BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CHIPPEWA VALLEY TECHNICAL COLLEGE TEACHERS' UNION, WEAC, NEA

and

BOARD OF CHIPPEWA VALLEY VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT

Case 185
No. 53243
MA-9276

Appearances:

Ms. Leigh Barker, WTCS Consultant, Wisconsin Education Association Council, 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin 53708-8003, for Chippewa Valley Technical College Teachers' Union, WEAC, NEA, referred to below as the Union.

Mr. Stevens L. Riley, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, for Board of Chippewa Valley Vocational, Technical and Adult Education District, referred to below as the Board, or as the District.

ARBITRATION AWARD

The Union and the Board are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute regarding the "Early Retirement Stipend." The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on February 6, 1996, in Eau Claire, Wisconsin. The hearing was not transcribed, and the parties filed briefs and a reply brief or a waiver of a reply brief by April 12, 1996.

ISSUES

The parties stipulated the following issues for decision:

Did the District violate the Collective Bargaining agreement when it based the early retirement stipend on final employment year's contractual salary as opposed to actual earnings?

If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE V - WORKING CONDITIONS

. . .

Section I - Professional Standards

. . .

2. Retirement Policy

. . .

d. The Board shall offer an early retirement stipend to teachers who elect to retire between the ages of 57 and 65 who have a minimum of ten years' teaching experience in the district.

The amount of stipend paid by the Board shall be according to the following formula:

S x R X .12 = Stipend

Where S = Salary Final Year of Employment
R = Number of Years Retire Early (up to a maximum of 3)

This early retirement cannot begin during the school year except for special circumstances and with the approval of the District Director . . .

Payment of this stipend is to be made in one sum in January of the year following retirement or as equal monthly payments to age 65 . . .

ARTICLE VIII - LEAVES OF ABSENCE

. . .

Section F - Sabbatical Leave

The Board shall offer a sabbatical leave for one teacher for each fifty teachers or fraction thereof . . . The Board shall pay one-half of the salary of said teacher less any amount over one-half year's salary received from any grants. The Board shall also pay 75 percent of the cost of the teacher's fringe benefits. The total received from grants and salary paid by the Board shall not exceed the current year's salary of said teacher . . .

Section K - Industrial Leave

1. Leave may be granted by the Board for the purpose of acquiring experience and knowledge in the teacher's instructional area . . .

4. The Board shall pay the teacher the difference between the job salary and the semester or yearly contractual salary for the period of the leave if such payment does not exceed 50 percent of the teacher's contractual salary for the length of the leave period . . .

ARTICLE IX - SALARY AND TEACHER WELFARE

Section A - Salary Schedule

1. The regular schedule shall be adhered to for all teachers. (See Appendix A.)

. . .

Section E - Fringe Benefits

. . .

2. Life Insurance

   a. The Board shall pay the premiums on term life insurance. This insurance shall be in the amount

double to that subject to the rules and regulations of the Wisconsin Group Insurance Board . . .

Section G - Teachers' Retirement Fund

Effective July 1, 1991, the Board shall pay 6.1 percent (6.1%) of the teacher's salary as part of the teacher's contribution to the Wisconsin State Teachers' Retirement System. Effective January 1, 1992, this payment shall increase to 6.2 percent (6.2%).

. . .

APPENDIX A

CHIPPEWA VALLEY TECHNICAL COLLEGE
Eau Claire, Wisconsin

SALARY SCHEDULE

Step	Bachelor's	Bachelor's Plus 10	Bachelor's Plus 20	Master's	Master's Plus 10	Master's Plus 20	Dr. or Spec.
1	. . .	. . .	. . .	. . .	. . .	. . .	. . .
2	. . .	. . .	. . .	. . .	. . .	. . .	. . .
3	. . .	. . .	. . .	. . .	. . .	. . .	. . .
4	. . .	. . .	. . .	. . .	. . .	. . .	. . .
5	. . .	. . .	. . .	. . .	. . .	. . .	. . .
6	. . .	. . .	. . .	. . .	. . .	. . .	. . .
7	. . .	. . .	. . .	. . .	. . .	. . .	. . .
8	. . .	. . .	. . .	. . .	. . .	. . .	. . .
9	. . .	. . .	. . .	. . .	. . .	. . .	. . .
10	. . .	. . .	. . .	. . .	. . .	. . .	. . .
11	. . .	. . .	. . .	. . .	. . .	. . .	. . .

