

AMERICAN ARBITRATION ASSOCIATION
ARBITRATOR'S OPINION & AWARD
JOSEPH M. DALY, ARBITRATOR

IN THE MATTER OF THE ARBITRATION BETWEEN

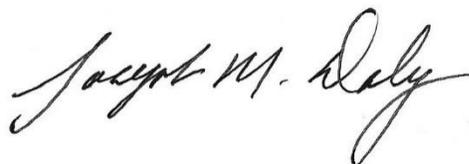
BOSTON TEACHERS UNION
-AND-
BOSTON SCHOOL COMMITTEE

AAA Case No. 01-19-0002-1327

AWARD

The undersigned arbitrator, having been designated in accordance with the Parties' collective bargaining agreement, and having duly heard the allegations and proofs of the Parties, **AWARDS** as follows:

The Boston School Committee violated the collective bargaining agreement when it: (1) failed to submit the YPP contract for consideration by the Joint Steering Committee before entering into that contract; and (2) when it engaged in direct dealing with members of the bargaining unit when it offered and paid a stipend of \$5,000 for serving as a 'teacher of record', and (3) when it, as a condition of receiving the stipend, required members of the bargaining unit to alter their contractually negotiated work schedule (planning and development periods).



DATE: April 23, 2021

JOSEPH M. DALY, ARBITRATOR

BACKGROUND

A hearing on this grievance was held over the course of two days: the first day of hearing was an in-person hearing conducted at the Boston offices of the American Arbitration Association on February 5th, 2020; the second day of hearing was conducted virtually via Zoom on November 17th, 2020, due to the closure of the AAA's offices during the pandemic. Matthew E. Dwyer, Esq., represented The Boston Teachers Union (variously referred to hereinafter as "the Union" or "the BTU") and Cristina Keefe, Esq., represented the Boston School Committee (variously referred to hereinafter as "the Employer" or "the Committee" or "the BPS"). At the hearing, both Parties were afforded the opportunity to present and cross-examine witnesses and to present documentary evidence. After the hearing both Parties filed written briefs that were received by the arbitrator on March 19, 2021, at which time the hearing was declared closed.

ISSUE

The Parties were unable agree on the precise wording of the issue to be determined by the undersigned but did agree to permit me to frame the issue based on the totality of the evidence and the arguments advanced by counsel. Having heard their arguments and reviewed the evidence, I find that the issues to be determined by this arbitrator are:

- (1) Is the grievance procedurally arbitrable?**
- (2) If so, Did the Boston School Committee violate the collective bargaining agreement by the manner in which it implemented its agreement with the Young Peoples Project (YPP) to provide classroom instruction to students at Excel High School?**
- (3) If so, what shall be the remedy?**

RELEVANT CONTRACT LANGUAGE

The Parties have executed collective bargaining agreements covering the terms between 2016-2018 and 2018-2021. The provisions of those Agreements that are relevant to this grievance are set out below:

ARTICLE I

A. Recognition and Duration

This Agreement is made..by and between the School Committee of the City of Boston...and the Boston Teachers Union, Local 66, American Federation of Teachers, AFL-CIO. The Committee recognizes the Union as the exclusive bargaining representative for all those persons in the bargaining unit...

ARTICLE II

DEVELOPING AND MAINAINING EFFECTIVE WORKING RELATIONSHIPS

B. Mechanisms to Insure Joint Problem Solving

2. Steering committee

A joint BTU/BPS Parent/Student Steering Committee will develop and implement policies and guidelines and generally oversee the implementation and operation of school-based/shared decision-making and all other joint committees established under this Agreement. The Steering Committee shall be composed of the Superintendent of Schools and the President of the Teachers Union, who shall serve as co-chairs...

The Union and School Department recognize that the provisions of this Agreement reflect a tentative consensus on a direction to move in improving the schools. Both sides recognize that school-based management ("SBM")

represents a new way of doing business with which they still have limited experience. Success is likely to require flexibility and continued learning from experience. Therefore, the School Department and the Union agree to work together during the period of this agreement to assess and improve the structures established here for school-based management and shared decision-making in light of experience.

ARTICLE V STAFFING

A. Teachers

3. Schedule and Teaching Load

(b) Planning and Development Periods

(1) Definition and Purpose. "Planning and Development Periods" are those periods during which a teacher is not assigned to a regularly programmed responsibility. Planning and development periods shall be teacher directed and it is expected of teachers that these periods will be used primarily for educational planning, team meetings, and parental contact.

(3) Middle and High School Teachers. All teachers in middle and high schools will be scheduled for 240 planning and development minutes per week. Teachers will have planning and development time each day and will be scheduled in blocks/periods of continuous time that are no less than 40 minutes in duration.

C. Alternative Service Providers

1. Educational Contracts

Before the School Department enters into any outside educational contracts that directly affect the teaching-learning situation in the classroom, the contract shall be submitted for discussion by the Steering Committee.

Prior to the bringing of any grievance resulting from such a contract to arbitration, the Union shall submit the dispute for consideration by the

Steering Committee. If within thirty (30) days of its presentation the Steering Committee reaches a decision on how to resolve the grievance, it shall be considered resolved and shall not be appealable to arbitration.

