BEFORE JOHN A. CRISWELL
HEARING EXAMINER

In the Matter of a Dispute Between:

CHERRY CREEK SCHOOL DISTRICT NO. 5 (“DISTRICT”)
and
CHERRY CREEK EDUCATION ASSOCIATION (“ASSOCIATION”)

SCOT KAYE, GRIEVANT

HEARING EXAMINER'S REPORT

An evidentiary hearing was conducted before the undersigned hearing examiner on April 27, 2017. At that hearing the DISTRICT was represented by Sonja S. McKensie, Esq., and the ASSOCIATION was represented by Charles Kaiser, Esq., and Erik Bradberry, Esq. Sworn testimony was taken from eight witnesses, each of whom was subject to cross-examination, and some eight written exhibits were presented. At the completion of the evidentiary portion of the hearing, the parties were granted the right to file written post-hearing briefs, both of which were received by the hearing examiner on May 11, 2017, at which time the hearing was considered as closed and the issues were ready for the hearing examiner’s consideration and report.

Based upon the evidence received and the parties' various submissions, the hearing officer sets forth below his findings of fact and his non-binding report.

THE ISSUES

Before the commencement of the evidentiary hearing, the parties agreed that the issue that the hearing examiner was to consider was:

> "Was the allocation of planning time and class load to Scott Kaye in the 2016–17 school year applied inequitably, in violation of negotiated policy 4136A.2a, and if so, what is the proper remedy?"

In addition, however, the DISTRICT asserted that the arbitrator lacked procedural jurisdiction over the grievance because it was not filed within the time provided in the negotiated policy.

This report, therefore, shall address both issues.

THE POLICIES' PROVISIONS

The parties' agreement here has not taken the form of a typical collective bargaining agreement. Rather, their overall agreement is represented by a series of agreed-upon "Policies" and several memoranda of understanding. Nevertheless, the effect of this arrangement is the same as if the provisions contained in these policies were contained in a single collective bargaining agreement. And, the provisions of two of those policies have direct pertinence to the instant dispute, although others may also have an indirect relevance.

The first policy of significance is Policy 4116, at pages

000024 through 000027 of Exhibit 1. Section F of that policy is entitled “Teacher Planning Time.” Such time is described as “teacher time for activities directly related to student instruction, exclusive of instruction, duty, supervision and duty free lunch.” It then sets forth certain minimum standards to be observed. It requires that each planning period must be at least 40 minutes in length and that each full-time teacher must be provided a minimum of 375 minutes of planning time each week. (Policy 4116F.1), page 000024)

This policy makes no distinction in the amount of planning time due to the nature of courses to be provided, except it provides that teachers without a full-time contract are to be provided a prorated amount of planning time. It does, however, provide that the parties recognize that changes in the amount of planning time “for groups of teachers may be necessary or advisable from time to time.” (Policy 4116F.6)

Policy 4136 (Ex. 1, at pp. 000082 through 000087), then establishes a somewhat typical grievance procedure. However, it defines a “grievance”, among other things, as “a written complaint that there has been a violation or inequitable application of any of the provisions of policies or administrative procedures. . . .” (Policy 4136 A.2.b., emphasis supplied) This policy also establishes three “levels” at which any such grievance is to be considered; the final level being a submission directly

to the DISTRICT'S Board or a submission of it to “Arbitration.” (Policy 4136D.5.) If the latter alternative is selected, a “Hearing Examiner” is to be appointed to conduct a hearing and to receive evidence, after which he or she is to issue a “report” within twenty days, which is to contain “findings of fact, reasoning, conclusions, opinions and recommendations on the issues submitted.” This report “will be advisory only and be binding on neither the Board nor the grievant and or the [ASSOCIATION].”

FINDINGS OF FACT

The evidence presented by the parties is substantially undisputed, and those factual disputes that do exist are, in this hearing examiner's opinion, of little relevance to the issues that he must decide.

It is apparent that, at least in terms of both teaching time and planning time, the administrative authorities at Liberty Middle School (Liberty) have, at least for several years, distinguished between those teachers who teach “core” subjects (core teachers) and those who teach “elective” subjects (elective teachers).

“Core subjects” are those subjects that have been designated as such by the Colorado Commission of Education pursuant to 22-7-1006.3, C.R.S. and consist of English language arts, mathematics, science, and social studies.

It would appear that this concept of “core” subjects was given birth by the federal No Child Left Behind Act of 2001. See 20

U.S.C. 6311(b(1)(c)

The federal act provided for the assessment of a state's educational success by having students tested in these core subjects. However, the DISTRICT asserts, and I accept that assertion, that this former federal act has been repealed, and Colorado has established a similar state law that will designate the core subjects listed above and provide for an assessment similar to that which had been contained in the federal act. Every student at Liberty is required to take a course or courses in each of these core subjects.

In addition to these core subjects, of course, there are other substantive courses offered to Liberty students which are not required courses, but which the student may elect to take. Examples of such courses are foreign languages (or at least Spanish), music, art and physical education.

At Liberty, there are eight class periods each day in which courses are taught, each period being 49 minute in length, plus an additional four minutes between classes to allow students to pass from one class room to another. Core teachers teach five classes each school day In addition, each such teacher has a PRIDE class each day, which lasts for 19 minutes and is subject to a

uniform lesson plan that the teacher does not prepare. They also attend a Professional Learning Community (PLC), where teachers who teach in the same academic area meet to discuss teaching plans and other areas of common concern, for a total of 73.5 minutes each week. Based upon the undisputed testimony, I find that the time that core teachers spend attending PLC meetings is planning time for them.

Each core teacher is provided two class periods of 49 minutes each for a total 98 minutes each day during which they are not scheduled to teach any class and which they may use for multiple purposes including preparing for presentations to later classes, considering methods for aiding individual students and contacting parents. In addition, many core teachers have "back-to-back" planning periods each day, so that they may use the few minutes between these two periods as additional time for planning activities. Hence, each core teacher without a back-to-back planning period is granted a total of 490 minutes of planning time each week, and each core teacher with a back-to-back planning period has 510 minutes of planning time each week. Subtracting the 19 minutes each day during which the core teacher has a daily PRIDE class, a weekly total of 95 minutes, means that each core teacher is provided with either 415 or 395 net minutes each week during which they may devote themselves to planning purposes.

In contrast to the workload and planning time that the core

teachers teach, elective teachers teach six, rather than five, classes, and they are provided with one 49-minute planning period, rather than two, plus an additional period, either before or after their lunch period, of 19 minutes, for a total of 340 minutes each week.

In addition to these scheduled planning times, all teachers have the time between 2:50 p.m. and 3:40 p.m. each day during which they teach no classes.

Hence, the evidence establishes that, while the elective teacher teaches some 30 minutes more each day than the core teacher, he or she is provided some 55 to 75 minutes less planning time each week.

The one exception to this distinction between the core teacher and an elective teacher is made for the special education teacher. While the subjects taught by this teacher are not considered core subjects, so that this teacher is an elective teacher, that teacher is, nevertheless, provided with the same amount of planning time as are the regular core teachers. While there was no specific evidence presented upon the subject, I infer and find that this exception for the special education teacher was based upon the consideration that this teacher requires more time to plan for those classes.

This planning time schedule has been in effect for some time; the evidence does not establish when this schedule was initially adopted. The principal is the one who adopts such a schedule

There is no evidence establishing whether this schedule is common to other middle schools in the DISTRICT or whether Liberty is the only one with such a schedule. The written schedules of some other middle schools were placed in evidence (Exhibit 3), but no testimony was received concerning those schedules, and this hearing examiner does not consider himself competent to interpret them for himself.

The Grievant has been an elective teacher at Liberty for several years; he teaches three classes, an introductory and a more advanced classes in Spanish and a computer technology class. He has been evaluated with the highest rating available to Liberty teachers.

Grievant has apparently been concerned with the inequity that he sees in this schedule for some time. At some point in 2014, he spoke with Liberty's then principal, and he testified that the principal agreed to change the schedule for the forthcoming school year. The principal agrees that she and the Grievant had a conversation about this subject, but denies that she agreed to change the schedule. Thus, while it is clear that Grievant and the principal disagree about this conversation and its alleged inequity a resolution of the issues presented to me does not require me to resolve, and I do not resolve, this conflict in the testimony.