BACKGROUND

The grievance has roots extending back to the experience of Patrick Devine, an instructor for the Board and, in the 1994-95 school year, the Union's Grievance Chair. Facing the possibility of a kidney transplant, Devine began to investigate Board policies regarding early retirement and disability. He learned the Board calculated disability payments and the Early Retirement Stipend of Article V, Section I, Subsection 2. d., referred to below as the Stipend, based on contractual salary, not on total annual earnings. Devine died in the Spring of 1995, and his concerns on these issues were assumed by George Nelson, an Accounting Instructor. Nelson filed a grievance in the summer of 1995 challenging the Board's calculation of the Stipend. Kenneth Stelzig served as a Math teacher for the Board for roughly twenty-nine years. In the summer of 1995, he requested early retirement from the District. Stelzig was the first teacher to apply for early retirement after Nelson's filing of the grievance, and was made part of the processing of the grievance.

The grievance questions what, if any, factors beyond the salary stated in the Salary Schedule are included in the "S" of the Stipend formula. The evidence adduced at hearing focused, primarily, on bargaining history and past practice.

The Evidence on Bargaining History

The Stipend first appeared in the parties' 1976 labor agreement, and read thus:

> The Board shall offer an early retirement stipend to teachers who elect to retire between the ages of 59 and 65 who have a minimum of ten years teaching experience in the district.
>
> The amount of stipend paid by the Board shall be according to the following formula:
>
> S x R X .1 = Stipend
>
> Where S = Salary Final Year of Employment
>
> R = Number of Years Retired Early (up to a maximum of 3)

The face-to-face collective bargaining which culminated in the 1976 agreement started in October of 1975. The Union made the initial proposal for the payment of a stipend. That proposal included a different formula to calculate a "Bonus" payment and made the bonus available to any

teacher who "retires at an age earlier than the mandatory retirement time." This bonus was subject to a series of proposals and counter proposals. The Union's negotiation notes indicate that in December of 1975 the Board indicated concerns with "a minimum age, a minimum number of years in the system, and limiting the program to a trial basis." In January of 1976, the parties reached a tentative agreement which led to the inclusion of the Stipend in the 1976 Labor Agreement.

The balance of the evidence of bargaining history is best set forth as an overview of witness testimony.

Norbert Wurtzel

Wurtzel was the Board's Director for roughly twenty years, and served in that capacity at the time the Stipend was first negotiated. Wurtzel noted that the Union had, prior to 1975, sought to negotiate a bonus payment for teachers who took early retirement. The Board was, however, concerned that teachers not increase their workload immediately prior to an early retirement to "feather their nest." The Board, Wurtzel noted, sought to avoid making unnecessary incentives to retire by restricting any bonus payment to the wage stated in the teacher's individual teaching contract. Wurtzel was involved in the 1975 negotiations, but did not typically attend face-to-face negotiating sessions. His role was primarily a policy role played within the Board's caucus. He felt the Board's desire to restrict the Stipend to contractually stated salary was either formally communicated across the table to the Union during negotiations sessions or at informal discussions during school.

Bill Ihlenfeldt

Ihlenfeldt has served as the Board's President since September of 1994. He noted that the District administrators, from the level of Vice-President up, meet as the Administrative Council. Minutes of Council meetings headed "4/91" state the following concerning the calculation of the Stipend:

> Approved by Admin Council:
>
> The calculation of the Early Retirement Stipend is based on the face value of the individual's contract. Per past practice, the previous full contract year completed is used. Pay for assignments over and above contract assignment (including instructor overloads) is not considered.

These minutes are a public document, but Ihlenfeldt could not recall if they were given to the Union.

Maureen Watson

Watson has served as an instructor for the Board since 1973, and was a member of the Union's Negotiating Committee in 1975. She could not recall the parties discussing whether the Stipend was based on the contractual Salary Schedule or on total annual earnings. She assumed that the formula turned on total annual earnings. She stated she was unaware of a controversy on this point until Devine informed her of his findings. Those findings posed, she felt, a fundamental inequity not traceable to the 1975 bargaining. Her position manifests the inequity, she stated, since she teaches a summer school course in personal relations to students enrolled in the Board's program for long-haul truck drivers. Other instructors in that program teach under extended contracts. Those instructors are, under the Board's implementation of the Stipend, eligible for the Stipend while she is not. Wurtzel did not, she noted, spend much time at the bargaining table in 1975.

Emmett O'Brien

O'Brien has served as a Counselor for the Board for roughly twenty-four years. He served on the Union's Negotiating Committee during the bargaining for a 1976 agreement. At that time, the parties' labor agreements were in effect for a calendar year. O'Brien noted he assumed the Stipend would thus be based on an entire year's earnings, including any pay earned under an extended contract or under a summer school contract. He could recall no discussions on the issue of salary which would contradict that assumption.

It is undisputed that certain changes have been made to the Stipend since the 1976 agreement. None of those changes involve the definition of "S" in the Stipend formula. No testifying witnesses could recall any bargaining regarding the definition of "S" following the execution of the 1976 agreement.

