BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LITTLE CHUTE EDUCATION ASSOCIATION

and

LITTLE CHUTE SCHOOL DISTRICT

Case 14
No. 61545
MA-11975

(Salary Schedule Dispute)

Appearances:

Davis & Kuelthau, S.C., P.O. Box 1278, Oshkosh, WI 54903-1278, by **Mr. Edward Williams**, Attorney at Law, appearing on behalf of the School District.

Wisconsin Education Association Council-Fox Valley, 921 Association Drive, Appleton, WI 54914-7250, by **Mr. Roger Palek**, Executive Director, appearing on behalf of the Association.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, the Little Chute Education Association (hereinafter referred to as the Association) and the Little Chute School District (hereinafter referred to as the Employer or the District) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over the salary schedule in the second year of the parties' 2001-2003 collective bargaining agreement. The undersigned was so designated. Hearings were held on February 24 and March 11, 2003, in Little Chute, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted the case on written arguments. Briefs and reply briefs were exchanged through the Arbitrator, and the record was closed on June 16, 2003.

ISSUE

The parties stipulated that the Arbitrator should frame the issue in his Award. The substantive issue is whether the District violated the collective bargaining agreement in the manner in which it calculated salaries and/or the amount of salaries paid to the teaching staff in the 2002-2003 school year. If so, the issue is what is the appropriate remedy.

CONTRACT LANGUAGE

ARTICLE 21

TERM OF AGREEMENT

A. Savings Clause

If any Article or part of this Agreement is held to be invalid by operation of law or by a tribunal of competent jurisdiction, or compliance with or enforcement of any Article or part should be restrained by such tribunal, the remainder of the Agreement shall not be affected thereby and the parties shall enter into immediate negotiations for the purpose of arriving at a mutually satisfactory replacement for such Article or part.

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MEMORANDUM OF UNDERSTANDING
Implementation Timeline for 2001-2003 Agreement

Article	Article Name	Change in Language	Implementation Date
	All applicable articles	Updated "Staff development" to "Professional Development" throughout contract	Date of Ratification
1	Preamble	No changes	
2	Recognition	No changes	

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19	Compensation and Benefits	Members used as substitute faculty compensated at the following rates: 30-minutes=$7.50; 45 minutes=$11.25; 60-minutes=$15.00; 90 minutes=$22.50 Insurance changed to WEA Trust Managed Care Plan with $100/$300 deductible with a three-tiered drug card	Date of Ratification **February 1, 2002**

		D) 4. Members can move from MA+24 to cells beyond only with approved courses taken after completing one year at Step 10. Mileage reimbursement = federal mileage reimbursement rate rounded down to the next nearest whole cent (currently 32 cents per mile) K. Three thousand dollars ($3,000.00) and 200 hours ($15/hour) will be budgeted for committee salaries	January 1, 2002 Mileage incurred after Date of Ratification Date of Ratification

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21	Term of Agreement	July 1, 2001 – June 30, 2003	
	Appendix A	Includes new index for 2001-02 and 2002-03 and new salary schedules for 2001-02 and 2002-03.	Retroactive to first payday in 2001-02 school year
	Appendix B	Includes updated co-curricular contract (new title) and revised co-curricular schedule. Includes supervisory pay and explanation for establishing rates.	Retroactive to beginning of 2001-02 seasons

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Old Appendices

Appendix A- Statement parties mutually agreed to package using WERC costing procedures.	Implemented when QEO went into effect and not necessary. **DELETE**	
Appendix B- Old salary schedule used from 1993-1997	Moved to a new index. **DELETE** and insert new index Appendix A	
Appendix C – Explanation of transition from 1998 salary schedule to 1999-2001 salary schedule	No longer pertinent. **DELETE**	
Appendix D & E – Salary Schedules	Replace old with new and condense with the index into one Appendix A	Retroactive to first payday in 2001-02 school year
Appendix F – Co-curricular Pay Scale	Replace old with new and include supervisory pay scale and language in Appendix B.	Retroactive to beginning of 2001-02 seasons

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BACKGROUND

The Little Chute School District and the Little Chute Education Association have for many years been parties to a series of collective bargaining agreements setting forth the wages, hours and working conditions for the District's professional staff. Prior to the implementation

of the Qualified Economic Offer law in Wisconsin, the parties negotiated set salary schedules for each year of the contract, and included those schedules in their collective bargaining agreement. The QEO law placed limitations on the Association's ability to access interest arbitration to resolve bargaining disputes so long as the District offered an economic package in each year that was equivalent to a 3.8% package increase. Rules on the method of costing and the apportionment of the available package money between salary and benefits were promulgated by the Wisconsin Employment Relations Commission.

Beginning with the 1995-97 agreement, the parties went to a system of bargaining economics within the framework of a total package cost. As the cost of insurance for the second year of the contract was often unknown, only the salaries for the first year would be stated in the contract. The second year salary schedule and the co-curricular salaries would be left to float, and would be calculated once the insurance costs came in. In the 1995-97 contract, these contingencies were expressed in a number of ways. Article 18 – Compensation and Benefits – specified that the District would provide the WEACARE Lifetime Protection Package to employees. Although the parties agreed to have the premiums fully paid by the District for the term of the contract, the insurance language stated that the cost would not exceed so many dollars per month in the first year, with the second year amounts left blank. The second year insurance premiums would then be inserted once they became known.

