

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

| | | |
|--|---|----------------------|
| MAPLE DALE-INDIAN HILL EDUCATION ASSOCIATION, | : | |
| | : | |
| | : | |
| Complainant, | : | |
| | : | Case VIII |
| vs. | : | No. 22346 MP-810 |
| | : | Decision No. 16000-A |
| JOINT SCHOOL DISTRICT NO. 8, VILLAGES OF FOX POINT, BAYSIDE, RIVER HILLS, AND THE CITY OF GLENDALE, 1/ | : | |
| | : | |
| Respondent. | : | |
| | : | |

Appearances:

Mr. Bruce Meredith, Staff Counsel, for the Association.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Michael Roshar, for the Employer.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and hearing having been held on January 23, 1978, in Milwaukee, Wisconsin before Examiner Stanley H. Michelstetter II, and the Examiner having considered the evidence and arguments of the parties and being fully advised in the premises makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Maple Dale-Indian Hill Education Association, herein the Association, is a labor organization with offices located at 5600 West Brown Deer Road, Brown Deer, Wisconsin.

2. That Joint School District No. 8, Villages of Fox Point, Bayside, River Hills, and the City of Glendale, herein the Employer, is an employer operating a school district with principal offices located at 8377 North Port Washington Road, Fox Point, Wisconsin.

1/ The complaint was amended during the course of hearing to reflect the correct name of the Employer.

3. That at all relevant times the Employer recognized the Association as the exclusive collective bargaining representative of certain of its professional employees; that at all relevant times the Employer and the Association were party to a 1975-1977 collective bargaining agreement which contains a grievance procedure as amended, but which does not provide for a method of the final resolution of grievance, and which reads in relevant part:

ARTICLE V

SALARY AND FRINGE BENEFITS

5.1 Salary Schedules

The salary schedules of teachers covered by this Agreement are set forth in Appendix A. In 1975-76 each teacher who was at Step 16, 16+, or 16++ of the Master's Degree Salary Schedule in 1974-75 shall be paid, in addition to the salary stated in 1975-76 Master's Degree Salary Schedule, and [sic] additional \$400.

5.2 Salary Administration

5.2.1 Placement on Salary Schedule

The Maple Dale-Indian Hill School's Salary Schedule adopted by the Board and Association will be used for computing salaries for teachers.

The initial base salary for teachers upon employment will be determined by negotiation between applicants and the Board or Superintendent.

The Board reserves the right to re-negotiate at any time with the Association the contract of a teacher whose service and experience or training warrants an improvement of his/her negotiated salary.

5.2.2 Increments

An increment is defined as an increase in pay during the following year and is earned by satisfactory completion of the current year's contract.

The Board may withhold all or part of the annual increment of any teacher whose work or maintenance of professional standards is not satisfactory to the Board.

5.2.3 Progression from B.A. Schedule to M.A. Schedule

Individuals teaching in the district's schools on a B.A. Schedule, who gain their Master's Degree shall be placed on the M.A. Schedule for the succeeding contract year at a step one level beyond where they currently are placed on the B.A. Schedule. Such progression from B.A. to M.A. Schedule shall take place between March 15 and September 15 for the succeeding contract year. This placement of a one step acceleration basis represents the normal one step progression for one year's service in the district.

. . .

5.2.5 Horizontal Steps

Teachers with a B.A. Degree plus 15 credits will receive an additional \$100 to their base salary.

Teachers with a M.A. Degree plus 15 credits will receive an additional \$200 to their base salary.

. . .

ARTICLE X

DURATION

- A. This Agreement shall become effective as of first teacher workday of the 1975-76 school year and shall remain in full force and effect through August 31, 1977 unless either party pursuant to Subsection (D) of this provision has notified the other party in writing that it desires to reopen the provisions of this Agreement identified in Subsection (D) of this provision. Furthermore, it shall renew itself for additional one-year periods thereafter, unless either party pursuant to Subsection (B) of this provision has notified the other party in writing that it desires to alter or amend this Agreement.

. . .

- C. If either party requests negotiations for a new Agreement, and said negotiations extend beyond the expiration date of August 31, 1977, this Agreement shall remain binding until a new Agreement is signed by both Board and the Association.

. . .

