



# CRITIQUE



The Official Publication of the Cleveland Teachers Union

VOL. XLVIII, NUMBER FOUR

SEPTEMBER 2015

## Rulings on Grade-Level Transfers, SLOs

# CTU WINS Three Arbitrations



### Inside the Critique

#### Implementing the CBA

- The CTU Grievance Team... 4-5
- The Grievance Process... 4-5
- Arbitration #3: Grade-Level Preferences, Again... 6
- History of Arbitration... 7

### Grievance sustained — times three!

The CTU Grievance Co-Directors, Jillian Ahrens and Mary Moore, announced that three different arbitrators ruled in favor of the CTU on three grievances that had gone to binding arbitration. Within eight days in the beginning of September, two grievances about grade level preferences, filed by Stephanie Henderson and by Verna Chambers-Weeden, and one grievance regarding approval of Student Learning Objectives, filed by Jim Wagner, were won by the CTU.

The arbitration decisions reversed contractual violations made by CMSD administrators that negatively affected CTU members. They also helped to signifi-

cantly strengthen and clarify the interpretation of the Collective Bargaining Agreement as the rulebook that all parties must follow.

■ continued on page 3

## Arbitration Award #1: Grade Level Preference

Article 10, Section 5, *Grade Level/Subject Preference*, reads: Teachers shall submit their grade level/subject preference for the following year to the Principal on or before April 15, and those preferences shall not be unreasonably refused.

The issue in this grievance: a long-time kindergarten teacher was involuntarily moved from kindergarten to eighth grade and then to fourth grade.

Was the grievant's grade level preference unreasonably refused, and if so, what is the remedy?



Stephanie Henderson will be returning to her kindergarten classroom, thanks to the arbitrator's ruling that grade/subject preferences matter.

### The Facts

The grievant, Stephanie Henderson, is a teacher at East Clark School. She has taught kindergarten for 29 of 31

years; the other years she voluntarily "looped" with her kindergarten class and taught first grade. As a kindergarten teacher, Ms. Henderson was rated as "Accomplished" last year, and her skills and service as a kindergarten teacher are highly regarded by colleagues and parents of her students. She is also the long-time Chapter Chairperson at East Clark, and serves on the CTU Executive Board as a Member-at-Large, K-8.

By agreement between the Principal and Union Conference Committee, the date to submit grade level preferences at East Clark was moved to March 20, 2015, even though the agreement states April 15 as the deadline. East Clark Principal Lisa Adams asked for five preferences, although usually three are requested. Ms. Henderson put down only kindergarten for all five choices.

Ms. Henderson alleged that Principal Adams had made the grade-level assignments on the morning of March 20, 2015, before several teachers had even turned in their preferences.

■ continued on page 3

## Arbitration Award #2: Student Learning Outcomes

Article 13 in the CBA deals with Teacher Evaluation, including the Teacher Development & Evaluation System (TDES) and the

related issue of Student Growth Outcomes (SLOs).

The issue in this grievance: once an SLO has been approved by the building principal, does the Academic Superintendent or another administrator have the authority to override the principal and later override the SLO, and if not, what shall the remedy be?

### The Facts

The grievant, Jim Wagner, teaches 5th grade ELA and science at Benjamin Franklin School. He also serves on the CTU Executive Board as a K-8 Trustee. He submitted an SLO on November 18, 2014, covering 22 students. He adjusted the target downward for six students, and left the others unchanged. Ben Franklin



Jim Wagner's grievance established that the collaboration in TDES process matters, and decision-making cannot be unilaterally usurped.

■ continued on page 2

# Arbitration Award #1: Grade Level Preference

■ continued from page 1

“I was amazed to see that I had been assigned to teach eighth grade!” said Ms. Henderson. “I asked the principal, ‘Are you kidding me?’” She believed Ms. Adams would ultimately change her assignment, so did not immediately file a grievance.

The principal said that Ms. Henderson “was great with discipline, and knew how to work the centers.” Ms.

and was willing to switch with Ms. Henderson to fourth grade.

- David Lockard had requested middle school as his preference, but was assigned to second grade by the principal. As a result, he opted to leave the school entirely through the Open Position Fair process last spring.

Verna Chambers-Weeden also filed

the October 1 staffing deadline.

## The Arbitrator’s Decision

Arbitrator Sandra Mendel Furman, J.D. was appointed to the case on August 19. The matter was heard on August 25 at the CTU office. The arbitrator’s decision was issued on September 1, 2015.

**The arbitrator decisively stated: “The decision to place Grievant in the 2015-16 school year as an eighth grade teacher was unreasonable. To place an inexperienced teacher eight grade levels up who plainly and clearly lacked stated affinity and experience at that grade level was neither practical nor logical.”**

She pointed out that Ms. Henderson was not highly qualified to teach multiple eighth grade subjects, stating: “This should have been a per se disqualifier. It appears from the record that [Principal] Adams did not consider this as important or relevant.”

**In a particularly scathing note, the arbitrator wrote: “Synonyms for reasonable are: sensible, judicious, practical, realistic, sound, evenhanded, equitable, intelligent, wise, logical or level-headed. The arbitrator concludes that the assignment meets none of those parallel meanings.”**

The arbitrator said that the context of the assignment was “a telling and significant factor” in determining its unreasonableness. There was no evi-

She dismissed as unconvincing the argument that success in a kindergarten classroom would be a predictor of like success in middle school, stating she “takes judicial notice that the needs, behaviors, and learning skills and aptitudes of scholars eight and nine years older than five- and six-year-olds is unlikely to be similar or easily adapted.” Such a grade level switch was unprecedented and unreasonable.

The arbitrator noted that in no sense were teacher preferences given any stated weight by the principal. “[Principal] Adams failed to balance the need to consider [teacher’s preference] as a relevant factor in making the assignment against her stated good-faith efforts to address the best interests of the students.”

