BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:
DEFOREST AREA EDUCATION ASSOCIATION	: Case 21
and	: No. 41718
	: MA-5441
DEFOREST AREA SCHOOL DISTRICT	:

Appearances:

Mr. Phil Borkenhagen, Executive Director, Capital Area UniServ-North, 4800 Ivywood Trail, McFarland, Wisconsin 53558, appearing on behalf of the Association.

Lathrop & Clark, by Attorney Ronald J. Kotnik, 122 West Washington Avenue, Madison, Wisconsin 53703, appearing on behalf of the District.

ARBITRATION AWARD

The DeForest Area Education Association, hereinafter referred to as the Association and the DeForest Area School District, hereinafter referred to as the District are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association and the District jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned as a single, impartial arbitrator to resolve the instant grievance. The hearing, which was not transcribed, was held in Madison, Wisconsin on April 11, 1989. Initial post-hearing briefs were filed by each of the parties on May 10, 1989; reply briefs were filed by each of the parties on May 22, 1989.

ISSUE

The parties stipulated to the following statement of issue:

> Did the District violate Article 22 of the collective bargaining agreement when it applied the vertical step salary freeze to newly hired, experienced teachers hired by the District for the 1987-88 school year? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE III

NEGOTIATING PROCEDURES

> A. (1) On or about January 5th and no later than January 15th of each year, the parties agreed to meet to confer and negotiate in accordance with the procedures set forth herein in a good faith effort to reach agreement on all matters raised by either party concerning questions of wages, hours and conditions of employment. Any agreement reached shall apply to all contracted teachers according to the preceding recognition clause, be reduced in (sic) writing and be executed by the appropriate and duly authorized officer or officers of the Board and the Association.
>
> . . .

ARTICLE XXII

EXPERIENCED TEACHERS ENTERING THE SYSTEM

> Experienced teachers entering the DeForest School System for the first time shall receive full credit for previous teaching experience, provided such experience is defined as no longer than three (3) years absence from the teaching profession.
>
> . . .

BACKGROUND

The facts are not in dispute. On May 5, 1988, the parties reached a voluntary settlement to the successor collective bargaining agreement which was to commence retroactively on July 1, 1987 and extend for a three year period through June 30, 1990. A key provision of the successor agreement was a one year vertical step freeze with respect to the salary grid which was to take place in 1987-88. Motivated by a desire to improve substantially DeForest base

teacher salaries, but at an affordable cost, the DeForest School Board had originally proposed a two year vertical step freeze in conjunction with vertical step improvements. The proposition was resisted by the Association until the parties reached a mediation driven compromise of a one year vertical step freeze, along with improvements to the vertical steps.

The DeForest teacher salary schedule is similar in general form to that found in a number of other Wisconsin school districts. It consists of a grid, the vertical steps of which reflect teaching experience, and the horizontal lanes of which reflect academic achievement. Thus, to implement the vertical step freeze to which the parties agreed in DeForest, for 1987-88, only, DeForest teachers were to remain at the same vertical step at which they had been placed for 1986-87. As a practical matter, this would result in two consequences: (1) teachers affected by the vertical step freeze would, for as long as they taught in the DeForest School District, lose one year of credited teaching experience for purposes of placement on the salary grid; (2) nonetheless, because of the improvement to the vertical steps, teachers affected by the vertical step freeze would still receive a 1987-88 increase in excess of what they would have received if credited for actual teaching experience, with no further improvement to the salary grid from the 1986-87 levels.

In July and August of 1987, the School District hired seven new teachers, on whose behalf the Association originally filed the instant grievance. Such teachers are by name: Ann Bauman (originally Brown), Jack Doyle, Sharon Flock, Cindi Haack, Kathleen Klinkner, Julie Lund, and Jack Prehn. By stipulation of the parties, Julie Lund was dropped as a grievant at hearing.

Thus each of the remaining six grievants were hired prior to the 1987-90 collective bargaining agreement being in place. 1/ Each of the six entered into individual teaching contracts with the District. On four of such individual contracts there was the additional asterisk notation to the effect that salary adjustments would be made upon the completion of negotiations. Inexplicably, this notation was omitted on the teaching contracts for Grievants Doyle and Flock. All of the six, however, were credited with their actual years of teaching experience at the time they were hired, and placed on the appropriate vertical salary step.