The Evidence on Past Practice

It is undisputed that the Board has included compensation paid to Department Chairs and to teachers issued extended contracts in calculating the Stipend. Since the execution of the 1976 contract, the Board has approved the early retirement of forty-one teachers. Board records 1/ indicate that of those forty-one teachers, twenty-four had the "S" of their Stipend stated as an

1/ Employer Exhibit 1.

amount corresponding to a cell of the Salary Schedule in effect for their "last contract year." 2/ Seventeen had the "S" of their Stipend stated as an amount not corresponding to a cell of a Salary Schedule in effect for their "last contract year." 3/

2/ R. Rice; J. Arata; I. Rounsville; R. Johnson; V. Quayle; W. Carroll; M. Becher; E. Walde; D. Severson; H. Skelton; C. Campbell; A. Guite; K. Peters; B. Rolland; J. Schnagl; R. Verbrugge; A. Schmidt; L. Larson; R. Blackburn; D. Rowe; V. Leadholm; C. Cooley; J. Galpin; and K. Stelzig.

3/ V. Myrick; C. Beyreis; C. Bradford; H. Carroll; A. Bell; S. VanGorden; R. Lewis; I. Schultz; R. Hogstad; P. Tremain; V. Merrin; V. Druschel; T. Widule; H. Anderson; R. Swerman; R. Heidenreich; and R. Shimel.

The calculation of "S" for the Stipend paid those seventeen teachers cannot be determined solely by reference to the Salary Schedule. Nine of those seventeen teachers received compensation for an extended contract. 4/ Two others of that group of seventeen received compensation for Department Chair status. 5/

Of the remaining six teachers from the group of seventeen, one had the "S" of the Stipend calculated by averaging two contractual Salary Schedules. 6/ This averaging reflects that the parties abandoned a calendar year salary schedule in 1980. The Board calculated the "S" for early retirements during the 1979-80 school year by averaging the amounts for the cell appropriate to the teacher's lane and step placement on two salary schedule grids. The first grid covered 1979, and the second covered the period from January 1 through June 30 of 1980.

Two other teachers from the group of seventeen apparently had the "S" of their Stipend calculated by averaging the cell corresponding to their lane and step placement from two contractual Salary Schedules. 7/ Averaging the cells appropriate to the salary schedules covering these teachers yields a figure within $5.00 of the "S" reflected in Board records.

The "S" reflected in Board records for the three remaining teachers from the group of seventeen is difficult to account for. It appears that teachers who took unpaid leave in their final school year had the Stipend based on the amount of their annual earnings rather than on the cell of the Salary Schedule for that year. Helen Blumer, the Board's Human Resources Manager, testified that this was the case regarding Helene Carroll, whom the Board gave an "S" of $13,931.97, but whose lane and step placement would have yielded an "S" of $15,264.00. Carroll took twenty-one days of unpaid leave during her final year of teaching.

This completes a rough overview of the Board's implementation of the Stipend. Other discrepancies between the "S" afforded a teacher granted an early retirement and then-prevailing Salary Schedule rates exist, but need not be set forth here.

Two of the teachers who have taken early retirement were members of the Union's Negotiating Committee in 1975-76. The Board calculated the "S" for each teacher based on a figure less than each teacher's final year's total annual earnings. Al Guite's "S" was $40,384.00, which reflects the MA+20, Step 13 cell of the 1990-91 Salary Schedule. This figure reflects the

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4/ R. Hogstad; I. Schultz; V. Merrin; V. Druschel; T. Widule; D. Anderson; R. Heidenreich; R. Swerman; and R. Shimel.

5/ S. VanGorden and P. Tremain.

6/ A. Bell.

7/ V. Myrick and C. Beyreis.

Board's calculation of his "S" did not include $5,783.77 he earned for teaching summer school. Cy Beyreis' "S" was $18,080.40. This appears to reflect an averaging of the MA+20, Step 13 cell of the 1976 and the 1977 Salary Schedules. In any event, Beyreis' "S" is well below his final year's total earnings of $19,001.37. Neither Guite nor Beyreis filed a grievance regarding their Stipend.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidence, the Union contends that the term "salary" in the Stipend formula was defined by the parties "in the 1976 bargain" to mean "total monetary earnings." Such earnings currently include, the Union argues, "base salary, extended contract salary earnings, salary earnings for overload, and/or salary earnings for summer school teaching." Noting that each party made proposals concerning the Stipend, the Union urges that both parties understood "the term 'salary' to mean total earnings for the year." This understanding stemmed from a series of then-existing Board practices. Among those, the Union notes the use of "salary" to mean total annual earnings in provisions governing Wisconsin Retirement Fund contributions and the use of "38 week contractual salary" in provisions governing Industrial Leave. The distinction between the provisions is, the Union urges, apparent and significant. That the Board included summer school earnings to advance Watson on the salary schedule in 1975 underscores this conclusion, according to the Union. That neither party has attempted to modify the reference to "Salary-Final Year of Employment" in post-1976 bargaining establishes, the Union contends, that the meaning of the term salary has been fixed since 1976.