■ continued on page 4

**The decision . . . was unreasonable. To place an inexperienced teacher eight grade levels up who plainly and clearly lacked stated affinity and experience at that grade level was neither practical nor logical.**

— ARBITRATOR’S DECISION

Henderson replied that there were significant differences between kindergarten and eighth grade. Plus, she was not highly qualified to teach 7th grade science, 7th-8th grade math, 7th-8th grade reading, or 7th-8th grade ELA.

Ms. Henderson filed a grievance, which was denied by the principal at Step One. In the appeal, she stated that she disagreed with the principal that this move would be “in the best interests of the students.” She pointed out that only two teachers had listed kindergarten as their preference, herself and the other kindergarten teacher (there were only two kindergarten classes at the school at that time). She also stated that this move would affect her high-stakes TDES evaluation, she was not comfortable teaching 8th grade, she did not meet HQT (Highly Qualified Teacher) standards, and her preferred choice was kindergarten. Another concern was that Ms. Henderson has taught grades K-3 summer school in past years, and as a fourth-grade teacher, would be ineligible. The move would affect her financially.

On July 13, 2015, Ms. Henderson was sent a letter via U.S. mail (which she did not receive), stating, “Due to staffing certifications, your grade level has been changed from 8th grade ELA and Social Studies to the 4th grade homeroom.” She did receive the same letter via CMSD email.

A few other East Clark teachers had been moved to grade levels they did not request, or that were their last or next-to-last choices. Some examples were:

- Kelly Farris, a 20-year veteran, was assigned to teach kindergarten. She had never taught kindergarten and was not certified to conduct the state-required kindergarten assessments done in September. She had been teaching middle school, had taught grades four and five in the past,

a grievance on her new assignment. CTU took that grievance to expedited arbitration; read about it in this issue, Arbitration #3.

Irene Schez, CMSD Talent & Labor Relations Manager, in her response to the Appeal, stated, “After conversation with the Principal, grievant will be assigned to Grade 4 for the 1516 SY. Grievant only made one choice on preference form. Also, the decision made by the principal is in the best interest of the scholars at East Clark.”

When school began in August, Ms.

**Synonyms for reasonable are: sensible, judicious, practical, realistic, sound, evenhanded, equitable, intelligent, wise, logical or level-headed. The arbitrator concludes that the assignment meets none of those parallel meanings.**

Under the plain language of the CBA, the so-called good faith effort to address the best interests of the students is not a weighted factor in making teacher assignments. Rather, the CBA clearly states that teacher grade level/subject matter preference is a relevant factor.

— ARBITRATOR’S DECISION

Henderson was in fourth grade, and at the time of the arbitration, the kindergarten assessments for her former kindergarten classroom had still not been conducted.

The CTU decided to take this case to expedited arbitration because the regular arbitration timelines were too long, and a decision needed to be made as soon as possible, certainly before

dence of an in-depth study or detailed, comprehensive review by the Principal or the Curriculum and Instruction Specialist Lisa Moore, who testified for CMSD, that assigning East Clark teachers in this manner would better serve the school’s mission. This assignment stood out “very dramatically as anomalous and by inference unreasonable.”



# Arbitration Award #2: Student Learning Outcomes

■ continued from page 1

Principal Rachel Snider reviewed the SLO, along with recommendations from the school SLO Team member Karen Petro (who recommended approval of Mr. Wagner's SLO), and she approved it on November 19, 2014.

Mr. Wagner later received an email from Principal Snider on November 26, 2014, stating that the same SLO had been rejected, but without giving any reason. This was the day before Thanksgiving. Actually, Principal Snider played no role in this rejection. Academic Superintendent (Network Leader) Andrew Koonce had rejected the SLO by gaining access to the closed Portal through CMSD's Marianne Harris, who had "Super User access capability," and could unlock the Portal that allows access to SLOs.

It does not appear that prior to 2014-15, an SLO approved by a building principal was ever later "disap-

proved" by a higher-level administrator. The District did not inform the Union that it planned to begin doing this, and the Union did not consent to it. In addition, neither the TDES Steering Committee nor the SLO Subcommittee had discussed rejection of already-approved SLOs by Academic Superintendents before this happened.

ally took away the contractual power of the SLO Teams, and I felt it was wrong. Once the appropriate people have approved an SLO, it should stay approved."

## The Arbitrator's Decision

Arbitrator Matthew M. Franckiewicz was assigned to the case. A two-

unfairly subjected to defaulting to the lowest score for student growth, which is the result if there is no approved SLO on record.

The District argued that the nothing in the CBA addresses the SLO process or the role of Academic Superintendents in that process, and their role is "to supervise principals and be accountable for the performance of their respective schools." By extending SLO deadlines as they did once the additional SLOs were rejected, no harm was done to teachers who complied with the SLO Guidance Document.

The District stated that they acted "in good faith" and within management rights' guidelines, and insisted that Grievant Wagner had suffered no substantive harm: "Wagner experienced at most the mild inconvenience of having to spend a few extra hours on his SLO, a process that could have taken less time had he simply revised his SLO the first time it was rejected instead of submitting a deficient SLO three times."

In his lengthy decision, Arbitrator Franckiewicz cited some U.S. Supreme Court decisions, explaining that when "one is charged with interpreting and applying a writing, [one] must be ever mindful of what that writing is, whether it is a commercial contract, a deed, a statute, a collective bargaining agreement, a will, or a constitution, and must consider what the drafters were trying to do, what were their values, what were their assumptions." He added that the task of interpretation requires cautious judgment, and the responsibility to avoid adding to, subtracting from, or modifying the parties' agreement.

Arbitrator Franckiewicz said that while the CBA "says not a word about the specifics of drafting, reviewing, and approving or rejecting SLOs, . . . it reveals a great deal about the Parties' understanding of how all aspects of the evaluation system are to be implemented." He went on to list a dozen places in the CBA in which the notion of "collaborative dialogue" and "mutual development of procedures" recurs in various forms throughout Article 13.

He determined that "percolating throughout Article 13 is a mutual commitment to mutuality," and even though both CMSD and CTU recognized TDES was a work in progress,

---

**T**he arbitrator determined that "percolating throughout Article 13 is a mutual commitment to mutuality," and even though both CMSD and CTU recognized TDES was a work in progress, "this progress was to be obtained through a collaborative process, and not unilaterally."

