

In the Matter of Arbitration:

ANNE ARUNDEL COUNTY  
PUBLIC SCHOOLS

and

TEACHERS ASSOCIATION OF  
ANNE ARUNDEL COUNTY, MSTA/NEA

Grievance of Joseph Michael Keenan

Salary Scale Placement

Before: Ira F. Jaffe, Esq., Impartial Arbitrator

APPEARANCES:

For the Union:

Kristy K. Anderson, Esq.  
(Assistant Counsel, MSTA/NEA)  
Michael Carrington, UniServ Director, MSTA/TAAAC  
Joseph M. Keenan, Grievant

For the Board:

Synthia J. Shilling, Esq.  
(Assistant Superintendent for Legal & Personnel Services, AACPS)  
Steve Flavin, Supervisor, Labor Relations, AACPS

**BACKGROUND**

The issue presented in this matter is whether the Grievant, Joseph Michael Keenan, was properly placed on the salary scales and, if not, to determine the appropriate remedy. An arbitration hearing was held on May 2, 2006.

The underlying facts, with one significant exception, were not in dispute.

The Grievant was hired by the Board of Education of Anne Arundel County ("Board") in August 2002. At that time, he held a Provisional Certificate and needed to

complete 21 additional credits and to pass the PRAXIS I and PRAXIS II examinations to be eligible to receive a Professional Certificate.

The Grievant was placed initially on the Provisional salary scale. In January 2003, the Provisional Certificate was replaced by a Conditional Certificate. COMAR §13A.12.01.11.C., State Board of Education. The Provisional Certificate was a one-year certificate, renewable for three more years. The Conditional Certificate is a two-year certificate, renewable once for the same total period of four years as applied to the Provisional Certificate. There was no dispute regarding the propriety of the Grievant's initial salary scale placement or his being continued on the Provisional salary scale up to the beginning of the 2005-06 school year.

As of July 2005, the Grievant still needed three credit hours and needed to complete the second part of the Praxis II test in order to be eligible to receive his Standard Professional Certificate I ("SPC I") from the State of Maryland.

Article 3, Salary and Other Compensation, of the 2005-06 Agreement between Board and the Teachers Association of Anne Arundel County ("TAAAC" or "Union"), provides in pertinent part that:

D. Exception for provisional certificate

Holders of Provisional Degree Certificates who are within three semester hours of completing Standard Professional Certificate requirements, or who have completed the teacher education program in their teaching fields in a regionally accredited college but do not meet Maryland's requirements, shall be paid on the professional salary scale for one year to give them an opportunity to qualify for the Standard Professional Certificate.

As of the beginning of the 2005-06 school year, the Grievant had taken and passed the PRAXIS I examination, had taken (in June 2006) the first part of the PRAXIS II examination (but had not then learned that he had passed), and had not yet taken the second part of the PRAXIS II examination (he took that in September and received his

scores on or about October 26, 2005). The Grievant was also three credit hours short of having completed the requirements to obtain a SPC I certificate.

TAAAC asked herein that an award be entered to place the Grievant on the Professional Salary scale effective October 26, 2005 – the first date on which he had completed all of the requirements to qualify for a SPC I certificate other than the three missing credits. The claim was based upon the plain language of Section 3.D. of the 2005-06 Agreement.

The Board argued that there was a past practice of not applying the language of Section 3.D. of the Agreement in other than new hire situations. Several witnesses for the Board testified in support of that claimed past practice, but no specific examples were provided of named teachers who first qualified for assignment to the Professional Salary Schedule after their initial hire and who were denied that reassignment because of the Board's refusal to apply Section 3.D. to non-initial hire situations. No specifics as to the precise number of teachers who did not benefit from Section 3.D. because they first qualified at some point after their initial dates of hire were provided.

Steve Flavin, Supervisor, Labor Relations, testified that he worked for the Board from 1974 through 2006 and that during that entire period the Board consistently failed to apply Section 3.D. to incumbent employees; when asked for details, however, Mr. Flavin noted that he could not provide any estimate of the number of times that Section 3.D. was not applied due to an employee's status as an incumbent; he also stated that he was unaware of any prior grievances on this issue and was unaware of any discussion of the matter between representatives of the Board and the Union prior to the instant case.

Florence Bozzella, Director, Human Resources, testified that during her long tenure with the system (27 years), she was unaware of any of the Hiring and Certification Specialists ever asking her whether Section 3.D. applied to existing employees. When asked the number of conditionally certificated teachers, she noted that about 14% of the teachers have held Provisional certificates. No specific cases prior to the instant case in which the issue was raised, however, was identified by Ms. Bozzella.

Victoria McCormick, a retired Personnel Specialist, also testified that it has not been the practice of the Board to change the salary scale placement of existing employees under Section 3.D. She stated that it has always been her understanding that Section 3.D. was limited to new hire situations (she began working at the Board in 1983), but did not cite any individual cases and noted that, most of the time when a provisionally certificated teacher is within three credits, the teacher also still needs to pass some part of the PRAXIS. Ms. McCormick noted that this case was factually unusual in that the Grievant completed his PRAXIS requirements prior to completing his required coursework.

Arthur Smelkinson, Human Resources Hiring Specialist for approximately the past five years, testified that he also was advised that Section 3.D. applied only to new hire situations. No indication, however, of the number or identity of people other than the Grievant who met the requirements of Section 3.D. for the first time as an incumbent was provided.

Nor was there any evidence that, prior to the instant case, there had been a challenge to the Board's actions in applying Section 3.D. only to new hires or that the claimed practice of the Board had been brought to the attention of the TAAAC.

Michael Carrington, UniServ Director, MSTTA, who has serviced the TAAAC unit for three years, testified that to the best of his knowledge, this was the first case that was brought to the attention of the Union of the failure to apply Section 3.D. to an incumbent employee.

The record also was devoid of any affirmative evidence of application of Section 3.D. to any teacher in other than the initial hire situation.

The TAAAC relied, in support of its position herein, upon notes of some bargaining history when Section 3.D. was last amended.

Section 3.E. of the 1969-70 Agreement provided in its totality as follows:

A holder of a Provisional Degree Certificate who is within six semester hours of completing Standard Professional Certificate requirements, or who has completed the teacher education program in his teaching field in a regionally accredited college but does not meet Maryland's requirements, shall be paid on the Professional salary scale and be given up to two years to qualify for the Standard Professional Certificate.

The Parties agreed in the 1973 negotiations to change that language to the language currently found in Section 3.D. of the Agreement. The relevant changes (which resulted from a proposal by the Board) were: 1) a change from being within six semester hours of completing Standard Professional Certificate Requirements to being within three semester hours of completing Standard Professional Certificate Requirements; and 2) a change from being given up to two years to qualify for the Standard Professional Certificate to being given one year to qualify for the Standard Professional Certificate.

The bargaining notes reflect some concern by the Union as to how the changes would impact on those already employed. According to the notes:

1) the Board participants in the negotiations explained that the supply of teachers had improved and that the Board need not wait two summers for a person who lacks six hours to become professionally certificated;

2) TAAAC asked how many persons now employed would be affected by the proposal and, at the following session, the Board replied as follows:

30 Elementary Teachers  
30 Secondary Teachers

Elementary  
15 (1-3 semester hours)  
17 (4-6 semester hours)  
8 (more than 6 hours)

Secondary  
11 (3 hours)  
1 (4 hours)  
16 (6 hours)  
1 (9 hours)  
1 (special case)

3) agreement was reached to add the following language to the provisions of Section 3.D, in the 1974-76 Agreement: "However, teachers in the employ of the Board at the time of the ratification of this Agreement (February 6, 1974) shall be governed by Article 3, Item D of the 1972-74 Master Agreement."

Several Board witnesses also noted that there was a review and full discussion of the Agreement, on a section by section basis, during the 2001 bargaining. Each of those witnesses acknowledged, however, that there was no discussion in those negotiations of the Board's claimed practice of applying Section 3.D. only to new hires or of the Board's position that Section 3.D. was limited to new hires.

### **CONTENTIONS OF THE UNION**

The Grievant met the provisions of Section 3.D. for inclusion on the Professional Salary schedule. That provision is clear and unambiguous and entitled him to be placed on the Professional Salary schedule as of October 26, 2005 – the point at which he had satisfied all of the requirements needed to obtain a Professional Certificate other than three additional credit hours.

The Board's assertion that Section 3.D. was limited to new hire situations must be rejected for several reasons. First, nothing in the language of that provision purports to limit it to new hires. Second, the available evidence of bargaining history suggests that the negotiators understood that it applied even after new hires. The 1973 negotiations revealed that the Parties adopted language to ensure that the changes to this provision applied only to those hired after ratification. This strongly suggested that they mutually understood that it could apply to teachers already employed by the Board. Third, the Board's claim of past practice must be rejected as unproven. No specifics were provided as to that claimed practice. Not even a single instance was cited in which the Union was put on notice of any such practice. The Union could not challenge breaches of the Agreement of which it was unaware. The party asserting a past practice has the burden of proving its existence and its scope. The record failed to substantiate the practice claimed to exist by the Board in this case.

Any claim that mid-year adjustments are not made must be rejected as unproved. Section 3.D. does not speak in terms of only becoming applicable at the beginning of a school year. Moreover, the claim that no mid-year adjustments were appropriate was not made until the Board's closing argument and was never cited in the grievance reply as a basis for having denied the Grievant's claim.

The Board's argument that there are no Provisional Certificates any longer also is not significant. The Conditional Certificate is the same thing under a different name and that change of name provides no basis for invalidating Section 3.D.

For all of these reasons, the grievance should be sustained. The Board should be directed to place the Grievant on the Professional Salary Scale, retroactive to October 26, 2005, in accord with Section 3.D. of the 2005-06 Agreement.

### **CONTENTIONS OF THE BOARD**

The Board acted in accord with the Agreement in this case. The Union is attempting in this arbitration to assert an interpretation of Section 3.D. that has not been applied at any time in the past 30 years. The un rebutted testimony of the Board's witnesses established a consistent pattern of applying Section 3.D. only in initial hire situations for decades. The Union was unable to cite even a single case in which an incumbent teacher like the Grievant was granted the benefit of Section 3.D. of the Agreement.

The 1973 negotiations do not support a contrary approach. The negotiated changes were from six credits within two years to three credits within one year and the fact that recruitment prospects had improved and the Board need not offer the Professional Scale for individuals who were further from completion of their requirements to obtain their Professional Certificates. There was no discussion and no focus upon changing the provision to apply to other than new hires or to changing the prior practice of the Board in that regard.

The Union's reliance upon the bare language of Section 3.D. is misplaced. No reason was shown to adopt an interpretation for the first time decades after the agreement to that provision that varied from the consistent application of that language over many agreements. Further, if the focus is upon the language as written, there are no holders of Provisional Degree Certificates and Section 3.D. would never be applicable. Following

the changes to COMAR, there are no longer individuals who possess Provisional Degree Certificates; rather, they possess Conditional Teacher Certificates.

Finally, the interpretation advanced herein by the Union would create an undue administrative burden. The Board is not obligated to (and could not easily) monitor each of its employees' situations to determine mid-year when someone has become eligible for a Professional Certificate, but for three more qualifying credits. Nor has the Board made such mid-year salary adjustments for any other bargaining unit employees.

For all of these reasons, the grievance should be denied in its entirety.

### **DISCUSSION AND OPINION**

After careful consideration of the entire record, I am persuaded that the Board violated Section 3.D. of the Agreement when it refused to place the Grievant on the Professional Salary Scale, effective on or about October 26, 2005. A summary of the principal reasons for this holding follows.

The language of Section 3.D. says nothing about limiting its provisions to new hires. The question is presented, therefore, as to whether there is some clear evidence of mutual intention to so limit Section 3.D. The Board relied primarily upon a claimed past practice which it maintained was reflective of mutual intent over the years to limit Section 3.D. to initial hire situations only. The problem with this assertion is the absence of clear record evidence establishing the existence of the claimed past practice.

While a number of Board witnesses testified to their understanding that the Board has consistently applied Section 3.D. only in initial hire situations, there was no detailed evidence of the type needed to prove the existence of a past practice. Past practice, as an interpretative tool, is significant only to the extent that it evidences an agreement, by

conduct, as to a mutually acceptable response to a particular situation. None of the customary hallmarks of a past practice were shown on the record in this case.

There was no showing of the number of times that Section 3.D. would have triggered in incumbent employees, but was not applied. The record evidence suggests that the situation involved in this case – an incumbent teacher who has passed all PRAXIS and other certification requirements, but who still has three or fewer credits to complete to fully qualify for certification – is a relatively uncommon occurrence.

Absent express notice to the Union of the Board's practice and absent a sufficient number of examples that notice to the Union may be inferred, what was shown, at best, on this record was an internal practice of unknown frequency and no basis to conclude from the Union's "silence" that it acquiesced in the Board's behavior.

Since a true past practice represents an agreement by conduct, it is well recognized that the relevant facts and circumstances that led to the development of the practice and its continuation must be similar to those present in the instant case. There was no showing of the relevant facts and circumstances that surrounded the claimed prior practice of not applying Section 3.D. to non-initial hire situations. The witnesses recognized that the case involving the Grievant was unusual since in the vast majority of the cases an individual who has not completed the coursework also has failed to complete all of the various PRAXIS examinations. How many times the situation involved in this arbitration may have arisen over the years is unknown. No documentation was introduced to establish that this situation ever arose in the past, much less that it was handled in a consistent fashion in a sufficient number of instances to be found to constitute a past practice.

The claim of practice in this case suffers from another problem – it conflicts with the available evidence of bargaining history. While there was no first-hand testimony of the negotiations that surrounded the original adoption of Section 3.D. or its amendment in 1973, the Union's notes of the 1973 negotiations were disclosed to the Board many months prior to the instant arbitration and were not rebutted. No testimony from anyone who participated in those negotiations and no notes from the Board of those negotiations were introduced. Regardless, the relevant part of those negotiations related to language that ultimately was included in the 1974 Agreement – to wit, provisions that were designed to make sure that those individuals who were employed prior to contract ratification would be covered by the provisions of Section 3.D. contained in the 1972-74 Agreement (which were more favorable to employees). Any doubts as to whether that provision was intended to cover only teachers who were already receiving Section 3.D. salary placement benefits or were intended also to apply to those who might thereafter qualify for such benefits (notwithstanding their incumbent employee status) is answered by the Board's response to the Union identifying those incumbent employees who would be affected by the changed language. The listing of affected employees included a number who were more than six credits from fulfilling all requirements for a Professional Certificate. They, thus, would not have qualified under Section 3.D. for salary placement on the Professional Scale when they were hired and would potentially become eligible for Section 3.D. benefits only after having passed additional qualifying credits. Viewed as a whole, the 1973 bargaining and the negotiated language preserving the salary scale placement benefits of the 1972-74 Agreement for employees hired prior to ratification,

strongly suggest that, at the time the provision was negotiated and modified, both Parties believed that it applied to incumbent employees as well as to newly hired employees.

The record revealed no discussions between the Parties, subsequent to 1973 and prior to the instant case, in negotiations or otherwise, of the issue of whether Section 3.D. was limited to new hires. Nor, as previously noted, does the record evidence support a finding of a past practice to that effect.

The argument that the change from Provisional to Conditional Certificates voided Section 3.D. is unpersuasive. For purposes of Section 3.D., the change was one in name only. Moreover, there was no evidence that the Board stopped applying Section 3.D. altogether coincident with the change in COMAR provisions.

The assertion that Section 3.D. should not be applied to mid-year situations must also be rejected. On this record, there was no proof as to whether over the years the Board has failed to apply Section 3.D., or any other salary provision of the Agreement, to effect mid-year increases when an employee meets the requirements to receive that higher salary mid-year. The burden of making such a showing rested with the Board since it was being asserted as an affirmative defense to the obligation to convert the Grievant to the Professional Salary scale. The assertion of administrative burden relative to such salary scale movement also is unpersuasive. There was no showing of undue burden by the ruling in this case; the Board's obligation is not to monitor employees' situations continuously throughout the school year to determine whether they have taken courses and/or passed the required PRAXIS exams to qualify for conversion to the Professional Salary scale. Rather, the obligation is to appropriately adjust employees' salary scale placement once the employee brings those facts to the attention of the Board

as was done in this case. Moreover, the claim of administrative burden – even if proved – cannot support a refusal to apply negotiated provisions where there was no showing that it historically supported such a failure in the past.

In sum, when one examines the plain language of the Agreement, it is clear that the Grievant was entitled, pursuant to Section 3.D., to be placed on the Professional Salary scale. Although the grievance initially sought that the Grievant be placed on the Professional Salary scale prior to his receiving notice of his having passed the second part of the PRAXIS examination, at the arbitration hearing that claim was amended to seek placement only as of October 26, 2005 – the date on which it was known that he had satisfied all requirements for a Professional Certificate other than the three credits.


### **AWARD**

The Board violated the Agreement, specifically Section 3.D., when it failed to move the Grievant, Joseph Michael Keenan, to the Professional Salary schedule, effective October 26, 2005.

The Board is directed to make the Grievant whole for the salary and any benefits that he lost as a result of that violation.

The grievance is sustained to the extent consistent with the foregoing Opinion and Award.

November 25, 2006



Ira F. Jaffe, Esq.  
Impartial Arbitrator

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November 25, 2006

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BY E-MAIL ONLY

Re: AACPS-TAAAC  
(Joseph Michael Keenan)  
(Salary Scale Placement)

Dear Counsel:

Attached please find copies of the Opinion and Award in this matter.

The fee for my services in this matter is \$3,810.00, representing one day of hearing and one and one-half days for study and preparation of the Opinion and Award, plus mileage expenses to and from Annapolis.

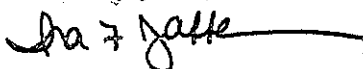
This sum is payable one-half, or \$1,905.00, by each Party.

I would most appreciate your forwarding a copy of this letter to the appropriate persons for processing and payment.

If you require a printed "hard" copy, please let me know.

Thank you for your patience and it was a pleasure working with you both.

Sincerely yours,



Ira F. Jaffe  
(Taxpayer ID Number 52-1259732)