The Union then contends that Wurtzel's testimony fails to undercut its interpretation. Wurtzel was not, the Union notes, a member of the Board's negotiating team. Beyond this, the Union asserts that Watson's and O'Brien's testimony contradicts Wurtzel's and that the Board's review of its own files failed to corroborate Wurtzel's account. Wurtzel's assertion that the Board, in 1976, wished to avoid creating an incentive for teachers to pad their earnings immediately prior to retirement is, the Union contends, "contradicted by the facts." The Union argues the illogic of Wurtzel's assertion is demonstrated by the following facts: The incentive pointed to by Wurtzel is already built into the retirement system; overload compensation did not exist until after the Stipend was created; Rongstad, as late as June of 1995, had an understanding of the interpretation of the Stipend inconsistent with Wurtzel's; and Wurtzel's stated concerns have no foundation in contemporaneous accounts of the negotiating sessions leading to the creation of the Stipend.

The Union's next major line of argument is that the term "salary" is unambiguous and

supports its reading of the Stipend. Dictionary definitions of the term as well as business practice within and outside of the Board confirm this assertion, according to the Union. Even if the term "salary" could be considered ambiguous, the Union argues that the evidence favors its interpretation. The Board's interpretation "creates inequitable treatment of employees who earn the same or similar salaries, working the same or similar amounts of time." This inequity is caused by the Board's view that service on an extended contract counts toward the Stipend while work under summer school letters of employment does not. The Board unilaterally controls which type of work is afforded to a teacher and this control cannot, the Union urges, be considered evidence of a mutual intent to permit such inequity. Beyond this, the Union argues that the Board's interpretation leads to the nonsensical result of reading the same term "salary" in different ways depending on where the term is placed in the agreement. The Board's view will also, the Union urges, work a forfeiture of a negotiated benefit.

Nor can the Board's interpretation be seen to reflect consistent administration. In school years in which a split salary schedule was in effect, the Board averaged the two schedules. This averaging, the Union concludes, both supports its view of the term "salary" and explains why Beyreis did not grieve the Board's calculation of his Stipend. In years in which a teacher earned less then the contractually stated salary, the Board calculated the Stipend on actual earnings. This also, the Union argues, supports its view of the term "salary." The Board's inclusion of extended contract and department chair compensation in the Stipend similarly supports its view. That the Board, on three occasions, based the Stipend on a figure less than a teacher's actual earnings belies any finding of a consistent pattern of administration of the benefit.

This inconsistency in administration precludes finding the binding past practice asserted by the Board. That the Union acted as soon as it became award of the Board's interpretation underscores this point. The nature of the benefit and the infrequency of its use makes the absence of any earlier challenge to the Board understandable, according to the Union. That the asserted practice is irreconcilable to clear contract language precludes, the Union contends, any determination of a binding practice.

Viewing the record as a whole, the Union asks that the grievance be sustained and that the Board be ordered to "re-calculate . . . Stipends paid . . . based on final year's actual total salary and that the District pay any employee/s involved the re-calculated amount." The Union also seeks an order that "from here forward the term 'salary' . . . be interpreted as total final year's salary, including summer school and/or overload earnings."

The Board's Initial Brief

After a review of the evidence, the Board notes that "(t)his case hinges on the meaning of the word 'salary' as used in the phrase: 'Where S = Salary Final Year of Employment.'"

The Board notes that evidence on bargaining history is conflicting and thus cannot be

considered conclusive. Watson was present at the 1975-76 negotiations, but stated only that she "assumed" the reference to "salary" meant "actual earnings." Wurtzel's testimony stands in direct contrast to this. The Board concludes that "there was probably only limited discussion at the bargaining table regarding the definition of 'Salary.'" The absence of such discussion, the Board urges, should not be taken as a mutual understanding that "salary" means "earnings." References to "salary" in provisions governing Sabbatical and Industrial Leave cannot, the Board urges, be considered persuasive guides to determine whether the Stipend is calculated on earnings, unless it is to underscore that each provision refers to contractual salary. That Industrial Leave refers to "contractual salary" is "not material to the parties' negotiation of the early retirement language in 1975-76," according to the Board, since Industrial Leave "was never considered by the parties" in those negotiations. That total earnings may be used in calculating life insurance coverage, Wisconsin Retirement Fund contributions or taxes cannot, the Board urges, be considered to have any bearing on the issues posed here.

Recourse to the dictionary establishes, the Board contends, that "an employee's contract salary is much more closely aligned with 'salary' than with 'earnings.'" Dictionary definitions establish, the Board concludes, that the contractual reference to salary clearly and unambiguously establishes the propriety of its calculation of the Stipend.

