BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL DISTRICT OF LUCK

and

NORTHWEST UNITED EDUCATORS

Case 5
No. 66438
MA-13528

Appearances:

Andrea M. Voelker, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Pkwy., P.O. Box 1030, Eau Claire, WI 54702-1030, appearing on behalf of the School District of Luck.

Tim A. Schultz, Executive Director, Northwest United Educators, 16 W. John Street, Rice Lake, WI 54868, appearing on behalf of Northwest United Educators.

ARBITRATION AWARD

The School District of Luck, hereinafter District or Employer, and Northwest United Educators, hereinafter Union or NUE, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission provide a list of five WERC commissioners/staff arbitrators from which they could jointly select an arbitrator to hear and resolve a dispute between them regarding the instant grievance. Commissioner Susan J.M. Bauman was so selected. A hearing was held on January 25, 2007 in Luck, Wisconsin. The hearing was not transcribed. The record was closed on April 3, 2007, upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

There are no procedural issues in this matter. The parties stipulated that the substantive issue to be decided is:

> Did the District violate Article IV.D. of the parties' collective bargaining agreement when it denied the Grievant's request for second and third payments upon his reactivation into the military? And, if so, what is the appropriate remedy based on the collective bargaining agreement as a whole?

BACKGROUND and FACTS

Northwest United Educators and the Board of Education of the School District of Luck are parties to a collective bargaining agreement that describes the wages, hours and working conditions for the teachers employed by the District. The agreement provides for a school calendar requiring teachers to be involved in direct student contact, in-service, and professional development activities for 186 days per year, from July 1 of the year through June 30 of the following calendar year. The agreement also provides that teachers are to be paid 1/186th of their contracted salary per day in the event they are required to work additional days. Although teachers work these 186 days generally between the months of September and June, they are paid over the entire year, in 26 bi-weekly payments. In addition, the collective bargaining agreement provides for various benefits, including a number of paid sick leave days and a number of personal days an employee may utilize in any year. The agreement also provides payment for military leave, which is the subject of this grievance.

The Grievant herein, Joe Bartylla, has been a middle school and high school science teacher in the District for 12 years. Over his tenure with the District, he has also coached various sports. In addition, Bartylla has been a member of the Army Reserves for 22 years. He currently holds the rank of Major in the Training Support Battalion. The Grievant is currently the only member of the Luck School District faculty to serve in the Reserves.

As a member of the Reserves, Bartylla is sometimes called for training or active duty during the course of the school year and is therefore absent from his teaching duties on those days that are not on weekends and when school is in session. Over a period of time, and under different school superintendents, Bartylla has been treated differently for pay purposes while on such military leaves. At one time, he was paid his regular salary for the two days he was on active military duty, and had two days deducted from his accumulated sick leave. In 2003, the District paid Bartylla the difference in his army per diem salary and his teacher contracted salary divided by 186.

Because of the lack of clarity and differences in the manner in which Bartylla was compensated during periods of leave for active military duty, he approached Marty Messar, the NUE unit director and member of the teacher bargaining team, about negotiating contract language to cover pay while on military leave. Messar agreed that it was in the best interests of the bargaining unit membership to see if the collective bargaining agreement between the District and NUE could include language covering the situation. Messar looked for language to propose for inclusion in the 2001-2003 contract. None of the other 27 school districts that are part of NUE had such language, but he found language covering this topic in the collective bargaining agreement between Chippewa Falls Area Unified School District and Chippewa

Falls Federation of Teachers Local 1907, WFT, AFT, AFL-CIO. The contractual provision he found in that contract was proposed by NUE in bargaining for the 2001-03 contract and reads as follows:

> ***Section D. Military Leave***
>
> 1. An employee who is a member of a reserve component of the Armed Forces who is required to enter upon active duty or temporary special service shall be paid the difference between the amount of pay received from the Federal or State government for such duty and normal earnings calculated on the basis of normal weekly salary for time lost while on such duty up to a maximum of four (4) weeks per year. However, if such employee has the option of filling such required service time outside of the school year, no benefits shall be paid for election to take it during the school year. Such items as subsistence, rental and travel allowance shall not be included in determining pay received from the government.
>
> 2. Any employee covered by this agreement who leaves to enter the Armed Forces either by enlistment during the times of declared national emergencies or by enlistment if satisfactory evidence is provided to the superintendent that such enlistment is for the purpose of selecting a branch of the Armed Forces rather than submitting to the draft under the Selective Service and Training Act of 1940 or any other similar Federal legislation which may be passed, shall be granted a leave of absence until such time as service in the Armed Forces is terminated. The employee shall accumulate job seniority.