---

Mr. Wagner submitted the identical SLO on the next school day, December 1. Ms. Snider reviewed and rejected it; Mr. Wagner received that email on December 3, saying it "did not comport with the Guideline."

He submitted the same SLO for a third time on the morning of December 4, and received an email that same afternoon saying that it had been rejected. The principal also discussed the SLO with him that day.

He resubmitted the SLO on December 4 at 3:20 p.m., after modifying two of the targets originally lowered. It was approved with a time stamp of 3:51 p.m. on December 4.

Mr. Wagner filed a class action grievance on the SLO rejection situation. This means he filed the grievance not only for himself, but on behalf of any other bargaining unit member who was in the same situation. The decision would be binding on all. The CTU decided to take the issue to regular arbitration.

"I filed the grievance because I thought what happened to me and other CTU members was wrong," said Mr. Wagner. "Contractually, the building SLO Team and principal are the ones who are supposed to approve or reject SLOs, and with reason. Downtown administrators decided to override their decisions and reject approved SLOs, and they are not part of the SLO Teams. They didn't even go through the principals, they unilater-

ally took away the contractual power of the SLO Teams, and I felt it was wrong. Once the appropriate people have approved an SLO, it should stay approved."

The arbitrator's decision was issued on September 5, 2015.

The Union had argued that there was a procedural error created in the evaluation process when the authority to change the SLO approval process was arbitrarily changed without any agreement or consent. The CTU called this a "rogue" process. In fact, prior to November 2104, the Academic Superintendents did not even have read-only access to the SLO Portal, confirming they had no role in the SLO approval process.

The CTU disputed the District's management rights' argument as "inconsistent with the authority of the TDES Steering Committee and the implementation of TDES under Article 13, as well as devastating to future collaboration." The Union said if the administration had an issue with SLOs, its proper recourse was through the TDES Steering Committee or SLO Subcommittee. This change in SLO rules and procedures initiated by Mr. Koonce precluded teachers from finding out why their SLO was rejected or what they needed to do to revise it, and damaged the integrity of the SLO process.

The Union maintained substantive harm was done to the grievant because there would be no finality to the SLO process. Teachers would be

---

**T**he Parties spent an enormous number of hours working together through committees to refine the overall TDES, and the SLO component of that system. It would not seem that they did so with the expectation that their joint conclusions could be overruled by Academic Superintendents, or that the Academic Superintendents could on their own authority interpose new procedures.

---

— ARBITRATOR'S DECISION



# Arbitration Award #1: Grade Level Preference

■ continued from page 2

Arbitrator Furman also pointed out that under the plain language of the CBA, the so-called good faith effort to address the best interests of the students is **not a weighted factor in making teacher assignments**. Rather, the CBA clearly states that **teacher grade level/subject matter preference is a relevant factor**. “Preferences are weighted in favor of the teacher, and the Board is restricted from being unreasonable in the denial of said preferences. This shifts the burden to the Board in showing its failure to grant a preference is reasonable.”

Assigning Ms. Henderson to fourth grade was also deemed unreasonable, as no rationale was provided for that move other than the District’s implied conclusion that the eighth grade assignment was inappropriate. The arbitrator said the fourth grade assignment was unreasonable as well. She mentioned that based on the preference requests and testimony, there were East Clark teachers ready and willing, qualified and experienced, to teach those grades, and honoring those preferences as the CBA requires would have been “a positive outcome for the scholars and teachers involved alike.”

Arbitrator Furman had a caveat: the District can override teacher preferences so long as the decision is reasonable. “A teacher’s preference does not amount to a sinecure or an entitlement. But here the assignment went against an established history of success at the kindergarten level, and zero demonstrated interest, ability, [or] experience, and significantly a lack of needed qualifications at the eighth or fourth grade level.”

The arbitrator’s award was that Ms. Henderson will be re-

assigned to her former kindergarten classroom at the earliest practicable moment. At this time, staffing changes are being considered for East Clark along with the rest of the District, and the move will take place by October 1.

“This decision reconfirms — in strong terms — that placement in a preferred grade levels matters,” said Grievance Co-Director Jillian Ahrens. “In Ohio’s high-stakes testing and teacher evaluation world, grade-level and subject preferences are important. The arbitrator recognized this. Teacher preference **must be considered** prior to making staffing decisions, and cannot be arbitrarily denied.”

“These types of ‘malicious transfers’ need to stop,” said Kurt Richards, CTU 2nd Vice President and a member of the Grievance Team. “The administration likes to use the excuse that ‘it’s in the best interests of the children.’ The arbitrator saw through that excuse in no uncertain terms, calling the grade assignments unreasonable and not in the best interests of children. As this decision establishes, the CBA language requires that teacher preference can’t be unreasonably denied. Hopefully this will put a stop to the malicious transfers that are used to target teachers, and ultimately hurt Cleveland scholars.”

“I am eager to get back to my kindergarten classroom,” added grievant Stephanie Henderson, “where I know I can do my best work as a professional. I only want what’s best for the students of East Clark, and this move was definitely not in the best interests of children. Thanks to the grievance process, the CTU Grievance Team and the arbitrator’s decision, that wrong will be corrected.”

**H**onoring [teacher’s grade/subject level] preferences as the CBA requires would have been “a positive outcome for the scholars and teachers involved alike.”

As this decision establishes, the CBA language requires that teacher preference can’t be unreasonably denied. Hopefully this will put a stop to the malicious transfers that are used to target teachers, and ultimately hurt Cleveland scholars.

— KURT RICHARDS, CTU 2ND VP

## Who serves on the CTU



JILLIAN AHRENS



MARY MOORE



CHERYL



SHARI OBRENSKI



KURT RICHARDS



## Grievance Process and A

The grievance procedure is delineated in the CBA in Article 6, *Problem Resolution, Grievance Procedure and Time Limits* (pages 15-20 in the CBA).

