BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
HIGHLAND SUPPORT STAFF FEDERATION LOCAL 3529, WFT/AFT, AFL-CIO	Case 11 No. 49511 MA-7973
and	
HIGHLAND SCHOOL DISTRICT	

Appearances:
Mr. Steve Kowalsky, Representative, Highland Support Staff Federation Local
Mr. Robert Butler, Staff Counsel, Wisconsin Association of School Boards, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to a request by Highland Support Staff Federation Local 3529, WFT/AFT, AFL-CIO, herein the Union, and the subsequent concurrence by the Highland School District, herein the District, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on September 20, 1993 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on November 16, 1993 at Dodgeville, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on December 13, 1993.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties were unable to stipulate as to the issues.

The Union framed the issues as follows:

1. Did the District violate Article VIII, Section A, when it reduced the grievant's hourly wage from $7.30 to a lower rate?

2. If so, what is the appropriate remedy?

The District frames the issue in the following manner:

What is the appropriate wage rate for Step 10 years in the Aide classification?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Did the District violate Article VIII, Section A of the collective bargaining agreement by reducing the grievant's hourly wage from $7.30 to a lower rate or should said section be reformed to provide for a wage rate at the Aide after 10 years cell of $6.80 instead of $7.30

per hour?

2. What is the appropriate remedy?

FACTUAL BACKGROUND:

Jane Kroll, hereinafter the grievant, has been an Aide in the District for the last twenty years. She is presently placed as an Aide at Step 10 years.

Negotiations between the parties over the 1991-93 contract came to an impasse in the spring of 1992. At that time the parties filed for arbitration. The parties selected Raymond E. McAlpin to arbitrate the dispute between the parties.

An arbitration hearing was conducted on August 27, 1992. The parties reached a consent agreement after mediation conducted by Arbitrator McAlpin. A wage schedule was included in the consent agreement.

Board President Vince Ramsden's notes from the mediation-arbitration meeting indicate that the Aide after 10 years cell should be $6.80 for the 1992-1993 school year.

District Attorney Robert Butler's notes from the bargain also show that the Aide after 10 years cell should be at $6.80 for said school year.

On August 28, 1992, Arbitrator McAlpin issued a Consent Award presumably reflecting the mediated agreement reached by the parties on August 27th. The Award provided that the Aide after 10 years cell should be at $7.30 for the 1992-1993 school year. This represented an eighty cent increase over the prior year. Every other cell in the Consent Award increased by twenty-five or thirty cents over the prior year except for the cell in question.

On October 13, 1992, the grievant signed an Employee Agreement with the District which was also signed by Board President Ramsden that provided for a wage rate of $7.30 per hour.

On or about November 5, 1992, the District discovered that a mistake had been made and that the Aide after 10 years cell should be $6.80 instead of $7.30. When contacted, according to District Superintendent Jim Siedenburg's notes, Arbitrator McAlpin responded "'Mutual mistakes are correctable.' If we need him to get everyone off the hook, he's available."

Also according to Superintendent Siedenburg's notes, he contacted the Union's representative, Steve Kowalsky, in order to correct the error in the wage schedule. On December 2, 1992, he spoke with Kowalsky whereupon Kowalsky stated that he had nothing in his notes to indicate whether the Aide after 10 years cell should be $6.80 or $7.30. Kowalsky did indicate, however, that "where aides should be placed was one of the last issues resolved."

Thereafter, following an unsuccessful attempt to get the Union to agree that $6.80 was the proper rate for the Aide after 10 years cell, the District decided to pay all employees in the affected cell $6.80.

On December 22, 1992, Superintendent Siedenburg met with the grievant and informed her that she would be paid at the rate of $6.30 effective next pay period January 8, 1993 until she had worked enough hours to equal the number of hours she had worked and been paid at $7.30 until the District recouped the amount of the over payment at which time the District would begin to pay her "at the correct pay of $6.80."

The grievant met on January 5, 1993 with Superintendent Siedenburg to discuss the matter, but was unable to resolve the dispute. Subsequently, on January 8, 1993 she filed a grievance over the matter.

During the course of the grievance process, the District made the following settlement offer:

. . .

> 2. It is the District's understanding that such a mistake is correctable.
>
> However, as a conciliatory measure, the Board is willing to offer the following:
>
> 1. You will keep all wages previously paid at the rate of $7.30 per hour.
>
> 2. The wage schedule remains at $6.80 per hour for the wage cell for "Aide-10 years."
>
> This offer cannot be used as a precedence in any grievance or court case arising out of this matter.