Even if the reference to "salary" could be considered ambiguous, the Board argues that past practice establishes the propriety of its calculation of the Stipend. That practice extends, according to the Board, across "a period of twenty years" through "forty-one early retirements." The Board contends that Arbitrator Justin, in Celanese Corp. of America, 24 LA 168, 172 (1954), stated the following three criteria which define when a past practice can be considered binding:

> In the absence of a written agreement, 'past practice', to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.

The evidence establishes the Board's calculation of the Stipend meets each criterion.

While granting that there are a few variations from a strict calculation of the Stipend based on contractual salary, the Board argues that those "variations . . . are minor in nature and cannot be held to invalidate the College's practice itself." The second criterion has been met, the Board argues, because the "practice was open and above-board." The final criterion has been met, the Board asserts, because the Union cannot persuasively claim "it was not aware of the Employer's interpretation of 'Salary' in the early retirement clause until the instant grievance." That the practice spans over forty retirements underscores this conclusion. Beyond this, the Board points out that two members of the Union's 1975-76 negotiations team took early retirement and received

a Stipend based on their contractual salary. The Board puts the point thus:

> If the Union's negotiating team in 1975-76 did, in fact, believe that Salary = earnings, the payment of the early retirement stipend to Beyreis in 1976 and to Guite in 1991 based on their contract salaries should have resulted in grievances. They did not.

Arbitral precedent precludes, the Board argues, rewarding the Union for failing to challenge the Board's practice for twenty years.

Even if the grievance could be found meritorious, the Board contends that the remedy sought by the Union is inappropriate. Presuming the Union's grievance is a "continuing" grievance, the Board argues that arbitral precedent limits the remedy in such cases to "violations occurring after the date of the filing of the grievance."

Viewing the record as a whole, the Board concludes that the evidence demonstrates only that "no contact violation has occurred and the grievance must, therefore, be denied."

The Union's Reply Brief

The Union, after challenging a number of statements of fact made by the Board, argues that it is improper to consider only the Industrial Leave and Sabbatical provisions when determining how the parties' agreement uses the term "salary." Beyond this, the Union denies that the Board's calculation of the Stipend can meet the Celanese criteria. The variations acknowledged by the Board cannot, the Union contends, be considered minor. Nor can the asserted practice be considered openly acted upon, since the Board's calculation of the Stipend was available to the Union only through its own research. Beyond this, the Union argues that of the forty-one retirements cited by the Board, only two can be considered to support its position. Thirty-seven "provided no reason for the Union to even question, let alone to grieve, the District's practice." Beyond this, the Union notes that Beyreis' Stipend "was correct within $5.00 of his actual final year's actual salary." Only Blackburn's and Guite's Stipend can be considered to support the Board's position, and that support cannot be considered "to make a readily ascertainable practice that was accepted by both parties."

Regarding the issue of remedy, the Union urges that a recalculation of Blackburn's and Guite's Stipend must be seriously considered, and that "(a)t the very least, Mr. Stelzig must be included." A review of the evidence dictates, according to the Union, that "the grievance be sustained and that the Stipends be recalculated to include total salary.

The Board's Reply Brief

The Board deemed it unnecessary to file a reply brief.

DISCUSSION

The issue is stipulated and focuses on the formula by which the Stipend is calculated. More specifically, the issue turns on the "S" of the Stipend's formula, which the agreement defines as "Salary Final Year of Employment." The grievance questions whether "S" means "Salary Schedule wage rate" or "total annual earnings."

Both parties claim the reference to "Salary Final Year of Employment" is clear and unambiguous. Each party, however, offers a plausible reading of the terms and this makes it impossible to conclude the reference is unambiguous. That the reference is ambiguous is manifested by the parties' conduct and by the agreement itself. When Arnold Rongstad, a member of the Administrative Council, was approached by Stelzig during the Union's investigation into the Stipend, he initially agreed with Stelzig's view that "salary" meant total annual earnings. Rongstad changed this view after discussing the point with the Board's Accounting Department and after being reminded of the Administrative Council's prior determination of the point. This does not constitute Board acquiescence in the Union's interpretation, but does manifest that the Union's interpretation is plausible. Nor can the Union assert the conduct of its members is consistent with an assertion that the contractual use of "Salary" is unambiguous. Two members of the Negotiating Committee which proposed the Stipend accepted a Stipend which was not calculated on their total annual earnings.

The agreement also manifests the ambiguity of "salary." Appendix A is headed "Salary Schedule" and states a grid composed of lanes and steps. An individual cell of that grid states a teacher's "salary," yet that "salary" is not total annual earnings. Article IX, Section G, states what percentage of a teacher's "salary" will be paid by the Board to the Wisconsin Retirement Fund. That "salary" means total annual earnings.

The Stipend's reference to "Salary" is, then, ambiguous. Broadly speaking, the most persuasive guides for the resolution of contractual ambiguity are past practice and bargaining history, since each focuses on the conduct of the parties whose agreement is the source and the goal of contract interpretation.

