strike “beyond the Basic Workday” from Article IV.F. He did not offer any explanation. No one recalls that the Union specifically mentioned what it meant if the phrase were struck. This is hardly surprising, as the words of Article IV, and the meaning of this phrase are clear on their face. Article IV.A. sets forth strict limits on when the District may compel teacher attendance at school, and Articles IV.E. and F. creates enumerated exceptions. The subsequent 1:30 a.m. Union counter-proposal and the signed 2:00 a.m. tentative agreement both reflect the elimination of “Beyond the basic workday.”

The evidence shows Union co-chief negotiator Pat Lerman was careful to ensure Lou Lozano intended to strike “beyond the Basic Workday” on June 4, 2008. Lozano confirmed this is what the District intended. As a result of these negotiations, the District was limited to holding mandatory staff meetings for no more than an average of two hours per month, and could not require attendance at them beyond the basic 7.5-hour workday.

The District now claims that despite striking “beyond the Basic Workday” from Article IV.F. during 2008 negotiations, it is still authorized to require mandatory meetings beyond the basic workday,” interpreting the effect of striking “beyond the Basic Workday” as limiting only the total time spent in faculty meetings to two hours per month. This narrow reading of Article IV. defies logic and common sense, and offends the plain meaning rule.

In addition to its illogical interpretation of the plain language of Article IV.F., the District’s second main defense seems to be “past practice.” However, the District introduced no evidence to show a widespread failure by the District to abide by the revised Article IV, or that a past practice was created. The District produced no evidence that it issued guidelines or directives that faculty must attend faculty meetings after the Basic Workday. The record evidence shows, to the contrary, that certain schools did, on occasion, ignore the plain language of Article IV, but most stopped holding mandatory faculty meetings after the school workday once the Union filed

the instant grievances. About five schools, out of 32, occasionally required staff meetings “beyond the Basic Workday”. These actions were not so frequent, widespread, regular and repetitious as to establish a mutual understanding that the District could continue to require attendance beyond the Basic Workday. And, there is no evidence the District notified the Union of this practice. When local Union site-representatives learned that these actions were occurring in violation of the Agreement, they objected or filed grievances. All of this evidence cuts against the showing required to establish a past practice.

The District also attempts new defenses, raised for the first time during arbitration. First, the District asserts that the Union never expressed what it intended during 2008 negotiations by proposing to strike, “Beyond the Basic Workday” from Article IV.F.. This defense ignores the plain meaning of Article IV, including the clear effect of striking “beyond the Basic Workday” from Article IV.F. Article IV.F. was an enumerated exception to the Basic Workday, defined in IV.A. By striking this phrase, the exception was eliminated.

The numerous bargaining proposals exchanged in May and June 2008 regarding Article IV, and Pat Lerman’s testimony and notes, all confirm that both parties understood striking “Beyond the Basic Workday” was intended to prevent the District from holding faculty meetings after the 7.5-hour workday. Former Union negotiator Margie Jennings, a District witness, testified that as to limiting the amount of faculty meetings, “most of it was about being after the workday.” Striking these words eliminated the “Faculty Meeting” exception to Article IV.A’s Basic Workday. The Plain Meaning Rule, plus the record evidence of Union intent during negotiations, defeats this District defense and supports sustaining the grievance.

The second new District defense is that by striking, “Beyond the Basic Workday,” the Union intended only to reduce the time spent in faculty meetings. Again, the Plain Meaning Rule and the rule governing “intent” easily negate this defense. With the meaning so plain, it cannot be defeated by “intent.” Further, intent is not proven by what is in the mind of a negotiator such as former Union negotiators Peggy Pughe or Margie Jennings, particularly when their testimony was inconsistent, and given that the District did not call its other negotiators, Lou Lozano and Dorma Baker, to testify during arbitration. Intent is proved by the words manifested during the bargaining and in the proposals exchanged. Nothing within those words said or exchanged written proposals defeat the Union’s interpretation.