In the area of salary, Article 18, Section H stated, *inter alia*:

. . .

2. The basic salary schedule for 1995-96 appears as Appendix C (contingent upon stipulations in Appendix A).

3. The basic salary schedule for 1996-97 appears as Appendix D (contingent upon stipulations in Appendix A).

3. [sic] The co-curricular rates appear as Appendix E.

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Notwithstanding the statement in Section 3, Appendix D did not contain a salary schedule for the second year. Instead, under the heading "1996-97 SALARY SCHEDULE" it stated "Calculations for the 1996-97 Salary Schedule will be completed once final insurance figures are in. The Salary Schedule will be sent out as an insert at that time." Likewise, Appendix "E" did not contain the co-curricular salaries for 1996-97. Instead it stated a percentage of the base salary for each assignment, a statement of the 1995-95 base salary and the 1995-96 co-curricular salary amounts calculated using that base. The column headed "1996-97 Base" was left blank, and no salaries were listed.

Appendix "A" of the 1995-97 contract explained the package system:

> The parties mutually agree to a 3.8% total package increase for the 1995-96 contract and a 3.8% total package increase for the 1996-97 contract in accordance with the costing procedures set forth by the WERC. The base year costing for the 1995-96 and 1996-97 contracts shall be the applicable bargaining unit member data as of April 2, 1995. The district will make this calculation once all necessary information is known. The 1995-96 and 1996-97 salary schedule will become part of the Master Agreement as soon as they can be finalized.

Once the insurance information for the second year became known, the District proceeded to calculate a salary schedule and co-curricular salary amounts for that year, and paid according to that calculation.

The same format was used in the 1997-99 collective bargaining agreement. The parties suspended the use of their index for those years, and instead specified a formula to be used to determine compensation. Article 18 continued to refer to the salary schedules as "contingent upon stipulations in Appendix A." Once again, Appendix A stated that the package size for each year would be 3.8% using WERC costing methods, and that the calculation would be made "once all necessary information is known. The 1997-98 and 1998-99 salary schedules will become part of the Master Agreement as soon as they can be finalized." Appendix "C" of that contract set out the formula for the new salary schedule, including notes that the QEO for each year would be 3.8% and that "Calculations for 1998-99 are illustrative only and will be finalized when insurance renewal rates are received next July for 1998-99." Appendix "D" set forth the salary schedule for 1997-98. Appendix "E" was titled "1998-99 Salary Schedule" but contained only the statement "(Page will be inserted as soon as 1998-99 Salary Schedule is finalized in 1998. See Appendix A)." Again, the co-curricular schedule contained only salary figures for the first year, with the second year figures left blank.

In 1999-2001, the parties again agreed not use the index in favor of a negotiated formula. Article 19 referenced the salary schedules as contingent. 1/ Appendix "A" was identical to earlier formulations, except that the first year package would 3.83% and the second year package would be 3.91%. Appendix "C" set out the formula for calculating salaries, with the caveat that the 2000-2001 base was an "estimate only until insurance rates are known." It also stated the amount of the QEO package size in each year. The 1999-2000 salary schedule was shown, but Appendix "E" simply contained the same statement about second year schedule being inserted as soon as it was finalized. The co-curricular schedule contained salary amounts for both years, but the second year figures were lined out and adjusted when the 2000-01 base was recalculated to account for the insurance costs.

1/ The Compensation and Benefits provision was renumbered from Article 18 to Article 19 in the 1999-2001 contract.

For more than ten years, it has been the practice of the parties not to use professional negotiators. Instead, they employed a sophisticated interest-based, consensus bargaining model, with the teachers' local bargaining team and the District's team (including District Administrator William Fitzpatrick and Business Manager Cheryl Banda) meeting directly to seek areas of agreement. Notes of the bargaining sessions are kept and are jointly approved by the bargainers. The District takes responsibility for costing various options and generating salary schedules for various scenarios. Since the inception of the QEO law, the costings have been done in accordance with the WERC's QEO costing rules. In recent rounds of bargaining, the costings have been projected on a wall as each compensation option was discussed.

The same consensus system was used for the negotiations over the 2001-2003 contract. In that round of negotiations, the parties agreed to reinstitute an index for their salary schedule and negotiated over the construction of the index. They also pursued a change in the health insurance plan, changes in voluntary early retirement, a general wage increase, pay for meeting the new licensure requirements, incentives for professional development and other items of concern. At the outset, on the issue of the general wages, the Association negotiators had adopted a goal of achieving a cost of living increase for each teacher, while the District negotiators adopted a general goal of reaching agreement within a package amount acceptable to the School Board.