Messar does not recall any discussion regarding the proposed language which was agreed to by the parties. Todd Route, Vice President of the School Board, who served on the District bargaining team for the '01-'03 contract remembers that the Union brought up the issue of military leave. He recalls that the rationale for the proposal was to avoid financial hardship to teachers. Route said that the parties did not spend much time on the issue: it was a good idea and there was agreement. The parties did not discuss the specific language. Jody Seck, Treasurer of the School Board, was also on the bargaining team at that time. She recalls that it was a union proposal and recalls Messar saying that it was difficult to find language. As there was nothing to compare it to, the Board accepted the language as it was read.

The practice of the District and NUE is that the actual language of new proposals is hammered out by Messar and Rick Palmer, the superintendent for the District. Palmer agrees that the intent of the parties was to avoid financial hardship to members of the bargaining unit when they are called up. He has no idea why the phrase "normal earnings calculated on the basis of normal weekly salary for time lost" was omitted from the collective bargaining agreement between the District and NUE.

In January 2004, Bartylla was called to active duty by the Army. He was initially activated for 179 days. On the day he was to return to civilian life, "demobed", his tour of duty was extended. Subsequently, again on the day he was to be demobed, he was extended again. Ultimately, he served 730 days of active duty, from January 2004 through January 2006. Although federal law permitted Bartylla 90 days from being demobed to his return to his place of employment, he returned to teaching at the start of the second semester of the '05 –'06 school year.

Pursuant to the collective bargaining agreement, Bartylla sought military leave pay for three years, based on the difference between his daily rate of pay in the military and his daily rate of pay as a teacher, calculated by dividing his contracted rate by 186 to determine the daily rate. Bartylla worked with the District's payroll person, Dawn Bille, who determined that he was due $949.56 for the first school year, '03-'04, that he was on active duty. Palmer okayed the payment, although he did not review the calculations.

At all times during his activation, Bartylla kept Palmer apprised of his status, including e-mailing the fact that his tour of duty was extended twice. Bartylla requested the military leave payment for the second two years of this tour of duty, school years '04-'05 and '05-'06, but this was denied. During his 730 days of active duty, Bartylla returned home to attend his mother-in-law's funeral.

After being demobed, Bartylla contacted Messar regarding military leave pay for the second and third years. Messar agreed with Bartylla's interpretation of the collective bargaining agreement and a grievance was filed on Bartylla's behalf. The parties worked to reach resolution, but ultimately were unable to do so. In the course of trying to resolve the matter, Palmer contacted the Chippewa Falls School District to determine what, if any, experience they had with interpreting the language. No guidance was forthcoming from this contact, and the matter proceeded to arbitration.

RELEVANT CONTRACT PROVISIONS

ARTICLE IV – TEACHER RIGHTS

. . .

D. An employee who is a member of a reserve component of the Armed Forces who is required to enter upon active duty and temporary special service shall be paid the difference between the amount received from the Federal or state government and contracted teaching salary for such duty up to a maximum of four (4) weeks per year.

However, if such employee has the option of filing [sic] said required service time outside of the school year, no benefit shall be paid for election to take it during the school year. Such items as subsistence, rental and travel allowances shall not be included in determining pay received from the government.

An employee covered by this agreement who leaves to enter the Armed Forces either by enlistment during the times of declared national emergencies or by enlistment if satisfactory evidence is provided to the superintendent that such enlistment is for the purpose of selecting a branch of the Armed Forces rather than submitting to the draft under the Selective Service and Training Act of 1940 or any other similar Federal legislation which may be passed, shall be granted a leave of absence until such time as service in the Armed Forces is terminated. The employee shall accumulate job seniority.

ARTICLE VI – GRIEVANCE PROCEDURE

The purpose of the procedure is to provide an orderly method for resolving grievances. A determined effort shall be made to settle any such differences at the lowest possible level in the grievance procedure, and there shall be no suspension of work, or interference with the operations of the school system. Meeting or discussions involving grievances or these procedures shall no interfere with teaching duties or classroom instruction. Aggrieved party may by NUE.

. . .