Third, the District argued during arbitration that the Union “knew” in 2008 it had not achieved the elimination of the District’s right to require meetings after the Basic Workday,

evidenced by the Union's failure to enforce this during 2008 to 2013. Two different interpretative rules apply, depending on whether the core language is clear or ambiguous. When the contract language is clear and unambiguous, as the Union asserts it is here, evidence of a past practice inconsistent with a clear and unambiguous provision is irrelevant, except possibly as to a monetary remedy. (See, e.g., *How Arbitration Works*, "Custom and Practice at Variance With Clear Contract Language," p. 12-24.) Thus, if the Union failed to "protest past violations of a clear contract rule," that does not bar it from insisting on future compliance with clear contract requirements. Although the Union disputes any ambiguity in the contract language, the District failed to provide evidence of past practice sufficient to alter the clear language of the Agreement.

The Union initiated these three grievances in Fall 2013. The first step of the procedure provided notice of the Union's intent to enforce the Agreement. Nonetheless, Amesti Elementary School principal Erin Haley continued to violate the Agreement for the rest of the 2013-2014 school year, but came into compliance for the 2014-2015 school year. The District is liable for violating the Agreement by holding required meetings after Oct. 1, 2013. At Pajaro Valley High, the interim principal complied with the Agreement for the meeting scheduled after the grievance was filed, but principal Frank "Pancho" Rodriguez violated the Agreement for the rest of 2013-2014. In 2014-2015, at Pajaro Valley High, new Principal Alison Nizawa scheduled mandatory faculty meetings during the Basic Workday. The District is liable for all meetings held after the filing of the grievance. At Watsonville High, Principal Elaine Legorreta violated the Agreement during 2013-2014 school year to the present. The District is liable for all of these meetings, held after the basic workday, in violation of the Agreement.

The District finally argued that the Union acquiesced in its requiring mandatory meetings beyond the Basic Workday, thereby waiving any contractual right to prohibit them. The District bears the burden of proof to show the Union's waiver. The District cannot meet that burden because it failed to raise this defense until the opening of the arbitration hearing and because there was no past practice. The District never notified the Union of its interpretation of Article IV or that it believed it was entitled, under the contract, to hold meetings after the 7.5-hour workday. It is a well-established principle that, while "acquiescence by one party to violations of an expressed rule by the other party precludes action in regard to past transactions, [arbitrators] do not consider that acquiescence precludes application of the rule to future conduct." *How Arbitration Works, supra.*, p. 10-76.

Regarding the appropriate remedy, each directive to faculty to attend an unpaid, after-work meeting constitutes a separate transgression, part of a continuing violation by the District. Each teacher required to attend a meeting after the basic workday should receive his or her *per diem* rate, plus interest at the legal rate, in compensation for the District violating the contract that day. The Union also requests a cease and desist order preventing the District from holding meetings beyond the basic workday.

POSITION OF THE DISTRICT

The Union waived its right to challenge any practice by the District of holding faculty meetings after the workday by failing to grieve the practice over a period of five (5) years. After negotiation of the June 2008 tentative agreement, the practice of holding mandatory faculty meetings beyond the Basic Workday continued during the 2008-2009 school year, without any grievance by the Union. After the CBA went into effect on July 1, 2009, the practice of holding faculty meetings after the teacher's regular 7.5-hour workday continued during the 2009-2010, 2010-2011, 2011-2012, and 2012-2013 school years, also without any grievance. The only two timely grievances are 1) the grievance of October 22, 2013, pertaining to a faculty meeting of September 24, 2013, at Amesti Elementary School, and 2) a grievance filed November 14, 2013, pertaining to an October 2, 2013, faculty meeting. The union has provided no credible explanation as to why it waited over five years to grieve what it now alleges is a clear violation of the June 2008 TA and CBA. "[T]he conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (*Kennecott Corp. v. Union Oil Co. of California* (1987) 196 Cal.App.3d 1179, 1189, 242 Cal.Rptr. 403.) By failing to file a grievance prior to 2013, any other complaints regarding faculty meetings held after the basic workday are untimely and were waived by the Union.