Negotiations proceeded from the late Winter through the Fall of 2001. Agreement was reached on the Board's desire to move to a managed care insurance plan, with a commitment to pass the savings on to the faculty. The wage issues were dealt with in a sub-committee where parties exchanged dozens of possible salary scenarios, showing the impact of various index proposals. As each proposal was discussed in bargaining, it was accompanied by a costing, showing the package impact calculated according to the QEO costing system. In doing these calculations, the District used a 15% assumption for the second year insurance rates, which they felt was a conservative estimate.

In October, as the negotiations neared the end, the School Board authorized its representatives to make an agreement within a parameter of a 5% total package for the second year. Agreement was reached on a new index to be phased in across the two years of the contract. The index changed the multipliers in some steps between the two years, and the new schedule classified teachers as "Initial Educators" or "Professional Educators" based on years of service and other criteria to be settled in future negotiations, and as "Master Educators" with a definition to be determined in future negotiations. A first year salary schedule with a base of $28,000 was agreed upon, representing a 3.64% increase in salary costs and a 5.27% total package. The second year schedule had a base of $28,800, with a projected salary cost increase of 2.75% and a projected package cost of 4.95%.

At a bargaining meeting on November 8th, the parties discussed the feedback from their constituents. They also reviewed a draft Memorandum of Understanding ("MOU") Fitzpatrick had prepared, showing the changes in the contract and the effective date of each change. Among other changes, the following were noted:

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Article 10	Professional Growth	Include Wisconsin State Teacher Standards	Date of Ratification
		Include Portfolio review <u>will</u> be part of the evaluation process	2002-2003 school year

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Article 15	Leave Policies	Second Personal Leave day granted to 10 year members to be used at their discretion within the limitations described.	2002-2003 school year

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	Appendix A – Statement parties mutually gree [sic] to package statement using WERC costing procedures	Implemented when QEO law went into effect and not necessary. DELETE	Date of Ratification
	Appendix B – Old salary schedule used from 1993-1997	Moved to a new index. DELETE and insert new index	Date of Ratification
	Appendix C – Explanation of transition from 1998 salary schedule to 1999 – 2001 salary schedule	No longer pertinent. DELETE	Date of Ratification
	Appendix D – Salary Schedule	Replace old with new. Includes change in compensation rate for district work beyond the contracted days for such things as Teacher Center Projects from $10/hour to $15/hour	Retroactive to first payday in 2001-2002 school year
	Appendix E – Second year salary schedule	Second year salary schedule	When Known
	Appendix F – Co-Curricular Pay Scale	Replace old with new include supervisory pay scale	Retroactive to first payday in 2001-2002 school

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The bargaining teams reviewed and approved the draft. They agreed that a joint press release would be prepared announcing the tentative agreement.

Fitzpatrick and Association President Jo Gehl developed a press release about the tentative agreement. Fitzpatrick's first draft characterized it as a 5.27% total package in the first year and a 4.95% package in the second year, but as they revised the release they removed the references to the specifics of the salary deal in favor of emphasizing new provisions compensating teachers based upon experience and professional attainment. The final release, approved by both bargaining teams, merely described the size of the economic settlement as "a total salary increase that reflects current cost of living projections."

Fitzpatrick sent a draft of the Master Agreement the negotiating committees on November 15th and they met for the final time on November 26, 2001. They approved the joint press release, and reviewed and approved the draft.

The draft prepared by Fitzpatrick eliminated a number of the Appendices that had appeared in prior contracts, and consolidated the salary index and salary schedules into a single Appendix A. Article 19 of the draft stated, in part:

I. Salary Schedule

1. The salary schedule index and salary schedules for 2001-02 and 2002-03 appear as Appendix A.

2. The co-curricular/supervisory pay rates and co-curricular contract for members appear as Appendix B.

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Appendix A contained four elements – the index for the first year, the schedule for the first year, the index for the second year, and the schedule for the second year. The second year schedule was titled "2002-03 SALARY SCHEDULE."

The draft also contained a Memorandum of Understanding along the lines of that presented by Fitzpatrick at the November 8th meeting. With respect to Appendices A, B and C, the MOU tracked the November 8th draft. For Appendices D, E and F, the MOU stated:

Appendix D & E – Salary Schedules	Replace old with new and condense with the index into one Appendix A	Retroactive to first payday in 2001-02 school year
Appendix F – Co-curricular Pay Scale	Replace old with new and include supervisory pay scale and language in Appendix B.	Retroactive to beginning of 2001-02 seasons

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While the 1999-2001 contract had twelve appendices, Fitzpatrick's write-up of the 2001-2003 contract reduced that to four: Appendix A consisted of the indexes and schedules, Appendix B was the co-curricular pay schedule and co-curricular contract, Appendix C set forth the school calendars and Appendix D was the standard teaching contract. The co-curricular schedule did not contain any salaries for the second year of the contract.

The teachers met to ratify the contract in early December. At the meeting, an information packet was distributed which included the MOU, excerpts from the Early Retirement, Professional Growth and Leave Policies articles, co-curricular pay schedules, calendars and the indexes and salary schedules. Cheryl Banda provided color copies of

Appendix A, the indexes and schedules, to the Association, since portions of the schedules were highlighted to show new features. The copies provided by the District titled the second year schedule as "2002-03 SALARY SCHEDULE."