Vertical step placement of the six new hires was pursuant to the provisions of Article XXII which provides that "experienced professional employes entering the DeForest School system for the first time shall receive full credit for previous teaching experience . . . " Article XXII had remained virtually unchanged since it first appeared in a 1969-70 collective bargaining agreement between the DeForest Area School District and the DeForest Education Association. Its present form in the 1987-90 collective bargaining agreement is identical to the form in which it appeared in the 1985-87 collective bargaining agreement between the parties. It does not appear that either party suggested changes to this article during the collective bargaining sessions which led to the 1987-90 collective bargaining agreement.

On May 10, 1988, the DeForest School Board ratified the tentative voluntary settlement reached five days earlier. On May 11, 1988, prior to an Association ratification meeting, an Association representative asked the District Administrator whether the vertical step freeze applied to 1987-88 new hires, and was told it did not. The Association subsequently ratified the tentative agreement on the same day.

Checks for retroactive pay were issued on May 20th at which time some of the grievants noticed apparent discrepancies with respect to the amounts they had been paid. Consequent investigation revealed that not withstanding the reassurances of the District Administrator some ten days earlier, the vertical wage freeze had, in fact, been applied to the six new hires. Each had been reduced one vertical step. Thus, for example, a grievant with 4 years of teaching experience who had been placed at Step 5 the previous summer, was rolled back to Step 4.

On May 25, 1988, the District Administrator formally reversed his previous verbal opinion by means of a written memorandum to an Association representative. Uncontroverted testimony indicates that the total financial amount in dispute is approximately of $7,000.

The District presented no testimony.

The parties stipulated to thirteen joint exhibits being admitted into evidence. In addition, the Association introduced into evidence seven exhibits of its own, all of which were admitted into evidence, there being no objection from the District.

1/ That there was no contract "hiatus" was due to an "evergreen clause" in the 1985-87 agreement which provided for the agreement's continuation while the parties bargained for the terms of its successor.

Further reflective of the absence of a factual dispute were eleven stipulations reached by the parties prior to hearing, and read into the record. While some of them are redundant to the foregoing narrative, in their sequential entirety they may add some factual thoroughness, and are, accordingly, listed as follows:

1. The 1987-88 contract year began without benefit of a negotiated settlement.

2. A three year contract was eventually reached covering July 1, 1987 through June 30, 1990.

3. The parties agreed in mediation over final offers on May 5, 1988, and the Board ratified the terms on May 10, 1988; the Association ratified on May 11, 1988.

4. The collective bargaining agreement was signed by the parties on November 30, 1988.

5. There are no time limits nor procedural arguments being raised. Consequently, the grievance is timely filed and operative.

6. The parties have amended the grievance to withdraw a Ms. Julie Lund.

6. (a). The parties agreed to a vertical step freeze at the previous years' step for 1987-88 salaries when they negotiated the 1987-90 collective bargaining agreement.

7. Neither party raised any issue or proposal during the realm of bargaining concerning the effects of the freeze on new hires for 1987-88.

8. The contract language specifying Article II ("Recognition") and Article II ("Placement for Experienced Teachers") have been virtually unchanged since the initial 1969-70 contract as their terms relate to this grievance.

9. All new hires for 1988-89 have been placed on schedule on accordance with their past experience and Article XXII as it was applied previous to 1987-88.

10. For settlement purposes in May, 1988, the parties utilized the 1986-87 staff and projected them forward for costing the 1987-88, 1988-89, and 1989-90 packages.

During the course of hearing, the District and Association reached one further stipulation to the effect that the words, "vertical steps frozen at previous years' placement" found in the upper left hand corner of page 44 (Salary Grid) of the collective bargaining agreement sheds no particular light on the issue of whether the vertical step freeze applies to new hires.

It was also established that consistent with the past practice of the DeForest Area School District, during the period the parties were negotiating a successor agreement to the 1985-87 collective bargaining agreement, returning teachers to the DeForest Area School District were advanced one vertical step in accordance with their actual teaching experience, but paid at the salary rate indicated for 1986-87. Upon ratification of the successor collective bargaining agreement, consistent with both parties' understanding of such agreement, such returning teachers were moved backward one vertical step to their 1986-87 level, but were paid the improved step rate negotiated for the 1987-88 school year.

Allusion to further facts or exhibits will be made as appropriate in the body of the Discussion section hereinafter.