To prevail on the merits here, the union must show a clear violation of the CBA. If the alleged violation was clear, the Union had actual or constructive notice of the alleged violation as soon as it occurred in the 2008-2009 school year and continued thereafter. If there was a violation, the Union slept on its alleged rights, attended faculty meetings after the basic workday on a regular basis, and filed no grievances for the duration of the 2009-2012 CBA, thereby affirming the practice and the District's interpretation. By following its understanding of what the parties did and did not agree upon, reinforced by the parties' practical construction of

the agreement, *i.e.*, the parties' actions, the District acted reasonably by continuing the status quo. The District, therefore, respectfully urges that, if a violation is found, that the remedies be limited to prospective relief only and constrained to a declaration of the parties' rights. The District will act in accordance with the rights of the parties as determined by the Arbitrator.

Article III paragraph A of the CBA provides that "[a]ll the District's rights and functions, including its power and authority to direct, manage, and control the operation of the District, shall remain vested with the District, except as specifically and expressly abridged by this Agreement." Other than the provision in Article IV paragraph F that "faculty meetings shall be scheduled on a reasonable basis," Article III paragraph E is the only limitation in the CBA as to when faculty meetings can be held. To prevail here, the Union must show that the parties intended to change the CBA to end the longstanding practice of holding faculty meetings after the regular workday. It has not and cannot do so.

Other than the provision of Article IV paragraph F stating that "faculty meetings shall be scheduled on a reasonable basis," Article III paragraph E provides the only restrictions as to when mandatory meetings can be held after the Basic Workday. Article IV.F. does not prohibit faculty meetings from being held after the basic workday. The current version of Article IV paragraph F provides:

Faculty meetings shall be scheduled on a reasonable basis, not to exceed an average of two hours per month. A majority of the faculty may vote to extend the time on a per-meeting basis. Ten (10) minutes in each faculty meeting will be made available to the PVFT Building Representatives to conduct PVFT business.

However, Article IV.F. does not address when faculty meetings can be held nor restrict the District from requiring faculty members to attend faculty meetings after the regular workday. The record shows there was no discussion during negotiation of the June 2008 TA regarding *when* faculty meetings could be held. This was confirmed by the fact that there is no reference in Ms. Lerman's notes from the June 4-5, 2008 negotiations to any discussion regarding Article IV paragraph F pertaining to *when* faculty meetings could be held.

Removal of "Beyond the Basic Workday" from Article IV.F. was not an agreement by the District to end faculty meetings after the regular workday. The following paragraph shows the changes to Article IV paragraph F, agreed upon by the parties in the June 2008 tentative agreement, with the strike-through language reflecting language that was removed and the underlined language reflecting language that was added: **Faculty meetings** shall be scheduled on a reasonable basis, not to exceed an average of two hours per month ~~beyond the Basic Workday.~~ A majority of the faculty may vote to extend the time on a per-meeting basis. Ten

(10) minutes in each faculty meeting will be made available to the PVFT Building Representatives to conduct PVFT business. The syntax and grammar of the previous version of Article IV paragraph F show that the clause "beyond the Basic Workday" limited the application of the two-hour restriction to faculty meetings after the teachers' workday. The Parties' subsequent acts, the continuation of the practice by the District, the bargaining unit members' attendance at those meetings month-after-month and year-after-year, and the failure to contemporaneously communicate what would have been a significant concession, shows that the Parties did not intend to end the practice of holding faculty meetings after the teachers' regular workday.

Mr. Rodriguez, PVFT President, testified that the purpose of Article III paragraph E was to ensure the availability of bargaining unit members for Union meetings whose regular workdays extended beyond 3:30 p.m. He acknowledged, however, that this provision does not shorten the regular workday or provide for an early release of Union members. Thus, a prohibition against meetings during the regular workday would do nothing to further the purpose of Article III paragraph E. If, as the Union contends, the District could not hold mandatory meetings after the Basic Workday, the prohibition in Article III paragraph E against such meetings after 3:30 p.m. would be unnecessary. Contracts must be interpreted "in a manner which gives force and effect to every provision, and not in a way that renders some clauses nugatory, inoperative or meaningless." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473, 80 Cal.Rptr. 2d 329.) Here, the parties sought to carve-out an exception to a generally understood rule that the District could hold mandatory meetings after the regular workday.