2. Volunteers

The union shall continue its policy of not filing grievances against the use of volunteers in the school system, provided such volunteerism does not result in the layoff of or failure to recall any member of the bargaining unit, nor the excessing of any member of the bargaining unit from a school that has not adopted shared decision-making.

Notwithstanding any other provision of this Agreement or prior arbitration decisions affecting voluntary programs as defined herein, the School Department may make any contract or arrangement for the provision of voluntary programs or services which enhance the educational output of the schools with organizations or individuals who are not part of the bargaining unit, provided that such contracts or arrangements have the effect of augmenting services and personnel rather than replacing them, and provided further that such contracts or arrangements shall not result in the layoff or excessing of unit personnel or preclude the recall of unit personnel. The term "voluntary" as used in this paragraph means that the School Committee shall not pay directly or indirectly for the services or programs.

ARTICLE X

DISPUTE RESOLUTION

D. Dispute Resolution Process for Grievances

Step One: School Level

An employee or his or her Union Representative may either orally or in writing present a grievance to the Principal, Headmaster, or Director within a reasonable time, normally thirty (30) school days after knowledge by the

employee of the facts giving rise to the act or condition which is the basis of her or his grievance.

The Principal, Headmaster or Director of the school shall confer with the employee at the time of the complaint or within five (5) school days with a view to arrive at a mutually satisfactory resolution of the grievance...

The Principal, Headmaster or Director shall communicate his/her decision orally or in writing...within five (5) school days after receiving the complaint or within five (5) school days after the conference, whichever is earlier.

If the grievance is unresolved, a mediator shall be assigned within three (3) school days to assist the parties in attempting to resolve the complaint. If the dispute is not resolved in three (3) school days following the assignment of a mediator, the grievance may be appealed to the next step.

FACTUAL BACKGROUND

Events Leading up to the filing of the Grievance.

In Massachusetts, the Department of Elementary and Secondary Education (D.E.S.E.) is charged with the responsibility of evaluating data on student performance in the public schools of the Commonwealth. If such evaluation establishes that a school is either “underperforming” or “chronically underperforming”, the Commissioner of DESE is authorized to formally designate the school as such. Once such a designation has been made, the School District’s Superintendent is required to create a “Turnaround Plan” for the school.¹

On September 26, 2016, the Commissioner of DESE informed BPS Superintendent Tommy Chang that he was designating Excel High School as a Level 4 underperforming school. In accordance with his statutory obligation, Superintendent Chang convened a local stakeholder’s group,

¹ See generally M.G.L. c 69, Section 1.

which in turn submitted a set of recommendations for a turnaround plan to the Superintendent in December 2016.

That Turnaround Plan consisted of 127 pages of goals, recommendations, plans and strategies to successfully accomplish the turnaround in school and student performance. Of relevance to this grievance is “Turnaround Practice 4, Strategy 4” which states:

Strategy 4: Collaborate with partners to support turnaround plan strategies. The district’s School-Community Partnerships Team will provide ongoing supports to strengthen partnership effectiveness between Excel and its school-community partners. These supports will begin with a partnership audit, and continue with ongoing technical assistance, professional development, and other capacity-building strategies that focus on strengthening partnership effectiveness...

As of October 2016, Excel had 28 partners offering programming in academic support and enrichment; arts; college and career readiness; physical health and wellness; and social, emotional, and behavioral health. The School-Community Partnerships Team will support Excel and relevant central office departments to identify partners that will be asked to continue working with the school to support the turnaround strategies. Like other Level 4 schools that have effectively engaged partners in their successful turnaround efforts, it will be essential that Excel’s partnerships, old and new, are closely aligned with and actively advancing the school’s turnaround priorities. The district will work with the school to focus on elements of effective partnership, beginning with strategic alignment and coordinated services.²

One of the new “partners” to whom Excel turned was an organization named the “The Young People’s Project” (hereinafter referred to as “YPP”). BPS and YPP entered into a formal contract wherein YPP would design courses in coding and math literacy for Excel High School students, and to provide classroom instructors for those courses, either YPP employees and/or college students. In February and July of 2018, YPP invoiced the Boston Public Schools for a total of \$156,700. The record evidence establishes

² Excel High School level Four Turnaround Plan, p. 75 (BTU Exhibit #8).

that this sum was paid to YPP not by Excel High School or the Boston Public Schools, but rather the Boston Education Development Fund, a 501(c)3 tax exempt organization that serves as a fiscal partner with the Boston Public Schools, and whose mission is to “assist in the procurement and supervised use of private resources for existing and new programs in both individual schools and across BPS.” (BPS Exhibit #11).” The record evidence also establishes that the funding for the YPP contract derived from a grant from the General Electric Co.

The evidence is somewhat muddy as to precisely when the YPP began offering courses, although the evidence suggests YPP may have offered a course in the second half of the 2017-2018 school year. However, the record clearly establishes that YPP designed and offered three (3) courses at Excel High School throughout school year 2018-19.

The Genesis of this Dispute

Prior to the commencement of the 2018-2019 School Year, the Headmaster of Excel High School, Renee McCall, addressed the Excel faculty during the required professional development institute where teachers meet to prepare for the upcoming school year, and “... all teachers will participate in up to 50 hours of professional development devoted to best practices within the Linked Learning and Curriculum pathway programming adopted by BHS & EHS.”³. This meeting was in August of 2018.