Both the Union and District recognize that “from time to time, problems relating to the application of the Agreement and/or the Administrative Code of the District to an individual employee or employees will arise. Many of these problems are resolved informally, by discussion, in accordance with the ‘open door’ policy followed by the District. A problem which cannot be resolved informally is called a grievance.”

The CBA definition of a grievance is “any matter concerning the interpretation, application, or alleged violation of any currently effective Agreement between the District and the CTU, or which alleges any employee represented by the Union has been discharged or disciplined without just cause, or has been treated unfairly or in a discriminatory manner.”

The grievance process has four steps, with timelines attached to each step. If the matter is not settled satisfactorily at the first two steps, or if the agreed-upon remedy is not implemented in a timely fashion, or if the grievance is not answered by the District in the CBA’s allotted time frame, the griev-

ant can appeal to the next level. Also, in the case of a grievance that impacts at least five bargaining unit members, the Union may file an appeal of the Step Two answer with the CEO, or may proceed directly to Step Four.

Step Four in the process is regular arbitration. If an answer to a grievance is not satisfactory, the Union can choose to submit the matter, within 75 days, to arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association. A single arbitrator is chosen by both parties, and the expenses of the arbitrator, and costs of arbitration, are share equally between the District and Union. The arbitrator, after hearing both sides and reviewing the evidence, renders a written decision that is final and binding on CMSD, CTU, and the affected employees.

Arbitration can be risky and expensive. It is not an automatic next step in the grievance process. The CTU Grievance Team and the CTU Executive Board ultimately decide to take cases to arbitration or not.

**The CTU Grievance Team carefully considers all arbitration requests. Because arbitration is binding, the potential ramifications must always be considered. The costs of losing an arbitration**

**decision is final, and a grievance for better than**

While the grievance process is by law from the award that from, or me is guaranteed to arbitrator cover every and as such is being into ations (griev are expenses come, the a part of the tion, and is

Recogni need to be others, the of arbitrati and also fo tration is a decision wa

In a non ally affecti unit memb so short th be untimel expedited a warrants it affecting g

# Grievance Team?



MARYLANE JONES-WILLIAMS



CHERYL NEYLON



JIM WAGNER

**Who serves on the CTU Grievance Team? By CTU Constitution, the three 3rd Vice Presidents are automatically members of the Grievance Team. The CTU President selects the other members of the team from the Executive Board members.**

**The members of the Grievance Team meet weekly with administration to deal with grievances. They also meet during the summer months.**

**The 2015-16 Grievance Team consists of: Co-Directors Jillian Ahrens and Mary Moore, 3rd Vice Presidents, K-8; Cherylane Jones-Williams, Paraprofessional Chapter Chairperson; Cheryl Neylon, Sergeant-at-Arms; Shari Obrenski, 3rd Vice President, Senior/Special; Kurt Richards, 2nd Vice President; and Jim Wagner, K-8 Trustee.**

## Arbitration Award #2: Student Learning Outcomes

■ continued from page 2

“this progress was to be obtained through a collaborative process, and not unilaterally.”

The arbitrator did recognize that the SLO process may have been abused by some who sought to game the system by lowering expected outcomes, and Academic Superintendents may have seen a need for quick action to correct this. The arbitrator said that in spite of this, under the CBA, “the SLO process, like other aspects of TDES, is to be refined not through the quick fix but through sober and informed joint discussion and consideration.” The Academic Superintendents had usurped a role allocated by the CBA to the TDES Steering Committee, ruled Arbitrator Franckiewicz.

“The Parties spent an enormous number of hours working together through committees to refine the overall TDES, and the SLO component of that system. It would not seem that they did so with the expectation that their joint conclusions could be overruled by Academic Superintendents, or that the Academic Superintendents could on their own authority interpose new procedures.”

putes that may arise in connection with the implementation of the award.

“This decision showed the power of the grievance process in our CBA,” said Mr. Wagner. “Don’t be afraid to file a grievance if you feel that you’ve been wronged. It was not personal for me. I just felt that the agreement had been violated, so I filed a grievance. Even though my rating stayed the same, thanks to this decision, maybe someone else’s will go up. And hopefully we won’t have to go through situations like this in the future.”

“This was a huge decision for CTU members,” said Mary Moore, Grievance Co-Director. “It strongly upheld that the TDES process, SLOs, and decision-making around these issues **must be collaborative**. As a class-action grievance and binding arbitration decision, it also helped define substantive harm, which will have implications in other situations.”

“The arbitrator’s statement that **time has value** is a significant part of this award,” continued Jillian Ahrens, Grievance Co-Director. “When teachers are forced to put in

I consider that the extra time Grievant Wagner was forced to spend revising and re-submitting his SLO amounted to a form of substantive harm. As the District asserts, the “harm” amounted to at most a few hours, since the Employer’s action had no impact on the Grievant’s summative evaluation. Nonetheless, time has value...in consequence of such lost time, I find that the Grievant did endure substantive harm.

— ARBITRATOR’S DECISION

## Arbitration Defined

can be more than financial — a decision can impact — or worse — more members of the grievant.

The arbitrator is prohibited from making any decision or would add to, subtract or modify the CBA, neither side need a win when a case goes on. The agreement cannot be possible workplace scenario, when it is a living document that is interpreted and defined as situations (grievances) arise. Arbitrations are not binding on all parties.

Recognizing that some situations are resolved more quickly than the CBA provides for two types of arbitration, regular and expedited, or mediation. Regular arbitration is a longer process. The SLO process is a regular arbitration.

In a class action situation (using five or fewer bargaining members), where the time frame is less than normal arbitration would allow, the CTU can demand arbitration. If a certain case is not, a class action grievance affects greater numbers of members

can be expedited by mutual agreement of CMSD and CTU.

If CTU declares an expedited arbitration, the Union and District make arrangements with the American Arbitration Association within 24 hours, and as soon as the AAA can schedule a hearing, it begins. The decision is to come within seven days of the hearing. The two grade-level preference decisions were expedited arbitrations.