On February 18, 1993, the grievant responded as follows:

> This is to inform you that the conciliatory measure of February 9 is not satisfactory. I feel the contract I signed was a binding contract. I want this processed to arbitration.

Thereafter, the parties processed the dispute to arbitration without procedural problems.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE VIII

WAGES

Section A.

1991-92

Position	Start	1 year	3 years	5 years	10 years
Custodian	$5.50	$5.75	$6.25	$7.00	$7.75
Clerical	$5.25	$5.50	$6.00	$6.50	$7.00
Cook	$5.00	$5.25	$5.75	$6.25	$6.75
Aide	$5.00	$5.25	$5.50	$6.00	$6.50

1992-93

Position	Start	1 year	3 years	5 years	10 years
Custodian	$5.75	$6.00	$6.55	$7.30	$8.05
Clerical	$5.50	$5.75	$6.30	$6.80	$7.30
Cook	$5.25	$5.50	$6.05	$6.55	$7.05
Aide	$5.25	$5.50	$5.80	$6.30	$7.30

. . .

ARTICLE XI

GRIEVANCE PROCEDURE

. . .

5. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and restricted to an interpretation of the contract provision alleged to have been violated. The arbitrator shall be held to have exceeded his/her authority if he/she modifies, adds to, or deletes from the express terms of this Agreement in making an Award.

PARTIES' POSITIONS:

The Union basically argues that the contract language is clear and unambiguous as to the correct wage rate for an Aide with ten or more years of service like the grievant, and that rate is $7.30 per hour for the 1992-93 school year. The Union maintains that the Arbitrator must enforce what is written in the collective agreement for "to do otherwise would be outside the authority of the Arbitrator as defined in the parties' agreement at Article XI, Section E, Step 4, Paragraph 5." Because the District violated the agreement by reducing the grievant's wage rate from $7.30 per hour to a lower rate, the Union requests that the Arbitrator sustain the grievance and order the District to make the grievant whole for all back pay and wage related benefits lost as a result of its action.

The District, on the other hand, contends that the wage rate listed in the collective bargaining agreement is a typographical error and that the wage rate which was agreed upon by the parties is $6.80 per hour. The District adds that the Aide cell 10 year should be reformed in order to represent the true agreement between the parties. In support of its position that the Arbitrator has the authority to reform the contract so that it corresponds to the oral agreement, the District cites "longstanding" tenets of contract law and Wisconsin case law. For the foregoing reasons, the District requests that the grievance be denied and the matter dismissed.

DISCUSSION:

The crux of the dispute is whether the Arbitrator should reform the contract to provide for a $6.80 rate at the Aide after 10 year cell during the 1992-93 school year instead of the $7.30 per hour rate currently in the contract. If the correct contractual rate is $7.30 then the grievant prevails. If the proper rate is $6.80 per hour, however, the District's position is supported. For the reasons discussed below, the Arbitrator finds it appropriate to grant the remedy of reformation herein.

The remedy of reformation to correct a mutual mistake in a contract is well established at law, and has been recognized by arbitrators. Elkouri and Elkouri, How Arbitration Works, 397 (Fourth Edition, 1989). In fact, a reformation may be granted even where the evidence falls short of what a court of equity would require for contractual reformation if considering all the evidence the arbitrator is persuaded that fairness and justice, though not strictly "equity" as it is administered in the courts, requires that kind of relief. Id. And, contrary to the Union's assertion, arbitrators will grant relief in cases of mutual mistake even where a collective agreement contains the common prohibition against adding to, subtracting from, or modifying the terms of the agreement as in the instant case. Id.

A reformation may be granted to effectuate the true intent of the parties where that intent is not reflected in the agreement as a result of typographical error. Mohawk Beverages, 50 LA 298, 300 (Moran, 1968).

Applying the above standard to the instant case, the Arbitrator concludes that the record easily supports a finding that the wage rate of $7.30 per hour for the Aide Step 10 cell only appears in the collective agreement as a result of an error made by Arbitrator McAlpin in the transcription of the oral agreement reached between the parties. In this regard, the Arbitrator notes the record is clear that during bargaining for the instant contract neither side proposed 1/ nor agreed to a wage rate of $7.30 per hour for the Aide Step 10 cell. The record is also clear that the wage rate of $6.80 represents the "true" agreement which was reached between the parties. (Unrebutted testimony of the District's witnesses). In addition, other persuasive evidence of

bargaining history 2/ supports a conclusion that the parties actually agreed to a wage rate of $6.80 per hour even though that figure is not contained in the parties' collective bargaining agreement. A $6.80 per hour rate instead of $7.30 is consistent with the raises for all other cells from the 1991-92 school year to the 1992-93 school year.