Ms. McCall informed the faculty that YPP had agreed to partner with Excel and to design three courses and provide instruction in coding and math literacy. Headmaster McCall told the faculty that she was seeking three volunteers who would serve as “Teacher of Record” in these YPP-taught classes. The ‘Teacher of record’ would not be required to prepare or actually teach any of the course content; that would be the responsibility of the YPP instructors, who would also grade the students’ exams and determine the

³ BPS Exhibit # 6, page 85.

students' final course grade. Rather, the Teacher of Record's duties would be to attend the class, manage classroom behavior and discipline, and handle any parental contact that might become necessary; further, once the YPP instructors had determined final grades, the 'Teacher of Record' would be responsible for entering that grade into the ASPEN software program which is utilized by BPS to officially input and record students' grades into the Student Information System.

During her presentation to the faculty, Headmaster McCall offered a payment of \$5,000 to any teacher who volunteered to serve as a 'Teacher of Record'. Following her presentation, three teachers expressed interest, but ultimately only two persons agreed to serve as Teacher of Record. Ryan Gillespie, (a BTU bargaining unit member and a Foreign Languages teacher with a program area in Spanish) served as Teacher of Record in one of YPP's classes, and Jonathan Boudreau, (a member of the Paraprofessionals Unit who also had a teacher certification in ESL) served as Teacher of Record in two classes. Gillespie was paid \$5,000 and Boudreau was paid \$10,000.

When meeting with Headmaster McCall to finalize arrangements for their service as 'Teacher of Record', Gillespie learned that Headmaster McCall expected him to relinquish his Professional Development Period on the days that he attended YPP classes, and Boudreau learned that he would be required to surrender his break time on the days he attended YPP classes.⁴

Jennifer Garay is a math teacher at Excel High School and is also the BTU Building Representative. Ms. Garay testified at this hearing that she felt uncomfortable with the arrangements made by Headmaster McCall, and for that reason she contacted the BTU's Secondary Field Representative, Caren

⁴ As noted in the language of the collective bargaining agreement set out at p. 4 of this Award, each BTU Teacher is contractually granted a daily Professional Development Period of no less than 40 minutes, and which shall be "...teacher directed and it is expected of teachers that these periods will be used primarily for educational planning, team meetings, and parental contact.

Carew, to inform her of Headmaster McCall's plan to provide \$5,000 stipends per class and to require the 'Teacher of record' to forfeit either planning and development periods or break time. After meeting with Ms. Garay, Ms. Carew filed a grievance at Step One of the grievance procedure on September 7, 2018. That grievance reads, in pertinent part:

This grievance arises because it has come to the Union's attention that Excel High School and the Boston Public Schools have apparently entered into a contract with Young People's Project to provide instruction to students...In order to resolve the grievance, the School must cease and desist having these non-BPS employees provide instruction to students unless they are provided contracts, wages, and benefits as teacher unit BTU members or are working in concert with a teacher unit BTU member as part of his contractually compliant workday. (BPS Exhibit # 1)

Headmaster McCall wrote the Step 1 response on behalf of the BPS on September 25, 2018:

I maintain my position that the grant-funded partnership between Excel High School and the Young Peoples' Project is authorized under Turnaround Practice #4, Strategy 4, which addresses the need to cultivate community partnerships to support Excel's school improvement efforts.

After receipt of this denial of the grievance, the BTU -in the person of Executive Vice President Erik Berg - invoked the grievance mediation language (see p. 6 of this Award) of Article X by requesting mediation to the BPS Administrative Assistant who schedules mediation sessions, Christine Wilson. Ms. Wilson wrote to Headmaster McCall to determine if McCall was available for a mediation session on October 30, 2018. For reasons not clearly identified in the record here, several attempts to schedule mediation failed, and the grievance was moved to Step 2 on January 2, 2019 by BTU Executive Vice-President Erik Berg. In his transmittal letter to Lisa Maki, the BPS's director of Labor Relations, Mr. Berg wrote, in pertinent part:

The union is grieving the fact that Excel High School and Boston Public Schools entered into a contract with Young People's Project...this contract was made without informing the BTU or the Steering Committee...The school must...ensure that they (YPP) are working with a BPS teacher **as part of their contractually compliant workday. (BPS Exhibit 2A) (emphasis added)**

In its response to the grievance at Step 2 on March 19, 2019 the BPS asserted that:

The Young People's project is a volunteer program whose volunteers are paid by People's Project and therefore, is not grievable by the union...One BTU Teacher and one paraprofessional offered to support Young People's Project in the classroom during their planning and development period. The Headmaster did not negotiate directly with BTU members for a payment to do this.

Mr. Berg then moved the grievance to Step 3 on March 28, 2019, reiterating the same assertions made in the Step 2 grievance.

On June 3rd, 2019 BPS Hearing Officer Peggy Kemp issued her written response at Step 3, in which she wrote, in pertinent part:

Ms. Wilson confirmed that the request for mediation was submitted in a timely fashion and provided emails that documented attempts to schedule. A common time was never confirmed due to scheduling conflicts and Ms. Wilson's scheduled vacation. Evidence was provided that Ms. McCall did respond to initial requests to schedule but did not respond to the last request on November 14. Ms. Wilson verbally recommended to Mr. Berg that the grievance should be moved to Step II, but did not record the date she spoke to Mr. Berg...