CMSD and CTU can also decide, by mutual agreement, to use the grievance mediation process to try to resolve a grievance before going to arbitration. The objective is to find a mutually satisfactory resolution to the problem. The mediator does not have the power to compel a resolution, and if no settlement of the issue is reached, the mediator can give an advisory opinion. The advisory decision does not constitute a precedent unless both parties agree. If no settlement is reached, the issue can then be taken to arbitration. However, the mediator’s decision/opinion cannot be used or mentioned in the arbitration case.

It is highly recommended that all CTU members take the time to actually read the CBA, to become familiar with their rights as a member of the CTU. It is well worth your time to familiarize yourself with the agreement book.

The arbitrator acknowledged that TDES and SLO details are processes that are being refined over time, and Academic Superintendents may well have a role to play in the SLO process. But he ruled that decision must be made by the process of mutual consultation envisioned in the CBA. “The Academic Superintendents’ unilateral action amounted to a procedural error in violation of Article 13 [Teacher Evaluation], and Article 4 [Management Rights] does not absolve that error.”

Arbitrator Franckiewicz concluded his decision with the statement: “I consider that the extra time Grievant Wagner was forced to spend revising and re-submitting his SLO amounted to a form of substantive harm. As the District asserts, the ‘harm’ amounted to at most a few hours, since the Employer’s action had no impact on the Grievant’s summative evaluation. Nonetheless, **time has value**. [Emphasis added.] For example, Article 13, Section 4(B) provides for hourly compensation for mentor teachers. While the Union does not seek an award of compensation in consequence of such lost time, I find that the Grievant did endure substantive harm.”

The arbitrator’s award was that Mr. Wagner’s grievance was sustained. Jurisdiction was retained by Arbitrator Franckiewicz for the limited purpose of resolving and dis-

extra hours on elaborate lesson plan templates imposed by principals, to perform or repeat extra tasks and busywork demanded by administrators, to spend additional time in irrelevant meetings, **that time matters**. There are implications to abusing teacher time, and this arbitrator confirmed that our time has value.”

This was a class action grievance, so the decision applies to all impacted grievants. At this time, the Union is aware of 16-18 other grievants. While Mr. Koonce had the largest number of rejected SLOs, he was not the only Academic Superintendent/Network Leader who did this. The CTU is currently reviewing all grievants impacted by the SLO rejections, and the Grievance Team will review each individual case and work with the District and Arbitrator Franckiewicz to make the grievants whole.

The Grievance Co-Directors explained that affected members’ growth numbers are not automatically changing. Each case must be examined individually, to determine if the SLO rejection had an effect on the CTU members’ Final Effectiveness Rating, Achievement Credits in CDOS (Cleveland Differentiated Compensation System), and layoff order. The Union was in the process of notifying all grievants who were impacted by the SLO changes as this article was written.



## Arbitration Award #3:

# Grade Level Preference, Again

**Article 10, Section 5, Grade Level/Subject Preference, reads: Teachers shall submit their grade level/subject preference for the following year to the Principal on or before April 15, and those preferences shall not be unreasonably refused.**

The issue in this grievance: a teacher was moved from a fifth grade class and assigned to seventh grade, a grade for which she had no prior experience, despite the fact that an open position at one of her designated preferred grades (second) was filled with a long-term substitute. Was the grievant's grade level preference unreasonably refused, and if so, what is the remedy?

### The Facts

The grievant, Verna Chambers-Weeden, a teacher at East Clark School, has taught for 22 years in Cleveland schools. During most of those years she taught fourth grade;

Weeden. "I was told that it was 'in the best interests of the students,' but it wasn't educationally sound. I have no experience in that grade level. I have 22 years at East Clark, which I think says a lot about my commitment to the school, its students and the community. I've worked with many different administrators, and I've willingly made changes and adjustments when it was truly in the best interests of students. This was not."

Ms. Henderson sent an email to the principal that evening, expressing her concerns over the changes, and that some changes seemed counter to expressed staff preferences. On March

filed her grievance alleging a violation of Article 10, Section 5, in that her grade preferences had not been reasonably honored. The Principal's Response at Step One said that her decision to change grade levels was "based on what was in the best interest of East Clark."

On June 30, 2015, the Step Two response from the District denied her grievance as follows: "After reviewing HQT of all other staff members, other than Kindergarten or Intervention Specialists, grievant is the only teacher HQT in Science and Math 6-8. In the best interest of the scholars, grievant had to be placed in middle grades."

The CTU decided to take this grievance and the related grievance from Stephanie Henderson to expedited arbitration.

### The Arbitrator's Decision

This case was heard before Arbitrator Margaret Nancy Johnson on September 1, 2015. Arbitrator Johnson noted that the Henderson case had already been heard by another arbitrator. In fact, the decision was rendered in the Henderson case as the Chambers-Weeden case was being heard.

Arbitrator Johnson explained, "While the cases are factually different, each arises from the same contractual language, and to the extent the previous arbitrator analyzes and interprets such language, that interpretation is binding and operative in this subsequent proceeding, absent egregious error."

The arbitrator's decision was issued on September 8, 2015. *[Editor's Note: Ms. Chambers-Weeden was at a prenatal doctor's visit September 8 when she got the call about the arbitrator's decision, but she had other pressing matters that day: her doctor sent her directly to the hospital, where she delivered a healthy baby girl the next day!]*

This arbitrator agreed with Arbitrator Furman in the Henderson case that the preference of the grievant was not given weight, as it should have been based on CBA language, in the grade level assignment. Rather, the administration overrode the teacher's preferences, and made the assignment based on "criteria which are not stated in the applicable contract language . . . Once the Union has established assignments were based upon factors other than teacher preference, the burden then shifts to the District to demonstrate that reliance upon those factors was a reasonable basis for denying teacher preference." The arbitrator then looked at the rationale for assigning Ms. Chambers-Weeden to seventh grade, a grade she did not

list as a preference and for which she had no prior experience.