In December, the final version of the contract was prepared by Banda. Banda's draft included Appendix "A" setting forth the index and the salary schedule for 2001-2002 and for 2002-2003. The 2001-2002 salary schedule was titled "2001-2002 SALARY SCHEDULE." The second year salary schedule was labeled "2002-2003 SAMPLE Salary Schedule." Banda did not confer with anyone from the Association before adding the word "Sample" to the final draft of the contract. She inserted it at the direction of Fitzpatrick. This version was presented to the School Board for ratification on December 11th and after the vote, the President and Clerk of the School Board signed the contract. Jo Gehl and Association Secretary Bob Klozotsky each stopped at the reception desk in the administrative offices on December 14th, and signed the agreement.

On April 30, 2002, the second year health insurance rates were announced, and the District experienced a 39% increase. Using the second year salary schedule set forth in the agreement, this would generate a 7.5% increase in package costs for 2002-2003. Fitzpatrick prepared a memo to the staff, announcing the larger than anticipated increase and stating that it appeared that it would consume almost the entire second year package of 4.95% leaving little money for salaries. He sent an advance copy of the memo to Gehl.

Gehl protested Fitzpatrick's memo, taking the position that the second year salary schedule was agreed and could not be reduced. Fitzpatrick took the position that the parties' agreement was for a 4.95% package, and that second year salary schedule was intended to float, as it had in prior years, and was to be finalized only when the insurance costs were known. The instant grievance was filed over the dispute. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

POSITIONS OF THE PARTIES

The Position of the Association

The Association takes the position that the salary schedule for 2002-2003 was fixed and immutable and that the District violated the agreement by failing to pay in accordance with that schedule. The language of the contract is clear – indeed nothing could be clearer than a salary schedule. The parties who negotiated this language are sophisticated bargainers, well schooled in the process of consensus bargaining. The process they followed is specifically designed to avoid misunderstandings and disputes. At no point in that process was there any discussion of the package settlement concept now advanced by the District. On the contrary, the parties specifically agreed to delete the old language about package size limitations on the second year schedule as being unnecessary. The language the parties used, and the process they used to arrive at that language, leaves no room for question.

The District devoted a great deal of time and effort to discussing the past practice of the parties in changing the second year salary schedules to satisfy the negotiated limits on the size of the second year compensation package. This testimony and evidence is irrelevant. Plainly, the parties did do this in the past, and just as plainly, they did so because it was what they explicitly agreed to do. The practice under each prior contract was the result of the content of each contract. It was not some on-going general understanding of how salary schedules are to be administered. The deletion of the language giving rise to the "practice" renders the "practice" meaningless.

The Association notes that the prior agreements did not even contain second year salary schedules, and thus there can have been no practice of changing the negotiated schedules. In those contracts, the schedules were created after the fact by working backwards from a package calculation and known health insurance rates. In the 2001-2003 contract, the package size language was removed, and the second year schedule was included in the contract. There is simply no basis for the Arbitrator to weigh the claims of past practice in this case – evidence of a practice cannot change clear language, the underlying circumstances giving rise to the "practice" had changed, and the "practice" was not consistent with the District's actions in this case.

Even if the Arbitrator were to somehow conclude that there was an ambiguity in the contract allowing for interpretation, he must still conclude that the grievance should be granted. It is basic to the grievance arbitration process that an arbitrator cannot add to, modify or change the terms of the contract, and this principle is enshrined in the parties' grievance procedure. Here, the District is asking the Arbitrator to not only add a package limitation to the contract, they are asking him to add the limitation in spite of the parties' agreement to eliminate that language from the contract. Moreover, they are asking him to change the negotiated salary schedule, without any indication that that is what the negotiators intended as the means of meeting the package size limitation. Health insurance can be changed, other benefits reduced, wage payments can be delayed – there are many other ways to reduce a package size other than reducing the salary schedule. There is no evidence which of these options the parties would have agreed on, if they had intended such a reduction. In short, the District is asking the Arbitrator to legislate a new contract. The Arbitrator has no authority to accede to the District's desires.

In interpreting the contract, it is axiomatic that the Arbitrator must give meaning to all clauses and provisions. The corollary principle is that he must give meaning to the deletion of clauses and provisions. Here, the 2002-2003 Salary Schedule itself contains clear salary figures. It also contains the word "sample" which was unilaterally inserted by the District after negotiations, but before the final printing. The word "sample" does not appear in Article 19, which dictates payment per the schedules, not does it appear in the index for 2002-2003. It is undisputed that the parties agreed to eliminate the Appendices which appeared in prior contracts, calling for elimination of the package costing provisions and the insertion of the second year schedule when it was known. A specific MOU was drafted by the District,

explaining the changes and the timeline for implementing them. At one point, the draft said that the 2002-2003 Salary Schedule would be inserted "when known." This reference was dropped in the final agreement.