In this case, however, the application of those guides is less than determinative. Evidence of bargaining history is, as the Board points out, inconclusive. Wurtzel's testimony is contradicted by Watson's and O'Brien's. This does not pose a credibility dispute. The testimony of each witness poses the same problem. The bargainers brought differing assumptions to the table, but

did not openly address those assumptions. O'Brien and Watson assumed "salary" meant "total annual earnings." Wurtzel did not play a significant role in across-the-table bargaining, but was aware that the Board, within its caucus, interpreted "salary" as "Salary Schedule wage rate." Wurtzel thought this view had been communicated across the table or in informal "side-bar" discussions, but this view, like O'Brien's and Watson's, rests on assumption and not on proven fact. The persuasive force of evidence of bargaining history must turn on the extent it manifests direct, across the table communication.

Evidence of past practice is, at most, somewhat instructive. It cannot, however, be considered determinative. The Board, citing Celanese Corp. of America, 24 LA 168 (Justin, 1954), urges that past practice dictates acceptance of its interpretation. As noted by the Board, I have discussed this case in prior awards. In County of Pierce, MA-8316 (McLaughlin, 11/94), I addressed the application of Celanese thus:

> In a case where a practice must be implied, the principles of Celanese Corp. of America, assume their most persuasive force:
>
> > (Past practice), to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties . . .
>
> The third criterion implies that a practice has been mutually accepted. The criteria, however, only come into play if one of the contracting parties denies the existence of the practice. It is, arguably, then, impossible to find an "established practice accepted by both parties." The persuasive force of the Celanese criteria, however, lie less in express acceptance than in the establishment of circumstances in which it is appropriate to imply an agreement denied by one of the parties. The factual basis for this implication is less that the parties expressly accept the practice than that the practice is so well entrenched in work place conduct that it should not be denied. The policy basis for the implication is that the practice is a known and undisputed feature of a functioning work place which should be given binding force to avoid disruption in that environment. Put more simply, the binding force of practice lies in the agreement manifested by the parties' conduct. The three Celanese criteria define when it can be appropriate to imply such

agreement. 8/

In this case, however, only one of the three criteria has been established.

The practice asserted by the Board cannot be considered unequivocal. Board records 9/ account for the Stipends paid since 1976 by breaking down the Stipends into the constituent parts disputed here, including the "Salary Stipend Paid On"; the "Last Contract Amount"; and "Final Year Total Earnings." In thirty-three of the forty-one retirements on which a Stipend was paid, the "Salary Stipend Paid On" and the "Final Year Total Earnings" are the same. 10/ These thirty-three cases support either the Board's or the Union's view and thus cannot be considered "unequivocal" evidence of the practice asserted by the Board.

Further considerations undercut the contention that the evidence supports an "unequivocal" practice. The grievance pits "contractual salary" against "total annual earnings" as the definition of "S." The practice asserted by the Board does not, however, support this either/or dichotomy. The Board acknowledges that it has used non-Salary Schedule payments to determine the Stipend. Two teachers had a $200.00 Department Chair payment included in their Stipend calculation, and nine others had Extended Contract payments included in the calculation of their Stipend. In these eleven cases, then, the Board itself considered "Salary" to mean something more than "Salary Schedule wage rate." The Board urges that the "Salary Schedule wage rate" means "amount stated on the individual teaching contract." The contractual basis for this assertion is not apparent. Nor is it apparent how the inclusion of an extended contract or department chair payment on the teacher's individual contract distinguishes that payment from other payments mandated by the labor agreement. The Board notes that summer school, unlike teaching on an extended contract, is voluntarily undertaken by a teacher. Even if granted, this distinction cannot explain the inclusion in "S" of Department Chair payments. Those payments, no longer made, resulted from a Board appointment. An individual teacher could, however, choose to accept or reject the appointment.

Beyond this, the Board calculated the "S" of at least one teacher, Helene Carroll, as less than "contractual salary." The Board points out that the teacher took unpaid leave for that year. This cannot obscure that the "S" for that teacher was "actual annual earnings," not "contractual salary." That the Board averaged salary schedules in cases where a teacher's last year of employment spanned different salary schedules also undercuts the solidity of the asserted practice. Whatever is said of this averaging, it more closely mirrors "actual earnings" than "contractual

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8/ MA-8316 at 13-14.

9/ Employer Exhibit 1.

10/ There is a $0.07 difference regarding R. Shimel between these two categories. That difference has been ignored.

salary." In sum, the practice cannot be considered unequivocal.