The "excellent skills" Ms. Chambers-Weeden had that would make her an asset in middle school, the arbitrator reasoned, would also make her an asset at any grade level, and would also be beneficial to younger students. But they were not a reasonable basis for denying her stated grade level preference.

The District's HQT argument was not a basis either, according to Arbitrator Johnson, since Ms. Henderson, who did not meet HQT status, was moved from kindergarten to eighth grade, and Mr. Lockhard, the middle school teacher who met HQT requirements, was moved to second grade, causing him to transfer out of the school. The arbitrator pointed out that HQT status in science and math was never stated as the reason for denying her preference until the Step Two grievance response.

Further review of the grade level preference forms indicated that Ms. Chambers-Weeden was not the only staff member meeting HQT requirements in math and science. "Although alleged difficulty in filling middle school teaching positions is not a reason to deny the grievant — or any other teacher — a stated preference," wrote the arbitrator, "the forms simply do not substantiate a lack of qualified teachers willing to teach seventh grade."

The District referenced the Management Rights clause in Article 4 of the CBA. The arbitrator said that while the District has the right to effectively manage the work force, to assign personnel, and to "take actions to carry out the mission of the public employer as an educational unit," Article 4 also provides that those rights are "subject to any limitations found in this Agreement." And Article 10, Section 5, imposes a limitation that cannot be ignored by management.

The arbitrator also recognized the challenges confronting CMSD and East Clark: "The goal of Principal Adams is for her school, its scholars and teachers to succeed . . . Yet, however commendable her purpose may be, action by the Principal cannot contravene the stated intent of the parties expressed in their negotiated agreement."

Arbitrator Johnson explained that a generic statement that "change is necessary" without any evidence demonstrating the nexus between improving test scores and assigning the grievant to seventh grade was insufficient reason for the move. She also noted that filling the second grade open position with a substitute "undermines the logic in denying the grievant assignment in that grade level."

And finally, justifying the assignment on necessity (HQT) was not consistent with the principal's email in which teachers who disagreed with the school's new direction were advised

---

**The administration overrode the teacher's preferences, and made the assignment based on "criteria which are not stated in the applicable contract language...Once the Union has established assignments were based upon factors other than teacher preference, the burden then shifts to the District to demonstrate that reliance upon those factors was a reasonable basis for denying teacher preference."**

---

—ARBITRATOR'S DECISION

---

she also taught a few years in first, second and fifth grades, and at one time had a four-month assignment in sixth grade. She was moved from second grade to fifth grade for the 2014-15 school year.

She turned in her grade level preference form to Principal Lisa Adams on March 20, 2015, the date on which the Principal and Union Conference Committee had mutually agreed to submit grade level preferences at East Clark, even though the agreement states April 15 as the deadline. East Clark Principal Lisa Adams asked for five preferences, although usually three are requested. Ms. Chambers-Weeden indicated three preferences, fifth, fourth and second grades, as her first, second and third choices. That morning, Stephanie Henderson, the Building Chairperson, saw the proposed 2015-16 staff roster that indicated she would be moved from kindergarten to eighth grade, and Ms. Chambers-Weeden would be moved from her first choice, fifth grade, to seventh grade. Ms. Henderson also filed a grievance that was settled by expedited arbitration; see Arbitration #1 article.

"I was very disappointed when I heard that I was being moved to seventh grade," said Ms. Chambers-

21 and again on May 11, 2015, the principal emailed staff members their 2015-16 assignments. In the May 11 email, she wrote: "If you do not agree with the direction that East Clark is heading, please feel free to participate in the OPI [Open Position Interview Fair] process . . . to secure a position at another school where you may feel your skills set is a better match."

On April 24, Ms. Chambers-Weeden emailed Carol Lockhart, Academic Superintendent, seeking an explanation for her reassignment to seventh grade. On May 5, she received a response that said "her passion for science, classroom management, and some of the trainings and expertise . . . would make her an asset to middle school."

In the meantime another teacher, David Lockhard, had been involuntarily reassigned from his eighth grade class to second grade, and used the Open Position Fair process to move to another school rather than stay and teach second grade. His reassignment to second grade was due to Ms. Henderson's reassignment to eighth grade, and his subsequent transfer out of the school created the vacancy in second grade, which had not been filled by the beginning of the 2015-16 school year.

On May 18, Ms. Chambers-Weeden

to take advantage of the Open Position process. The arbitrator said that this comment was especially troubling, given the description of the grievant as an asset to the school, and the recognition of her skills in classroom management and communication.

This arbitrator concurred with the arbitrator in the Henderson case that based on CBA language, the District — not the Union — has the burden of proving a compelling reason to refuse teacher preference in grade and sub-

ject assignment.

Arbitrator Johnson ruled that the administration unjustifiably denied Ms. Chambers-Weeden any of her stated preferences, even placing a substitute in one of her preferences, second grade. Pursuant to the prior arbitration decision (Henderson), reliance upon the “best interests of the scholars” is not sufficient to override teacher preferences as provided for in Article 10, Section 5 of the CBA. The award was that Ms. Chambers-Weeden

be moved to the second grade position currently assigned to a substitute.

However, due to staffing reorganization, another teacher will be taking the second grade position, and Ms. Chambers-Weeden will be moved into fifth grade, her first choice.

“I felt so relieved when I heard this decision,” said Ms. Chambers-Weeden, “and very thankful for the Cleveland Teachers Union! I am grateful for the grievance process. This important process still stands, and gives us a

voice as professionals, so we are not just blindly following mandates from the top, even when those decisions are not made using good judgment or best practices.

“I hope this will set a precedent and help other teachers in the same position in other schools, and save them from having to go through this. I am excited to go back to school, and even though I’m on maternity leave right now, I’m busy preparing for my new students!”