Looking at all of the elements of language in this case, the Arbitrator can only find for the District by ignoring the deletion of the old language, and the express agreement of the parties that the reason for deleting the language was that it was not necessary. He must ignore the clear salary amounts in the contract. He must also overlook the District's own wording of the MOU, wherein it originally listed the 2002-2003 schedule as tentative, and then dropped that reference. He must do all of this based on the unilateral, last minute insertion of the word "sample" in the final copy of the contract. That is wholly unreasonable. The District cannot be allowed to circumvent the bargaining history, the painstaking drafting and review process, and the clear language arrived at through that process, by the simple expedient of typing an extra word into the final draft and having the Association's negotiators fail to catch the change when they signed the document.

The Association reminds the Arbitrator that, in cases of ambiguity, the language in issue should be construed against its drafter. Here, the District drafted, and unilaterally inserted, the word "sample" into the second year schedule, and it obviously bears the burden of justifying that change. The District also drafted the language showing the deletion of the package costing provision, and the characterization of that provision as unnecessary. As to both provisions, the District should be held accountable for any resulting ambiguity or confusion. The Arbitrator cannot impose a substantial forfeiture on Association members because of the District's choices in wording and rewording the parties' negotiated agreement.

Finally, the Association argues that there was a meeting of the minds in this case, and rejected the District's claim that the parties somehow failed to make an agreement in the first place. The consensus process leaves no room for this argument. The District's position is that the second year salary schedule was always intended to be tentative. Yet, that was never expressed in negotiations, and the word "sample" never appeared anywhere until it was inserted in the final printed draft. The ratification documents provided by the District for use by the Association in presenting the agreement to its members did not contain the word or any other indication that the second year salary was tentative.

If there was a mistake here, it was not a mutual mistake. The District's negotiators anticipated a significant increase in insurance rates, and they increased there costing estimates from 10% to 15% to account for it. Those are the estimates they used for the second year, and both parties negotiated the second year salary schedule assuming a 15% increase in insurance costs. In relying on those estimates, the District assumed the risk that they would be low, and the Association assumed the risk that they would be high. The District was wrong, and the rate increase was much more than the 15%. The fact that an agreement was made based on the wrong information is not a grounds for reopening or reforming the agreement. Each side took risks. Absent a showing a fraud by the Association, a charge not made by anyone, the contract here must be enforced as written.

The Association concedes that the total compensation costs were a concern for the District in these negotiations. The Association also had goals. The goals of the parties are irrelevant. What matters is what the parties agreed to, not what they would have liked to agree to. Because the District erred in its estimation of insurance costs, the second year compensation package was more than it hoped to pay, but that is an inevitable risk in negotiations. The central fact is that District did not make an agreement with the Association to safeguard the package costs, and it cannot now go to the Arbitrator and ask him to impose such a safeguard.

The sole basis for the District's refusal to abide by the salary schedule agreement was Banda's insertion of the word "sample" in the title of the schedule. This was done after the negotiations, and after the proof reading. It was done without asking anyone or telling any Association representative about the change. It was done after the same schedule, without the word "sample", was provided to the membership for ratification. The Association's representatives stopped at the reception desk in the District office and signed the final printed contract without re-reading every line of it. There is no evidence that anyone ever bargained over including this word, or made an agreement to include it or any other phrase suggesting that the second year schedule was subject to change. The only reference to "sample" salary schedules in negotiations was when the parties were reviewing a wide array of scenarios, in which case it obviously means that they were options. The final contract document does not refer to package costing anywhere, nor does it specify a particular second year package cost, nor does it refer to a method by which a particular package cost should be achieved. Neither do the minutes of the negotiations make any mention of these particulars. It is inconceivable that the District could have failed so utterly to express its central goal in negotiations, yet have nonetheless achieved it by merely writing the word "sample" next to the title of the second year salary schedule.

The contract is clear, and there is no evidence whatsoever that the parties actually intended to limit the second year package cost to 4.95% or to reduce the salary schedule to achieve that figure. While the District may have erred in guesstimating the insurance rates for the second year, its unilateral mistake is not a basis for amending the negotiated agreement. For all of these reasons, the Association asks that the grievance be granted and that the members of the Association be made whole.

The Position of the District 2/

The District takes the position that the second year salary schedule was always intended to be subject to modification to reflect a 4.95% package cost, and that its actions were completely consistent with that intent. Thus, the grievance should be denied. The District notes that the second year schedule is titled "Sample" and that the Arbitrator cannot ignore the clear meaning of that word. It is an "illustration or an example", and the clear implication is that it is subject to change. In the context of the 2001-2003 contract, the parties needed a

sample schedule for the second year because they were phasing in a new index and additional lanes, and had to show how it would affect salaries over the course of the contract. However, since the second year insurance rates were not known, it was not possible to state the salaries with any certainty. Thus, the second year salary schedule was designated as a sample. This was not a unilateral understanding of the District. Both parties knew the District had revenue caps to contend with and could not agree to an open-ended economic settlement. Moreover, the November 8, 2001 negotiations minutes show that the parties understood that the second year schedule would be generated when insurance rates were known. The word "sample" was used consistently throughout bargaining when referring to the second year schedule, and no one ever said that the 2002-2003 salaries were fixed at the amounts shown in the sample.