I find the following:

The BTU initiated the Step I grievance and request for mediation in a timely manner...Ms. McCall publicly asked for volunteers to supervise the coding classes with an offer of \$5,000 per section for assuming extra responsibilities. She did not negotiate one on one with a teacher and did not change working conditions in terms of violating maximum minutes that

teachers can work in a day...The Young People's Project is a volunteer program whose volunteers are paid by Young People's Project and therefore is not grievable by the Union.... For the foregoing reasons, the grievance is denied.

The grievance, having progressed through the first three steps of the grievance procedure without resolution, was moved to arbitration by the BTU in accordance with the contractual grievance procedure.

POSITIONS OF THE PARTIES

THE BOSTON TEACHERS' UNION

The BTU asserts that its grievance is fully arbitrable. In support of this assertion, the Union points to the fact that it did not become aware of the YPP contract until August of 2018, and that its Step 1 grievance was clearly filed within the 30-school day period articulated in the grievance procedure. After the grievance was denied at Step 1, the Union argues that the Employer flouted the time constraints of the grievance process:

"In addition to McCall's frustration of the mediation, BPS took its own sweet time responding to Berg's Step 2 filing...The Step 2 meeting was concluded on January 9th, 2019 and the contract requires a written response '...five school days after the hearing...'. BPS did not deign to answer the grievance until March 19, 2019 (and) there is no evidence that BPS sought an extension of time from Berg to respond to Step 2...These are by no means the only procedural missteps by BPS. The grievance was timely appealed by Berg to Step 3 on March 28, 2019. The contract requires the Superintendent to answer the grievance 'not later than ...5 days after the conference...'. The Step 3 conference was held on April 25th, 2019. The Superintendent did not answer the grievance until June 3, 2019, more than a month after her answer was due. In sum, BPS is poorly situated on this record to complain about procedural issues on the part of BTU in its prosecution of the grievance. The arbitrator should reject an asymmetrical approach to grievance processing that permits one party to insist on strict

adherence to contractual procedures for dispute resolution while simultaneously arrogating to itself the right to ignore them.”⁵

Turning to address the merits of the grievance, the BTU advances the following arguments:

“BPS bypassed the Joint Steering Committee in violation of Article VC and it’s doing so was neither privileged by the Excel turnaround plan or Article VC2. BPS does not dispute the fact that it never submitted either the January 2018 Excel/YPP contract or the December 2019 scope of services contract to the Joint Steering Committee for discussion by that body in conformity with Article VC1. The evidence here is that BTU President Jessica Tang had been entreating BPS Superintendent Tommy Chang to convene the Steering Committee since she first took office in 2017 and continuing throughout the autumn of the 2017-2018 school year. Her testimony on this point was wholly un rebutted. Tang’s request fell on deaf ears as Chang never responded...Since both (YPP Contracts) affected the teaching-learning situation of Excel’s 9th and 10th graders, BPS’s conspicuous by-passing of the Joint Steering Committee clearly violated Article VC1 unless BPS can convince this arbitrator that Excel’s Turnaround Plan somehow trumps the collective bargaining agreement as its Step 2 and Step 3 grievances imply...The Level 4 Turnaround plan envisioned by G.L. c.69 sec.1j does not trump the relevant clauses of BTU’s collective bargaining agreement...Ms. McCall conceded in her direct examination testimony that while the Massachusetts statutory scheme required failing schools to develop plans to maximize rapid student academic achievement or face state intervention, it left to the schools the choice of how to do so, and thus nothing in G.L. c. 69 sec. 1j can be interpreted as having compelled Excel to engage non-unit personnel to perform teaching functions...⁶

Next, the BTU argues that the BPS, through its agent Headmaster McCall, engaged in ‘direct dealing’ with BTU-represented teachers in violation of Article 1A of the collective bargaining agreement.

⁵ Post hearing brief of the BTU, pp 29-30.

⁶ Post hearing Brief of the BTU pp 48-51.

“Direct dealing strikes at the very heart of the duty to bargain in good faith...The Employers’ duty to bargain ‘goes hand in hand with its duty to refrain from bargaining directly with employees represented by the Union. (citations omitted)..When employees become members of a represented bargaining unit, the concept of exclusive representation requires them to surrender any ability to bargain directly with their employer on matters governed by the collective bargaining agreement (citations omitted). The record here amply supports a conclusion that Ms. McCall, a statutory agent of the School Committee, engaged in direct dealing in violation of the first sentence of Article IA under which the BTU is the acknowledged “exclusive representative”. She offered members of the bargaining unit a payment of \$5,000 -not bargained for or consented to by BTU – as compensation for serving as ‘teachers of record’ and in return for their giving up two related rights under the collective bargaining agreement: first, the 50 minute daily planning and development period negotiated between BTU and the School Committee under Article V A3(b) of the collective bargaining agreement...and second, the cap of 180 minutes of daily instructional time established in V A3(d)...BPS does not dispute the basic facts: McCall’s price tag for the payment to teachers was relinquishment by teachers of their contractually established planning and development periods, and later, Boudreau’s relinquishment of his duty-free break during the daily forty minute period of “Excel Time” ...during which paras were otherwise free of their traditional duties. But to hear McCall...tell it, one would never know McCall had induced Gillespie and Boudreau to part with contractually established conditions of employment through the promise of a stipend; rather they “volunteered” out of the goodness of their hearts and were later thanked and rewarded for their selfless support...Direct dealing is prohibited because its effects are injurious to the union’s status as the exclusive spokesman, regardless of the employer’s intent. So too is the employer’s effort to characterize Gillespie’s and Boudreau’s participation as purely ‘voluntary’. That they were not ordered to support the coding classes and voluntarily agreed to McCall’s quid pro quo is simply irrelevant.”⁷