The DISTRICT presented testimony that, during the school year 2016-2017, Grievant was absent, with the consent of the principal,

about 24% of the time. Neither the Grievant nor the ASSOCIATION disputes this. However, I find that its relevance is only marginal at best.

The testimony from the DISTRICT is that the schedule for the school year 2016-2017 was distributed to all of Liberty's teachers in May 2016. Grievant denies receiving it at that time. However, I find, as a fact, that Grievant was aware months before he filed his grievance that, at least with respect to the difference in planning times between core and elective teachers, there would be no substantive change in the 2016-2017 school year from the schedules for the 2015-2016 and earlier school years

I also find, however, that Grievant filed his grievance (Exhibit 2), which asserted, among other things, that the pertinent schedule constitutes an inequitable application of the planning time policy, within 30 calendar days of the first school day of the 2016-2017 school year, which was the first day that that schedule was actually implemented for that year.

Finally, I should note that neither party presented any real evidence comparing the time and effort required to present an effective core subject course with the time and effort needed to present an effective elective course. For example, there is no evidence that would allow me to conclude that a Liberty teacher requires more effort to teach an effective course in social studies, or in any other core subject, than it takes to teach an elective course in Spanish or computer technology.

REASONING, CONCLUSIONS AND OPINIONS

1. The timeliness of the grievance.

The DISTRICT asserts that the grievance is untimely because the same was not filed within "thirty (30) days from the date the Grievant knew or reasonably should have known of the grievable act or omission," as required by Policy 4136.

In the DISTRICT'S initial written responses to this grievance at the first two levels, it seemed to assert that the "grievable act or omission" about which Grievant was complaining was the first time that any schedule was adopted that distinguished in terms of planning time between core teachers and elective teachers. However, no proof at the hearing was presented to establish when such a schedule was first adopted or when a policy first allowed a grievance to be filed complaining of the alleged inequitable application of a policy. Absent proof of both those facts, it is impossible to conclude even if Grievant could have filed a grievance, much less that he was required to do so.

During the evidentiary hearing, the DISTRICT'S claim was based upon Grievant's alleged tardiness since he became aware of the 2016-2017 schedule. The ASSOCIATION asserts that, by not raising this precise issue of timeliness at either level one or level two, it has waived its claim in this respect. I disagree.

I conclude that, once the claim of the lack of timeliness is raised, any argument respecting that issue would be legitimate, so

long as such argument does not attempt to rely upon information that was not made available prior to the hearing earlier. However, I agree that the grievance here was timely filed.

I have already described why I cannot conclude that Grievant was required to file a grievance before the adoption of the 2016-2017 schedule. One reason for this conclusion is that the mere adoption of this schedule was not a "grievable act or omission" within the meaning of Policy 4136C.2.

Arbitrators are fairly unanimous in concluding that the mere adoption of a policy does not give rise to a grievance. It is only when that policy is implemented, so that it actually adversely affects an employee, that there is a basis for a grievance. For example, Elkouri and Elkouri, "How Arbitration works" (ABA, 7th Ed. 2012), sec. 5.7 A. IV., at pp. 5-28 through 5-29, says:

> "A party sometimes announces its intention to perform an act, but does not culminate the act until a later date. Similarly, a party may perform an act whose adverse effect on another does not result until a later date. In such situations arbitrators have held that the 'occurrence' for purposes of applying timeliness limits is the later date."

See, also, City of Duluth, 91 LA 238 (1988).

Therefore, even assuming that Grievant became aware of the planned schedule for the 20-16-2017 school year in May 2016, that schedule did not have an impact upon him until it actually affected him, and that effect would have been felt first on only on the

First day that it was implemented, which would have been the first school day of the 2016-2017 school year. Since he filed his grievance within30 days of that date, it was timely filed.

Further, I also agree with the ASSOCIATION that where, as here, the grievance is based upon a continuous course of conduct, rather than a single, distinct act, that course of conduct constitutes a separate grievance each time that such conduct occurs. Here, then, the continued application of Liberty's planning time policy resulted in a "grievable act" each day that it was applied, and a grievance would be timely if filed within thirty days of any particular application. Of course, in such circumstances, no relief can be granted for any period more than thirty days before the grievance was filed.

For both these reasons, therefore, I conclude that the grievance here was timely filed.