Step IV

Grievances not settled in Step III of the grievance procedure may be appealed to arbitration provided:

1. Written notice of a request for arbitration is made with the Clerk of the Board within fifteen (15) school days of receipt of the Board's answer in Step III.
2. The issue must involve the interpretation or application of a specific provision(s) of the Agreement.

When a timely request has been made for arbitration, the parties or their designated representatives shall attempt to select an impartial arbitrator. Failing to do so, they shall within fifteen (15) school days of the appeal, jointly request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators. As soon as the list has been received, the parties or their designated representative shall determine by lot the order of elimination, and thereafter each shall, in that order, alternately strike a name from the list, and the fifth and remaining name shall act as the arbitrator.

The arbitrator shall schedule a hearing on the grievance and after hearing such evidence as the parties desire to present, shall render a written recommendation. The arbitrator shall have no power to add to, subtract from, modify or amend

any terms of this Agreement. A decision of the arbitrator shall be binding upon both parties and shall be final except:

1. When the decision would reduce or eliminate aids provided for school operation from State or Federal government or other sources.
2. If the decision is in conflict with an existing State or Federal law.

ARTICLE X – LEAVE

A. Sick leave is to be 14 days per year acculumative to 115 days. . . .

. . .

E. Personal leave – Each teacher shall receive three personal days per year.
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ARTICLE XVI – SCHOOL CALENDAR

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D. If by law, or by any other reason, the calendar exceeds 186 days, teacher salaries will be adjusted by 1/186 per day increase for each day over 186 days as per Schedule A.

. . .

ARTICLE XXII – PROFESSIONAL COMPENSATION

. . .

B. Salaries shall be paid every other Friday, for a total of 26 payments per year.

POSITIONS OF THE PARTIES

It is the position of NUE that the Grievant is entitled to military leave pay for each of the three school years for which he was called to active duty in the armed forces. The Grievant was paid properly for the first year of his activation and he is entitled to payment on a similar basis for each of the other two contract years during which he was on active duty, for a total of four weeks difference between his military daily rate and his teacher contract daily rate.

The Union contends that application of the standards for interpreting contract language support the grievance. Specifically, giving effect to all clauses and words of the contract requires that the military leave benefit be made available to teachers for up to four (4) weeks per year, which means for each of the three years Bartylla was on active duty. According to NUE, the District relies on the language of Article IV, Section D which references "who is required to enter upon active duty" and ignores the last part of the same sentence which references "per year."

The Union also relies on the arbitral standard that an agreement must be construed as a whole. In other portions of the collective bargaining agreement the words "per year" are used when a benefit is intended to be renewed each contract or school year. This includes references to paid sick and personal leave, as well as payment to teachers of 26 payments per year. Accordingly, the grievant is entitled to up to four (4) weeks of differential pay for each year that he was on active duty.

Both the District and the Union agree that the intent in negotiating this language was to ensure that an employee not suffer financial hardship by becoming an active participant in the Armed Services. The Union points out that the District has failed to demonstrate why financial hardship would only occur upon initial activation of a teacher, and not in subsequent years of that individual's activation. For the Union, a secondary reason for seeking inclusion of this language was to ensure that persons who are activated are paid in a consistent manner whenever they are on active duty so as to avoid what had happened to Bartylla in the past. That is, under two different superintendents Bartylla's situation and pay status had been treated differently. NUE's objectives included ensuring that future activations of Bartylla or any other teacher bargaining unit member would be treated in the same manner.

While all bargaining team members, both NUE and District, agree that the intent was to avoid financial hardship, and that there was very little discussion regarding the specific language, none of the members of the bargaining teams was able to explain why the portion of the Chippewa Falls language, "calculated on the basis of normal weekly salary," was omitted when the 2001-03 collective bargaining agreement was memorialized. The Union contends that there is no basis for reformation of the contract to include this language, as there is no clear showing that it was omitted in error. However, the Union also argues that whether this language is included or not, the resultant payment owed to Bartylla would be the same. It comes to this conclusion because under a teacher contract, the daily rate of pay is determined by dividing the contracted salary by 186, the number of days in a year that an employee is under contract with the District. If one were to base the calculation on weekly salaries, one would simply multiply this amount by five (5), the number of days in a week that a teacher is under contract. In contrast, when in active military service in the US Army, an individual is "owned" by the Army, 24 hours a day, 7 days a week, 365 days per year. Accordingly, the daily rate of pay is determined by dividing the annual salary by 365, while the weekly rate of pay is determined by dividing the annual salary by 52.