The second criterion, that the practice must be "clearly enunciated and acted upon," has been proven. The Board has persuasively demonstrated that its actions in calculating and paying Stipends was open and above-board. The evidence would, however, indicate the practice was more "acted upon" than "clearly enunciated." It can be noted that the Administrative Council determination to exclude summer school and overload compensation from the "S" value was not communicated to the Union. This cannot obscure that the Board did not hide its view in any fashion. The absence of formal discussions between the parties on what the "S" value should include reflects less on the openness of the practice than on the willingness of each party to

presume the validity of its view on the "S" value. The Board did not, however, alter its view of the "S" value in dealing with the two teachers who had been part of the negotiations which produced the Stipend. In sum, the second Celanese criterion has been met.

The application of the final Celanese criterion is not without difficulty. The discussion of the first criterion is relevant here also. The complicating factor regarding this criterion is that two members of the Union's Negotiating Committee accepted a Stipend calculated on something other than total annual earnings.

The Stipend paid Guite did not grant any value for summer school teaching, and is the strongest evidence of the practice. Guite retired after the 1990-91 school year. He was, for that school year, placed at the MA+20 lane at Step 13. The 1990-91 labor agreement gave that cell a value of $40,384.00. He earned, in his final year, $5,783.77 for teaching summer school. The Board calculated his Stipend at $14,528.24, which disallows any value to his summer school teaching: $40,384 x 3 x .12 = $14,528.24.

The Stipend paid Beyreis offers, at most, problematic support for the asserted practice. Beyreis retired after the 1976-77 school year. The following data regarding his final year of teaching can be gleaned from Employer Exhibit 1: He received the maximum 3 years for the "R" of the Stipend formula; the Board used $18,080.40 for the "S" value of the Stipend formula; the Board calculated his Stipend at $6,424.12; the Board used the 1976 Salary Schedule, MA+20 lane at Step 13 as the cell appropriate to his "Last Contract Amount;" and the Board stated $19,001.37 as his "Final Year Total Earnings." The Stipend formula in effect at the time of his retirement was: S x R x .1 = Stipend. That formula does not appear to yield the Stipend paid Beyreis: $18,080.40 x 3 x .1 = $5,424.12. It is not clear how the Board derived Beyreis' "S" value. Averaging the MA+20 lane at Step 13 for the 1976 and 1977 labor agreements yields the following:

$$\frac{\$17,661.00 + \$18,491.00}{2} = \$18,076.00$$

Even ignoring the difficulty in deriving the "S" value for Beyreis, it is not apparent how the Board arrived at a Stipend of $6,424.12. Under the then-applicable formula, the "S" value for that Stipend would have been 21,413.733. Using Beyreis' "Final Year Total Earnings" of $19,001.37 would yield a Stipend of $5,700.41 (19,001.37 x 3 x .1 = $5,700.411). Only two reliable conclusions can, in my opinion, be drawn from this. The first is that the Board correctly points out that it did not calculate Beyreis' Stipend on the actual earnings of his final year. The second is that no reliable conclusion can be drawn on why Beyreis failed to grieve his Stipend. That Stipend was arguably higher than he might have expected.

Thus, the assertion that the final Celanese criterion has been met turns primarily on Guite's Stipend. This single instance, given Guite's role on the Negotiating Committee which created the Stipend, is strong evidence that the Board's practice was accepted by both parties. In the terms of the Celanese criteria, however, this single instance is insufficient to show a practice "readily ascertainable over a reasonable period of time as a fixed, and established practice."

As I noted in County of Pierce, the binding force of a practice turns on the agreement manifested by the bargaining parties' conduct. Such agreement need not, in my opinion, necessarily turn on conduct of long duration. In this case, however, Guite's and Beyreis' situation exemplifies the confusion over the Stipend as much as the certainty asserted by the Board. In sum, the evidence is insufficient to establish a binding past practice.

In the absence of determinative evidence on bargaining history and past practice, other indicia of the parties' intent must be turned to. In this case, the Association's interpretation of the "S" value must be favored over the Board's because its view is more consistent with other agreement provisions.

The Union persuasively notes that its reading of "salary" is supported by Article VIII, Section K and Article IX, Section G. The force of this conclusion should not, as the Board asserts, be overstated. It serves, however, as preface to the necessary interpretation of what the parties mutually intended when the Stipend was created in 1976. Article VIII, Section K governs industrial leave, and at Subsection 4, links Board pay to a teacher's "yearly contractual salary." In the 1975 agreement the parallel reference appeared at Subsection 5 and referred to "38 week contractual salary." These references demonstrate the parties were capable of distinguishing "contractual salary" from actual earnings. The Board aptly notes that Industrial Leave was not discussed in the 1975-76 negotiations. This does undercut, but does not eliminate, the persuasive force of concluding the parties explicitly referred to contractual salary when they meant to.