⁷ Post hearing brief of the BTU pp 37-42.

For these reasons, the BTU requests a finding that the BPS violated the provisions of the collective bargaining agreement, and a remedy that would restore BTU to the position it would have occupied but for the breach.

THE BOSTON SCHOOL COMMITTEE

The Employer argues that the grievance is not procedurally arbitrable, and that if the grievance is determined to be arbitrable, it did not violate the provisions of the collective bargaining agreement in the manner that it implemented the contract with the Young People's Project.

With respect to procedural arbitrability, the BPS contends that:

This matter is not procedurally arbitrable because the BTU failed to submit its dispute to the Steering Committee. The BSC has, over the years, consistently preserved its affirmative defense of timeliness as it relates to procedural arbitrability in its Step 2 Responses. Mr. Martin, the Step 2 hearing officer has consistently put the BTU on notice of its affirmative defenses including procedural arbitrability in its Step 2 Responses. In short, the Boston Public Schools has consistently stated that "The School Department reserves the right to raise procedural and substantive arbitrability and/or grievability of this Grievance, including any and all timeliness issues as well as the failure to file this Grievance at the correct step." See BPS Exhibit 3 (emphasis added). The same is again reiterated in the BSC's Step 3 response. See BPS Exhibit 5. Moreover, the BTU has consistently known that the BSC may decide to go forward on it or not at arbitration...

In its grievance, the BTU highlighted Article V (C)(1) among the provisions of the of the parties' CBA the BSC was alleged to have violated. Indeed, the first paragraph of Article V (C)(1) states: Before the School Department enters into any outside educational contracts that directly affect the teaching-learning situation in the classroom, the contract shall be submitted for discussion by the Steering Committee.¹³ See Joint Exhibit 1 and 2 at pages 47-48. At the hearing, BTU witnesses Caren Carew and Jessica Tang testified that the YPP agreement with Excel was never discussed by the

Steering Committee. This testimony was offered in support of the BTU's proposition that not only was the YPP agreement an "educational contract" as contemplated by the CBA, but that by not submitting it for discussion (note that the CBA does says nothing about approval), the BSC violated the terms of the CBA. However, the BTU conveniently neglects to address its own failure to adhere to this provision.

The very next paragraph, after the paragraph cited to by the BTU, states: "Prior to the bringing of any grievance resulting from such a contract to arbitration, the Union shall submit the dispute for consideration by the Steering Committee. If within thirty (30) days of its presentation the Steering Committee reaches a decision on how to resolve the grievance, it shall be considered resolved and shall not be appealable to arbitration". See Joint Exhibit 1 and 2 at pages 47-48 (emphasis added). Thus, once the BTU became aware of the YPP agreement, it should have brought its grievance to the Steering Committee for resolution. The BTU did not do that, instead the BTU filed at Step 1. See BPS Exhibit 1. Put differently, either the BTU did not actually view the agreement as an "educational contract" as contemplated by the CBA, thereby explaining the grievance being filed at Step 1. Or, by its own reasoning, the BTU violated the terms of the CBA by not raising the grievance related to an educational contract at the Steering Committee. If the former, then the grievance should be dismissed for the reasons stated supra in sections A and B. If the latter, then the BTU should be barred from arbitrating this grievance pursuant to Article V (C)(1). Accordingly, the arbitrator should dismiss the grievance on the basis that it is procedurally not arbitrable on the grounds that the BTU failed to submit this dispute to the Steering Committee.⁸

Turning to address the merits of the grievance, The School Committee contends that:

"Excel High School's designation as a Level 4 underperforming school pursuant to G.L. c. 69, s. 1J, authorized its collaboration with Young People's Project to advance turnaround priorities... Excel's turnaround plan included "Turnaround Practice 4: School Culture and Climate" to establish a school culture at Excel that prepares its students for college and

⁸ Post hearing Brief of the Boston Public Schools, pages 11-13.

career opportunities after high school. Id. at page 63. Under that 4th turnaround practice, the plan included Strategy 4 – coordination between partners and the school. Id. at page 76. In other words, Excel would seek opportunities to partner with higher education institutions offering opportunities for students to participate in dual enrollment programs, exposure to college environment, adult learning opportunities, and pipelines for mentors and volunteers. Id. It is under this umbrella that Excel partnered with the Young People’s Project (“YPP”) in SY2017-2018 to provide an elective course entitled Introduction to STEM literacies for 9th graders. The courses, led by one YPP staff and volunteer college students, introduces Excel students to core STEM competencies, including coding, complex data science skills and math topics. High school students then prepare and provide STEM bootcamps for local middle school students. Again, the intent of this partnership was to bring in new educational opportunities that Excel was unable to offer on its own. However, in order to provide supports to strengthen the partnership’s effectiveness, Excel designated one staff person in the classroom during YPP’s presentation. These supports included monitoring student behavior, communicating with parents, and providing technical support to YPP staff and volunteers including assistance with imputing 10 grades. And, as the YPP program became vertically integrated at Excel each year, the extent of the Excel staff person’s supports grew to where, as of the current school year 2020-2021, an Excel teacher is assigned to the YPP course as part of their regular work schedule... As such, BSC and Excel properly authorized the partnership with Young People’s Project in accordance with the approved Excel High School Level 4 Turnaround Plan.⁹

Further, the Committee argues that it did not violate the Parties’ collective bargaining agreement because Article V (C)(2) of the CBA allows for the Young People’s Project volunteer-led instruction to Excel High School students:

The Alternate Service Providers provision of the CBA allows for the Young People’s Project volunteer-led instruction to Excel High School students... Headmaster McCall and Ms. Kimsey both testified to the fact that the YPP program was funded through a grant from General Electric. McCall and

⁹ BPS post hearing brief pp 8-9.

Kimsey Testimony. The grant money was distributed through the BDEF, a 503(c) tax-exempt educational foundation and fiscal partner of Boston Public Schools. Id., see also BPS Exhibits 10 and 11. No funds from Excel's budget were utilized for the YPP program during SY17-18 or SY18-19. Id., see also BPS Exhibit 14 and 15. In SY19-20 and the current 2020-2021 school year, Excel budgeted for the YPP program's assigned teacher unit BTU member. McCall and Kimsey Testimony. In other words, it was not BSC (through Excel) that paid for the YPP program, but General Electric (through BDEF). It was because of the funding from General Electric that was paid to YPP by BDEF that allowed BSC to authorize Excel's partnership with YPP. Therefore, the BTU should be estopped from filing a grievance against Excel's use of YPP volunteers.¹⁰

For these reasons, the Committee urges the arbitrator to dismiss the Union's grievance.

DISCUSSION AND OPINION

The dispute that the Parties have submitted to me for resolution is whether the Boston Public Schools breached its contractual obligations set out in the collective bargaining agreement with the BTU by the manner in which it implemented its agreement with the Young Peoples Project (YPP) to provide classroom instruction to students at Excel High School.

As a threshold matter, I first address the School Committee's contention that the grievance is not procedurally arbitrable.

Procedural arbitrability

During the first day of hearing on February 25, 2020, the School Committee's counsel argued that the grievance was not procedurally arbitrable for two reasons. *First*, because YPP had offered instruction to Excel students during the 2017-2018 school year and the BTU did not file its grievance pertaining to YPP until September of 2018; the clear implication of that argument was

¹⁰ BPS post-hearing brief, page 11.

that the BTU was on notice for many months, if not a full year, that YPP was rendering its services to Excel High School, and thus the Union failed to file its grievance within "...30 school days after knowledge...of the facts giving rise to the grievance". (JX1, Article X 1(a)). *Second*, the BPS contended that the BTU failed to comply with the time limits contained in the contractual grievance procedure as it moved its grievance from Step 1 through Step 3.

Neither of these contentions finds any support in the record evidence. With regard to *when* the Union learned that the YPP had been contracted to provide educational services at Excel High School, there is not a scintilla of evidence that the BTU had ever been informed, either in writing or verbally, of BPS's having entered into its contract with the Young People's Project before Ms. Garay called Caren Carew in late August of 2018 to inform her of Ms. McCall's solicitation of the Excel faculty for volunteers to serve as 'Teachers of Record' in YPP instructed classes, in return for a stipend of \$5,000. Thus, when the Union filed its grievance on September 7th, 2018, it was well within the contractual time limit of 30 school days "...after knowledge...of the facts giving rise to the grievance". With regard to the BPS's contention that the BTU failed to comply with contractual time limits as it moved its grievance from Step 1 to Step 3, the record evidence compels a finding that not only did the BPS frustrate the BTU's attempts to secure grievance mediation between Steps 1 and 2, (*see Hearing Officer Kemp's Step 3 decision, supra at p.12*) but further that the BPS itself failed to comply with contractual time limits for responding to grievances following both the Step 2 and Step 3 hearings on the Union's grievance.¹¹

It is perhaps for these reasons that the Committee abandoned these contentions when it filed its post-hearing brief, wherein it set forth a novel

¹¹ Article X 1. (b) and (c) both provide that when the parties meet in a grievance conference, the School Committee "**shall issue a written decision...not later than five school days after the hearing**". The Step 2 hearing was held on January 9, 2019, yet the BPS's written decision was not sent until March 19th, 2019; the Step 3 hearing was held on April 25, 2019, yet BPS's written decision was not sent until June 3rd, 2019. Clearly both BPS responses far exceeded the time constraints of the negotiated grievance procedure.

theory of procedural non-arbitrability, specifically, that once the BTU learned of the YPP contract, it should have brought its grievance to the Steering Committee for resolution. For the following reasons, this contention of non-arbitrability must also fail.¹²

As seen in Article VC1, (see page 5 of this Award) it is evident that the BTU and the BPS clearly envisioned and agreed that the School Committee has the authority to enter into “outside educational contracts” with non-BPS entities. This is exemplified by its agreement with YPP. However, the collective bargaining agreement expressly requires that **before the School Department enters into any outside educational contracts that directly affect the teaching-learning situation in the classroom**, the contract shall be submitted for discussion by the Steering Committee” (emphasis added).

It is undisputed that the BPS did not submit the YPP contract for discussion by the Steering Committee before entering into that contract; and the record evidence overwhelmingly establishes that the BTU did not learn of the existence of the YPP contract until late August of 2018, even though BPS signed the contract as early as January of 2018.

The School Committee’s novel argument that the BTU should have brought its grievance to the Steering Committee is based on a flawed reading of the two paragraphs in Article VC1. The first paragraph requires the Committee to bring a proposed ‘outside educational contract’ to the Steering Committee **before** it is entered into (which it did not do in this case); the second paragraph then provides that if the Union - having been apprised of the outside contract - then disagrees or otherwise disputes same, it will submit that disagreement to the Steering Committee “**prior to the bringing of any grievance resulting from such a contract**”. However, having been kept in the dark about the existence of the YPP contract until well after it had been

¹² Since this argument was never advanced at any time during the grievance procedure or during the arbitration hearing, the BTU sought leave to file a reply brief, which was granted. The BPS was offered the opportunity to file a sur-reply brief, which it declined.

implemented, the Union can hardly be expected to submit to the Steering Committee a dispute over a contract it did not know existed.

There is another equally compelling reason that the Committee's novel non-arbitrability argument is inapt. The BTU and the BPS have had a bargaining relationship spanning more than a half-century, and have participated in numerous arbitrations wherein arbitrators have consistently ruled against the Committee for either failing to specify any alleged procedural defects in a grievance (that might render the grievance non-arbitrable) as early as possible during the grievance procedure, or waiting until arbitration to assert a new rationale for non-arbitrability, as it did in the instant case. Arbitrator John Cochran wrote in 2012:

“Inherent in the grievance procedure in Article X, however, is the obligation of both parties to raise their claims and defenses at the earliest stages of the grievance procedure to facilitate settlements at the lowest possible step and to avoid the need to resort to arbitration. For this reason it is a widely recognized arbitrable principle that an Employer that does not explicitly raise the timeliness of a grievance during the steps of the grievance process waives that defense and should not be allowed to raise it for the first time at arbitration. Indeed, this is the analysis applied by prior arbitrators who have ruled on cases between these parties. See e.g., Boston Teachers Union Local 66 MFT and Boston School Committee AAA case No. 1139-0073-06 (Stutz 2008) and Boston School Committee and Boston Teachers Union Local 66 MFT AAA case no. 1139-0903-04 (Litton 2005).¹³

Accordingly, for the aforementioned reasons, I find that the Union's grievance is procedurally arbitrable.

The Merits of the grievance

As I observed earlier, there is no serious dispute regarding the authority of the Boston School Committee to enter into “outside educational contracts” as it did here when it contracted with YPP to design courses and provide

¹³ BTU & BOSTON SCHOOL COMMITTEE AAA Case No. 11390-01864-08, (Cochran 2012)

classroom instruction to Excel High School students. Article V of the Agreement expressly provides for “Alternative Service Providers” and “volunteers” working in the schools with the BPS. Indeed, the BTU specifically stated at the hearing and in its post-hearing brief that it does not seek a remedy that would include a discontinuation of the YPP contract.

Rather, the fundamental question here is whether the Committee, in exercising its contractual right to utilize alternative service providers, contravened the contractual rights of the BTU and BTU- represented teachers. The answer to that question requires an analysis of the following proven facts:

- The School Committee’s entering into the YPP contract without notifying the Union, and specifically, by not submitting the contract for discussion by the Steering Committee co-chaired by the Superintendent of the Boston Public Schools and the President of the BTU
- Headmaster McCall’s soliciting her faculty members to serve as “Teachers of Record” in exchange for a stipend of \$5,000 per class.
- Headmaster McCall’s requirement that the Teachers of Record relinquish their Planning and Development period (Gillespie) or duty-free break period (Boudreau) .

The School Committee Enters a Partnership Agreement with YPP

Article VC1 of the parties’ collective bargaining agreement (see p. 5 of this Award) contains an unambiguous provision:

“Before the School Department enters into any outside educational contracts that directly affect the teaching learning situation in the classroom, the contract shall be submitted for discussion by the Steering Committee.” (emphasis added)

The Committee makes no claim here that its contract with YPP was not an “outside educational contract” as described in Article VC1. Indeed, it would be irrational to argue that the YPP contract -whereby YPP staff and college students designed courses and provided in-class instruction to 9th and 10th graders at Excel High School – did **not** directly affect the teaching-learning situation in the classroom.

This contract provision further clearly articulates that any such outside educational contract **shall be submitted** for discussion by the Steering Committee **before the school department enters into such contract**. The evidentiary record convincingly establishes that despite several phone calls and emails (over a substantial period of time) from both the current and former Presidents of the BTU requesting that the Steering Committee be convened, the BPS Superintendents essentially disregarded these pleas.

Thus, by failing to fulfill its contractual obligation to submit the YPP contract to the Steering Committee before it was executed, the School Committee clearly violated its contractual obligation under Article V C 1.

Headmaster McCall Offers a \$5,000 Stipend to any Teacher Who Volunteers to Serve as a “Teacher of Record” in YPP-Instructed Classes; Headmaster McCall Requires That a Teacher of Record Forfeit his/her Planning and Development Period (Gillespie) or duty-free lunch period(Boudreau)

In labor law, it is well settled that it is unlawful for an employer to deal directly with union members on matters involving wages, hours, and terms and conditions of employment that have already been negotiated and set out in a collective bargaining agreement executed by the certified bargaining agent (the Union) and the Employer. Not only is such ‘direct dealing’ unlawful under the National Labor Relations Act, but also pursuant to various state statutes governing labor relations, including those in Massachusetts. The rationale against direct dealing is succinctly expressed in the decision of the Massachusetts Appeals Court in SEIU Local 509 v. Labor Relations Commission, 43 Mass. App Ct. 710 @ 715 (2000):

First, direct dealing violates the union's statutory right to speak exclusively for the employees who have elected it to serve as their sole representative. This right necessarily includes the power to control the flow of communication between the employer and the represented employees concerning subjects as to which the union is empowered to negotiate. Second, direct dealing undermines employees' belief that the union actually possesses the power of exclusive representation to which the statute entitles it.

However, 'direct dealing' is not only unlawful inasmuch as it is an unfair labor practice, but it also represents a breach of the 'recognition clause' of a collective bargaining agreement wherein the employer explicitly recognizes the union as the exclusive bargaining agent for its employees. In this case, the parties' collective bargaining agreement provides that: "The Committee recognizes the Union as the exclusive bargaining representative for all those persons in the bargaining unit..." (see Article IA, p.3 supra).

In offering the faculty at Excel High School a stipend of \$5,000 to teachers who agreed to serve as a 'teacher of record', Headmaster McCall clearly dealt directly with members of the bargaining unit on a core, mandatory subject of bargaining – wages – that had already been negotiated and agreed upon by the School Committee and the BTU and included in the collective bargaining agreement covering teachers in the Boston Public Schools. It is of no import whatsoever that Ms. McCall may not have known that 'direct dealing' is unlawful or a violation of the collective bargaining agreement. She did so as a representative of the Boston School Committee, and the \$5,000 stipends were paid to members represented by the BTU.

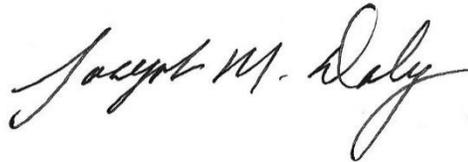
The same can be said for requiring a teacher (Gillespie) and a paraprofessional (Boudreau) to relinquish their contractually bargained-for rights to a planning and development period (see Art. VA3 at page 4 of this Award) and/or a duty-free lunch.

Therefore, for the reasons set forth above, it must be concluded that the Boston School Committee violated the collective bargaining agreement when it: (1) failed to submit the YPP contract for consideration by the Joint Steering Committee before entering into that contract; and (2) when it engaged in direct dealing with members of the bargaining unit when it offered and paid a stipend of \$5,000 for serving as a 'teacher of record', and (3) when it, as a condition of receiving the stipend, required members of the bargaining unit to alter their contractually negotiated work schedule (planning and development periods). The remedy for these violations follows.

REMEDY¹⁴

1. **The School Committee, including its representatives, Headmasters or other agents acting on its behalf shall CEASE and DESIST from negotiating directly with faculty and BTU-represented staff on hours of work (i.e., schedule modifications), rates of pay, and other terms and conditions of employment without the express consent of the Boston Teachers Union.**

2. **In order to effectuate the purpose and intent of Article VC1, the School Committee shall henceforth comply with its contractual obligation to submit proposed outside educational contracts for discussion by the Steering Committee prior to formally entering into such contracts.**



Date: April 23, 2021

Joseph M. Daly, Arbitrator

¹⁴ I note that in its post hearing brief, the BTU requested several remedies that I find are not warranted on this evidentiary record. I have not ordered the School Committee to meet and confer with the BTU President to establish a mutually agreeable schedule of regular and recurring meetings of the Joint Steering Committee, since remedy #2 requires meetings of the Joint Steering Committee in advance of any 'outside educational contacts' being executed, which of necessity must occur on mutually agreeable dates.

With regard to the Union's requested remedy of compensation for exceeding the cap of 180 consecutive minutes of instructional time (for Gillespie) and compensation to Boudreau at the provisional teacher rate, the evidentiary record provides neither sufficient facts nor evidence that would permit me to fashion such a remedy.

Lastly, I have declined the Union's requested remedy that I "order the BPS to post a copy of my decision" at Excel High School. While it is routine for the NLRB and the state Labor Relations Commission to order postings, that is not the case for arbitrators, since a 'posting order' would likely not be a remedy that "draws its essence from the collective bargaining agreement" (see *United Steelworkers v. Enterprise Wheel and Car Co.*, 80 S.Ct.1358 @ 1361(1960)).