STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MENASHA TEACHERS UNION LOCAL 1166, WFT, AFT, AFL-CIO, Complainant, vs. MENASHA JOINT SCHOOL DISTRICT, Respondent.	Case XXIX No. 24846 MP-1000 Decision No. 17138-C

Appearances:
Habush, Habush & Davis, S.C., Attorneys at Law, by Mr. John S. Williamson, Jr., appearing on behalf of the Complainant.
Mulcahy & Wherry, Attorneys at Law, by Mr. Dennis W. Rader, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

JAMES D. LYNCH, EXAMINER: The above named Complainant having filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent had committed prohibited practices violative of Chapter 111, Wisconsin Statutes; and a hearing in the matter having been held on October 8, 1979, following which the parties filed post-hearing briefs; and the Examiner having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises makes and issues the following

FINDINGS OF FACT

1. That Menasha Teachers Union, Local 1166, WFT, AFT, AFL-CIO, hereinafter referred to as Union, is a labor organization having its offices in Menasha, Wisconsin; that Steve Kowalsky is its representative for purposes of collective bargaining.

2. That Menasha Joint School District, hereinafter referred to as Employer, is an employer with offices located at 7th and Racine Streets, Menasha, Wisconsin; that Dennis Rader is its representative for purposes of collective bargaining; that Clayton Jackson is its business manager and has a responsibility for collective bargaining.

3. That on February 9, 1978, the parties entered into negotiations for a successor agreement to the contract which was to expire on August 31, 1978; that one of the items in dispute concerned payment for co-curricular duties.

4. That on May 16, 1978, the Union presented the Employer with its initial proposal regarding co-curricular payments; that that proposal stated in relevant part: "Co-curricular Schedule -- Salary Schedule Base Jan. 1, 1978 - Aug. 31, 1978 $9,950"; that the only discussion of the co-curricular proposal on that date was regarding increases in percentage payments for various co-curricular activities and a longevity provision which are not at issue in this proceeding.

5. That on June 6, 1978, negotiations having proved unsuccessful, the Union filed a petition for mediation-arbitration with the Commission.

6. On July 11, 1978, the parties met with a mediator-investigator in an attempt to resolve their differences; that during that meeting there was no discussion of payment for co-curricular activities.

7. That on August 8, 1978 during a face to face meeting between the parties, the Employer presented the Union with its first co-curricular proposal; that the proposal stated in relevant part: "Appendix A, Co-curricular Schedule Based on % of $9,950.00 Bachelor Degree Base"; during that meeting there was no discussion regarding this proposal.

8. That on August 10, 1978, the parties again met with a mediator-investigator in an effort to resolve their dispute, that on said date the Union and Employer exchanged final offers which addressed, inter alia, the subject of co-curricular activities.

9. That the Commission certified the following final offers; that the Union's final offer regarding co-curricular payment stated in pertinent part: '"Co-curricular Schedule - Appendix A . . . d. (make the following additions and changes)"; that the Employer's final offer regarding co-curricular payments stated in pertinent part: "Appendix A Co-curricular Schedule Based on % of $9,950 Bachelor Degree Base."

10. That subsequent thereto, the parties selected a mediator-arbitrator from a panel of five tendered to them by the Commission; that the parties met with the mediator-arbitrator on October 30, 1978 and November 3, 1978.

11. That, during the course of the October 30, 1978 meeting, the Union discussed the co-curricular issue with the mediator-arbitrator; that the Union conveyed to him that they could accept the percentage index proposed by the Employer in its final offer if there was an agreement on a longevity provision for performance of co-curricular duties.

12. That, during the course of the November 3, 1978 meeting, the parties reached agreement on the percentage index and longevity payments to be made for performance of co-curricular duties; that the parties then signed a document (regarding same) which recited in pertinent part: "Appendix A Co-curricular Schedule Based on % of $9,950.00 Bachelor Degree Base"; that at the time the parties executed this document there was no discussion regarding the BA base; further, that at the time the parties executed the document, they had not reached agreement on the salary schedule dispute which existed between them.