2/ For purposes of clarity in the narrative flow, this section incorporates both the arguments made in the District's initial brief and those made in its reply brief.

The District points out that its version of these negotiations is completely consistent with the practice followed by the parties in prior rounds of bargaining. The evidence is absolutely clear that the parties have never agreed on the amount of the second year salaries, leaving that to be determined in accordance with the package cost agreement and the second year health insurance rates. The prior contracts all contained blanks for the second year insurance rates, as did this agreement. Likewise, the prior contracts contained no second year co-curricular salaries – those were to be determined by the package size agreement. This contract contains no second year co-curricular salaries. If, as alleged by the Association, there was a firm deal on the second year economics, there should have been a statement of the second year co-curricular pay. The fact that there is not, demonstrates that the parties knew that the second year compensation amounts were all dependent upon the health insurance rates. That in turn demonstrates that the salary schedule for 2002-2003 was, as the contract states, merely a sample.

There is nothing to suggest that the parties approached the 2001-2003 negotiations any differently than they had approached the prior negotiations. The District provided QEO package cost calculations to the Association before bargaining commenced, and used them throughout negotiations. The Association's bargaining team knew full well that the District negotiators were constructing their proposals based on package costing. They also knew that the District was operating under revenue limits that made package costing necessary. Finally, they knew that the District viewed the settlement in package terms – 5.27% in the first year and 4.95% in the second year, and that the Board bargaining team's authority was limited by the package costs approved by the Board. The initial draft of the parties' joint press release expressed the settlement in those terms, and the reference to the size of the package was dropped from the final press release because of a desire to de-emphasize the economics, not because anyone believed it was incorrect. The Association knew beyond any doubt that the second year of the contract was a 4.95% economic package.

The District notes that the Association's entire argument is based on the elimination of a clause from the prior contracts, specifying the second year salaries would be calculated using the QEO costing system once insurance costs were known. This argument is misplaced. The language was eliminated as part of an effort to clean up the contract in the drafting process after negotiations were concluded. Neither party ever proposed the elimination of this language as a substantive item for negotiations, and the significance of eliminating it was never discussed at the bargaining table. The language was deleted at the suggestion of the District Administrator because — consistent with the collaborative nature of negotiations and the trust between the parties — he thought both parties understood that the WERC QEO costing rules were being used, and thus the language was not needed. Notwithstanding the housekeeping change, the District continued to use WERC costing methods to track the agreement, and reported the settlement to the WERC using those methods. Since the WERC costing method is required under the QEO law and the attendance administrative rules, the contract language was superfluous. Its deletion was not intended to change the practices of the parties, and it did not change the practices of the parties. The Arbitrator cannot conclude that the District would, on its own initiative, make so fundamental a change in the economics of the contract, and that such a change would pass without comment by any of the bargainers.

The Arbitrator must view this case in the overall context of the parties' relationship. These parties have always floated the second year salaries, waiting for the health costs to be known before finalizing those figures. These parties have always agreed on a package cost, and have always used the WERC system of fully funding benefits before funding salaries. Neither side proposed a different approach to this round of bargaining. It is absurd to believe that the District casually discarded these principles, without even bothering to discuss the matter, by eliminating an unneeded clause from the contract. It is equally absurd to think that the District's negotiators would have agreed to an open ended economic package in the second year, given the continuing revenue constraints on the District. It is equally absurd to think that the parties would have left the second year insurance premium figures and co-curricular salary figures blank, pending receipt of the actual insurance costs, but would have made a firm commitment on the salary schedule before the insurance costs were known. Finally, it is absurd to think that the District would have bestowed a $156,000 windfall on the Association, an amount 50% more than its negotiating authority for 2002-2003. The arbitrator is obliged to read the contract in context, and to use basic common sense in arriving at his interpretation. The result sought by the Association cannot be reconciled with either the context of the bargain or the dictates of common sense. The evidence is overwhelming that the parties intended to agree to a 4.95% package in the second year, and the Arbitrator must hold the Association to its bargain. Thus, the Arbitrator should deny this grievance.

The Reply of the Association

The Association disputes the District's claim that the blanks in the 2001-2003 contract for second year insurance rates have some sort of significance to this dispute. Those figures were left blank for the obvious reason that they were not known when the agreement was

reached. The parties have always operated on the basis of fully paid health insurance, and they continued that practice in this contract. No one contends that the commitment to pay the full health cost was in some fashion contingent or uncertain, and thus the blanks in place of second year insurance rates is completely meaningless to this grievance.

The Association takes exception to the District's attempt to paint it as seeking some form of windfall in the arbitration proceeding. The Association wants only what it bargained. It is the District which seeks to rewrite the collective bargaining agreement. If, as the District claims, it reached an agreement on a 4.95% total package, it would have been simplicity itself to express that in some way. Indeed, it was expressed in prior agreements, when that was what was meant. Here that language was deleted. This was not, as the District suggests, some casual, last minute housekeeping move. The deletion was included in the implementation Memorandum of Agreement. It was gone through line by line by the negotiators. It was carefully reviewed, and ratified by the Association membership. It was discussed and voted on by the Board of Education.