APPENDIX A
TEACHERS' SALARY SCHEDULE

1975-76

| <u>BACHELOR'S DEGREE</u> | | | <u>MASTER'S DEGREE</u> | | |
|--------------------------|---------------|------------------|------------------------|---------------|------------------|
| <u>Step</u> | <u>Salary</u> | <u>Increment</u> | <u>Step</u> | <u>Salary</u> | <u>Increment</u> |
| 1 | \$ 9,036 | \$-0- | 1 | \$ 9,603 | \$-0- |
| 2 | 9,836 | 300 | 2 | 10,403 | 300 |
| 3 | 10,186 | 350 | 3 | 10,753 | 350 |
| 4 | 10,557 | 350 | 4 | 11,224 | 450 |
| 5 | 11,001 | 400 | 5 | 11,768 | 500 |
| 6 | 11,598 | 550 | 6 | 12,371 | 550 |
| 7 | 12,198 | 550 | 7 | 13,035 | 600 |
| 8 | 12,811 | 550 | 8 | 13,704 | 600 |
| 9 | 13,385 | 500 | 9 | 14,332 | 550 |
| 10 | 13,958 | 500 | 10 | 14,961 | 550 |
| 11 | 14,477 | 450 | 11 | 15,538 | 500 |
| 11+ | 14,594 | -0- | 12 | 16,111 | 500 |
| 11++ | 14,657 | -0- | 13 | 16,681 | 450 |
| 11+++ | 14,686 | -0- | 14 | 17,197 | 450 |
| | | | 15 | 17,711 | 450 |
| | | | 16 | 18,220 | 450 |
| | | | 16+ | 18,131 | -0- |
| | | | 16++ | 18,179 | -0- |
| | | | 16+++ | 18,199 | -0- |

A teacher shall advance on the preceding salary schedules by adding his/her previous year's salary to the scheduled increment (if conditions of Section 5.2.2 of this Agreement are met) identified in the next step of the schedule [i.e.: 1975-76 salary \$11,001 (Step 5 B.A.); 1976-77 salary would be \$11,551 (\$11,001 + \$550)]. [Brackets theirs.]

MAPLE-DALE INDIAN HILL SCHOOLS
1976-77 INSTRUCTIONAL STAFF NEGOTIATIONS
SUMMARY OF TENTATIVE AGREEMENT REACHED
BETWEEN SCHOOL BOARD AND MDIHEA ON JUNE 16, 1976 ^[2/]

. . .

1. Salary Adjustments - Across the Board
Increases

| | |
|-------------------|-----------|
| Step 1 BA | no change |
| Steps 2-6 BA | \$400 |
| Steps 7 & 8 BA | 450 |
| Steps 9 - Max. BA | 500 |

| | |
|---------------------|-----------|
| Step 1 MA | no change |
| Steps 2-5 MA | \$400 |
| Steps 6-13 MA | 450 |
| Steps 14-16 & MA | 500 |
| Steps 16+-16++++ MA | 600 |

2. Increments (5.2.2)
The increment schedule will be the same
as 1975-76
(See Appendix A)

3. Longevity Pay
In 1976-77 each teacher who was at step
16, 16+, 16++, and 16+++ of the Master's
Degree Salary Schedule in 1975-76 shall
be paid, in addition to the salary
stated in the 1976-77 Master's Degree
Salary Schedule, an additional \$400.

4. Progression from B.A. Schedule to M.A.
Schedule (5.2.3) and Horizontal Steps
(5.2.5) will be paid by the School Board
the same as during 1975-76.

. . .

2/ This is herein referred to as the 1976-1977 addendum.

APPENDIX A
TEACHERS' SALARY SCHEDULE

1976-77

| <u>BACHELOR'S DEGREE</u> | | | <u>MASTER'S DEGREE</u> | | |
|--------------------------|---------------|------------------|------------------------|---------------|------------------|
| <u>Step</u> | <u>Salary</u> | <u>Increment</u> | <u>Step</u> | <u>Salary</u> | <u>Increment</u> |
| 1 | \$ 9,036 | \$-0- | 1 | \$ 9,603 | \$-0- |
| 2 | 9,736 | 300 | 2 | 10,303 | 300 |
| 3 | 10,586 | 350 | 3 | 11,153 | 350 |
| 4 | 10,936 | 350 | 4 | 11,603 | 450 |
| 5 | 11,357 | 400 | 5 | 12,124 | 500 |
| 6 | 11,951 | 550 | 6 | 12,768 | 550 |
| 7 | 12,598 | 550 | 7 | 13,421 | 600 |
| 8 | 13,198 | 550 | 8 | 14,085 | 600 |
| 9 | 13,811 | 500 | 9 | 14,704 | 550 |
| 10 | 14,385 | 500 | 10 | 15,332 | 550 |
| 11 | 14,908 | 450 | 11 | 15,911 | 500 |
| 11+ | 14,977 | -0- | 12 | 16,488 | 500 |
| 11++ | 15,094 | -0- | 13 | 17,011 | 450 |
| 11+++ | 15,157 | -0- | 14 | 17,631 | 450 |
| 11++++ | 15,186 | -0- | 15 | 18,147 | 450 |
| | | | 16 | 18,661 | 450 |
| | | | 16+ | 18,720 | -0- |
| | | | 16++ | 18,731 | -0- |
| | | | 16+++ | 18,779 | -0- |
| | | | 16++++ | 18,799 | -0- |