POSITION OF THE PARTIES

School District

The District notes that from the beginning of the 1987-88 school year until ratification of the 1987-90 collective bargaining agreement in May, 1988, all teachers, including the six grievants, were paid on the same basis, that is, according to the 1986-87 salary schedule, but on the vertical step which recognized their actual years of previous experience. The District further points out that after ratification by both sides, salary adjustments were made for all teachers in the same manner: all teachers, including new hires, were moved back one step to implement the negotiated vertical step freeze at the previous years' placement.

The District believes the Association's contention that the District

violated Article XXII ("Placement for Experienced Teachers") is a "curious position for the Association to adopt since it creates irrational inequities between teachers by paying some more for the same experience than it pays others." Such contention, adds the District, discriminates against the veteran teachers who have acquired their experience in the DeForest School District. It believes that such a result injects unfairness, absurdity, and divisiveness into the bargaining unit. Further, the District asserts that the Association's position is ". . . inconsistent with the purpose of a salary grid which is to provide uniformity by paying teachers similarly situated the same salary."

The District believes that it has a contractual obligation to treat the veteran and newly hired teacher similarly, regardless of the language of Article XXII and the equities previously addressed. It relies specifically on Article III of the collective bargaining agreement which states that "(a)ny agreement reached shall apply to all contracted teachers . . ." The District concludes that since the vertical step freeze was not negotiated, specifically, for application to a particular class of teachers, it applies to all teachers employed for the 1987-88 school year.

Neither does compliance with this requirement of Article III violate the provisions of Article XXII, according to the District. The District argues that the obvious intent of the parties in adopting Article XXII was to pay teachers with similar experience the same salary whether that experience was gained inside or outside the District. The District states that the negotiated vertical step freeze suspended the contractual right of the veteran teachers to a step increase for the 1987-88 school year. According to the District, the freeze also suspended the Article XXII contractual right of newly hired teachers to a step increase for that school year.

The District believes this interpretation of Article XXII is fair, sensible, gives effect to the provisions of Article III, and preserves the purpose of the salary grid.

Association

The Association believes that the School District has violated the collective bargaining agreement by reducing the new hires of 1987-88 one step lower on the salary schedule than that at which they were initially hired. As a result, these new hires didn't experience the full salary increases which they should have received as a result of their contracted initial placement on the schedule.

The Association contends the language of the parties' collective bargaining agreement is clear and unambiguous as it relates to new hires of the District in any year. It does not believe that Article XXII specifies any restriction upon a new hire, except if there is a three year break in previous service (an exception which is moot in the instant matter).

The Association further notes that neither the District nor the Union proposed ". . . a scintilla of change in the language of Article XXII, from the commencement of negotiations through the ratification process (as set forth in Stipulation 7)". By not granting the new hires full credit, the Association accuses the District of unilaterally implementing changes in the contract reached voluntarily, contrary to mutual agreement and interpretation.

The Association points out that it was the Association leadership who sought to confirm that the freeze would not affect the newly hired teachers. The Association argues it relied upon the representations of the District Administrator who, it notes, was an active participant in all negotiations between the parties. But, says the Association, neither the grievants nor the Association knew of District intentions to alter the Administrator's initial position to the Association until the grievants received their pay checks. The Association states that interpretations of the collective bargaining agreement as made by the District Administrator on May 11, 1988, are an integral part of the bargain as a bilateral interpretation.

To the District argument that allowing new hires to be placed at the step reflected by their actual teaching experience in 1987-88 will create two or possibly three classes of employes, the Association responds that both parties knew full well that a freeze would create more than one class of employes, and that this knowledge was the basis of the Association's opposition to the concept from the beginning of bargaining. It only agreed to it, the Association contends, in order to accommodate the District's concern over the issue of a low base hiring salary, and, even then, on condition that it be limited to a term of only one year and apply only to 1986-87 staff. Thus, according to the Association, the issue is not whether two classes of employes are created; the issue is rather when two classes of employes are created.

The collective bargaining agreement doesn't prohibit the creation of two classes of employes, according to the Association. It points to Article VII of the collective bargaining agreement (which permits paying teachers above schedule under certain circumstances) and Article XVIII (Probationary Employes) as illustrative of this point.