A conclusion that the remedy of reformation is available herein is also supported by the principles of contract law and Wisconsin case law. In this regard, the Arbitrator points out that reformation of a contract to correct an error is based upon basic contract principles. Restatement of Contracts, Second, Section 155, p. 406-407 (1981) provides:

> When Mistake of Both Parties as to Written Expression Justifies Reformation
>
> > Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.
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> Comment:
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> > a. **Scope.** The province of reformation is to make a writing express the agreement that the parties intended it should. Under the rule stated in this Section, reformation is available when the parties, having reached an agreement and having then attempted to reduce it to writing, fail to express it correctly in the writing. Their mistake is one as to expression--one that relates to the contents or effect of the writing that is intended to express their

1/ See, for example, Joint Exhibit Numbers 5 and 6.

2/ Board Exhibit Number 2. (District Representative Robert Butler's notes from the August 27, 1992 arbitration hearing whereat a mediated settlement agreement was reached by the parties).

agreement--and the appropriate remedy is reformation of that writing properly to reflect their agreement. For the rule stated in this Section to be invoked, therefore, there must have been some agreement between the parties prior to the writing. The prior agreement need not, however, be complete and certain enough to be a contract. . . . The error in expressing the agreement

> may consist in the omission or erroneous reduction to writing of a term agreed upon or the inclusion of a term not agreed upon. If the parties are mistaken with respect to the legal effect of the language that they have used, the writing may be reformed to reflect the intended effect. Reformation is available even though the effect of the error is to make it appear from the writing that there is no enforceable agreement. . . . Reformation is not precluded by the mere fact that the party who seeks it failed to exercise reasonable care in reading the writing, . . . (Emphasis added).

And, as pointed out by the District, Wisconsin courts have followed the restatement of contracts on the reformation of contracts which contain mutual mistakes. Wisconsin courts have often held that agreements may be reformed between the original parties in a suit in equity where the intent of the parties is not embodied in the written agreement because of a mutual mistake. Shearer v. Pringle, 203 Wis. 164, 233 N.W. 623 (1930); La Rosa v. Hess, 258 Wis. 557, 46 N.W.2d 737 (1951).

Based on all of the foregoing, the Arbitrator finds that the "clear and unambiguous" contract language relied upon by the Union in support of its position does not reflect the true intent of the parties when they reached an agreement over the wage rate for the Aide after 10 years cell during the 1992-93 school year; and should be reformed to provide for a wage rate at said step of $6.80 instead of $7.30 per hour. A question remains as to the appropriate remedy.

Where a clerical error concerns an employee's rate and has continued for some time, an employer is generally permitted to correct it for the future if it acts promptly upon discovery of the error (as the District did herein), but arbitrators are sometimes less inclined to permit recoupment. Elkouri and Elkouri, supra, at 398. Here, the grievant signed an employee contract with the District at the higher rate, and worked at said rate for a period of several months. The grievant was not at fault for receiving the higher rate, nor the District in mistakenly paying it. The mistake was caused by another. The Arbitrator will not transfer a loss that already has fallen upon one innocent party to another party equally innocent under such circumstances. See, generally, Food Employers Council, Inc., 64 LA 862 (Karasick 1975). Consequently, based on the fact noted above that equities on the overpayment issue are relatively equal herein, the absence of contract language clearly permitting recoupment by the District, and the record as a whole, the Arbitrator finds the District's recoupment action improper herein. 3/

Based on all of the above, it is my

AWARD

The grievance dated January 8, 1993 is hereby sustained in part and denied in part. The parties' 1991-93 collective bargaining agreement is hereby reformed to reflect the 1992-93 rate of $6.80 per hour at the Aide after 10

3/ The Arbitrator is aware that a strong argument can be made for recoupment based on the principle of unjust enrichment. However, for the reasons noted above, the Arbitrator rejects such an approach in the instant case.

years cell. In addition, the District is ordered to make the grievant whole for monies it recouped from the grievant for the period she worked during the 1992-93 school year up to the date the District discovered and corrected the error, on or about January 8, 1993.

Dated at Madison, Wisconsin this 25th day of February, 1994.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator