BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NIAGARA EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF NIAGARA

Case 20
No. 65262
MA-13171

Appearances:

Davis & Kuelthau, S.C., Attorneys at Law, by **Robert W. Burns**, 318 South Washington Street, Suite 300, Green Bay, Wisconsin, appearing on behalf of the Employer

Ted M. Lewis, UniServ Director, Northern Tier UniServ, 1901 West River Street, Rhinelander, Wisconsin, appearing on behalf of the Association [1]

INTERIM ARBITRATION AWARD

Niagara Education Association, herein referred to as the "Association," and School District of Niagara, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The undersigned held a hearing on June 27, 2006, in Niagara, Wisconsin. Each party filed post-hearing briefs; the last of which was received September 22, 2006.

ISSUES

The parties were unable to agree upon the statement of the issues, but they did agree that I would phrase the issues. I phrase the issue as follows:

1. Did the Employer violate its obligations under the Agreement by refusing the four grievants' request for additional contributions to their WRS accounts?

[1] After the close of the arbitration hearing, Mr. Lewis' mailing address changed to 1215 Suffolk Drive, Janesville, Wisconsin 53545.

2. If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

". . .

SECTION XVIII

GENERAL PROVISIONS

. . .

E. This agreement shall supersede any rules, regulations or practices of the Board, which shall be contrary or inconsistent with its terms.

. . .

SECTION XIX

VOLUNTARY EARLY RETIREMENT

Early retirement benefits shall be available to teachers who have thirty (30) years of creditable service and elect to retire after age 55. Insurance coverage benefits will be available to teachers between the ages of 62 and 65 who resign from their regular full-time duties.

A. Eligibility – Teachers who have taught at least five (5) years in the District shall be eligible to receive early retirement benefits from the WRS as authorized by Wisconsin Statutes and the language herein.

B. Notice – Teachers who plan to take early retirement shall notify the District of their intent to do so at least ninety (90) days prior to their expected date of retirement.

C. Limitations – Unless otherwise specified, teachers shall only be permitted to retire under this policy after age 55 with thirty (30) years of service or after age 62 for insurance benefits only.

D. Contribution to WRS – For teachers who have thirty (30) years of creditable service and elect to retire after age 55, the District will make the additional contributions to WRS to purchase the additional annuity to make the teacher "whole" (meaning the teacher will receive the same monthly retirement benefits as she/he would have received if they retired

at age 57 with thirty (30) or more years of creditable service). Such additional contributions shall be made just prior to retirement.

SECTION XXIII

TERMS OF AGREEMENT

. . .

C. This agreement may be modified only through the voluntary, mutual cnsent of the parties in written and signed amendment to this agreement.

. . . . "

BACKGROUND

Article XIX has been in the parties' collective bargaining agreement for many years. All teachers employed by the Employer are subject to the Wisconsin Retirement System (herein WRS). The WRS is administered by the Wisconsin Department of Employee Trust Funds (herein ETF). Article XIX is meant to supplement the retirement benefit received by teachers under that system.

The WRS has two alternative retirement benefits. Employees who retire receive one benefit or the other depending on which benefit is greater as of the date they retire. One is a defined benefit pursuant to Sec. 40.05(2)(g), Stats. Under this benefit employees who retire receive a defined monthly benefit according to formulas of the WRS. Under this method teachers who retire with 30 years of service creditable under WRS rules receive a greater benefit when they retire at age 57 than they would receive if they retire before age 57. The benefit received by teachers who retire before age 57 is adjusted to a lesser amount by virtue of an "actuarial reduction" which results in a lower monthly payment to the retiree.

The other is a defined contribution benefit pursuant to Sec. 40.23(2m)(g), Stats. The money in the teacher's retirement account is used to purchase an annuity which then makes a monthly payment to the retiree. The number of years of service is not a factor in calculating this benefit. ETF applies a "money purchase factor" which takes into account the age of teacher at retirement. Thus, if a teacher retires at age 57 the money purchase factor and resulting monthly benefit is greater than if the teacher retired before age 57. The difference between the age related factors is only an actuarial difference. Thus, it is expected that the total benefit received over a teachers' retirement is essentially the same total number of dollars based upon actuarial probability.

The WRS pension of each of the retirees in the instant case was based on the money purchase benefit. All but two of the retirements of District teachers since 1996, were under the formula benefit.

During that time, when an employee notified the Employer that he or she intended to retire between age 55 but less than 57 with at least 30 years of service, the Employer would write to ETF shortly before the employee's retirement date to request the amount which the Employer would need to contribute to avoid actuarial reduction under the formula benefit. Sec. 40.23(2m)(g), Stats., requires that any supplemental contribution used to offset the actuarial reduction of the formula benefit be made before the employee leaves employment. ETF would normally write back with an amount on a form which was then to be completed by the employer. The Employer would then complete an ETF form and submit the amount designated to offset the actuarial reduction of the formula benefit.