The Association characterizes the testimony of the grievants as stating

that when hired by the DeForest School District, they came from a variety of school districts, each having its own conglomerative salary schedule. The Association concludes that since exact placement on a salary schedule is completely indeterminable for the grievants, ". . . it is ludicrous to effectuate a freeze upon them at their 1986-87 placement" . . . based on the District's claim that the vertical step freeze obligated the District to do so. The Association argues that the specific language of Article XXII must be given the nod over the general language contained in Article II or Article III. The Association does not believe that the District should gain from the Arbitrator that which it specifically failed to gain or forgot to gain at the bargaining table.

The Association believes that the District should be precluded from arguing Article III, since it never advanced this argument in its rationale throughout the grievance process. In any event, however, the Association does not believe that Article III, A. (1) provides that employes shall be treated alike. Instead, it believes the contract language relied on by the District is intended as a protection against individual bargaining.

Response of the District

The District accepts the initial argument of the Association that the language of Article XXII of the collective bargaining agreement is clear and unambiguous, that such language does not authorize the salary step freeze, and that neither side bargained for a change in the language. It disagrees, however, with the Association's assertion that "the District is unilaterally implementing changes in the contract . . . " The District says that since the effect of the freeze on new hires was not even considered, (Stipulation No. 7) the freeze must be applied to all teachers as required by the terms of Article III.

The District assails the Association argument that the District Administrator's initial representation to the Association that the freeze would not apply to new hires was an integral part of the bargain as a bilateral interpretation of a segment of the contract. Not so, says the District, because the representation was not made by the District Administrator during precontract negotiations, but rather on May 11, 1988, after the School Board had already ratified the contract the day before. Besides, adds the District, there is no claim by the Association that it relied on the initial opinion of the District Administrator to its detriment or that it irrevocably changed its position in any way.

The District also believes the Association misses the mark when it suggests that the specific language of Article XXII be given precedence over the general language contained in Article III. According to the District, Article XXII does not deal specifically with a certain phase of the subject matter dealt with by Article III.

The District does not believe it should be precluded from asserting the provisions of Article III of the collective bargaining agreement as support for its extension of the vertical step freeze to the new hires. It points out that the Association neither offered authority for its position, nor has it demonstrated that it has been prejudiced by the District's failure to advance the argument at lower levels of the grievance process.

Finally, the District agrees that Article III does not require all employes to be treated alike, but it does require ". . . like treatment for all contracted teachers in the absence of an agreement that a negotiated provision shall apply only to a particular class of teachers." It reiterates Stipulation No. 7: "neither party raised any issue or proposal during the realm of bargaining concerning the effects of the freeze on new hires for 1987-88."

Response of the Association

The Association believes that though the District tries to emphasize fairness and equity to all teachers in its brief, its actions in this matter fell short of that mark.

The Association acknowledges that under its interpretation the veteran (incumbent) teachers were the only group to suffer nonrecognition of actual years of teaching experience when they ratified the contract on May 11, 1988. But, says the Association, this was by agreement of the parties, and asserts this view is substantiated by identical interpretation from the District Administrator on May 11, 1988.

The Association suggests the District has waived its right to argue that "the District had a contractual obligation to treat the veteran and newly hired teachers similarly", when it was the District which had continuously proposed a freeze.

The Association doesn't disagree, in concept, with the District's comments that the purpose of a salary grid is to provide uniformity in the payment of teachers. But, says the Association, an inspection of every District's salary schedule grid would reveal that some teacher's years of

service do not perfectly match to exact step placement, including the DeForest School District. In DeForest, for example, states the Association, a teacher's full experience can be discounted if there has been a break in service greater than three years. Moreover, newly experienced teachers newly hired in DeForest in the term of 1988-89 are already mismatched with the incumbent staff of 1987-88, as they relate to years of teaching service to an equivalent step placement on schedule, because of the freeze.

The Association believes that Stipulation 7 of the parties clearly isolates the new hires, because it establishes they were not specifically addressed.

To grant the grievance arbitration award to the District would, according to the Association, add new meaning to Article XXII that never was subject to bargaining for the 1987-90 term of contract. The Association accuses the District of desiring now what the District failed to gain in bargaining, but attempting to cover its tracks by now arguing that the vertical step freeze is unfair to veteran (incumbent) teachers.

DISCUSSION

It is axiomatic that the arbitrator has only such authority as may flow to him through the collective bargaining agreement of the parties. Public Schools Education Association, 78-1 ARB 3832, 3835 (Roumell, 1978)

Normally, arbitrators have no authority to add or delete contract language, in the absence of a demand for contract reformation premised on a claim of mutual mistake.