The only last minute piece of language in this case is the unilateral addition of the word "sample" to the second year salary schedule in the final printed version of the agreement. This word was added after the line by line review of the contract, after negotiations had ended, after the Association had ratified the agreement. While the District rails against the "absurdity" of the Association's position, what is absurd here is the notion that the District representative who typed the agreement should have the power to add a single word and thereby change the entire substance of the negotiated contract.

The parties each took a calculated risk in relying on the District's insurance estimates for the second year of the contract. The rates were higher than the estimates, and the District now regrets its agreement. A voluntary agreement is not rendered less than binding by the fact that one party regrets it.

DISCUSSION

At base, the question in this case is whether the parties' 2002-2003 economic settlement was a 4.95% package, with the salary to be determined once insurance costs were known, or whether it was a fixed salary schedule, and a commitment by the District to pay the costs of insurance in addition to the salary.

The signed contract refers to the second year schedule as a "sample." This word was added at the direction of District Administrator Fitzpatrick when Cheryl Banda typed the signature version of the contract. That was the version that was ratified by the School Board. The word "sample" did not appear in the earlier versions of the salary schedule which had been reviewed and approved by the negotiating teams, nor in the version the District supplied for teachers to vote on at their ratification meeting. The Association argues strongly that this

is a unilateral change in the agreement, and that it cannot overcome the other evidence pointing to an immutable second year schedule. That evidence principally consists of the elimination of the verbiage from the prior agreements about agreed upon package sizes, the use of WERC QEO costing procedures to calculate the packages, and about how the second year schedule would be inserted once it could be calculated. Put another way, in contrast to the last four contracts, there is nothing in this contract to indicate a contingent second year salary schedule, aside from the word "sample."

The difficulty in this case is that the Association's arguments are all facially sound and quite powerful as abstract principles of interpretation, but the changes it describes in the content of the contract do not appear to reflect any express, mutual agreements at the bargaining table. No one in this case claims that the Board's representatives ever said they were abandoning the package costing approach they had used for the prior four contracts. Indeed, the record shows that the Board's representatives consistently spoke in terms of package costs whenever specific salary proposals were examined. By the same token, the Association's representatives never expressly agreed to proceed on a package basis, even though package costs were presented for all salary proposals. Each party discussed salary on its own terms.

The Association's interpretation of this bargain reflects a fundamental change in the parties' historical approach to bargaining, and a very significant economic concession by the District. However, the elimination of the various contract provisions referring to package costing and the means of calculating second year salaries was not something that the Association demanded in bargaining, nor anything that was even discussed. Instead, like the insertion of the word "sample", these changes appear to have been unilateral drafting decisions by the District's representatives. District Administrator William Fitzpatrick wrote up the MOU reflecting the tentative agreement, and it was he who proposed to delete the costing and package language in Appendix A. Fitzpatrick testified at the arbitration hearing that he felt the language was unnecessary, since the parties had been doing it for years and understood how their system worked, and since in any event the procedures for QEO costing were set by the Administrative Code.

The most persuasive pieces of evidence in this case consist of (1) the initial draft of the MOU prepared by Fitzpatrick and (2) the absence of second year co-curricular amounts in the contract. In the initial draft of the MOU, Fitzpatrick proposed deleting the various appendices and with them the wording that made it absolutely clear that the second year salary schedule would float. Having proposed these changes, however, he still noted, under the effective date for the second year salary schedule, "when known." The negotiating teams reviewed and approved this document as a correct write-up of the tentative agreement. This was prior to Fitzpatrick's decision to clean up the contract, a process which led to the final MOU consolidating the indexes and schedules into a single Appendix without the "when known" notation. The unilateral nature of these wording choices is highlighted by the fact that, between the first MOU and the second, no bargaining took place and there was no change in the parties' agreement on economics.

While Fitzpatrick's consolidation of the indexes and schedules between the first and second drafts of the MOU could reasonably explain how the notation about the effective date of the 2002-03 schedule was left out of the second draft, it is almost impossible to construct a scenario by which the phrase "when known" could have been placed inadvertently in the original summary if that was not part of the agreement. It can only be understood to mean that the second year schedule was not fixed and final. Given the long history of floating the second year salary schedule in this contract, the significance of the phrase is self-evident, yet it passed without comment at the November 8th meeting when the teams met and agreed that the write-up was accurate.