13. That subsequent thereto, the parties reached agreement on the salary schedule; that the agreement provided (1) for a bachelor degree base rate of $10,000 effective on September 1, 1978, (2) for a bachelor degree base rate of $11,100 effective on September 1, 1979 and (3) a bachelor degree base rate of $11,300 effective on January 1, 1980.

14. That the parties never discussed which bachelor degree base figure would be used in calculating payment for co-curricular activities of any time during their negotiations.

15. That the Union ratified the collective bargaining agreement on December 14, 1979.

16. That the Employer has made payment for co-curricular activities during the current contract term based on a bachelor degree base figure of $9,950.00.

17. That from 1967 through 1976, the Employer made percentage payment for co-curriculars pursuant to their contracts which provided that payment would be based on the then existing bachelor degree base at the time the work was performed.

18. That the contract between the parties from January 1, 1977 through August 31, 1978, contained a co-curricular schedule which provided in pertinent part: "Appendix A Co-curricular Schedule The following is a summary of the agreement reached for the co-curricular schedule to begin January 1, 1977. Percentages are related to the bachelor degree base of that date."

19. That despite the contract language recited in Finding of Fact number 18, supra, specifying that payment shall be made on bachelor degree base salary existing as of January 1, 1977, the Employer made payment based on the following bachelor degree rates contained in the contract for the following periods (1) from January 1, 1977 through December 31, 1977 - $9,550; (2) from January 1, 1978 through August 31, 1978 - $9,950.

Upon the basis of the above and foregoing Findings of Fact the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Union and the Employer never discussed the meaning of the term "Appendix A Co-curricular Schedule Based on % of $9,950 Bachelor Degree Base" at any time during the course of negotiations; that insofar as the Union understood this language to mean it contemplated a continuation of the policy of making payment upon the bachelor degree base existing at the time co-curricular work was performed whereas the Employer understood the language to pay the bachelor degree rate upon which co-curricular payment was to be made at $9,950, there existed a mutual mistake which precluded meeting of the minds with respect to this subject which, therefore, prevented the formation of a contract.

2. In view of the above conclusion, the Employer's action in implementing its understanding of the meaning to be given to the term by making co-curricular payments based on the $9,950 figure does not give rise to a finding of refusal to bargain or of contract violation.

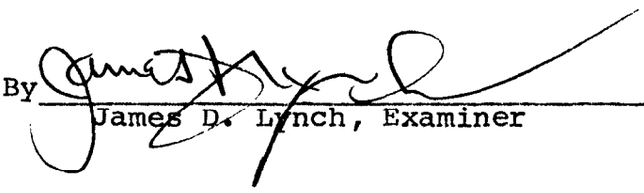
On the basis of the above and foregoing Findings of Fact and Conclusions of Law the Examiner issues the following

ORDER

IT IS HEREBY ORDERED that the complaint filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 8th day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
James D. Lynch, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES:

The Union contends that the Employer has refused to bargain in good faith and has violated the collective bargaining agreement by failing to make proper payment for co-curricular duties performed by teachers in accordance with the bachelor degree base salary subsequently agreed upon by the parties. The Union avers that an agreement was reached during mediation-arbitration which required the Employer to make co-curricular payments based on an index providing for certain percentage payments of the extant bachelor's degree base salary in effect at the time the work was to be performed. It is the Union's position that as per the past practice existing between the parties relative to co-curricular payments, that the language agreed to "Appendix A Co-curricular Schedule Based on % of $9,950 Bachelor Degree Base" does and must refer to the bachelor degree base of the salary schedule in effect at the time such co-curricular work is performed. It argues that the $9,950 figure was but an illustration of, and referred to, the only base figure known when the agreement was reached, namely that for the 1977-1978 year, since the parties had not yet reached agreement on the provisions of the salary schedule. Further, the Union argues that as the Employer never apprised the Union of its intent to change the existing practice by means of this language, their attempt to construe the language to require freezing the base at $9,950 is a fraud upon the Union.