No such demand is made by either party in the instant proceeding.

Similarly, there is no need for interpretation by the arbitrator unless the agreement is ambiguous. Elkouri and Elkouri, How Arbitration Works 4th Edit., 1985 BNA, Wash., D.C., 342. An agreement is ambiguous if "plausible contentions may be made for conflicting interpretations thereof." Ibid, citing Armstrong Rubber Co., 17LA 741, 744 (Gorder, 1952); Allis-Chalmbers, 71LA 375, 378-379 (Goetz, 1978); Genova Pennsylvania, Inc. 70LA, 1303, 1305 (Wolf, 1978).

In the instant matter, both sides advance conflicting interpretations as to whether the vertical step freeze included in the parties' collective bargaining agreement for 1987-90 requires its uniform application to all teachers under contract with the District in 1987-88. Each party offers plausible contentions in support of its interpretation. Thus, by definition, ambiguity exists. Under this circumstance, the intent of the parties becomes the crucial standard against which the relative plausibility of each contention may be measured.

Intent of the parties may be gleaned from various sources, including the express language of the agreement, bargaining history, and position memoranda issued by the employer. Los Angeles Community College Dist., 8LA 988, 990 (Christopher, 1985). Arbitrators normally restrict the meaning of a general provision by application of a more specific one, unless a contrary intention appears from the contract construed as a whole. Chillicothe Tel. Co., 84LA 1, 3 (Gibson, 1984); cited in Elkouri and Elkouri, How Arbitration Works Supplement, 4th Edit., 1988 BNA, Wash., D.C., 70. In addition, "equity" may sometimes be utilized in arbitration, provided it is not used as a substitute for the express terms of the contract. Elkouri, Ibid., 78.

In the instant matter, both parties cite the express language of the agreement as determinative of the parties' intent. The District looks to the provisions of Article III; the Association, to the provisions of Article XXII.

The relevant portion of Article III provides that "(a)ny agreement reached shall apply to all contracted teachers . . ." The relevant portion of Article XXII provides that "(e)xperienced professional employes entering the DeForest School system for the first time shall receive full credit for previous teaching experience, provided such experience is defined as no longer than three (3) years absence from the teaching profession." This is the extent to which either party relies on express contract language.

The District claims that the Article III language it cites requires it to treat all teachers similarly, and thus impose the vertical step freeze on incumbent and newly hired teachers, alike, for 1987-88. It claims that the intent of Article XXII is to pay teachers with similar experience the same salary, whether that experience was gained inside or outside the DeForest district. It further asserts that Article XXII does not deal specifically with a certain phase of the subject matter dealt with by Article III.

In response, the Association suggests that the language relied on by the District was intended only to protect teachers against individual bargaining, but even if it has broader implications, those must yield to the far more specific language of Article XXII. The Association further claims the District's reliance on Article III is belated and should therefore be deemed waived.

Dealing first with the threshold issue of waiver raised by the Association, inasmuch as the Association has not demonstrated that it has been unfairly prejudiced by the District's failure to erect an Article III defense in earlier stages of the grievance procedure, there is no basis on which to preclude the District from now asserting such defense.

Moving then to the merits of that defense, there can be no quarrel with the District's proposition that Article III makes the collective bargaining agreement applicable to all teachers employed by the District. As a corollary, of course, individual bargaining with teachers covered under the agreement is eliminated. But this merely means that all of the teachers are subject to the various provisions of the collective bargaining agreement. Contrary to the District's assertion, this does not mean that each article applies equally to each teacher, or even that each article touches on every teacher. Nor does this mean that the parties cannot agree to establish different or separate classifications of teachers, provided the classifications are rational and not prohibited by law. Indeed, there are several instances in the collective bargaining agreement where the parties, over the years, have done just that. 2/ Under these circumstances, the Article III interpretation now advanced by the District is simply inconsistent with past bargaining achievements of the parties.