The lack of a second year co-curricular schedule also strongly suggests that the second year salary schedule was not fixed in place. The co-curricular salaries are calculated by using a multiplier of the base salary. If the second year schedule was set, the calculation should have been included in the agreement. Jo Gehl testified that co-curriculars were a point of continuing discussion in a committee devoted to that task, and offered that as an explanation for the lack of a second year salary. The minutes of the parties' negotiations do not reflect that decision, and the summary of the agreement in the contract shows the items still under negotiation to be compensation for National Board Certified Educators, Master Educators and Professional Development Certificated Educators. The co-curricular article describes the District Wide Co-Curricular Advisory Committee as having responsibility to recommend candidates for head coach/advisor vacancies, making recommendations on requests for new co-curricular positions, and consulting on a variety of topics. It also tasks them to periodically review compensation levels and report back to the negotiating committees on their findings. However, there is no express re-opener in this contract for co-curricular salaries, and the minutes of the June 6, 2001 negotiations show that the parties were discussing to a two year cycle for reviewing these salaries. Those minutes also reflect a small number of items still under discussion, not a general review of all co-curricular salaries. Thus, I do not find that the existence of the Co-Curricular Advisory Committee explains the lack of a second year co-curricular schedule. While the Association also notes that there was no need for a statement of the second year salaries, given the formula in the contract, that is not a particularly persuasive argument either. Every contract has used a formula, and thus no statement of the co-curricular salaries has ever been necessary. Yet, each contract has had the salary spelled out for the years in which the base salary was known.

A review of the negotiations history persuades me that the ultimate agreement on the second year economics should most reasonably have been understood to have been a package settlement. The Association did not expressly agree to deal on a package basis, but its bargainers understood that the District was operating on that basis. The first characterization of the tentative agreement plainly identified the second year salary as unknown, which demonstrates that the second year settlement was a package settlement, just as the second year had been in the past four contracts. As of that point, there should have been no misunderstanding of the parties' agreement. Had the District proceeded to write-up the agreement as a package, with all of the crystal clear language used in prior agreements to

express that thought, there could have been no disagreement. Instead, the District made a series of ill-considered editorial choices, eliminating the clear language in the belief that it was not needed, and consolidating the two salary schedules in a way that made it appear that both stood on the same footing. The cumulative result of all of these choices was a document that can reasonably be read to suggest that the second year salary schedule was fixed. There is a certain irony in the fact that the final editorial choice – the insertion of the word "sample" in the signature version – is the only basis on which a finding of ambiguity can be made.

It is the drafting of this contract rather than the negotiation of this contract that created uncertainty about its meaning. That having been said, the contract as drafted is the document I must interpret and apply. A finding for either party presents problems of interpretation. A finding that the District is correct – that the second year is a 4.95% package and that the package size should be achieved by reducing the salary schedule – is consistent with bargaining history and past practice, but has little basis in the document itself. There is no reference to a 4.95% package in the signed contract and no specification of how it is to be achieved aside from the suggestive word "sample" in the 2002-03 salary schedule. A finding for the Association requires me to effectively read the word "sample" out of the contract. While that word was inserted without the Association's consent, and after its ratification vote, it is included in the signed document which is the source of my jurisdiction. Moreover, given the reference to including the second year schedule "when known" in the original write-up, the Association's complaint that this is a unilateral provision is at best only technically correct.

The contract is ambiguous, in that the word "sample" in the second year salary schedule renders it contingent, without clearly delineating the nature of the contingency or the specific action to be taken in response to the contingency. In resolving this ambiguity, the Arbitrator is bound to determine, from the other available evidence, the mutual intent of the parties when they made the agreement. The evidence of that intent is found in the history of the negotiations and the past practice of the parties. As discussed above, the contingency as it was understood by the negotiators was the receipt of the second year insurance rates and the impact those rates would have on the economic package. There was a clear agreement that the District would pay the full cost of the insurance and that was expressed both at the bargaining table and in the contract. There was also an agreement at the bargaining table that the second year package would be 4.95%. While the contract was drafted without referring to that figure, it is undisputed that the sample schedule appearing in the contract was a schedule that, in combination with the 15% insurance assumption used in negotiations, generated a 4.95% package at the time the bargain was struck. Given a fixed commitment on insurance and agreement on a package size, the necessary implication is that the parties intended an adjustment in the second year schedule. This is consistent with the practice they had followed in their agreements since the QEO system was adopted.

The collective bargaining agreement as drafted was a poor reflection of the parties' agreement. However, the great weight of the record evidence demonstrates that the negotiators agreed to a fixed package size in the second year, and a firm commitment that the

District would pay the increased costs of insurance within the confines of that package. It follows that the second year salary schedule was to be adjusted to accommodate the insurance costs and the package size. As that is the action taken by the District in response to the larger than expected insurance rate increase, I conclude that the District did not violate the collective bargaining agreement in the manner in which it calculated and paid salaries to the teaching staff in the 2002-2003 school year. 3/

3/ In concluding that the District's interpretation is correct, I do not mean to cast doubt on the good faith of the Association's leaders in processing and litigating this grievance. The drafting choices made by the District's bargainers created uncertainty about their own intentions, and the Association's committee could have come to believe that the District had decided to commit to the second year salary – not because that was what had been bargained, but because that was how the District was expressing the bargain. It may be that that conclusion required a certain amount of wishful thinking on the part of the Association's negotiators, but it is not entirely unreasonable.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The District did not violate the collective bargaining agreement in the manner in which it calculated salaries and/or the amount of salaries paid to the teaching staff in the 2002-2003 school year. The grievance is denied.

Dated at Racine, Wisconsin, this 21st day of November, 2003.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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