A teacher shall advance on the preceding salary schedules by adding his/her previous year's salary to the scheduled increment (if conditions of Section 5.2.2 of this Agreement are met) identified in the next step of the schedule [i.e.: 1976-77 salary \$11,357 (Step 5 B.A.); 1977-78 salary would be \$11,907 (\$11,357 + \$550)]. [Brackets theirs.]

4. That prior to August 31, 1977 the Association and the Employer entered into collective bargaining for the purpose of negotiating a successor to the 1975-1977 agreement; that such negotiations continued past August 31, 1977 without the parties having reached agreement with respect to the successor agreement; that at all relevant times after August 31, 1977, the parties have been unable to reach agreement on a successor to the 1975-1977 agreement.

5. That, pursuant to Section 3 of the 1976-1977 addendum to the aforementioned collective bargaining agreement, during the 1976-1977 school year the Employer paid each of its teachers who had been at step 16, 16+, 16++, or 16+++ of the Master's Degree Salary Schedule in the 1975-1976 school year, a total of \$400.00 in addition to his or her salary as determined in accordance with the 1976-1977 salary schedule.

6. That for the 1977-1978 school year the Employer refused, and continues to refuse, to pay any teacher who was at step 16, 16+, 16++, 16+++ or 16++++ of the Master's Degree Salary Schedule for the 1976-1977 school year any longevity pay.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSION OF LAW

That the Employer, by refusing to pay teachers for the school year 1977-1978 who were at step 16, 16+, 16++, 16+++ or 16++++ of the Master's Degree Salary Schedule for the school year 1976-1977 \$400.00 in addition to their salary as specified in said salary schedule, has committed, and is committing, a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and enters the following

ORDER

IT IS ORDERED that Joint School District No. 8, Villages of Fox Point, Bayside, River Hills, and the City of Glendale, its officers and agents, shall immediately:

1. Cease and desist from refusing to pay longevity pay for the 1977-1978 school year or any subsequent school year pursuant to Article X, Section C of the parties' 1975-1977 collective bargaining agreement, as amended.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
- (a) Pay each of its teachers who was at step 16, 16+, 16++, 16+++ or 16++++ of the Master's Degree Salary Schedule for the 1976-1977 school year \$400.00 which represents longevity pay for the 1977-1978 school year.
 - (b) Notify all of its employees represented by the Association of its intent to comply with the Order herein by posting in a conspicuous place in each of the schools operated by it, a copy of the notice attached hereto and marked "Appendix 1". Such notices shall be signed by the President of the Employer's School Board and its District Superintendent. The notice shall be signed and posted immediately upon receipt of this Order and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Employer to insure that said notices are not altered, defaced or covered by other material.
 - (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Milwaukee, Wisconsin this 16th day of October, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner

Appendix 1

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT refuse to pay longevity pay to teachers qualified therefor for the 1977-1978 school year or any subsequent year as required by Article X, Section C of the 1975-1977 collective bargaining agreement.

WE WILL pay each teacher qualified therefor \$400.00 of longevity pay for the 1977-1978 school year.

Dated this _____ day of _____. 1979.

By _____

By _____

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The parties' comprehensive 1975-1977 collective bargaining agreement specifies that it is in effect through August 31, 1977, but it provides that it is to remain in effect after that date until the parties agree upon and execute a successor. Although the parties attempted to negotiate a successor, they were unable to reach agreement before August 31, 1977 or at any relevant time thereafter. During the period after the scheduled expiration, the Employer administered the wage and benefit provisions in a manner that was generally acceptable to the Association, except that the Employer refused to grant any teacher who had been on step 16, 16+, 16++, 16+++ or 16++++ of the Master's Degree Salary Schedule in 1976-1977, \$400.00 longevity pay for the 1977-1978 school year. Thereafter the Association filed the instant complaint^{3/} in which it alleged the Employer violated Sections 111.70(3)(a)4 and 5, and, derivatively, 111.70(3)(a)1, by failing to pay the \$400.00 longevity additive for the 1977-1978 school year. The Association requested, in essence, that the Employer be required to pay the benefit to the teachers together with 12% interest on back pay, to post the appropriate notice, and to pay the Association's costs in this action, including attorney and "UniServ fees."

POSITIONS OF THE PARTIES

It is the Association's position that the Employer violated the parties' collective bargaining agreement (Section 111.70[3][a]5 and 1) and its obligation to bargain (Section 111.70[3][a]4 and 1) when it unilaterally discontinued paying the longevity additive. It contends Article X, Section C (duration) requires that the 1975-1977 agreement continue in effect after its scheduled August 31, 1977 termination until such time as the parties agree on a successor agreement. In so doing, it argues, the duration clause requires that the \$400.00 longevity additive, like other wages and benefits, be paid in the extended period in a manner similar to the payment paid in the scheduled contract term. It denies that the contractual specification that the additive is for "1976-1977," means the additive may not be applied on a like basis in the extended period. Instead, it alleges the foregoing

^{3/} No issue has been raised concerning any possible failure to follow the grievance procedure, and the parties expressly agreed that the matter is properly before the Commission.

is ambiguous and should be read to require the longevity additive be administered until the agreement expires: (1) because the additive was designed to solve the continuing problem of pay for teachers at the top of the schedule until an improved system was agreed upon in the successor agreement; (2) the ambiguity created by the specification of the effective date for the longevity additive should be construed against its drafter, the Employer; (3) the Employer construction would require a forfeiture; and (4) the Employer's administration of other provisions is inconsistent with its view of the longevity additive.

Finally, the Association argues that the Employer's position would essentially work as a contractual waiver of the Employer's obligation to bargain before eliminating the longevity additive. Thus, in view of that obligation, the Employer should be required to affirmatively show the agreement was intended to be a clear and unmistakable waiver of its bargaining obligation.

The Employer concedes Article X, Section C (duration) requires that the contract continue in effect after its scheduled expiration. However, it argues that the longevity additive specified in Section 5.1 and Section 3 of the 1976-1977 addendum expressly limit the longevity additive to the 1975-1976 and 1976-1977 school years. Alternatively, it argues that the bargaining history demonstrates that it was intended to be a temporary solution to compensating teachers at the top of the schedule. It asserts its administration of health insurance payments is consistent and its continued payment of increments is consistent in that increments were intended to be a permanent and continuing concept. Alternatively, it seeks an offset for any payments it might be required to make.

DISCUSSION

The issue in this case is whether under the terms of the parties' 1975-1977 agreement, as amended, the longevity additive benefit is so identified with the school year 1976-1977 that Article X, Section C does not require that it be repeated on a similar basis in the period following the scheduled expiration.^{4/} Article X, Section C states:

^{4/} To establish its position under Section 111.70(3)(a)4 the Association must demonstrate that the Employer, in fact, did unilaterally change the longevity benefit. If the benefit was intended to be a one-time only benefit as the Employer contends, it could not have made a unilateral change by not paying it (cont'd to p. 12)

If either party requests negotiations for a new Agreement, and said negotiations extend beyond the expiration date of August 31, 1977, this Agreement shall remain binding until a new Agreement is signed by both Board and the Association.

Its purpose is to preserve the status quo, including the existence of contractual type protection, pending the conclusion of negotiations, thus avoiding the use of economic pressure by the parties. An important element of this protection is to insure that employees are compensated after the scheduled expiration on a basis similar^{5/} to that which they were being compensated in the last scheduled contract school year. Because of this very fundamental purpose and the fact that parties rarely negotiate in detail how they plan to have an agreement administered after its scheduled termination, it would be very inappropriate to conclude the parties did not intend any particular benefit to be administered in the period after scheduled termination on a basis similar to that in the last scheduled contract year, unless the agreement very clearly states that it is not to be so administered.

The longevity provision of the 1976-1977 addendum states:

Longevity Pay

In 1976-77 [emphasis supplied] each teacher who was at step 16, 16+, 16++, and 16+++ of the Master's Degree Salary Schedule in 1975-76 shall be paid, in addition to the salary stated in the 1976-77 Master's Degree Salary Schedule, an additional \$400.

The specification of the school year in which longevity was to become effective could be read to mean that it was to be effective in only the 1976-1977 school year and not thereafter, or it could be read to be effective beginning in the 1976-1977 school year and terminating at the expiration of the extended period. Had the parties

4/ (cont'd) subsequent to 1976-1977. dist. Fennimore Joint School District No. 5 (11865-A) @ pp. 10-11 6/74. In view of the results of my determination under the contractual issues, no determination is made under Section 111.70(3)(a)4 and, derivatively, Section 111.70(3)(a)1. Accordingly, no determination is expressed or implied as to whether the aforementioned unilateral change issue ought to be decided on precisely the same interpretation standards as the contractual issue.