The District argues that ". . . Article XXII does not deal specifically with a certain phase of the subject matter dealt with by Article III." True enough. Article III deals in main with a description of the negotiating procedure to be followed by the parties, a subject untouched by Article XXII. But Article III also provides that "(t)his Master Contract shall not be interpreted or applied to deprive teachers of professional advantages, as specified in this contract, heretofore enjoyed unless expressly stated herein." Inasmuch as there is no disagreement that the current contract contains no express language suspending the operation of Article XXII, arguably Article III lends itself to greater support of the Association's position in this matter than that of the District. In any event, the fact that each article deals primarily with different topics does not appear to be of any particular value in interpreting the language of either.

What then of Article XXII? The District professes to agree with the Association's characterization of this article as clear and unambiguous, as not authorizing the imposition of the vertical step freeze on the 1987-88 new hires, and, further agrees that neither side bargained for a change in Article XXII language. (District's Reply Brief, p. 1) The District does not, however, withdraw its earlier interpretation of this article which asserted that the intent of the article was to pay teachers with similar experience the same salary without regard to whether that experience was gained inside or outside the District. (District's Initial Brief, p.4)

2/ For example, Article XXII permits teachers with unbroken teaching experience to be more favorably treated than their counterparts with the same or greater teaching experience, if the experience of the latter group has been broken by absence from the profession for more than 3 years. Article VII provides another example wherein the Board may grant additional compensation to secure or retain the services of teachers under certain circumstances. The salary schedule is yet a third example in that teachers who have accumulated graduate credits or advanced degrees are treated more favorably than their counterparts who have not.

Review of the Article XXII language finds little basis for the District's earlier interpretation. That article appears to make no reference to teaching experience gained inside the District. Moreover, if the language of the article is, in fact, clear and unambiguous, its meaning is self-evident, and interpretative efforts which seek to provide additional thrust must be rejected.

Consistent, then, with the apparent agreement of the parties, I find the language of Article XXII to be clear and unambiguous. The question remains whether considerations of equity or other indicia of a contrary intent of the parties are of sufficient strength to permit suspension of its operation in 1987-88.

Although "equity" will not normally defeat express contract language, sometimes it can be a helpful determinant of the parties' intentions. Thus, the District argues that failure to impose the 1987-88 vertical step freeze on teachers newly hired that year would result in the creation of two classes of teachers, and that this is inequitable to the less favored class.

But even the District's position that the step freeze be applied to the 1987-88 new hires would result in more than one classification of teachers being created; the only difference would be that the favored class would then consist of teachers newly hired in 1988-89 and thereafter, instead of the 1987-88 new hires and those following them. From this standpoint, "equity" doesn't appear to favor or condemn either alternative.

Moreover, the "equity" urged by the District turns out to be an uncertain equity, at best. For to place the 1987 new teacher hires on a vertical step of the 1987-88 salary grid by freezing their 1986-87 step position, would require reference to what step these teachers had been placed during the previous year on whatever salary grid (if any) was then in effect at their former site of employment. Testimony established that the grievants came to DeForest from a variety of schools and school districts, each having its own particular salary schedule. While the forms of some of the schedules might be similar to that used in the DeForest District, there could still be significant variances even between these similar forms as to the number of vertical steps each contained, or the years of experience each step represented. To apply the vertical step freeze in DeForest by referring to an external potpourri such as this would create a potential confusion and inequity which the parties could not have intended.

Nor do the equities change because the incumbent teachers were treated identically to the newly hired teachers at the beginning of the 1987-88 school year. Individual teachers in both groups were placed on the vertical step of the 1986-87 salary schedule which represented the actual teaching experience of each. But this wasn't a question of equity; by virtue of the "evergreen clause" in the 1985-87 collective bargaining agreement of the parties, such agreement continued in effect until its successor was ratified. Thus, District placement of individual teachers on salary grid steps was a matter mandated by the language of the continuing collective bargaining agreement, including that contained in Article XXII. Equity considerations may have been the motivation for the controlling contract language, but it was in response to the contract language, not "equity," to which the District was reacting when it treated the 1987-88 new hires the same as the incumbents. Thus, when the incumbents agreed to freeze their respective step placement for the 1987-88 school year, neither notions of "equity" nor past practice compelled the conclusion that the 1987-88 new hires must be treated the same -- or that such was the intention of the parties.

Certainly, the District is correct when it claims to have complied with the provisions of Article XXII in its initial placement of the grievants on their respective vertical steps. But this is a bootstrap argument, for the District's initially correct action cannot be viewed in a vacuum, and without reference to its later action. Put another way, if it contravened the intentions of the parties in mid-May, 1988, its proper placement action the previous summer doesn't somehow excuse the later breach.