## **American Arbitration Association**

# A Brief History of Arbitration

“Arbitration is a very old method of settling disputes between people and even disputes between different nations,” wrote Robert V. Massey, Jr., an arbitration advocate and labor educator at West Virginia University, Institute for Labor Studies and Research. Examples of arbitration in history go back to King Solomon; arbitration was used to settle disputes as far back as ancient Rome and Greece, and the Middle Ages. England was using arbitration as a common means of commercial dispute resolution as far back as 1224, and arbitration is older than England’s common law system, which American courts later inherited. Professor Massey noted that in fact, long before European settlers arrived in what is now the United States, early Native American tribes had been using arbitration to resolve disputes within the tribes and between different tribes.

Arbitration methods can be used to settle disputes between nations, between corporations, and between management and workers. While labor unions helped promote the use of grievance arbitration in the United States, compulsory arbitration has become a growing means of dispute resolution in the non-union sector of the United States too.

Professor Massey stated that most, if not all, labor educators and authors in America agree that every business should have a means of dispute resolution for employees, and the result of not having a means for workers to air out their disputes would be low morale and decreased productivity.

He found that in the United States unionized sector, studies have shown that the number of collective bargaining agreements that contain arbitration clauses as a means of dispute resolution (grievance arbitration) has been growing. By 1944, the Bureau of Labor Statistics showed that 73% of all labor contracts in America contained arbitration clauses. By the early 1980’s, that figure had grown to 95%. In the early 2000s, 98% of all collective bargaining agreements in the United States contained arbitration clauses.

The federal government has supported arbitration as a means for settling disputes for more than a century. The 1887 Interstate Commerce Act had a voluntary arbitration clause for workers in the Railroad industry. In 1925, Congress passed the Federal Arbitration Act (FAA), strengthening the credibility of the arbitration process. In 1991, the Civil Rights Act encouraged the use of arbitration in the interpretation of antidiscrimination laws.

The first time in U.S. history that an arbitration clause was used in a labor management document was in 1829, when the Journeymen Cabinet-Makers from Philadelphia had it written into their union constitution. The clause was more of an interest arbitration clause than a grievance arbitration clause. Interest arbitration is more common in the public sector, as an alternative to

a legal strike at the expiration of a contract before or after impasse has been reached by the parties during negotiation. Professor Massey said interest arbitration is very common in U.S. professional sports to determine equality in player’s salaries.

In contrast, grievance arbitration is a process used by impartial arbitrators interpreting the language of a contractual dispute between the parties. The United Mine Workers of America (UMWA) developed and placed a grievance arbitration-type clause in its constitution at UMWA’s founding convention in 1890.

### **American Arbitration Association**

The American Arbitration Association (AAA) was founded in 1926 to help provide dispute resolution and avoid civil court proceedings. Headquartered in New York City, it is a not-for-profit organization in the field of alternative dispute resolution. It provides services to individuals and organizations who wish to resolve conflicts out of court, and is one of several arbitration organizations that administers arbitration proceedings. The AAA also administers mediation through Mediation.org and other forms of alternative dispute resolution.

The Arbitration Association (AAA) has employees in offices around the world, represents over 8,000 arbitrators and mediators worldwide, and administered over two million cases in the last 75 years. As a means of resolving labor disputes, arbitration can serve as an alternative to strikes and lockouts.

While the AAA itself does not actually arbitrate the disputes, it provides administrative support to arbitrations, which are heard before a single arbitrator or a panel of three arbitrators. The arbitrators are chosen in accordance with the parties’ agreement or, if the parties do not agree otherwise, in accordance with the AAA rules. Under its rules, the AAA may appoint an arbitrator in some circumstances, for example, where the parties cannot agree on an arbitrator or a party fails to exercise its right to appoint an arbitrator.

The role of the AAA in the dispute resolution process is to administer cases, from filing to closing. It also provides administrative services in other countries through its International Centre for Dispute Resolution (ICDR). The ultimate goal of the AAA and ICDR is to move cases through arbitration or mediation in a fair and impartial manner until completion.

Additional AAA services include the design and development of alternative dispute resolution (ADR) systems for corporations, unions, government agencies, law firms, and the courts. It also provides elections services as well as education, training, and publications for those seeking a broader or deeper understanding of alternative dispute resolution.

Many U.S. contracts include an arbitration

clause naming the AAA as the organization that will administer arbitration between the parties.

### **The Growth of U.S. Grievance Arbitration**

There are two types of labor arbitration: interest arbitration, which provides a method for resolving disputes about the terms to be included in a new contract when the parties are unable to agree, and grievance arbitration, which provides a method for resolving disputes over the interpretation and application of a collective bargaining agreement.

Before 1930, arbitration in the United States was a preventive strike tool used mostly in negotiations. Due to rapid industrialization and unionization in the United States after 1930, Professor Massey stated, and due to the passage of the National Labor Relations Act in 1935, arbitration use (mostly interest arbitration) really began to grow in America.

“Grievance arbitration became the preferred method of dispute resolution in the United States sometime around 1945 due to World War II. Because of the great World War, President Franklin Roosevelt and his War Labor Board were cognizant of the fact that during this war, the interruption of steel production and other war materials could not be tolerated by work stoppages taking place prior to interest arbitration hearings. Therefore, Roosevelt’s War Labor Board insisted that labor and management place grievance-arbitration clauses into collective bargaining agreements as a final and binding last step of the grievance procedure, to meet the wartime production needs of the country.”

Grievance arbitration has grown well beyond the scope of industrial relations. In 1996, use of arbitration was implemented for Olympic athletes, in the event there was a dispute over drug-testing procedures or results (drug testing is a requirement for eligibility to participate in the Olympics). Arbitration advocates believe it could help clear overcrowded U.S. court dockets by using more arbitrators to resolve property disputes, divorces, wills, and other similar civil court situations, and free up the courts to handle criminal cases. In 2013, the New York State Department of Financial Services hired the AAA to host mediation sessions between Hurricane Sandy victims and insurance companies.

The AAA has also promoted the use of mediation around the world. In 2007, it was a co-founder and remains a current board member of the Netherlands-based International Mediation Institute.

Arbitration could become a growing industry in America. In the U.S. today, more than 70,000 grievance and interest arbitration cases are ruled on by arbitrators. Due to the final and binding nature of most arbitrations, less than 1.5% of all American arbitration cases ever end up in court.

# THE PRESIDENT'S REPORT

BY DAVID J. QUOLKE

## CBA Ensures Teacher Voices Matter

*Our labor unions are not narrow, self-seeking groups . . . Through collective bargaining and grievance procedures, they have brought justice and democracy to the shop floor.*

— President John F. Kenneddy, speech, August 30, 1960

The three recent CTU arbitration wins are major victories for the Grievance Team and CTU members. While we are pleased with the decisions, the reality is that if the District was truly working with us in a collaborative way, these three situations would not have occurred in the first place, and they certainly wouldn't have reached the level of binding arbitration. However, in a District that operates far too often by mandates from the top instead of mutual respect and cooperation, we're forced to use the grievance process guaranteed in the CTU/CMSD Agreement.

Kudos to the original grievants who took the time and effort to file their grievances when they felt they had been wrongly treated. Kudos to the CTU Grievance Team and the Union's attorney, Susannah Muskovich, for their dedication and hard work in preparing the appeals and presenting compelling cases to the three arbitrators.

The grievance process can be frustrating. It may take some time to get a reply, and work through the steps of the process if necessary, especially when the District drags its feet and ignores mutually-established timelines, or refuses to implement a remedy even when they have sustained a grievance. Despite this, it is still the strongest enforcement arm of the CBA. CTU members should not be afraid to use this powerful tool.

As I read and re-read the recent decisions, three important themes came to mind, which both District and CTU members should note.

### Words Matter

The arbitrators looked carefully at the CBA language when they made their decisions, and emphasized that

the words in our agreement matter. The words apply to all of us, CTU members and administrators, and all of us must follow them.

In the grade level preferences cases, both arbitrators relied on the word "reasonable" and Article 10, Section 5, regarding teachers' grade level and subject preferences, stating "those preferences shall not be unreasonably refused." One arbitrator even went so far as to list almost a dozen synonyms for the word "reasonable," and contended that the grade-level switch met none of them. **Words matter.**

part of the CBA, management cannot simply overrule it and do what it wants. In other words, CTU members have rights too, and **our voices matter.**

In the decision about Network Leaders changing SLOs after they had been approved at the building level, there was no exact wording in the contract covering that situation. Instead, the arbitrator looked at the numerous instances calling for Union-District collaboration all through the contract, especially in the TDES and related SLO process, and decided that the collaborative process described in the CBA must be followed. **Our voices matter.**

And while administrators used the argument that their mandates are "in the best interests of the children," these arbitrators asserted that simply claiming it doesn't make it so. Yes, children should be the top priority of all of us in the business of education. But administrators are not infallible experts on knowing what's really best for our children. It may be that the teachers and support personnel who



### Promises Matter

I have referred often to the quote from the joint statement from me and CEO Eric Gordon in the beginning of the CBA book: "Our greatest success will not be found in the District's offices or the CTU's headquarters, but in the labor-management relationships in our schools and departments that turn the elements of [the Collective Bargaining Agreement] into success for students."

In the SLO arbitration, the arbitrator cited this quote and many others calling for a mutual, collaborative process in developing and implementing TDES and the related SLO process. These promises made by both sides to work together were an important part of the arbitrator's evidence in reaching his conclusion. Promises matter.

I wish the District had been more

Our greatest success will not be found in the District's offices or the CTU's headquarters, but in the labor-management relationships in our schools and departments that turn the elements of [the Collective Bargaining Agreement] into success for students.

— CTU PRESIDENT DAVID J. QUOLKE AND CMSD CEO ERIC GORDON

The two arbitrators who ruled on the grade-level preference arbitrations both added that even if the District's claim that the moves were "in the best interests of the scholars" was true (although both arbitrators concurred that this claim was not proven), it still would not be enough to justify the grade-level moves: the burden of proof fell on the District to prove that a preference request was not being unreasonably denied, because that was the condition stated in the CBA. **Words matter.**

### Our Voices Matter

The District cited Article 4, the Management Rights clause, as part of their arguments. The arbitrators agreed — and the CTU acknowledges — that the District has and needs some management rights to function and operate. But the arbitrators firmly stipulated that management rights only go so far, and if something is stated or clearly implied in another

are actually in the classrooms and see children every day know what's really in the best interests of the children they teach. Administrators don't necessarily have all the answers, and mandates from on high may not meet the needs of every child. Teachers want the same good teaching conditions that their students need for learning. **Our voices matter.**

In the SLO arbitration, in a significant addition to the decision, the arbitrator maintained that time has value, and teachers who had to redo SLOs several times when the process was thwarted by Network Leaders "did endure substantive harm." We believe this decision justifies the objections of educators who disagreed with being forced to do extra paperwork or busywork that has no clear educational benefit. **Our time has value**, and when we object to that valuable time being wasted by questionable mandates, **our voices matter.**

willing to keep its promises, and work with the CTU on this and other issues — think of the time, effort and resources (personnel and taxpayer dollars) that could have been saved if collaboration was the first step used to solve these issues. What if we didn't have to go through the whole grievance process to come to an agreement? Promises matter.

I believe the Cleveland community and stakeholders were expecting CMSD and CTU to work together to improve teaching and learning when they pulled the lever to support the school levy. I believe they still want us to keep that promise, and genuinely work together with mutual respect. Promises matter.

The CTU remains ready and willing to work as a respected partner in a sincere collaborative effort to improve teaching and learning in CMSD. That partnership will be one of our goals in the approaching negotiations process.

### THE CRITIQUE

CLEVELAND TEACHERS UNION  
AFT, OFT Local 279  
The Halle Building  
1228 Euclid Ave., Suite 600  
Cleveland, Ohio 44115  
216/861-7676

President . . . . . David J. Quolke  
Publications Chair . . . . . Christy Rorick  
Photography . . . Helen Boru, Dorothy Fair,  
Stephanie Henderson, Wendi Kral  
Graphic Design . . . . . Joe Buchwald Gelles  
Guest Editor . . . . . Pamela Hummer