It is undisputed that Article IX, Section G, links "salary" to "total annual earnings." This link is, however, a function of State regulation, not a function of the labor agreement. Its significance must, then, be noted but not overstated. More significantly here, however, the linkage of "salary" with "total annual earnings" is typically known to participants of the Wisconsin Retirement System. Such participants were on both sides of the table for the 1975-76 negotiations. This affords some basis to conclude that the parties would link "salary" to "total annual earnings" when discussing retirement issues.

These considerations preface the determinative point here. The parties' labor agreement, now and in 1975, uses "salary" to connote either "Salary Schedule cell" or "total annual earnings." Other agreement provisions do not slur this distinction. The practice asserted by the Board, however, does slur this distinction. "S" in Article V, under the Board's view, means something more than "salary" as used in Appendix A, but something less than "salary" as used in Article IX, Section G. This view requires the conclusion that the parties, in the 1975-76 negotiations, sought

to create a new connotation to the already elastic term "salary." No view of the evidence supports this. The Union's view of the evidence requires less of a stretch, since the reference to "salary" was to a view already included in the agreement. Under this view of the negotiations, it is not surprising that the parties would not have entered into extensive discussion of the definition of "salary." The Board's view, however, strains a review of the bargaining context. Under its view, the negotiations involved the delegation of discretion to the Board to extend the definition of "salary" in a manner not yet included in the labor agreement. In sum, the Union's interpretation of "salary" strains a reading of the parties' agreement and a review of the bargaining context in which the Stipend was created less than the Board's. For that reason, the Union's interpretation must be favored. It is more likely the 1975-76 negotiations yielded an existing meaning of "salary" than it is that they yielded an entirely new one.

The issue of remedy does not require extensive discussion. There is no dispute that Stelzig was joined as a grievant during the processing of the grievance or that the grievance was untimely filed. Thus, make-whole relief is appropriate for Stelzig. Extending relief beyond Stelzig raises procedural and, potentially, jurisdictional problems. It is not apparent how my authority under the 1993-95 labor agreement can be extended to Stipends paid under other labor agreements. Even if this problem can be surmounted, I can see no persuasive reason to extend that remedial reach to non-grieving teachers, two of whom accepted a Stipend calculated in a fashion not approved of by the Negotiating Committee they sat on. There is no assertion the Board acted in less than an above-board fashion in implementing the Stipend. Extending the remedy beyond Stelzig would reward non-grieving teachers for their lack of diligence and would punish the Board for good-faith actions.

Before closing, it is necessary to touch on certain arguments raised by the parties. In theory, the goal of contract interpretation is to give the bargaining parties what they intended. In cases such as this, determining what the parties intended blurs into determining what the parties would have intended had they considered the point. This determination may be more firmly rooted in theory than in fact, but the goal of contract interpretation is to award the parties' bargained view of the work place rather than an arbitrator's unbargained view of what the parties should have agreed to. In this case, it is more likely that an existing definition of "salary" strays from the range of meanings the parties would give to "salary" than would an entirely new definition.

For similar reasons, certain guides cited by the parties have not been used here. That taxing authorities or the Employe Trust Funds may equate "salary" with "total annual earnings" is of limited use in determining what the bargaining parties meant by creating the "S" value to the Stipend's formula. As noted above, the participation by the parties in the Wisconsin Retirement System affords some basis to believe their use of "salary" in a retirement related issue may parallel the System's. This inference remains a less persuasive as an indicia of intent than evidence that a party made such a statement across the table.

Similarly, assertions that the Board has acted "inequitably" or worked a forfeiture are unreliable guides of intent. It can be noted that the Board's view of "salary" afforded extended contract teachers a benefit denied summer school teachers. That may be an inequity from an individual teacher's viewpoint. Bargaining for limited resources is, however, a difficult task. If bargainers determined a new benefit could be secured for only part of the unit and chose to do so, refusing to honor that intent works no equity. Would it be equitable to forego the benefit in the fear that not all members could receive it? If the bargainers made the conscious and difficult choice to agree to such a limited benefit, what equity is there in overturning that decision? Whatever is gained from an individual's perspective on equity is lost in undermining the difficult and collective effort to reach agreement.

Some argument was offered on the impact of references to "salary" in Article VIII, Section F. The reference to "salary" in the second sentence appears to connote "contractual salary." The reference in the fourth sentence may or may not. The latter reference may incorporate the same interpretive issue posed here. In the absence of evidence of how the parties have resolved that issue, the implications of Article VIII, Section F have been ignored.

AWARD

The District did violate the Collective Bargaining agreement when it based the early retirement stipend on final employment year's contractual salary as opposed to actual earnings.

As the remedy appropriate to the Board's violation of Article V, Section I, 2, d, the Board shall pay Kenneth Stelzig the difference between the Stipend it paid him and the Stipend it would have paid him had it based his Stipend on his final employment year's actual earnings rather than on his final employment year's contractual salary.

Dated at Madison, Wisconsin, this 19th day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator