

IN THE MATTER OF ARBITRATION BETWEEN

Teachers Association of Lee County

and

Case No.: 01-23-0004-3550

School District of Lee County

TALC'S POST-HEARING BRIEF

I.

INTRODUCTION

This case has its origins in the receipt of funds received by The School District of Lee County (“the School District”) from the federal government during the COVID period. The purpose designated for some of the funding, known as the Elementary and Secondary School Economic Relief (ESSER) Act, was to provide compensation to teachers who provided additional classroom coverage for absent classroom teachers.

To implement the payment of the ESSER funding the School District and the Teachers Association of Lee County (TALC) entered into two Memorandums of Understanding (MOU) and negotiated provisions in the Collective Bargaining Agreement (CBA) addressing the payment of the ESSER funds for 2021-2022 (FY 22); 2022-2023 (FY 23) and 2023-2024 (FY 24) The School District expended the ESSER funding in accordance with the MOU’s and CBA for FY 22 and 23, but did not provide any ESSER funding for classroom coverage for FY 24.

TALC filed a grievance over the failure to pay the negotiated ESSER funding in FY 24 as well as the failure of the School District to provide specified coverage data required under the CBA. The grievance was denied at Level II by the School District and the matter was then referred to AAA for the assignment of an Arbitrator.

The Arbitrator, Christopher M. Shulman, subsequently conducted an evidentiary hearing on June 27, 2024.

STATEMENT OF THE ISSUES

The issues in this case are whether the School District violated Sections 10.04(4)(g) and (h) of the CBA by failing to share or report specified coverage data, and failing to fund coverage for classroom coverage during FY 24, and, if so, what is the appropriate remedy.

FACTUAL BACKGROUND AND ARGUMENT

This is a straightforward case of interpreting the language in Section 10.04(4)(h) of the CBA. (Ex. 23, pg. 60) The School District spent a great deal of time at hearing explaining how the ESSER funds were obtained, the grant applications, state, federal and local approval of the funding applications, as well as the coverage expenditures in FY 23. None of that is relevant to a determination of the issues in this case.

The School District receives funding from federal, state, and local sources. As in this case, it can receive non-reoccurring funding under certain circumstances. Once the funds are received by the School District it negotiates with TALC how the funds are to be distributed to the employees. Agreements from those negotiations take the form of either Memorandums of Understanding or provisions in a CBA. When the parties successfully negotiate how the funds are to be expended the source of the funding becomes irrelevant to the expenditure of the funds. The issue becomes were the funds spent or distributed in accordance with the terms of the Agreement. Accordingly, there is no purpose in providing detailed explanations of the grant application or approval process. There are three relevant documents in this case, the February 10/11, 2022 MOU (Ex. 21); the August 11, 2022 MOU (Ex. 22) and section 10.04(4)(g)&(h) of the CBA. (Ex. 23)

In the February, 2022 MOU the parties agreed:

. . .

This document shall constitute a Memorandum of Understanding (MOU) between the Teachers Association of Lee County (TALC) and the School District of Lee County (District) relating to Article 10 (compensation) of the Collective Bargaining Agreement.

. . .

The parties involved desired to enter into an agreement that addresses emergency needs related to instruction during missed planning and classroom coverage. These emergency needs will be addressed with the expenditure of available Elementary and Secondary School Economic Relief (ESSER) Act funding. (Ex. 21, pg. 1 of 3)

The MOU went on to explain the additional funding rates for classroom coverage for Elementary, Secondary, Special Centers, and K-8 schools. (Ex. 21, pg. 2 of 3).

The MOU concluded:

This agreement will be effective January 12, 2022 and remain so until ratification of the subsequent collective bargaining agreement or the exhaustion of ESSER funding. The parties commit to providing payment for the remainder of FY 22 (2021-2022 school year) and may agree to a modification or amendment of this MOU for FY 23 (2022-2023 school year). (Ex. 21, pg. 3 of 3)

That MOU was expanded on and clarified in the August 2022 MOU. That MOU contained the following language:

“This agreement will be effective on August 10, 2022 and will remain in place for FY 23 (2022-2023 school year) or until the exhaustion of the \$8.2 million in ESSER funding allocated for coverage for each year. All District employees must be notified of the exhaustion of the ESSER funding. (Ex. 22, pg. 4 of 5)

Thus, the parties agreed there was \$8.2 in ESSER funding for classroom coverage for FY 23, because there was \$8.2 million allocated for each year of the covered period, FY 22 through FY 24.

That MOU was subsequently modified and included in section 10.04(4)(h) of the CBA as follows:

(h) DURATION: This article will remain in place for the remainder of FY 23 (2022-2023) and FY 24 (2023-2024) or until the exhaustion of the \$8.2 million per year in ESSER funding allocated for coverage. If ESSER funding is exhausted, the parties will return to the language in place prior to the exhaustion of ESSER funding. All District employees must be notified prior to the exhaustion of ESSER funding. (Ex. 23, pg. 60)

The District fully funded the Agreement in FY 23.

On August 7, 2023 the District provided notice to the teachers that; “Regrettably, we have now exhausted our ESSER funds that were allocated for coverage pay.” (Ex. 26) TALC was puzzled by this development. The District was saying funds allocated for coverage claims for FY 24 had been exhausted before any had been spent given the FY 24 school year was just beginning.

The District informed TALC, and maintained in this proceeding, the language in the August, 2022 MOU and section 10.04(4)(h) of the CBA meant there was a single pot of money for classroom coverage pay. It was either \$24.6 million for three years (FY 22-24) or \$16.4 for two years (FY 23-24) Those amounts were determined by aggregating the \$8.2 million allocated on a per year basis. The District maintained it exhausted the ESSER funding because it spent more than either \$24.6 or \$16.2 million through FY 23, thus no funds were available for FY 24.

There is no language in either MOU or the CBA supporting the District’s argument. There is no evidence the parties intended for a single pot of money, \$16.2 million for FY 23 & 24, and once that \$16.2 million was exhausted the District had met its obligations. The clear language in the CBA contemplates two separate and distinct funding requirements, \$8.2 million in FY 23 and \$8.2 in FY 24. The District was obligated to spend up to \$8.2 in each fiscal year.

Once the \$8.2 limit was reached in each year the District's obligations for the fiscal year were met. It had no further obligations for that fiscal year.

That proposition is supported by the following scenario. Suppose a teacher had come to TALC in FY 23 and claimed they had not been paid in accordance with the ESSER funding formula for classroom coverage. TALC had gone to the District and reported the complaint and asked for the teacher to be compensated. The District told TALC and the teacher it had expended the \$8.2 million allocated for FY 23, thus it was not obligated to pay the teacher under the ESSER formula. Under that scenario TALC would have had no claim against the District because it had complied with the language in the CBA. The converse must also be true.

The August 2022 MOU contemplated a single year. It required funding up to \$8.2 million for FY 23 as, “. . . ESSER funding allocated for each year. . . “ (Ex. 22, pg. 4 of 5) The CBA required funding in the amount of \$8.2 million per year for FY 23 and FY 24. The language addressing the exhaustion of the funding in the August, 2022 MOU by definition addressed exhaustion of the funds for that year. It didn't contemplate any other year. The CBA simply expanded the MOU to extend from FY 23 to include FY 24. The exhaustion of funds language was similarly expanded to include FY 24.

The District effectively argues the Arbitrator should re-write the language in 10.04(4)(h) to say there was a single pot of money, \$16.4 million for classroom coverage to cover FY 23 and FY 24. Once that money was expended the District's obligations ceased. The District argues the Arbitrator should interpret the language in 10.04(4)(h) as an aggregate amount covering two fiscal years. If that was the intention why does the August MOU and the CBA specifically reference the exhaustion of \$8.2 million per year. (emphasis added)

The District's position undermines the purpose of multi-year agreements. If the parties agree funds are available on a per year basis for two years, and the District can say it overspent in the first year of the agreement, thus it is not obligated to fund the second year, there is, in effect, no agreement for the second year. The District's argument effectively made the language regarding funding for FY 24 superfluous.

Dr. Fazzone's testimony sets forth the reasonable interpretation of the language in 10.04(4)(h):

- Q. So if the District chose to spend - - this is really the crux of this. If the District chose, of its own volition, to spend more than 8.2 million, more than 16.4 million in fiscal year '23, why do you think that's not the exhaustion of funds as contemplated in 10.04(4)(h)?
- A. Because that contradicts the idea of there being two separate pots of money. And, you know, our - - I tell my bargaining team this every time we go to bargain. Our charge is to do the most for the most. We would not set - - set the expectation that there's this, you know, fund out there and - - and not set aside that second pot of money.
- Q. Okay. Let's take a separate example. Let's say, hypothetically, you negotiate a two-year contract for teacher salaries. The District agrees to put aside \$300 million for fiscal year '23 and fiscal year '24 to pay salaries. If in fiscal year '23 they spend 450 million on salaries, what would be the obligation in fiscal year '24?
- A. \$300 million.
- Q. Why?
- A. We negotiate the pot of money. You know, they have the experts that are monitoring this. And, I mean, we do this in collective bargaining all the time. When my - when our math and the District's math work out, then, you know, we've got a deal, and it's - - you know, we negotiate the pot, we don't monitor that. And if they - - in your example, if they didn't count the number of employees that they had, that's really not TALC's problem.

Q. Okay. So it would be up to the District to come up with the additional - - the 300 million for the second year?

A. Yes. (T. 37-38)

Following that line of reasoning the District's position it spent more than \$16.4 million by the end of FY 23 thus it was not obligated to fund FY 24 is wrong. If the District intended to say through the negotiated language there was a single pot of money to cover two fiscal years, and not two separate pots of money each to cover a specific fiscal year it should have said so in the CBA. It did not. And the District cannot ask the Arbitrator to re-write the CBA to say what it meant it to say.

Section 4.04(2)(d) of the CBA states: “. . . The disposition of the grievance made by the Arbitrator shall be binding on both parties: providing that the arbitrator shall have no power to add or subtract from, modify or otherwise alter the terms of the collective bargaining agreement.” (Ex. 23, pg. 11) TALC does not seek to have the Arbitrator add, subtract, modify, or alter the language in section 10.04(4)(h). The School District does. It seeks to have the Arbitrator say the language means what it meant it to say, not what it did say. By the terms of the CBA the Arbitrator cannot do what the School District requests. The Arbitrator cannot aggregate the \$8.2 million per year language to mean \$16.4 to cover a two year period. Absent that the District's failure to provide up to \$8.2 million in funding for classroom coverage for FY 24 violated section 10.04(4)(h) of the CBA, thus requiring TALC's grievance be upheld.

Remedy

The District's position is it spent more than the total of \$16.2 million in FY 23 so TALC has no damages, and is showing ingratitude to the largesse of the District. (Tr. p. 163) That argument misses the point.

The purpose of the language in 10.04(4)(h) was to ensure teachers who covered classes in both FY 23 and FY 24 were compensated for doing so. The CBA did not contemplate compensating teachers in FY 23 in such a way there was nothing left for FY 24. It was not contemplated some teachers would get excess payment in FY 23 and teachers doing the same work in FY 24 would get nothing because of FY 23 expenditures. The purpose of the multi-year agreement was to make the distribution of funds equitable over the two year period, not to provide excess funding in FY 23 so nothing was left for FY 24.

Importantly, the excess funding in FY 23 was not the result of any action by TALC. How and where the funds were expended in FY 23 was solely under the control of the District. It chose to spend the funds as it did in FY 23. It chose to overspend the total funding limits by FY 23. The District created this problem, not TALC. The District should be required to fix it.

Because the District chose to overspend in FY 23 and unilaterally decide not to use ESSER funding for classroom coverage for FY 24 there is going to be difficulty in determining who should be compensated for coverage for FY 24. Dr. Fazzone offered the most equitable and reasonable resolution;

- Q. Okay. So if the arbitrator decides that TALC's position is correct and that there were two pots of money, the District was obligated to put aside \$8.2 million for coverage funding for fiscal year "24, what is TALC's position in terms of how that money should be distributed to the employees?

- A. That's a good question. In an ideal world, we'd be able to go back, look at all supplement requests that were put in, and pay those at the negotiated rate here, but I don't believe that that would be fair because I truly believe that there were a number of folks who would not have - - that we wouldn't have record for. So I think the easiest way to do it would be to take the number of bargaining unit members at a time certain and divide 8.2 million by the number of bargaining unit members.
- Q. That's going to create inequities.
- A. It will create inequities either way, but I think dividing it over the population is the most fair, and I can stand behind that.
- Q. And how would the inequities - - does this situation come about because of the District's August 7, 2023, unilateral statement that they weren't going to cover anymore?
- A. I mean, I suppose so. I want - - if I put myself in the secretary's shoes, I wouldn't be entering supplement requests into PeopleSoft if there was no expectation of payment.

To the extent classroom coverage records for FY 24 exist or can be recreated that would provide the most equitable result. As Dr. Fazzone testified, however, that is not likely or feasible. Thus, the best available remedy is to distribute the \$8.2 million equally among the then employed staff.

The School Board's position it has spent the ESSER funding allocated for classroom coverage thus no funds are available to fund FY 24 must fail. The School District cannot agree to pay certain amounts then declare the funds are not available to fulfill its obligations. This is not a situation where resources were not allocated to cover the costs of the negotiated terms of the CBA thereby relieving the employer of its obligations to fund the agreement. (See Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1979). The funds were allocated, however it was the School District's unilateral actions that caused the overspending in FY 23. The School

District is thus obligated to fully fund its obligations for FY 24. Consistent with Article 1, §6 of the Florida Constitution a public employer cannot unilaterally abrogate a CBA. By failing to fund the coverage claims for FY 24 the School Board unilaterally abrogated the CBA.

10.04(4)(g)

TALC also grieved the District's failure to comply with the requirements of 10.04(4)(g). The provision required data related to coverage would be shared with TALC on a monthly basis. That did not happen to the extent TALC, through Dr. Fazzone, had to make a public records request to see how and where the money was being spent. That resulted in the District dumping 28,000 pages with individual line accounting of how the coverage was charged, on Dr. Fazzone. (T. 34)

The District's failure to comply with 10.04(4)(g) was further evidenced by the August 7, 2023 letter notifying the employees there were no funds available for classroom coverage for FY 24. (Ex. 26) If the District had been providing the data contemplated in the CBA the August 7th letter would not have been the first time TALC was notified of the District position there were no funds available for FY 24. (T. 34)

Accordingly, that article in the grievance should also be upheld.

CONCLUSION

For the foregoing reasons TALC requests the Arbitrator uphold the grievance and fashion a remedy that is reasonable and feasible.

Respectfully submitted on August 12, 2024.

/s/ Mark Herdman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on August 12, 2024 to:

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