The Arbitrator directed the parties to address the issue of remedies. For the reasons discussed herein, there has been no violation of the CBA and, as such, the Union is not entitled to a remedy. In the event that the Arbitrator finds a violation, the District, for the reasons explained below, urges an award of prospective relief in the form of a declaration only of the Parties' rights. In the event the Arbitrator finds against the District, and is inclined to award monetary relief, the District respectfully requests that it be provided the opportunity to present evidence and further briefing on the issue. The Parties have not yet had an opportunity to present evidence regarding relief, and the Union similarly requested that the Arbitrator "remand the issue of compensation." Furthermore, if remedies are considered, it should be noted the Union stated that it is not seeking relief for any meetings held prior to

2013.

As noted, the Union seeks an award of per diem pay. However, the only provision for per diem pay in the CBA is found under Article VII paragraph F, pertaining to extra days. Faculty members were not asked to nor did they work extra days, therefore, this provision does not apply. Exhibit B-1 of the CBA lists Extra Pay Assignments. Faculty meetings do not satisfy any descriptions provided therein. At most, any violation here would constitute supplemental work under VII paragraph E, which provides for an hourly rate of pay. For all reasons set forth above, no violation should be found and no remedy should be awarded.

DECISION AND AWARD

In this dispute concerning contract interpretation, arbitral authority recognizes that plain meaning be accorded to clear and unambiguous contractual language. In addition, the parties' agreement should be construed as a whole, with proper effect given to all related words and clauses. However, where disputed contractual language is unclear or ambiguous, the parties' past practice or course of conduct may be relied upon to determine their original intent. (Garfield Board of Education Association, 116 LA 887 (BNA Books, 2001) See also Fairweather, Practice and Procedure in Labor Arbitration, 3rd, 172-175 (BNA Books, 1991.) Therefore, to establish proof of a past practice, clear, specific and certain evidence must be presented to demonstrate that the parties' practice was consistent, repetitive, and mutually accepted. (R. Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, 59 Michigan Law Review (1961) or Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators (BNA Books, pg. 30-68.) Here, the evidence is undisputed that, at the conclusion of 2008 negotiations, the Parties agreed to strike the phrase, "beyond the Basic Workday" from Article IV, Section F. of the prior collective bargaining agreement.

The Parties stipulated generally that final negotiations occurred late on June 4, 2008, with a tentative agreement was reached on June 5, 2008 at 2:00 a.m., although certain documents, including UX 29D, are misdated and witnesses expressed some confusion about whether the final negotiation day and agreement was reached on June 4 or 5, 2008. (TR 284, 323)

The 2008 negotiations resulted in the 2009-2012 CBA, contained in Joint Exhibit 1. The 2008 version of Article IV. F., without the phrase "beyond the Basic Workday," was incorporated into the 2009-2012 CBA. Article IV.F. of the 2009 Agreement states:

"Faculty Meetings shall be scheduled on a reasonable basis, not to exceed an average of two hours per month. A majority of the faculty may vote to extend the time on a per-meeting basis. Ten (10) minutes in each faculty meeting will be made available to the PVFT Building Representatives to conduct PVFT business."

The Union asserts that language of Article IV.F., in the 2009 Agreement, is clear as written, and that their proposal to strike such language was intended to guarantee that teachers not be compelled to attend staff meetings after the 7.5 hour basic workday. The District asserts that their agreement to strike this language was intended to guarantee that staff meetings would be limited to two hours per month, without restriction on the time of day the meetings were held.

Read on its face, the language of Article IV.F. limits faculty meetings to two (2) hours each month, on average, scheduled on a reasonable basis. Other than requiring the meetings to be scheduled "on a reasonable basis" for an average of two hours monthly, the plain language of Article IV.F. does not specify the time when faculty meetings may or may not occur. That is, it is not clearly evident from the language of this provision that faculty meetings after the basic 7.5-hour workday are prohibited. On its face, the language here is capable of more than one interpretation,.