2. The "past practices" assertion.

The DISTRICT also argues that Grievant's alleged failure to file a grievance within 30 days from when he was, for the very first time subjected to the difference in the schedules of planning time between core and elective teachers, resulted in this policy becoming a binding past practice. I likewise disagree with this assertion, again for two reasons.

First, the mere failure to exercise or to enforce a right does

not result in a binding practice. See Elkouri and Elkouri, supra, section 12.2, relying, in part, upon Girard School District, 119 LA 1476 (2004), which says that:

> "If a right is explicitly provided for in a collective bargaining agreement, then the non-exercise of that right does not amount to a 'negative past practice' and then becomes a forfeiture of it when challenged. Even if a party has not done so in the past, the party retains the right to police the agreement at any point."

Here, the present policy expressly allows a teacher to challenge an alleged inequitable application of a policy. As previously noted, the evidence does not show how long that provision has been in effect. But, even if it is assumed that this right has been the subject of a negotiated policy for a number of years and that the planning time schedule was never challenged, the mere failure to enforce that provision in the past did not result in the establishment of a negative past practice and a forfeiture of that right today.

Further, and perhaps of more importance, the evidence explicitly establishes that it was Liberty's principal who established the differing schedules. There is no evidence that the DISTRICT'S board approved it, or was even aware of it, or that it was a uniform practice of all middle schools.

Consequently, this case clearly falls within the reasonable assertion made by the DISTRICT in a previous instance that no past practice can be established based only on the past practice of a

particular school. Rather,it must be demonstrated that there was a practice impliedly agreed to by both parties -– the DISTRICT and the ASSOCIATION. The well-known arbitrator, Kathryn E. Miller, accepted the DISTRICT'S assertion and reached this conclusion in her report, dated March 15, 2004, in the grievance of Wade Manney. Irrespective whether that report was accepted by the Board, I agree with her conclusion in this respect, and I apply it here.

Hence, I must conclude that there is no past practice that is binding or even applicable here.

3. The alleged inequitable application of negotiated Policy 4116F.

Negotiated Policy 4116 F. established certain minimum for planning time to be provided each teacher. It is agreed by all that the schedule adopted by Liberty provides the minimum of each teacher. There is, therefore, no claim that the express provisions of this Policy have been violated by the DISTRICT.

The ASSOCIATION'S claim, rather, is based on negotiated Policy 4136A.2, which allows a grievance based upon an alleged "inequitable application of any of the provisions of policies . . ." And, it claims that the application of the planning time schedule at Liberty is "inequitable."

Now, in considering this issue, the first question presented is what standard is to be applied in determining whether there has been an "inequitable application." Without some articulated

standard, “inequity,” like “beauty,” will simply rest in the eye of the beholder. In that case, it will be only the personal sense of “justice,” residing in the heart and soul of each individual hearing examiner, that will dictate the result. Surely, neither party could be satisfied with such a personalized and perhaps quite different approach to the concept of equity.

However, neither party has been very helpful in advising me of a particularized standard to apply.

The ASSOCIATION suggests that the reference to “inequitable application” requires the DISTRICT to be “fair.” But, this is really no more specific than the Policy's provision itself.

The District, on the other hand, argues that “equity” does not mean “equality;” two persons, for example, may each be treated equitably without being treated equally. But, this principle is not universally true; if two persons in identical circumstances are treated unequally, it may well be concluded that one is being treated inequitably.

In considering a particularized standard to be applied, I recall that there is another circumstance in which arbitrators are called upon to consider the propriety of treating two or more employees differently. In a contract that requires “cause” or “just cause” for the imposition of discipline, virtually all arbitrators consider that, if the present grievant has been treated differently, either in the conclusion that some discipline

is warranted or in determining the degree of discipline, that fact may impact upon the conclusion whether cause or just cause exists.

Elkouri and Elkouri, supra, page 15-76, describes the standard that is applied in such circumstances as follows:

> "It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of conduct must be treated essentially the same, unless a reasonable basis exists for variation. . . ."

While I fully recognize that this standard has been developed for disciplinary cases, it is based upon the concept of fair and equitable treatment among comparable employees and is one that I conclude can be, and should be, applied here.

Here, then, all of the teachers at Liberty have the same general responsibilities, whether they teach core or elective courses; they are expected to spend their best efforts to provide the best educational experience and the best learning to all of the students they teach, whether the class is for a core course or an elective one. And, all of the negotiated policies are, to the extent of each teachers' specific responsibilities, applicable to all of them. I must conclude, therefore, that all of the teachers at Liberty "engage in the same type of conduct" for purposes of applying the standard that I have adopted.

The essential issue presented, then, is whether there is a "reasonable basis" for the difference in planning time that Liberty's schedule makes between core and elective teachers.

Certainly, if the District expected the pupils in an elective course, such as Spanish or computer technology, to receive less effective teaching than those in a core course, such as social studies, i.e., if elective teachers are to be held to a lower standard than core teachers, this would, I suspect, be a reasonable basis for distinguishing between the two groups of teachers. I daresay, however, that the District would vigorously deny such a motive. On the contrary, I have no doubt but what the DISTRICT would affirmatively insist that each teacher of an elective course, like each core teacher, is expected to expend all of the necessary energy to present the course materials in the best manner possible.

If a specific course or courses required less preparation than another, that factor would certainly constitute a reasonable basis for differentiation. Indeed, the DISTRICT itself has recognized that some teachers' responsibilities are such that a differentiation based upon this factor is required. That is the basis, I would think, why the special education teacher, while not teaching a core subject, is given more planning time than other elective teachers.

Hence, if there were a factual basis for concluding that an elective course requires less planning time than the planning time

required for teaching a core subject, this would, in my view, be a reasonable basis for a difference in the planning time allowed. But, as I have noted, there simply has been no evidence produced that such is the case. Indeed, the DISTRICT does not assert that the manner in which the elective teacher is treated at Liberty is justified because it takes less planning time to teach an elective course than is required by the core teacher.

The claim that making a distinction between the core teacher and an elective teacher is a reasonable one might deserve more consideration if it was demonstrated that such a distinction is one that is commonly made. But, as I have noted, there is no evidence that other middle schools also made this distinction for their planning times schedules.

The DISTRICT asserts that, in enacting the applicable federal and state legislation, Congress and the state authorities have recognized that core subjects are more "important" than other subjects. This assertion may be accurate, but it also may not be. No legislative history has been cited to support this assertion. And, the fact that the Congress did not require "science," a subject that no one could suggest is not important, to be included as a core subject until a later date, would suggest that "importance" was not the Congressional criterion. Rather, it could be that Congress picked the subjects for comparative assessment because those were the subjects that the vast majority of school authorities were teaching, so that, when comparing one to

another, the comparison is to be between the teaching of common, not different, courses.

But, if importance is the criterion, the question becomes: "Important to whom?"

In this day and age of technological globalization, is a foreign language or computer skills less important to the student than is the knowledge of mathematics? At least a reasonable argument could be made that, given the prevalence of electronic calculators in every Smart Phone, the latter subject is less important to the student than the knowledge of either Spanish or of computer science.

Indeed, even the DISTRICT does not support the proposition that the core subjects are intrinsically more important to the students. Its basic assertion, rather, is that the core subjects are those upon which assessments are to be made and that it is these assessments upon which the DISTRICT is to be judged.

However this may be, if the basic function of a school district is to provide quality education for its students, which I conclude is its most important underlying function, the distinction between core subjects and elective subjects, while perhaps a reasonable one for other purposes, is not a reasonable basis upon which to distinguish between the amount of planning time provided to teachers.

Therefore, I am driven to conclude that the planning time

adopted by Liberty's principal for the 2016-2917school year was an inequitable application of the planning time provisions for the Liberty teachers and, as a result, did not serve the underlying purpose of planning time and violated section F of Policy 4116.

RECOMMENDATION

In adopting a recommendation for a reasonable remedy for the violation found, I do not consider that a monetary award limited only to Grievant would be either fair or reasonable, particularly considering the extraordinary amount of time that has passed since this grievance was initially filed.

Rather, I consider that the only remedy that would be appropriate would be similar to a "declaratory judgment" that the present schedule is inequitable and that no distinction between teachers for planning time should in the future be made based upon whether it is a core subject or an elective subject that is being taught.

Dated this 30th day of May, 2017.

s/ John A. Criswell

JOHN A. CRISWELL
Hearing Examiner