The Employer argues that the co-curricular schedule language is clear and unambiguous and, thus, its meaning may not be altered by parol evidence relating to any alleged past practice. Therefore, in construing the language the Employer argues that it means exactly what it says -- that the percentage payments are to be determined by referance to a bachelor degree base of $9,950. However, the Employer argues further that this language is not meant to apply to the second year of the contract insofar as neither party had discussed a two-year proposal at the time the co-curricular schedule was signed off.

DISCUSSION:

The nub of this dispute revolves about the meaning to be given to the co-curricular attachment to the contract which provides in relevant part: "Appendix A Co-curricular Schedule Based on % of $9,950 Bachelor Degree Base." In construing this language, it is critical to note the fact that both parties admit that there was never any discussion regarding this provision or its meaning at any time during contract negotiations.

The threshhold question which must be addressed is whether the language is ambiguous. A contract term is ambiguous if plausible contentions may be made for conflicting interpretations thereof. Thus, the parties' arguments regarding same must be considered.

The Union contends that the term "$9,950 Bachelor Degree Base" is ambiguous because the $9,950 figure is not a bachelor degree base; save in the context of that contained in the parties' previous collective bargaining agreement which had expired on August 31, 1978. Therefore, the Union argues that this figure is meant to be but a reference, a benchmark to be used for illustrative purposes, because at the time the parties signed off the co-curricular attachment they had not yet reached agreement on the issue of salary. Thus, the Union argues, having established ambiguity, reference must be made to the past practice regarding the method by which payment for co-curricular activities

has been made in order to ascertain the language's meaning. Thus, the Union contends that for a period of more than ten years contractual payment for co-curricular duties had been determined by reference to the bachelor degree base figure in effect at the time the work is performed. The Union notes further that this practice has persisted even in the face of contrary contract language. For, as recited in Findings of Fact numbers 18 and 19, that even where the contract specified that payment shall be made on the base salary existing as of a certain date, nevertheless when new salary provisions became effective pursuant to their agreement the Employer proceeded to make payment based on the salary provisions in effect at the time the work was performed. Thus, the practice establishing the parties' intent, the Union avers that the language requires payment to be made in accordance with the operative salary provisions at the time co-curricular duties are performed.

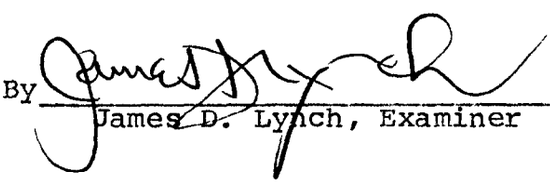
The Employer contends that the language is clear and unambiguous and fixes payment for co-curricular activities at the former bachelor degree base of $9,950. However, the Employer further contends that the language does not apply to establish a rate for the second year of the contract.

Upon a review of the language and the parties' positions regarding same, the undersigned finds that plausible contentions may be made for either interpretation thereby establishing ambiguity. This conclusion is buttressed by the Employer's argument that the language does not fix the rate in the second year of the contract. For the Employer's argument, of necessity, requires a finding that the language is ambiguous as the language on its face does not provide an exception to its scope in the second year.

Turning then to the applicable contract law regarding mistake, it is well-settled that where the parties to a contract give materially different meanings to a term, and neither one knew or had reason to know the meaning of the other, there is no contract. 1/ Where, as here, neither party ever discussed the language or the meaning which it attached to it with the other party, a mistake occurred which precludes the formation of a contract. In this circumstance, the Employer's action in implementing its understanding of the meaning to be given to the term by making co-curricular payments based on the $9,950 figure does not give rise to a finding of refusal to bargain or of contract violation where, due to mutual mistake, no contract regarding co-curricular was formed. Accordingly, the complaint filed herein shall be, and hereby is, dismissed.

Dated at Madison, Wisconsin this 8th day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
James D. Lynch, Examiner

1/ Restatement, Contracts Section 71; Corbin on Contracts Section 104.