The issue concerning the money purchase benefit first arose regarding the retirements of David Langlois in 2003 and K W in 2004

Mr. Langlois was the former Association President. When he announced his retirement to the Employer, the Employer wrote to ETF in accordance with its ordinary procedure. ETF responded that no contribution was necessary to offset the formula benefit actuarial reduction because the money purchase benefit exceeded the "*unreduced* formula amount." The responding letter stated:

> The other option for the district (through the WRS) is to make employer additional contributions into the WRS. These contributions must be made while the employee is still in active status prior to his termination date. Enclosed is some information and a worksheet to calculate the IRS contribution limits if your district decides this alternative is feasible.

Patty Hamel was the Employer's business manager at the time. This was the first time the situation occurred with the money purchase benefit to her knowledge, including at her former employment in human resources with a county agency. She decided that she did not have the authority to make this decision and submitted the matter to the Employer's new superintendent, David Thymus. Superintendent Thymus called ETF and received information similar to the above-quoted language in the letter from ETF. Supt. Thymus made the decision to make the maximum additional contribution after consulting with then Association President Allard. The tenor of Ms. Hamel's testimony was that she voiced opposition to that decision, but carried it no further than the limits of her authority. The Langlois retirement agreement reads in relevant part:

"LETTER OF AGREEMENT

> This is to confirm that the District will be making additional contributions to WRS to make David Langlois "whole" in accordance with Section XIX D (Voluntary Early Retirement) of the 2001-2003 Master Contract between the School District of Niagara and the Niagara Education Association.
>
> . . ."

The W retirement occurred effective October 17, 2004. There was another retirement that year, but that retirement occurred under the formula benefit. Ms. W taught in the 2003-04 school year. The Employer had a different new superintendent, Mr. Winch. Superintendent Winch's employment with the Employer was scheduled to, and did, end before July 1, 2004. The next Superintendent, Superintendent Kososki, started employment July 1, 2004.[2]

In April, 2004, the Employer, Association and Ms. W, individually, entered into a "Retirement Agreement" which provided that she would work until the end of the 2003-4, school and be considered on leave until October 7, 2004, when her retirement would become effective. The agreement provided that she waived any rights she had under Sec. 118.22, Stats.[3] It also provided in relevant part:

> 3. Teacher will be eligible for early retirement benefits pursuant to Article XIX of the Master Agreement commencing upon the effective date subject to the terms and conditions thereof.
>
> 4. In exchange for the benefits and payments to her described in this Agreement (which she acknowledges to be greater, in their totality, than any benefits due her absent this Agreement, Teacher hereby irrevocably and unconditionally, releases, waives and fully and forever discharges the School Board and District . . . from any and all claims . . . whether known or unknown, anticipated and unanticipated, which in any way related to or arise out of the parties' employment relationship or the termination of that relationship other than those arising out of this Agreement. [Section 4 then expressly waives claims under specific fair employment laws, Employee Retirement Income Security Act, and "any local (sic) state or federal law, whether statutorily codified or not governing discrimination in employment, the payment of wages and benefits, or sounding in contract or tort"]
>
> . . .
>
> 6. All parties agree and understand that this agreement (sic) shall be non-precedential and does not establish a practice or policy of any party, and this agreement (sic) shall not be used to the prejudice of any party in any collective bargaining or grievance proceeding.
>
> . . .
>
> 8. The district will pay the teacher $4000 (sic) minus the required deductions over the first three pay periods of the 2004-05 school year.

[2] Superintendent Kososki was the only superintendent available to testify.
[3] This provision relates to teacher dismissal.

9. The district will make the required WRS payment soon after the specific amount of the contribution is determined.

There was no evidence as to whether there was any discussion during negotiations for the written agreement as to the expected amount of any "make-whole" benefit under Section XIX D or other aspects of Section XIX D.

The Employer requested the election to pay the cost of actuarial reduction form from ETF. On May 18, 2004, ETF notified the Employer that the money purchase benefit exceeded Ms. W's unreduced formula benefit, thus indicating that no payment under Sec. 40.23(2m)(g), Stats., was appropriate.

Ms. Hamel made her same objections to making an additional contribution to WRS known to Mr. Winch. She notified the school board president of her objections. She also sought legal advice for the Employer on this issue. It is unclear whether the school board president intervened in the decision. The issue was not resolved before Mr. Winch left employment and Superintendent Kososki started dealing with the issue when he started employment.

Superintendent Kososki and Ms. Hamel did not receive information back sufficient to make a decision with respect to this issue before the October deadline. The tenor of Superintendent Kososki's testimony is that he made the maximum additional contribution but did not do so on the basis of consciously concluding that the maximum contribution should be the appropriate "make-whole" benefit under Section XIX D. The Employer first agreed to make the maximum additional contribution after the last date for additional contributions allowed by law. The parties agreed that the Employer would make the cash payment directly to her.

The four teachers at issue in this case retired in 2005, at ages 55 or 56 with at least 30 years of service. They were Judy Ball, John Fox, Marge Meyers and Kathryn Paul. All four had WRS money purchase benefits which exceeded the unreduced formula benefit. Ms. Hamel again asserted her objections. Superintendent Kososki explored the matter with counsel and declined to make any additional contribution. The Association disagreed and filed the instant grievance which was properly processed to arbitration.

POSITIONS OF THE PARTIES

Association

The Employer violated Art. XIX, Sec. D of the Agreement when it refused to make the grievants' whole for the reduction they received for retiring early under the money purchase option of Sec. 40.23(2m)(g), Stats., of the WRS. The grievants are John Fox, Judy Ball, Kathryn Paul and Marge Meyers. Under that benefit, the WRS applies a "money purchase factor" which renders a lesser benefit than if the teacher retired at age 57.

Past practice supports the Association's position. When David Langlois retired, the money purchase exceeded the defined benefit calculation. The Employer sent a letter requesting the amount of the "actuarial" reduction. The WRS responded there was none because the money purchase exceeded the defined benefit. It did not report the "money purchase factor" because the same was not an "actuarial" reduction under WRS's technical terminology. The Employer, Association, and Mr. Langlois agreed that the Maximum Additional Contribution Worksheet could be used to meet the provision of the Agreement. The Employer then made a contribution of $30,731. At no time did the Employer suggest to Langlois or the Association that it had no obligation to make a payment under Art. XIX.

The Employer also did the same with regard to Ms. W. Ms. W's money purchase benefit exceeded the unreduced formula benefit. The parties again used the worksheet to make the maximum contribution which was $32,026. The Employer's superintendents at the time, School Board, and legal counsel all agreed this was appropriate.

Linda Owen, a Benefit Plan Policy Analyst with the Department of Employee Trust Funds, testified about a method of making retiring members whole under the money purchase option. Under the money purchase option, the monthly benefit is the money purchase factor times the dollar balance in the member's WRS account. She testified at tr. p. 24 that the Employer could use the money purchase factor for age 57 rather than the employee's actual age to determine the benefit. It then could calculate the additional contribution necessary to produce that monthly benefit. Dennis Eisenberg, a benefits and pension expert, also testified that the Employer could do so. See, tr. pp. 71-72, Ass'n. ex. 2, pp. 6-8.

Article XIX is clear and unambiguous in that it requires the Employer to make employees whole when they retire. The language is clear and unambiguous even if making the calculations may be difficult. Retirees receive a larger monthly benefit if they retire at age 57 than they do if they retire before age 57. This is true whether they retire under either option. The Employer has attempted to read a restriction into the agreement which does not exist. It wrongly equates "actuarial reduction" with the term "make whole" in the agreement. The WRS sent a letter with respect to each of the four retirees in question stating that their money purchase benefit was greater than their unreduced formula benefit and that, therefore, the WRS could not calculate an actuarial reduction. If the Employer and Association had intended that the Employer pay the make whole benefit only under a specific statute, they would have referenced the statute in the Agreement. It is impossible to make an additional contribution under Sec. 40.23(2m)(g), Stats., for the grievants because they suffered no actuarial reduction. However, nothing prevents the Employer from making an additional contribution to the WRS under Sec. 40.05(2)(g), Stats. That is what the Employer did for Mr. Langlois and Ms. W.

The Employer established a past practice that the worksheet is the proper method for making retirees whole. The Employer (superintendents and school board) with legal advice determined that the worksheet was the proper method of how to make employees whole. The past practice is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed, and established past practice accepted by both parties.

In the alternative, the Employer should calculate the difference in the benefit using the money purchase factor based on age 57 and the actual age the employee will be at retirement and pay the difference. The Association requests an order finding that the Employer violated the agreement as to the four grievants and that the arbitrator order the Employer to pay the sum so determined to the WRS or to a tax sheltered annuity for the affected employees.