NUE acknowledges the fact that the Grievant's annualized salary in the military is greater than his contracted teacher rate working for Luck School District. However, the military salary represents payment for 365 days a year. In contrast, Luck School District teachers are paid for 186 days in a year and are free to enter into additional employment on weekends, during summers, and even after the 8 hour school day if they so desire. Teachers are paid for 186 8-hour days, and any calculation of teaching daily rate based on some other basis is inconsistent with the language of the collective bargaining agreement and past practice. The grievance should be sustained and Bartylla should be compensated for the two additional years that he was on active duty, on the same basis as he was paid during the first year, the 2003-04 school year.

In contrast, the District contends that it complied with Article IV, Section D of the collective bargaining agreement when it denied Bartylla's request for second and third payments. The District argues that Bartylla received substantially more pay per month and per year while activated in the military than while teaching and that he is seeking a windfall to which he is not entitled.[1]

It is the position of the District that the parties intended to incorporate the language of the Chippewa Falls contract into its collective bargaining agreement with NUE and that the doctrine of mutual mistake should be applied, resulting in reformation of the contract to reflect the Chippewa Falls language. The language, as written, does not reflect the true intent of the parties at the bargaining table, and, therefore, the appropriate remedy is to reform the contract. The omitted phrase "calculated on the basis of normal weekly salary for time lost" is, according to the District, critical and makes clear that Bartylla is not entitled to the sought after second and third payment and he was not eligible for the one he received. This is based on the Grievant's testimony that while on active duty he received a monthly salary and was paid twice a month, unlike while in the reserves when he was paid at a daily rate. Teachers are also paid on a bi-monthly basis. The District calculates that Bartylla received a "normal weekly salary" in the military of approximately $1322 in 2004-05 and $1369 in 2005-06. Grievant's 2004-06 annual teaching salary was $46,658, with a "normal weekly salary" of approximately $897, significantly less than while on active duty, making him ineligible for payment under the military leave provision of the collective bargaining agreement.

The District contends that it complied with the clear and unambiguous language of the parties' collective bargaining agreement. The Grievant is only entitled to a payment pursuant to Section D, Article IV in the event that his teaching salary for a four week period is greater than his military salary for the same four week period. The critical word in Section D is "difference." If, as in Bartylla's case, the military earnings were greater than his teaching earnings would be, no payment is due.

[1] Although the District argues that the Grievant should not have been paid for the '03-'04 school year because he earned more on active duty than he would as a teacher, the District is not seeking repayment for that year.

The District also argues that the manner in which the daily or weekly rate is determined must be the same: the number by which the yearly salary is divided must be consistent in both calculations in order to be reasonable. The Grievant's calculation methods are inconsistent, dividing his teaching salary by 186 and his military salary by 365. The 186 is the number of days in the school calendar, but is not the actual number of days that a teacher works – it is common knowledge "that most teachers work additional days outside of the school calendar and school day, without additional compensation." Thus, the "daily rate" of approximately $250 is inaccurate. With respect to his military salary, however, he divided by 365 days, creating a daily rate of $188.42 for 2004-05. Grievant acknowledged that he did not work all of the 365 days, having some bereavement time and some personal time off. He did not, however, account for these days off in calculating his military rate of pay.

In addition to contesting the rate of pay, the District argues that, at most, Grievant was entitled to one payment at the time that he was called into active duty in 2004. The District bases this argument on the language of Section D, Article IV, which reads "required to enter upon active duty." Because there were no breaks in duty, and the Grievant was continually activated for the 730 days, the District was only obligated to make one payment to the Grievant, if his military earnings were less than his teaching earnings. The District finds the language, "an employee…who is required to enter upon active duty…" to be clear and unambiguous in providing a benefit when an employee enters upon active duty, not while on active duty or during active duty. According to the District, NUE ignores the triggering language when if focuses on the words "per year" in contending the Grievant is entitled to three payments.

Finally, the District argues that, should the undersigned not opt to reform the language of the agreement and should find the method of calculation included in the existing Section D, Article IV, to be ambiguous, that the bargaining history demonstrates that the District's interpretation more accurately reflects the parties' intent. The District contends that the Grievant's method of calculation is unreasonable and undermines the purpose and intent of the provision of the collective bargaining agreement. The District believes the grievance should be denied.

DISCUSSION

The parties bargained in good faith to include a provision in the collective bargaining agreement that would ensure that members of the bargaining unit who serve in the armed forces during the course of the school year would not suffer financial hardship as a result of that service. A secondary purpose, espoused by NUE, was to ensure that all members of the bargaining unit would be treated in a consistent fashion when activated, without regard to the administration or the school board then in charge. NUE proposed contract language and, with little discussion, the Board agreed to the inclusion of a military leave provision. The specifics were left to Messar and Palmer to finalize, but none of the members of the bargaining teams,

nor Messar or Palmer themselves, have any recollection as to why the language memorialized in the contract differs from the NUE proposal that was based on the Chippewa Falls language. In pertinent part, the proposed language stated:

> An employee who is a member of a reserve component of the Armed Forces who is required to enter upon active duty or temporary special service shall be paid the difference between the amount of pay received from the Federal or State government for such duty and normal earnings calculated on the basis of normal weekly salary for time lost while on such duty up to a maximum of four (4) weeks per year.

But, the language that was incorporated in the collective bargaining agreement is as follows:

> An employee who is a member of a reserve component of the Armed Forces who is required to enter upon active duty and temporary special service shall be paid the difference between the amount received from the Federal or state government and contracted teaching salary for such duty up to a maximum of four (4) weeks per year.

The contractual language differs from the proposed language in two respects. The first, which has not been raised as an issue herein, is that the Chippewa Falls proposed language references an employee "who is required to enter upon active duty or temporary special service" whereas the contractual language references an employee "who is required to enter upon active duty and temporary special service." The other manner in which the two clauses differ is at the heart of the dispute between the parties. The Chippewa Falls language describes the military leave pay as "the difference between the amount of pay received from the Federal or State government for such duty and normal earnings calculated on the basis of normal weekly salary for time lost while on such duty up to a maximum of four (4) weeks per year." The language incorporated into the NUE/Luck collective bargaining agreement describes the amount as "the difference between the amount received from the Federal or state government and contracted teaching salary for such duty up to a maximum of four (4) weeks per year."

The District urges the undersigned to apply the doctrine of mutual mistake and reform the contract to include the verbatim language of the Chippewa Falls contract in the Luck contract, contending that the existing contract language does not reflect the true intent of the parties. "A mutual mistake exists when both parties sign off [on] contract language that does not correspond with their actual agreement. In this limited circumstance, an arbitrator may reform the contract to reflect the true intent of the parties." ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, (BNA, 6TH EDITION, 2003, AT P. 439). The mistake must be mutual, not a unilateral mistake by one party. ID., AT P. 440.

In support of its request for reformation, the District cites Arbitrator McGilligan's award in HIGHLAND SCHOOL DISTRICT, MA-7973 (2/04). The issue in that case was whether the collective bargaining agreement resulting from a mediation-arbitration settlement correctly reflected the agreement of the parties. At issue was the wage rate for one cell of a wage scale where an amount that was not in line with any of the other increases was included in the printed collective bargaining agreement. The arbitrator found that the clear and unambiguous language relied upon by the Union did not reflect the intent of the parties. Accordingly, he reformed the contract to reflect the mediated agreement. The District also cites IRON COUNTY, MA-7442 (Yaeger, 11/93) in support of its argument. In that case, the mutual mistake was the negotiation of new wage rates based on published rates that were incorrectly established based on the County Clerk's unilateral change in the cost-of-living basis to be utilized in determining quarterly wage rates. The arbitrator discussed reformation in connection with the remedy to be awarded to the Union as a result of sustaining the grievance. The mutual mistake was in the assumption that the base rates had been correctly determined, which was not the case.

Here, there is no question that the language NUE proposed was the Chippewa Falls language. There is question, however, as to how changes to that language were made and came to be incorporated into the collective bargaining agreement between the parties. None of the participants in the bargaining process recalled discussion of the specifics of the proposal. All concurred that the intent was to prevent financial hardship, and all concurred that there was very little discussion. School Board Vice President Route testified that the deletion of the phrase regarding weekly salaries was inadvertent. But, he stated that there was no discussion on the point. School Board Treasurer Seck testified that she remembered Messar saying that language on this topic was hard to find. According to her, the proposed language was read and accepted as read. She has no recollection of discussions specific to discussing the "per year" aspect, nor discussing multiple activations. She offered no testimony regarding the basis of calculating the amount of pay to which an activated employee may be entitled.

Neither Palmer nor Messar, those charged with, according to Route, "hammering out" the specific language, recall why or how the language of the Chippewa Falls contract was modified to create the Luck collective bargaining agreement language.

The power of an arbitrator is derived from the language of the collective bargaining agreement. Here, the contract states: "The arbitrator shall have no power to add to, subtract from, modify or amend any terms of this Agreement." The remedy of reformation to correct a mutual mistake is generally understood to not violate this proscription against arbitral modification of collective bargaining agreements. That is, were the undersigned to find that a mutual mistake had occurred, the limits on the arbitrator's powers would not prohibit the reformation of the contract. In this case, however, I am unable to determine that a mutual mistake resulted in the change in the proposed language to that of the contract language. The testimony of the members of the bargaining team was not specific. Nobody testified that the changes were the result of a mistake. Nobody, in fact, recognized the first change noted above (from "or" to "and") and all testified that there was very limited discussion across the bargaining table. Route said that the change was "inadvertent." In fact, there was no

testimony as to how the final contract language was developed, or who put together the contract that was finally executed. Apparently, the parties left it to Messar and Palmer to "hammer out" the language, but neither had any recollection of this process.

Because it is not clear that there was a mutual mistake, I decline to incorporate the Chippewa Falls language into the NUE/Luck collective bargaining agreement.

In determining whether the District violated Section IV.D. of the collective bargaining agreement, there are two issues that must be addressed. The first question is whether Joe Bartylla is entitled to military leave pay once upon his activation in January 2003 or three times, once for each year that he was on active duty – during school years 2003-04, 2004-05, and 2005-06. The second question is, based on his military pay and his contracted teaching pay, whether he is entitled to any money from the School District for the period that he was on active duty.

Arbitral principles of contract interpretation require that the arbitrator, whenever possible, interpret the contract language in such a manner as to use the plain meaning of the words of the contract, as well as to give meaning to all of the words and clauses of the contract, construing the agreement as a whole. When the language in question is clear and unambiguous, extrinsic evidence, including the intent of the parties, should not be considered.[2]

In order to respond to the first issue, whether Bartylla was eligible for military leave pay once or three times, we look at the language of the provision of the collective bargaining agreement, specifically the sentence that has already been quoted:

> An employee who is a member of a reserve component of the Armed Forces who is required to enter upon active duty and temporary special service shall be paid the difference between the amount received from the Federal or state government and contracted teaching salary for such duty up to a maximum of four (4) weeks per year.

In order to separate the substance of the two issues, frequency of pay and amount of pay, we delete the words that address the amount of pay:

> An employee . . . who is required to enter upon active duty . . .shall be paid . . for such duty up to a maximum of four (4) weeks per year.

In its analysis, the District has focused on the first portion, "who is required to enter upon active duty". Rick Palmer, the District Administrator, in his letter of April 27, 2006 to Tim Schultz, NUE Executive Director, Mr. Bartylla and Mr. Messar, contends that payment is to

[2] See, generally, Elkouri and Elkouri, chapter 9 (BNA, 6th Edition, 2003).

be made upon initial activation of a member of the teaching staff into military service. This position was repeated in Dr. Palmer's letter of May 19, 2006 to Mr. Bartylla, as well as in the District's brief filed in this matter. The clear language of the contract does not state upon "initial activation." The District's interpretation of the language ignores the last portion of the sentence that states that payment shall be for "up to a maximum of four (4) weeks per year."

NUE, on the other hand, appears not to address the meaning of "who is required to enter upon active duty", the portion the District refers to as the "triggering language", and focuses, instead, on the "per year" portion of the contract clause. NUE points to other provisions of the collective bargaining agreement that utilize the phrase "per year" such as the sick leave provision, the personal leave provision, and the payment to teachers provision, to support its argument that "per year" means that the benefit repeats each school year, July 1 through June 30 of the ensuing calendar year.

As noted above, the parties did not discuss this contract provision in any detail at the time that it was negotiated into the contract. As such, there is no clear bargaining history to assist in interpreting this ambiguous language. Although the District contends it is not ambiguous, it is difficult to understand such a conclusion when the District's interpretation of payment upon initial activation clearly conflicts with NUE's interpretation of payment for up to four (4) weeks of each and every year of activation. In order to harmonize these two segments of the provision, it is necessary to analyze a number of possible scenarios.

The simplest situation is that where a Reservist is called up for a short period of time that does not extend beyond one school contract year. In that event, the individual is entitled to payment (as described more fully below) for no more than four (4) weeks of active duty. If the activation is for less than four (4) weeks, he or she would receive payment for the duration of the activation. If the activation is for four (4) weeks or more, payment would be for four (4) weeks. In the event the same Reservist is called to active duty again during the same school contract year, payment would be available only if the initial activation(s) had been for a duration of less than four (4) weeks, and there would be no payment due in the event that he or she had already received four (4) weeks of military leave payment.

The more complex situation occurs in the event a Reservist is called up for an period that spans school contract years, or in Bartylla's case, where his activation was extended (twice) on the days that he was to be demobed. Should such an individual receive less consideration than someone who is activated once in each of two successive years? Or, is there less hardship in being activated for a long period of time that extends beyond one teacher contract year than being activated for, perhaps, a shorter period of time in each of two or three successive years? Would Bartylla's benefit be different if he had been demobed for a period of 24 hours, or even two weeks, and then reactivated, rather than being "extended" on the day that he was to be demobed? An interpretation of the language that would not grant the benefit for more than the first activation under these scenarios does not make any sense, given the

"per year" aspect of the contract provision. Operationally there is no difference for both the Grievant and the District if Bartylla was demobed for 24 hours, or two weeks, and then reactivated or "extended" on the day he was scheduled to be demobed.

The District's interpretation effectively reads out the words "per year" if a period of activation extends over two teaching contract years. NUE's interpretation acknowledges that one must be activated to receive the benefit initially, and must be on active duty to receive the benefit in any contract year.

Accordingly, I find that the phrase "enter upon active duty" does not mean initial activation, but rather means that the individual is required to be on active duty, and is entitled to the military leave benefit for each teacher contract year that he or she is on active duty. Such conclusion is consistent with the notion that a person must be on active duty, having entered upon active duty, when he or she is no longer available to perform his or her teaching position because he or she has had to report for active duty. Thus, I find that Bartylla is entitled to the military leave benefit for each of the three teacher contract years that he was on active duty, school years 2003-04, 2004-05, and 2005-06.

The remaining question is the manner in which this military leave payment should be calculated. Section IV.D. measures the amount due as: "…the difference between the amount received from the Federal or state government and contracted teaching salary for such duty up to a maximum of four (4) weeks. . ." The contract clause is quite clear that the benefit is available only when an individual is unable to perform his or her teaching duties during the school year, and that the individual has not made the choice as to when he or she will be on active duty. The contract is clear that "… if such employee has the option of filing [sic] said required service time outside of the school year, no benefit shall be paid for election to take it during the school year."

We start from the undisputed premise that once on active duty with the military, one cannot engage in any other activities that generate income. The Army "owns" you 365 days per year, 24 hours per day, 7 days per week. Obviously, this does not mean that you are engaged in activities on behalf of the armed services all of those hours. It does mean that you are on-call, subject to orders from commanding officers during all of those hours, including while on personal or bereavement leave. Thus, the daily rate of pay for an individual on active duty is 1/365 of the annual salary. Men and women on active duty receive paid time off, unlike those in the teaching profession who are not engaged in teaching activity on weekends or during the summer months, but they are also not paid for that time, and are not subject to orders of the District Administrator or the School Board during those months.

To some extent Article XXII.B. of the collective bargaining agreement is misleading. It states that "[s]aleries shall be paid every other Friday, for a total of 26 payments per year." From this, the District has extrapolated a weekly salary for teachers of 1/52 of the contracted teaching rate. This method of calculation presumes teachers are under contract 52 weeks a

year. This is clearly contradicted by Article XVI.D. which provides that "if the school calendar exceeds 186 days, teacher salaries will be adjusted by 1/186 per day increases for each day over 186. . ." This section makes clear that teachers are paid to work 186 days even if their salary is paid over 52 weeks. While it is true that many teachers work more than 8 hours per day and more than 186 days per year for the District, they are paid for 186 days. The testimony of District Administrator Palmer confirms this in that he testified that teachers work 186 days and that if they leave employment with the District they are paid a lump sum for the unpaid amount rather than continuing to receive pay after they have severed the employment relationship.

Thus, the daily rate of pay for a teacher is 1/186 of his or her contracted salary. In Bartylla's case, his annual teaching salary was $46,658.00 in the 2004-05 school year. This means his daily teacher rate was $250.85. For the same year, Bartylla testified that his daily rate in the military was $188.42. This sum was calculated by dividing his annual military salary by 365, making his annual salary in the military for that year $68,773.30. As the daily military rate is less than the daily teaching rate, Bartylla is entitled to the difference, for a maximum of four (4) weeks of each teacher contract year that he was on active military duty.

The fact that a teacher called to active duty during non-teacher contracted days of the calendar year are not entitled to receive military pay provides additional support for the method of calculation espoused by NUE in this matter. If one compares the daily or weekly military pay to the daily rate of teacher pay that the District favors, one could only conclude that a teacher called to active duty during the summer is also entitled to receive a military pay differential. Inasmuch as the parties agree that the purpose of Article IV.D. is to avoid financial hardship to a member of the teacher bargaining unit as a result of being on active duty with the military, a claim for military leave pay during the summer months, when a teacher is able to earn money from the military while receiving the remainder of his or her annual salary that is actually earned during the school year (186 contracted days), would be considered nonsensical and categorically denied by the District if it were to be presented with such a claim. Given that military leave pay is not available for time that teachers are not required to be available to the District means that the District cannot claim that it pays teachers for 365 days of service each year.

The District appears to argue that for short term activations such as those Bartylla has experienced in the past, a daily rate is appropriate. For some reason, however, the District thinks there is a distinction to be made for an extended period of activation and a short-term activation. There is nothing in the collective bargaining agreement that supports such a differentiation.

Although I have declined to reform the contract to reflect the use of weekly rates of pay rather than the daily rate of pay comparison that the District has utilized in the past to pay Bartylla for time spent away from the District while serving in the military, it is appropriate to comment on the impact of using a weekly rate. The District simply divides the gross amount of a teacher paycheck by two to determine a weekly rate. In so doing, it, as noted above,

ignores the fact that the teacher contract year is 186 days, not 365. It also appears to presume a 7-day work week, which is obviously not the number of days in a week that a teacher is under contract. It is appropriate to divide the annual military salary by 52 to determine a weekly rate, or to multiply the daily rate by seven (7) to achieve the same result. But, comparison of these "weekly" rates continues the apples to oranges comparison that the District argues that NUE is doing when it divides the annual teaching salary by 186 rather than 365. If one were to accept that a comparison of "weekly" salaries was the correct way to administer the contract, one would have to have agreement on what "work weeks" are to be compared. In the military, one is working, or at least on-call, for 7 days. If the pay for seven days is the basis for comparison, then it must be compared to teacher payment for 7 days, not the 5 day work week that teachers work. If one compares 7 days of teacher contract pay to 7 days of military pay, one is performing the same comparison as when one compares the teacher daily rate ($1/186^{th}$ of the annual teaching contract) to the military daily rate ($1/365^{th}$ of the annual military pay).

It must be noted that NUE seeks the difference between Bartylla's daily military rate and his daily teacher contracted rate for four (4) weeks consisting of only 20 days. The District would, properly, object to Bartylla's seeking payment of four (4) weeks consisting of 28 days. Bartylla is not under contract on the weekends, and is not entitled to payment from the District in any amount for Saturdays and Sundays. This provides further support for calculation of the military leave differential on a daily basis, as has been done in the past, so as to avoid the conflicts that inherently arise when comparing a five (5) day with a seven (7) day work week.

Admittedly, it is counter-intuitive that Bartylla who earns more on an annual basis while on active duty in the military should receive any military pay differential when he is making significantly more than his annual teaching salary. However, when one considers that when not on active duty, teachers are under contract for 186 days and free to earn additional sums performing other work during the rest of the year, including co-curricular advising of student groups, coaching of sports and other opportunities on evenings, weekends and summers. In contrast, when on active duty with the military, one cannot earn any additional monies, creating a financial hardship for someone such as the Grievant who receives pay for coaching various sports during the school year and earns military pay for work he performs during the summer.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The grievance is sustained. The District violated Article IV.D. of the collective bargaining agreement when it denied military leave payment to the Grievant for the 2004-05

and 2005-06 school years. The District shall pay Joe Bartylla the sum of $1,248.59 for the 2004-05 school year and the sum of $1,383.40 for the 2005-06 school year, for a total of $2,631.99, less appropriate state and federal taxes.

The undersigned will retain jurisdiction for a period of 30 days following the issuance of this award for purposes of resolving issues of remedy.

Dated at Madison, Wisconsin, this 7th day of May, 2007.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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