Examining the bargaining history of the parties is another means of surveying the intent of the parties.

In this area, the District asserts that "(s)ince the vertical step freeze was not negotiated, specifically, for application to a particular class of teachers, it applied to all teachers employed for the 1987-88 school year." (District's initial brief, p.4) The Association, of course, views the matter differently. It suggests that since the parties did not see fit to tamper with the provisions of Article XXII as they negotiated their 1987-90 collective bargaining agreement, the parties had no intention of suspending application of that clause.

On balance, I am persuaded on this point, as well, that the argument of the Association has greater plausibility. The parties agree that Article XXII (along with Article II) has remained virtually unchanged since the appearance of both in the 1969-70 initial agreement of the parties. That in itself suggests that both sides were satisfied with the article, and saw no reason to change any of its provisions. Moreover, had the Association any intention of suspending for one year the operation of Article XXII, it hardly appears likely it would have sought an opinion from the District Administrator as to the District's intent on that matter. Thus, even if the District had been able to demonstrate that it wanted a change in Article XXII (which it has not), the apparent absence of acquiescence by the Association would demand the conclusion that as to that there was simply no meeting of the minds.

The evidence, however, does not remotely suggest that the District had any desire to alter Article XXII, except on a unilateral basis well after the parties had cut their deal. Indeed, the significance of the unequivocal initial reassurance of the District Administrator to the Association that the District did not view the vertical step freeze as applicable to 1987-88 newly hired teachers is worth emphasizing, for it is competent, compelling evidence that neither party ever contemplated any changes to Article XXII while bilateral negotiations were taking place. The record is fuzzy as to what, if any, reliance was placed on that reassurance by individual Association members who voted for ratification, but such reassurance need not rely on the equitable doctrine of "detrimental reliance" for its vitality. It stands on its own feet as a revealing indication of District intent, expressed by the District's chief executive officer.

To its credit, the District did not attempt to deny its administrator's statement. But its effort to discount the statement by arguing that it was not given during a period of "precontract negotiations" (District's reply brief, p. 2) is misplaced. Whether the reassurance was given during a formal period of precontract negotiations, an informal period of precontract negotiations, or during a post-negotiations, but precontract period is immaterial. Regardless of its timing, it constitutes a compelling admission against interest by a person normally authorized to speak for the District on matters such as these. Absent any evidence that the District Administrator was ill-informed (and there is none), the fact that such admission was made by the highest ranking District Administrator provides substantial enhancement to the weight to be accorded to it.

This view is strengthened by references to the parties' precontract negotiations -- in many cases the most critical part of the bargaining history. In the instant matter, it appears that although all new hires were in place by August, 1987, ". . . for settlement purposes in May, 1988, the parties utilized the 1986-87 staff and projected them forward for costing the 1987-88, 1988-89, and 1989-90 packages." Stipulation No. 10. To have included the 1987-88 new hires in those costing figures would have been a relatively simple operation. That the parties did not do so suggests that neither side had any intention of including the 1987-88 hires in the vertical step freeze then being negotiated. The initial response of the District Administrator on May 11, 1988 is thus justified; he was accurately and truthfully reflecting the sense of the District's bargaining team.

The Association argues that the District now seeks what it failed or forgot to obtain at the bargaining table. Perhaps. Another view is that the District now seeks what 20/20 hindsight suggests it should have attempted to gain through collective bargaining. In either case, to deny the grievance herein would enable the District to obtain an advantage not contemplated by either side during their precontract negotiations.

Accordingly, for the reasons stated herein, I conclude that the District violated Article XXII of the collective bargaining agreement when it applied the vertical step salary freeze to newly hired, experienced teachers hired by the District for the 1987-88 school year.

Based, therefore, on the foregoing discussion and the record as a whole, I enter the following

AWARD

The grievance is sustained.

As a remedy, the District shall replace each of the grievants to their original contracted step placements for 1987-88, as specified on their individual contracts and noted upon Association Exhibit 6 (as corrected at hearing); in addition, each of the grievants shall be made whole for his or her respective specific monetary loss incurred as a result of being set back one vertical step placement on the salary schedule of the 1987-90 collective bargaining agreement between the District and the Association.

Dated at Madison, Wisconsin this 22nd day of August, 1989.

By _____
A. Henry Hempe, Arbitrator