In reply, the Association notes that the language of the Agreement does not reference a specific provision of the WRS statute and cannot be construed to be limited by it. It notes that the Employer is referring to the defined benefit option as the "normal" retirement benefit. There is nothing in the statutes which says that this is the "normal" retirement benefit and the money purchase option is not. District expert witness Linda Owen developed the calculation which the Association uses, not the Association itself. The Employer makes many bizarre twists of logic to equate the contractual requirement to make retirees whole as if they retired at age 57 with actuarial reduction. For example, the Employer alleges that the 30 years of creditable service requirement would be rendered "meaningless" if the Employer must make money purchase option retirees whole. However, creditable service requirements are a standard qualifying component of post-retirement benefits. The agreement uses the same requirements for insurance benefits. The Employer wrongly alleges that the parties must have meant to reference the "make whole" requirement to actuarial reduction because we cannot know what the additional contribution under Sec. 40.05(2)(g) would be necessary prior to an individual's retirement. However, the additional contribution to increase the money purchase benefit could easily be calculated the day before retirement to arrive at the exact requisite contribution.

Employer

The Employer did not violate Article XIX when it refused to make the additional contributions to WRS sought by the four grievants. The Employer's construction is consistent with the benefit structure of WRS. The normal retirement age for teachers is 65. The teacher can receive an early retirement as early as 55, but the teachers' annuity is reduced by an age reduction factor of .4% per month of age below 65. See, Sec. 40.23(2m)(f)9, Stats. The reduction factor of .4% per month for each month between the ages 57 to 65 is reduced b .01111% for each moth of creditable service. (Sec. 40.3(2m)(f)9, Stats.) For 30 years of service, a retiree receives no reduction between the ages of 57 and 65. The agreement in this case includes the additional benefit that the Employer will eliminate the remaining portion of the reduction should the employee retire between ages 55 and 57. The statute allows an employer to make up the reduction between ages 55 and 57. The language of the provision, "make the teacher 'whole'" only logically refers to the Employer's obligation to make up the reduction. The law also provides that the annuity may not be less than the money purchase annuity applicable at the time of the retiree's retirement. There is no age reduction in that calculation. You simply cannot make whole something that is not reduced.

Article XIX should be construed as a whole. The provision is obviously coordinated with the WRS rules. The Association ignores the fact that the premise of the provision is that

the retiree has 30 years of creditable service under WRS rules. Thirty years is the point at which there is no age reduction factor in the normal form annuity for retirement at age 57 or older. The contract coordinates with this by making teachers whole until age 57 if they have 30 years of service. This demonstrates that the contract is intended to coordinate with the regular annuity and not the money purchase option. The money purchase calculation is nothing more than a safety net - an irreducible annuity value. The number of years a teacher may be credited with WRS has no impact on the money purchase calculation referenced in Sec.40.23(3), Stats. The Association's position ignores one of two components of the contractual provision, the 30-year requirement. The Association's position leads to the absurd result: the Employer must pay money even though the "employee is entitled to an annuity greater than the whole annuity." The Employer's position gives meaning to the whole provision while the Association's does not.

The use of the phrase "make whole" must refer to something that is not whole to begin with. This refers to the normal form annuity which is less when a teacher retires early. By contrast, the idea of making the money purchase "whole" makes no sense.

The Association came forward with a new interpretation at hearing. It proposed that the Employer make up the difference between the money purchase annuity based on the employee's age versus age 57. Aside from the fact that this is never what the parties understood, the position is entirely without merit. To accept the Association's position, the arbitrator must ignore the statutory structure of the WRS. There is a statutory structure for making the annuity "whole." This structure requires that the Employer commit to making the annuity whole before the employee retires, but the actual calculation must be made after the employee retires. This is why the parties used the term "make whole." There is no equivalent statutory structure for making the money purchase option "whole." There is no practical way to do so. The Association produced no bargaining history on this topic, nor could it have done so because the idea was first advanced on the day of hearing. Even if the agreement language is ambiguous, the Employer's position best represents the intention of the parties. Even if the Arbitrator accepts that the Association's proposed interpretation is "plausible," there is no evidence that this interpretation was intended. The only two chances the Association had to assert that its interpretation was proper occurred in the Langlois and W situations in which the Employer did not make a payment of the second alternative now sought by the Association. Indeed, the Association never put forward that alternative position in either of those situations.

The Association cannot establish the existence of a past practice supporting its position. The retirement agreement of Ms. W cannot be used to illustrate a binding past practice because the parties expressly agreed that the same could not be used to establish a past practice. Article XXIII of agreement precludes modifying the agreement through "practice." Thus, it precludes using past practice to expand a benefit. In any event, Superintendent Kososki testified that there was a "special agreement" with Ms. W relative to her retirement. All of the parties recognized that her retirement was a special circumstance. She did not work until her retirement. The Employer did not make a contribution to WRS for make-whole, but, instead, made a cash payment directly to her. The retirement of Mr. Langlois was handled in a

different way than Ms. W's and cannot be a practice. The retirement of Langlois was calculated under the maximum contribution work sheet and not on the theory which the Association recently created, using the age 57 factor in the money purchase benefit instead of the factor actually relating to the employee's actual age. In any event, there are insufficient instances of practice to support the Association's view.

The Employer concludes that its position corresponds to the language of the agreement. The only established past practice is that the Employer requested a calculation from ETF of the amount necessary to pay the applicable actuarial reduction to the formula method. There is no practice corresponding to the Association's theory of the case. The Association's position is not a plausible interpretation. The Association's interpretation came into existence only on the eve of arbitration. The grievants are already entitled to a benefit which exceeds the unreduced benefit under WRS. What the Association proposes now is nothing more than gratuitous overpayments on behalf of retirees and is in no way supported by the contract. In this age of tight school district budgets, it would be a great disservice to the public to require the Employer to pay money on behalf of a retiree that is already entitled to the greatest annuity benefit available under the WRS system based on his employment.

In its reply brief, the Employer makes the following additional points. It notes that the Association's brief demonstrates that it lacks understanding regarding this issue in that it misunderstands the fact that none of the retirees received a reduction in their annuities because they had not worked long enough. The length of service is only a consideration in the formula annuity. The approach first advanced by the Association in hearing was something that neither party discussed prior to this hearing. It never came up in any of the prior situations. Accordingly, it could not be within the contemplation of the parties.

KRISKA V. MADISON AREA TECHNICAL COLLEGE, 266 Wis.2D 1062 (Ct. App., 2003) involved a similar provision and came to the same conclusion as the Employer advocates herein, that the agreement provision was intended to comport with the statutory scheme. Only the formula annuity involves a system of "reducing" the annuity value, as well as a process for eliminating the reduction to make the annuity whole again. The only payments MATC Employer ever made were those payments made based on the cost of actuarial reduction.

DISCUSSION

1. Substantive Arbitrability/Statement of the Issue

The Employer stated the issues as:

1. Did the Employer violate the collective bargaining agreement in the manner it administered the early retirement contribution provision for the four grievants?

2. If so, what is the appropriate remedy?

The Association stated the issues as:

> 1. Did the Employer violate Article 19 and/or established past practice by refusing to make additional contributions to the WRS benefit for the four grievants?
>
> 2. If so, what is the appropriate remedy?

The difference over statements of the issue is whether some of the Association's arguments involving past practice are substantively arbitrable. The essence of these past practice theories that the Employer contends are not arbitrable is that the parties have created a new non-contractual benefit which expands the contractual benefit of Section XIX D. These arguments are effectively precluded by Sections XXIII C and XVIII E of the Agreement. Section XXIII C provides:

> This agreement may be modified only through the voluntary, mutual consent of the parties in written and signed amendment to this agreement.

Article XVIII E provides:

> This agreement shall supersede any rules, regulations or practices of the Board, which shall be contrary to or inconsistent with its terms."

Section XIX D comprehensively, but ambiguously, defines the "make whole" retirement benefit. Past practice cannot effect "modification" of Article XIX D. Accordingly, the foregoing provisions effectively preclude that aspect of the Association's position. The issue has been phrased essentially to exclude that potential interpretation. Past practice evidence is considered, however, as an aid to interpreting the ambiguity of Section XIX D

These provisions do not restrict the Association from arguing that the parties amended the comprehensive collective bargaining agreement by a written agreement. They do not preclude the Association from arguing that there is a past practice which explains an ambiguous term of the agreement.

2. Ambiguity in Section XIX D

A provision in a collective bargaining agreement is ambiguous if it is "reasonably or fairly susceptible to more than one construction."[4] There are three proposed constructions, the one proposed by the Employer, the Union's main theory of construction (maximum allowable contribution) and its alternate interpretation advanced after the testimony of Ms. Linda Owen and Mr. Eisenberg at the hearing (amount needed to offset age factor in money purchase

[4] UNITED STATES FIRE INS. V. ACE BARKING, 164 Wis.2D 499, 503 (Ct. App., 1991)., citing GARRIGUENC V. LOVE, 67 Wis.2D 130, at 134-5 (1975)

benefit). There is no dispute concerning whether the Employer's proposed construction is plausible. The Association's maximum allowable contribution theory bears no relationship to the language of the provision. It does not correlate to any monthly benefit. It could result in a significantly higher monthly benefit than the employee would have had had he or she been age 57 on the date he or she retired. It is merely an increase in an employee's WRS account.[5]

The Association's alternative construction is a plausible construction. It relates to the "monthly benefit" under the money purchase plan. It would tend to approximate the "monthly benefit" the employee would have received if he or she were 57 years old at the time they retired rather than the lower age. Accordingly, it is plausible interpretation of the term "monthly benefit" in Article XIX.