5/ Because parties rarely negotiate in detail how they plan to have an agreement administered after its scheduled termination, it may be necessary to look to parol and other evidence to determine what a "similar" basis is. However, the proper administration of the longevity benefit is not in issue in this case; only the applicability of the benefit is in issue.

wished to specify the former, they could have said: "In the 1976-77 school year, but not for any school year, or part thereof, occurring after August 31, 1977, each teacher. . . ." This they did not do. Without more evidence I would conclude the benefit only began in 1976-1977.

The other evidence offered in this case supports or does not contradict this conclusion. In volume II, page 29 of the transcript of proceedings, Superintendent Wierschem testified he drafted the language of Section 3 of the 1976-1977 addendum, and that it was his subjective intent to limit the longevity benefit to the 1976-1977 school year only. If this was his subjective intent, it never was communicated to the Association prior to the adoption of the ambiguous language. Under the circumstances, this testimony supports the conclusion that the ambiguity ought to be construed against the drafter (Employer). Any other result would discourage full discussion in the bargaining process.

Finally, the Employer's evidence of bargaining history falls far short of overcoming the purpose of the duration clause to continue the status quo. The facts relating to the bargaining history are undisputed. In negotiations leading to the parties' 1975-1977 agreement, the Association proposed that there be steps added to the top of the Master's Degree Salary Schedule for teachers who had been at the maximums thereof. This proposal was for the purpose of providing those teachers with an increase larger than just the general increase made to the schedule. While it recognized a need to increase the compensation of such teachers, the Employer was reluctant to grant the amount of the increase the Association wanted and was reluctant to put any increase it would grant into the form of additional steps to the salary schedule. The reason for the latter position was its fear that, as other aspects of the salary schedule have become, this additional amount might become too much of a "given" in future bargaining. In response to the Association's position, the Employer offered to establish the \$400.00 longevity^{6/} benefit specified in Article V, Section 5.1. In negotiations leading to the 1976-1977 addendum, the Association again proposed the additional steps. As a result of those negotiations the Employer proposed what became Section 3 of the 1976-1977 addendum. Also, as a result of those negotiations the

^{6/} Not then termed "longevity."

parties established a joint committee to meet after the close of negotiations to do the following with respect to longevity:

- 1) Develop a definition of productivity.
- 2) Recommend the criteria and procedures for determining productivity.
- 3) Recommend the financial reimbursement related to productivity.

Thus, it is undisputed that both parties, for different reasons, believed the longevity provision to be a temporary solution to the mutually recognized problem of compensation of teachers who have reached the maximum of the Master's Degree Salary Schedule, in that both parties expected that for future contracts they would be able to negotiate what each believed would be a better method of compensation of the teachers at the top. While the fact that the Employer was concerned about the benefit becoming too much of a "given" in future bargaining, might arguably tend to support an inference that the longevity additive was to terminate at the scheduled termination of the agreement in order to require the Association to "renegotiate" it for the successor agreement, this inference is contradicted by a more reasonable competing inference that since both parties clearly recognized there was a continuing need to provide compensation in addition to salary schedule amounts to teachers at the top of the Master's Degree Salary Schedule, they expected this compromise to remain in effect until the improved payment system, whatever it might be, was negotiated with the successor. On the basis of the foregoing, and the record as a whole, I conclude that Article X, Section C requires that the longevity additive specified in Section 3 of the 1976-1977 addendum to the parties' agreement be administered in 1977-1978 and thereafter until the agreement terminates, on a basis similar to that in which it was administered in 1976-1977.

REMEDY

The remedy entered today is consistent with Commission policy. It is not generally the Commission's policy to grant interest on back pay awards. No arguments were addressed to this issue under the nature of Article X, Section C. I, therefore, conclude the award of interest is inappropriate in this case. Assuming an award of costs and fees might be appropriate under such circumstances in this type of case, the Association has failed to show that the Employer's position was taken in bad faith or based upon legal arguments which are insubstantial

and without justification.^{7/} It is not now appropriate to address the Employer's setoff issue.

Dated at Milwaukee, Wisconsin this 16th day of October, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner

^{7/} Madison Metropolitan School District (15007-A, B) 9/77; Madison Metropolitan School District (14038-A, B) 4/77; Madison Metropolitan School District (16471-A) 12/78, petition for review pending.