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file Arbitration:  
Past Practice

**BEFORE  
SEYMOUR STRONGIN  
ARBITRATOR**

September 19, 2006

**In the Matter of the Arbitration between-**

**WICOMICO COUNTY BOARD  
OF EDUCATION**

**-and-**

**Grievance: Dittrich—Inclement Weather**

**WICOMICO COUNTY  
EDUCATION ASSOCIATION**

**APPEARANCES:**

**For the Board:**

**Judith S. Bresler, Esq.  
Reese & Carney, LLP  
10715 Charter Drive  
Columbia, MD 21044**

**For the Association:**

**Kristy K. Anderson, Esq.  
MSTA  
140 Main Street  
Annapolis, MD 21401-2020**

The Association claims in this grievance that the Board wrongfully required grievants to remain at work for their full scheduled workdays on June 13 and 14, 2005, unscheduled early-release days, under circumstances where the

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Board closed the entire school system early on those days due to excessive heat in its non-air-conditioned schools. The Association asks that all affected employees be awarded compensatory time in an amount equal to the time they should have been released over the two days.

The facts of this case are not in any material dispute. In the 2005 school year, the County had 24 school sites in its jurisdiction. Of those sites, 16 were air-conditioned, and eight were not. During a period of especially hot, muggy weather at the end of the 2005 school year, limited for purposes of this case to Monday and Tuesday, June 13 and 14, but extending through the last three scheduled half-days of that final week of the school year, the Superintendent deemed the indoor temperature in the County's non-air-conditioned schools to be so excessively hot as to warrant the early release of the students in those schools. For reasons of economy related to the increased costs of busing if only those students were released early, the Superintendent ordered the entire school system closed early. The Superintendent testifies, in effect, that she believed such action would be appreciated by the teachers as an opportunity to spend some additional time on end-of-year activities without the students present.

In the action giving rise to this grievance, the Superintendent required all teachers to work the entirety of their regularly-scheduled workdays on June 13 and 14, rather than to permit them to leave early. So far as the record shows, bargaining unit teachers were provided the option on those days either to remain at their assigned schools to perform their normal end-of-year activities—which originally were scheduled to be completed on scheduled half-days on June 15, 16, and 17—or to report instead to one of the County's air-conditioned schools.

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It is undisputed that the Superintendent has the authority to order the early closing of schools due to excessive heat in school buildings. In relation to that authority, Article 4.6 of the parties' Agreement establishes working conditions for bargaining unit employees in the event of "emergency closings," providing in its entirety as follows:

**¶ 1] EMERGENCY CLOSINGS - Teachers shall not be required to report to work on days when schools are officially closed for the entire day due to inclement weather or other emergencies producing hazardous or unhealthful conditions.**

**¶ 2] In regard to delayed opening and/or early dismissal days due to inclement weather, the workday of classroom teachers will have the same relationship to the student starting and dismissal times as on a normal workday, provided that a reasonable number of teachers may be required to remain in the school until all buses have departed.**

**¶ 3] In case of a school closing due to lack of heat, fire damage or other similar circumstances, teachers may be required to report to work at the closed school to provide emergency services of limited duration or may be temporarily reassigned to other buildings as substitutes or to perform other teaching-related duties. If required to report to the closed school, teachers will not be expected to remain on duty in circumstances which jeopardize their health or safety.**

According to former Uniserv Director J.C. Parker, who negotiated Article 4.6 on behalf of the Association, the language of ¶¶ 1 and 2 of the present Article 4.6 first appeared in the parties' 1976 Agreement as a single, two-sentence paragraph, and remains materially unchanged. Parker testifies that ¶ 3 of Article 4.6 was first added in the 1979 Agreement, and has remained materially unchanged since that time except for the addition of the "temporary reassignment" phrase in the first sentence of that paragraph. Parker testifies, further, that the language grew

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out of the Board's concern about ongoing mechanical problems at a single school, and was intended to address mechanical failures at a single school rather than system-wide weather-related problems.

In relation to "health and safety," the Arbitrator observes that Article 4.7 provides in relevant part that:

#### HEALTH AND SAFETY

- A. The Board agrees that it shall comply with state, federal, and OSHA regulations with regard to safe and healthful working conditions. Teachers will not be asked to search for bombs or other explosives.

Association witnesses testify that the entire school system has been shut down due to excessive heat three or four times since the early 1990's, and on each such occasion the teachers and students alike were released early. Association witnesses are only able to identify two specific dates of such early releases, June 8 and 9, 1999. Assistant Superintendent Allen C. Brown confirms that the schools indeed were closed early on those two days. All agree that June 13 and 14, 2005 are the first occasions on which the current Superintendent has ordered schools closed early due to high heat, under circumstances where the provisions of Article 4.6 have not materially changed in relevant part.

The Association first contends that this proceeding is governed by ¶ 2 of Article 4.6, rather than ¶ 3. Relying on the testimony of J.C. Parker regarding the parties' bargaining history, the Association asserts that ¶ 3 is designed to address mechanical failures at individual schools, and not to system-wide weather-related emergencies. The Association thus argues that the excessive heat that led to the early dismissals on June 13 and 14, 2005, cannot be viewed as mechanical failures, because there simply was no air-conditioning machinery installed at the

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particular schools that required the early dismissals. In this regard, the Association relies on the *ejusdem generis* canon of construction for the principle that the reference in ¶ 3 to, "other similar circumstances," must relate to mechanical failures. Responding to the Board's anticipated argument, the Association also contends that ¶ 2 cannot properly be construed as relating only to travel-related considerations, in essence because the language relates more generally to inclement "weather," as opposed to inclement "travel," and that inclement weather must include excessive heat.

The Association next contends that its position is supported by the parties' past practice under Article 4.6. The Association principally relies on the undisputed evidence relating to June 8 and 9, 1999, but also relies on the general recollections of other senior bargaining unit members. The Association argues that where, as here, there are relatively few opportunities for a practice to be applied, but the practice has been consistent on each of those parallel occasions, those relatively few instances are sufficient to establish a binding past practice.

The Board principally contends that Article 4.6, ¶ 3, unambiguously permits the Superintendent to order an early dismissal due to lack of air-conditioning in school buildings, and to reassign teachers to other duties in other buildings. Accordingly, and relying on judicial decisions of the Court of Appeals of Maryland, the Board argues that the Arbitrator must give effect to that plain meaning. In this regard, the Board cites the same canon of statutory construction as does the Association, *ejusdem generis*, for the proposition that the general phrase, "other similar circumstances" as used in ¶ 3, must include lack of air-conditioning, because it follows the specific reference to a lack of heat, and both conditions, the Board argues, bespeak "a lack of utilities."

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As a corollary, the Board contends that it would be improper, and inconsistent with Maryland decisional law, to allow extrinsic evidence to create ambiguity where none exists in the plain language of the Agreement. Thus, the Board dismisses as irrelevant the testimony offered by J.C. Parker regarding the parties' bargaining history. More specifically, the Board argues that nothing in ¶ 3 of Article 4.6 suggests that it applies only to problems at a single school.

The Board next contends that ¶ 2 of Article 4.6 is not relevant to this dispute, because the Superintendent did not close the schools due to inclement weather. The Board argues that ¶ 2 obviously relates to hazardous conditions on the roads, and not to conditions inside of the schools, and that road conditions were not relevant to the Superintendent's decision to order the early dismissals.

Finally, the Board contends that the Union has not provided sufficient evidence to establish a binding past practice requiring that teachers be released early on occasions when students are released early due to a lack of air-conditioning.

As a starting point for analysis of this contract interpretation case, the Arbitrator does not share the Board's confidence in the clarity of the language of Article 4.6 as it applies to this case. Although the Arbitrator agrees with the Board's assessment that the provision must be read in its full context and must be construed reasonably, the provision simply does not address explicitly the manner in which the Superintendent must treat bargaining unit teachers when the entire school system is closed early on a particular day due to the lack of air conditioning in some, but not all, of the County's schools. A question exists as to whether this dispute should be considered a case of inclement weather governed by ¶ 2 of Article 4.6, or instead as a school closing governed by ¶ 3 of that article. Both

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parties present reasoned arguments, and the matter is fairly debatable. The Arbitrator accordingly concludes that the question should be answered on the basis of the entire record.

What now exists as the first two separate paragraphs of Article 4.6 is, for purposes of this case, essentially unchanged from what used to be a single, two-sentence paragraph when the language first was added to the parties' Agreement in 1976 as Article 4.5. As a single paragraph, the second sentence followed on the heels of the first, which expressly provided then, as it does now, that teachers shall not be required to work on days when schools are officially closed for the entire day due to inclement weather. By clear, unambiguous language, the first sentence of Article 4.5 (1976), and what now is Article 4.6, ¶ 1, addressed the system-wide closure of "schools," in the plural. There is no suggestion anywhere in the record that ¶ 1 ever was intended to address single-school closing, or that any single school ever was closed for an entire day due to inclement weather.

Recognizing the reality that the weather does not always heed the County's school clock, the parties provided in the second sentence of Article 4.5 (1976), and what is now Article 4.6, ¶ 2, that teachers' schedules on days of partial inclement weather, *i.e.*, late openings or early closings, would be tied to the students' schedule on such days. As originally provided, teachers were required to report 30 minutes before the students, and to remain 30 minutes after the students, on such days. This second sentence of Article 4.5, as with the first sentence, plainly refers to system-wide closures, and not to single school closings. Again, there is no evidence to the contrary in the record.

Paragraph 3 of Article 4.6 was not added to the two foregoing provisions until 1979. By its terms, it did not then, and does not now, address

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system-wide school closures. Rather, it plainly addresses a “school closing”—singular, not plural—a conclusion subsequently made even more obvious by the addition of the provision regarding temporary reassignments to “other buildings,” which would make no sense if all school buildings were closed pursuant to that provision.