3. Past Practice and "Memorandum of Understanding"

The Association has heavily relied upon the existence of past practices supporting its position. The concept of past practice is defined as follows:

> 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 fixed, and established practice accepted by both parties.[6]

There are two instances of past practice upon which the Association relies. They are the David Langlois retirement and the Kathryn W retirement.

I address the W retirement first. The agreement signed by the parties in the W retirement states:

> All parties agree and understand that this agreement shall be non-precedential and does not establish a practice or policy of any party, and this agreement shall not be used to the prejudice of any party in any collective bargaining or grievance proceeding.

This agreement expressly excludes the consideration of this settlement as an example of past practice in this proceeding. It is unclear whether there was an actual discussion during the negotiation of the agreement about the amount of the WRS benefits Ms. W would receive under Section XIX D or if the parties knew at the time of the negotiations that the money purchase benefit would exceed the unreduced formula benefit for Ms. W. The instant dispute concerning Section XIX D of the collective bargaining agreement arose during the administration of the W retirement agreement shortly after the agreement was signed. The Association has not demonstrated that the maximum contribution was made by the Employer

---

[5] I also address this issue on its merits as well. See, below.

[6] CELANESE CORP OF AMERICA, 24 LA 168, 172 (Justin, 1954)

based upon an interpretation of the collective bargaining agreement rather than on the basis of the discussions underlying the settlement agreement. It is clear that Ms. W waived substantial rights in reliance upon the terms of the agreement. The better view is that the "make whole" payment made for Ms. W is so intertwined with the issues arising under the retirement agreement that the above-quoted provision of section 6 making this non-precedential applies to the decision to make that payment. The agreement to treat it as non-precedential is binding and will be enforced.

I turn next to the issue concerning the weight to be assigned the retirement of David Langlois, former Association President. The essence of the Association's position is that this is a separate collective bargaining agreement [7] ("MOU") or strong evidence of past practice. Article XXIII of the Agreement states:

> This agreement may be modified only through voluntary mutual consent of the parties in written and signed amendment to this agreement.

The subject of the Langlois retirement agreement was Section XIX D of the agreement, not an issue entirely uncovered in the agreement. The retirement agreement does not state that it is an amendment of the agreement. The import of the settlement was that it dealt with one individual's set of circumstances under that section and it did not contain any language as to how the parties intended to conduct themselves in the future concerning the interpretation of Section XIX D. Accordingly, this settlement is not a MOU adding a provision to the agreement, modifying Section XIX D for future instances, or explaining Section XIX D for future instances.

The next issue is whether this one instance constitutes sufficient evidence of past practice to establish that the maximum additional contribution as the correct interpretation of Section XIX D. I conclude that it is not sufficient evidence because this interpretation is not established over a sufficiently reasonable period of time to be viewed as an established view of the parties and because it is inconsistent with the language of Section XIX D. The expert testimony presented by both sides at the hearing herein indicates that the Employer's choice to make the maximum additional contribution in the Langlois case was a mistake. The payment is not calculated in any way to adjust the employee's monthly benefit to the age 57 "unreduced" level. It is clearly far more than is reasonably necessary to do so. This mistake occurred largely because the superintendent at the time was new and inexperienced in this subject. ETF provided him with incomplete and incorrect information. It did not inform him that there were different age-related factors in the money purchase benefit. ETF's discussion led him to believe that the maximum contribution was related to the statutory reduction of the formula benefit. It is information upon which both parties relied. The fact that others in the Employer's oversight management system failed to recognize the error does not make it any-the-less a mistake. The main purpose of evaluating past practices over a reasonable period of

[7] Parties often negotiate separate agreements adding to, explaining or modifying their collective bargaining agreements. I refer to these as memoranda of understanding or "MOU's."

time is to distinguish between "mistakes" and genuine mutual agreement. A maximum contribution practice would be inconsistent with the terms of Section XIX D, and, thus, its adoption by the arbitrator would violate Section XXIII C. Accordingly, the evidence does not establish any enforceable or persuasive practice supporting the Association's maximum contribution theory. Accordingly, the maximum contribution theory is not an appropriate interpretation of Section XIX D.

The evidence of the Employer's conduct in the Langlois case is at least worthy of consideration as evidence of the parties' mutual interpretation that Section XIX D might properly be applied to situations in which the money purchase benefit exceeds an employee's formula benefit even though the drafters of Section XIX D did not actually consider that possibility.

I conclude that the evidence does not establish a past practice of paying "make whole" payments under either theory advanced by the Association, but there is some evidence that the parties intend it to apply to the money purchase situation.