As a result of the ambiguity of Article IV.F. as written and devoid of context, it is necessary to review the record evidence regarding the 2008 negotiations to determine the Parties' intent in striking "beyond the Basic Workday." The negotiations in late-May 2008 through the final day of negotiations, June 5, 2008, indicates that the District was initially resistant to the Union's proposal to strike the phrase at issue, but ultimately agreed to do so at 11:00 p.m. on June 5, by striking that phrase in its counter-proposal, with that agreement reflected in the Parties' Tentative Agreement written and signed on June 5, 2008, at 2:00 a.m., and ultimately incorporated into the 2009-2012 CBA language as Article IV.F.

Ms. Lerman and Mr. Rodriguez testified persuasively that the reason for the Union's request to strike "beyond the Basic Workday" was as a quid pro quo for economic cuts requested by the District. This is also reflected, to some degree, in notes from the June 4, 2008 negotiations. (UEX 19) In that regard, the record supports the conclusion that the Union intended to protect its members from being required to attend meetings after the basic 7.5-hour workday. As a benefit exchanged for the District's proposed cuts, the record also supports the conclusion that during 2008 negotiations, the Union communicated its intent to limit required

faculty meetings to be held during the basic 7.5 hour workday through its proposal to strike, "beyond the Basic Workday."

The record is void of specific statements or clarification made at the bargaining table rejecting or contradicting the Union's stated intent. Taken as a whole, the Union's stated intent to protect its' members time and schedules, in exchange for District-proposed cuts, its repeated proposal to strike the phrase "beyond the Basic Workday," and the District's agreement to strike that language without objection or clarification orally or written, during (or since) the 2008 negotiation, all require that the grievance be granted.

Therefore, as a partial remedy, the District is ordered to cease and desist scheduling or holding any and all mandatory staff meetings after the basic 7.5-hour workday. In addition, the District shall require each principal of every District school not to hold mandatory staff meetings beyond each respective school's 7.5-hour basic workday. As further remedy, the District is ordered to make whole each teacher for all mandatory faculty meetings attended during the time period of September 24, 2013 to the date of this arbitration Award. While the record does not show the Union waived its right, in total, to challenge meetings held after the basic workday, it has waived the right to pursue remedies, for any alleged violations preceding the initial grievance that is dated September 24, 2013. The time each affected teacher attended a required faculty meeting or in-service training, not otherwise provided for in the CBA, will be paid for at his or her hourly rate of pay.


To further comply with this arbitration Award, an additional remedy issue is remanded to the Parties to confer and jointly compile a list of all affected teachers, the dates and time period of their respective mandatory faculty meetings and/or in-service trainings held beyond the basic workday, from September 24, 2013 to the date of this arbitration Award, and the hourly rate of pay for each teacher.

AWARD

1. The grievance is sustained;
2. The District violated Article IV.F. of the 2009-2012 Agreement by allowing certain principals to require teacher attendance at faculty meetings and in-service training held after the basic 7.5-hour workday;
3. The District shall cease and desist scheduling or holding any and all mandatory staff meetings and in-service training after the basic 7.5-hour workday;

4. The District shall prohibit each principal from holding mandatory staff meetings and in-service training beyond each respective school's 7.5-hour basic workday;
5. The Union waived the right to pursue remedies for any alleged violations preceding the initial grievance which is dated September 24, 2013;
6. It is ordered that the District make whole each teacher for all mandatory faculty meetings and in-service trainings attended during the time period of September 24, 2013 to and including the date of this arbitration Award. The time each affected teacher attended a required faculty meeting or in-service training, not otherwise provided for in the CBA, will be compensated for at their hourly rate of pay;
7. An additional remedy issue is remanded to the Parties to jointly compile a list of all affected teachers; the dates and time periods of mandatory faculty meetings or in-service trainings held beyond the basic workday during the time period from September 24, 2013, to the date of this arbitration Award; and the hourly rate of pay for each teacher; and
8. The Arbitrator retains jurisdiction solely over disputes involving interpretation and/or implementation of this remedy Award.

Dated: March 11, 2015


Morris E. Davis, Esq.
Arbitrator