The language and history of this provision thus suggests that ¶¶ 1 and 2 of Article 4.6 are meant to govern system-wide closures, whereas ¶ 3 is meant to govern single-school closures, but this is a conclusion that is bolstered by other record evidence. First, Parker testifies without evidentiary challenge that ¶ 3 was added to the Agreement at the Board’s behest, expressly in response to a problem the Board was facing with the heating system of a single school. Parker’s testimony is that the provision was never intended to govern system-wide closures, and never previously was applied to a system-wide closure.

Moreover, several Union witnesses testify that on the only occasions subsequent to 1979 on which the Superintendent has declared a system-wide early dismissal due to excessive heat, teachers have been excused early consistent with the language of ¶ 2, rather than been reassigned consistent with the terms of ¶ 3.

As a practical matter, the conclusion that this dispute is governed by ¶ 2 rather than ¶ 3 also is supported by the fact that the Superintendent declared a system-wide closing, applicable to all County schools regardless of whether any particular school was affected by the excessive heat. Even accepting that “lack of air conditioning” is an adjunct of “lack of heat,” the fact is, none of the 24 air-conditioned schools that were closed on the days in question either suffered from excessive heat or lacked air conditioning. Thus, ¶ 3 does not readily apply to the closing of those air-conditioned schools. System-wide closings under ¶ 2 are a

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more apt comparator. It is commonplace for entire school systems to be closed due to inclement weather conditions that may affect some, but not all, of a County's schools. For example, snow may fall more heavily in one area of a County than another, yet snow-related closings typically are system-wide.

As to this last point, the Arbitrator readily concludes that the "excessive heat" leading to the system-wide early dismissal on June 13 and 14, 2005 constitutes "inclement weather" within the meaning of ¶ 2. The Board may be correct, so far as it goes, that there is a practical connection between inclement weather and travel concerns, but the Board thereby proves too little. Paragraph 1 of Article 4.6 does not simply apply to system-wide school closings due to inclement weather; it also applies to school closings "due to ... *other emergencies producing hazardous or unhealthful conditions.*" (Emphasis added.) This language is quite a bit broader than concerns about icy roads or poor visibility. Under the *ejusdem generis* canon of construction cited by both parties, inclement weather may produce conditions outside the schools that render school attendance hazardous or unhealthful. Likewise, excessive heat may create conditions inside the schools that render attendance hazardous or unhealthful. The language of ¶ 1 thus relates quite readily to general concerns about health and safety, which, as quoted above, are broadly defined at Article 4.7 as consistent with "state, federal, and OSHA regulations with regard to *safe and healthful working conditions.*" (Emphasis added.) The "safe and healthful working conditions" language of Article 4.7, it should be noted, has been in the Agreement at least since 1976 (albeit absent the inclusion of "OSHA" in the list of regulations with which the Board expressly agrees to comply). The Arbitrator believes that the historical

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relationship of ¶1 to ¶ 2 of Article 4.6 suggests that the “other emergencies” language applies with equal force to both all-day and partial-day closures.

In the final analysis, the Arbitrator returns to the point made at the outset of his discussion of this case: the two system-wide early dismissals due to excessive heat in some, but not all, of the County’s schools are not events squarely addressed by the language of Article 4.6. The tipping point in this conundrum is provided by the evidence of the Board’s heretofore uniform treatment of such episodes dating back to the early 1990’s, and most recently in 1999 on two days when the parties agree the teachers were dismissed consistent with the terms of ¶ 2 rather than ¶ 3. This uniform history is perfectly consistent with a reasonable reading of Article 4.6 in its entirety and the parties’ history of bargaining thereunder. Such uniformity—literally covering each and every instance in which there was a system-wide early dismissal to the best recollection of Union witnesses whose employment by the Board is best measured in decades rather than years—suffices to meet the test of a binding past practice under circumstances where, as here, the underlying event is a rare occurrence. The rationale for this conclusion, of course, is that to permit a change to this uniform, longstanding—albeit rare—practice would disturb the parties’ mutual ability to rely on an apparently settled matter. The time and place to change such understandings, if at all, is at the bargaining table.

Finally, the Arbitrator is not persuaded to the contrary by considerations of the Superintendent’s statutory authority under MD Code Ann., Education Article, § 6-201. In this regard, the Arbitrator notes that the Board does not explain how the Arbitrator’s foregoing conclusions unlawfully entrench on this statutory authority. It suffices to state that the Arbitrator finds no unlawful

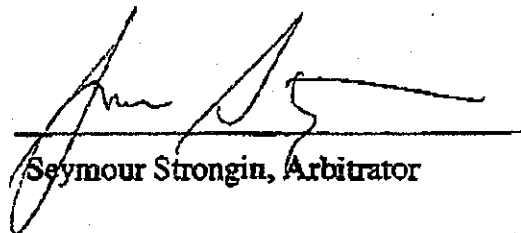
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inconsistency between that statutory authority and the terms of the parties' collective bargaining agreement as interpreted and applied in the instant proceeding.

### DECISION

The grievance is sustained. Each affected bargaining unit employee shall be awarded four hours of compensatory time for the time they wrongfully were required to remain on duty on June 13 and 14, 2005.



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Seymour Strongin, Arbitrator

Washington, D.C.