4. Association's Alternative Construction

The Wisconsin Court of Appeals addressed an issue similar to that presented here in an unpublished decision, KRISKA V. MADISON AREA TECHNICAL COLLEGE, CASE NO. 02-2958 (Ct. App., 2003) [8]. In that case, the Court of Appeals reviewed the lower court's grant of summary judgment for MATC on a *de novo* basis. It affirmed the decision of the circuit court which held that an employee retiring before his unreduced retirement date (before age 65) was not entitled to a supplemental contribution to his WRS account when the variable portion of his otherwise formula retirement was calculated on the money purchase method. [9] The employee contended that since the monthly amount of that portion was calculated at a monthly payment less than it would have been had he been 65, he was entitled to an employer contribution under the policy stated below. The court reviewed the following provision from MATC's unilaterally adopted personnel policy:

> Administrative staff who have been employed by the college for a period of ten (10) or more years and who have attained the age of fifty-seven (57), may elect to retire with 90 days notice to the college President. Under this option, the District will supplement the WRS payment so that the total benefit received is equal to the WRS benefit that would have been received had the employee been age sixty-five (65) on the date of retirement. . . . KRISKA, SUPRA, ¶ 3

The decision does not reflect that the employee ever negotiated with MATC with respect to this benefit. There is no mention in the decision of any promises made directly to the

[8] The Employer first cited this case in its reply brief. The Association did not have an opportunity to respond to that argument.

[9] Kriska was 59 years old and had over 30 years of service. Accordingly, it appears that there was no actuarial reduction in the formula portion of his benefit.

employee by MATC. The Court of Appeals concluded that the language was ambiguous and could reasonably be construed to require a supplemental WRS contribution only when there is an actuarial reduction in the formula method or could reasonably be construed to require a supplemental WRS contribution when the money purchase monthly benefit is reduced on the account of the employee's age. It concluded that the primary purpose of contract interpretation is to determine and give effect to the parties' intention at the time the contract was made. It relied upon the past practice of MATC in which it had always interpreted and applied this provision to grant a supplemental increase only when the unreduced formula benefit exceeded the employee's money purchase benefit.

There are significant factual differences between KRISKA, *supra*, and the case at hand. Its reasoning is instructive, but not controlling in this case. In KRISKA, *supra,* the policy the court interpreted was unilaterally adopted by MATC. There was no evidence Mr. Kriska ever negotiated with MATC to obtain the benefit. The Court applied the long standing law of Wisconsin that the purpose of interpreting ambiguous language was to determine "what the parties intended." In that case, the court applied past practice evidence apparently to corroborate that MATC's explanation of what its unilaterally adopted policy meant was not a recent fabrication. It did so by evaluating the past unilateral practice of MATC to see that it was consistent.[10]

Parties to collective bargaining agreements can, and frequently do, intend to have them applied to unforeseen circumstances. Indeed, they frequently include dispute resolution mechanisms to facilitate their application to unforeseen circumstances. Arbitrators must be careful to distinguish between situations in which collective bargaining agreement language should be applied to an unforeseen circumstance from those in which the arbitrator would be subverting the collective bargaining process. One arbitrator phrased it this way:

> [T]he ultimate responsibility of an arbitrator in the interpretive process is to rely on his or her background of experience or expertise in the collective bargaining process, with due regard to the relationship of the given parties and their presentations so as to provide as practical and realistic an interpretation as is possible under the circumstances.[11]

Essentially, this is a standard of review by the arbitrator of what parties similarly situated would have done, had they thought of the issue. The Wisconsin Supreme Court has applied this standard in at least one previous case.[12]

As noted above, I conclude that the parties who drafted this language never actually considered the money purchase benefit. The money purchase benefit has not been the basis of

---

[10] That case involved a situation in which the employee retired under a mixed formula and money purchase benefit. No decision is expressed or implied herein as to retirements under that circumstance.
[11] Elkouri and Elkouri, *How Arbitration Works*, (BNA, 6h Ed.) pp. 446-7, quoting Garret, NAA 38th Proceedings, at p. 143
[12] WIS. E.R.B V. GATEWAY GLASS COMPANY, 265 Wis. 114 (1953).

retirees' pensions in Wisconsin until recently. It is unlikely that they thought about it when they drafted this language many years ago. Neither party was aware of the alternative concept, using the age 57 money purchase factor, until the concept was raised at the hearing herein. There is no WRS statute facilitating an employer's offsetting the age-related money purchase factor. There is one for doing so in the formula benefit. The language of Section XIX D tracks closely with the statutory language of the administration of the formula benefit and shows no evidence of dealing with the issues which relate to trying to make the money purchase benefit whole. The better view of the language of the agreement itself is that it was actually written with reference to the formula benefit alone.

As noted above, there is significant evidence in past practice that the parties expected to have Section XIX D applied to the unforeseen circumstances. In any event, there is very strong evidence in the language of Section XIX D that the parties intended it to be applied to unforeseen circumstances in accordance with its stated intent. The language states: ". . . the additional annuity to make the teacher 'whole' (meaning the teacher will receive the same monthly retirement benefits as she/he would have received if they retired at age 57 . . . ." The parties could have phrased this differently in terms of the WRS statute. The language strongly suggests that they chose to phrase it this way because they thought they were correcting every way a person's monthly pension benefit would be lower on the account of age factors. However, they were unaware that the money purchase factor used to determine the money purchase monthly benefit is age related. The concept of making someone whole is standard method of using ambiguous language to specify an uncertain remedy in labor arbitration when an arbitrator orders back pay. Negotiators would be intimately familiar with this type of concept. I conclude that the parties intended to have the language applied to the unforeseen circumstances in accordance with the purpose of the provision.

I am satisfied that parties similarly situated would have made retirees whole by applying to the employee's benefit an amount sufficient to offset the difference between the money purchase age factor used at age 57 and the factor used at the age the teacher actually retires. The language in KRISKA, *supra*, and this case is similar; however, the language presented here more strongly conveys the parties' purpose of equalizing the monthly retirement benefit of the early retiring teacher to that of those who do not retire early. This is a significant incentive to teachers to retire early.

Additionally, the Employer's chief reason for not doing so is that the money purchase benefit is greater than the unreduced formula benefit and therefore there nothing to make whole. Essentially, this is an argument that a make whole payment under those circumstances would be an unwarranted windfall to the retiring employee. I find it highly unlikely that parties similarly situated would have made a distinction of that type. This judgment is based upon my experience in mediating public sector labor disputes in Wisconsin. The ordinary purpose employers have in having early retirement benefits is to obtain the savings when they replace a higher paid retiring teacher with a lower paid new teacher. Those savings are possibly substantial. Making that type of distinction would undermine the incentive this provision gives teachers to plan an early retirement. They could not know in advance if they

would actually receive a benefit under this provision.[13] They ordinarily cannot know until shortly before they retire whether the money purchase benefit will exceed their unreduced formula benefit. Accordingly, I conclude that the better interpretation of Section XIX D is that the Employer is required to make a one-time "make whole" payment to the benefit of the grievants offsetting the difference between the money purchase age 57 factor and the actual age at which the employee retires. The Employer violated Section XIX D by not doing so.

REMEDY

The order herein requires the Employer to make an appropriate payment or contribution on behalf of the four grievants to offset the difference in factors used in determining the money purchase benefit. There is no method of doing this specified in the WRS statute. I am affording the parties an opportunity to discuss and agree upon the appropriate method. If that fails, I will give the parties an opportunity for further hearing and/or argument as to that issue and issues discussed below. Further, under Sec. 40.23(3), Stats., the money purchase monthly benefit is calculated using the age-related money purchase factor and multiplying that times the amount in the employee's WRS account. This is different than the formula benefit. The amount in the employee's WRS account is not a factor in the formula benefit. Sec. 40.23(3), Stats., provides that the employee's account includes the sum "of the participant's accumulated additional and required contributions plus an amount from the employer accumulation reserve equal to the participant's accumulated required contributions to fund the annuity . . ." There may be some rare instances in which an employee's WRS account includes voluntary contributions, or is based upon career earnings from higher paying non-teaching positions. These are amounts in the employee's WRS account to which it is unlikely similarly situated parties would have intended to apply a "make-whole" benefit. There may be other differences in employee accounts for which the parties might not have wanted to apply a "make-whole" benefit. The Employer is only required to apply the make whole benefit to that part of the account resulting from contributions required for employees and employers and resulting from a normal teaching career. It is not required to apply the make whole benefit for voluntary contributions this employer did not make. It is also not required to apply a make whole benefit to earnings which were substantially in excess of what a teacher would have earned.

INTERIM AWARD

That since the Employer violated Section XIX D by not making the four grievants whole for the difference between the money purchase factor which would have been applied to their account at retirement had they been aged 57 when they retired and which was applied, the Employer shall make the four employees whole in accordance with the terms of this award.

---

[13] The Wisconsin courts have been cautious about employer efforts to undermine a benefit promised to retired employees. See, ROTH V. CITY OF GLENDALE, 237 Wis.2D 173 (2000)

The parties will notify me within sixty (60) days of the date of the award as to whether or not they have resolved the issues remaining as to remedy. If they do not, they should also advise me as to their request for supplemental hearing and/or argument.

Dated at Madison, Wisconsin, this 19th day of April, 2007.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

SHM/gjc
7124