

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**HOWARD-SUAMICO SCHOOL DISTRICT BOARD OF EDUCATION**  
and  
**HOWARD-SUAMICO EDUCATION ASSOCIATION**

Case 100  
No. 67149  
MA-13775

(Early Retirement Eligibility Grievance)

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**Appearances:**

**Robert W. Burns**, Attorney, Davis & Kuelthau, S.C., 318 South Washington Street, Suite 300, Green Bay, Wisconsin 543012, appeared on behalf of Howard-Suamico School District Board of Education.

**Suzanne Dishaw Britz**, UniServ Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303, appeared on behalf of Howard-Suamico Education Association.

**ARBITRATION AWARD**

Howard-Suamico School District Board of Education, herein the District, and Howard-Suamico Education Association, herein the Association, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Association as an Association grievance that concerned the eligibility for early retirement benefits of one of its members, Donna Melin. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held in the matter on January 31, 2008 in Green Bay, Wisconsin. A transcript was prepared. The parties filed written briefs and reply briefs by June 3, 2008 and the record was closed.

**ISSUES**

The parties did not stipulate to a statement of the issues. The District states the issues as:

Did the District violate the Collective Bargaining Agreement by its application of the 15 years' eligibility criteria in Article 14, Section A to deem eligible those employees who have worked 15 years without a break in the employment relationship with the District? If so, what is the appropriate remedy?

The Association states the issues as:

Did the District violate the collective bargaining agreement when it deemed Donna Melin ineligible for early retirement benefits following the 2007-2008 school year? If so, what is the appropriate remedy?

The District's statement of the issues is selected as that which most closely reflects the record and issue present therein.

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE IV- GRIEVANCE PROCEDURE**

**A. Purpose**—The purpose of this procedure is to provide an orderly method of resolving differences arising during the term of this agreement. A determined effort shall be made to settle any such differences through the use of the grievance procedure.

**B.** For the purpose of this Agreement, a grievance is defined as any complaint by a teacher, teachers and/or the Association regarding or relating to the interpretation, application or alleged violation of the terms of this Agreement.

**C. Procedure**

. . .

c) Request for arbitration shall be made to the Wisconsin Employment Relations Commission who shall designate a member of its staff as arbitrator. It is understood that the function of this arbitrator shall be to provide a binding opinion as to the interpretation and application of specific terms of this Agreement. This arbitrator shall not have power, without a specific written consent of the parties, to either advise on salary adjustments, except the improper applications there, or to issue any opinion that would have the parties add to, subtract from, modify or amend any terms of this agreement.

. . .

#### **ARTICLE XIV—EARLY RETIREMENT**

**A. Eligibility for Paid Benefits**—Teachers who have taught at least fifteen (15) years in the school district shall be eligible to receive early retirement benefits pursuant to this Article if they attain age fifty-five (55) by August 31. For each school year, the number of teachers eligible to avail themselves of this provision shall be ten percent (10%)

of staff, but no more than fifty percent (50%) of a grade in a school or fifty percent (50%) of a department (unless there is only one [1] teacher in the department), with preference based upon District-wide seniority. Teachers sharing time between schools shall be counted as an employee in the school at which they spend most of their time.

In consideration for the teachers' binding offer to accept early retirement benefits and sever employment, the District shall enter into a supplemental agreement binding the district and its successors to benefits promised as of the date the supplemental agreement is signed. Any necessary details spelling out the early retirement specifics are to be listed in the attached narrative Appendix F. Both the Association's representative and the employee shall sign the supplemental agreement.

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### **BACKGROUND AND FACTS**

Donna Melin, who was born on October 12, 1951, has been a teacher at Bay View Middle School in the District and in that capacity has been a bargaining unit member of the Association. She was originally hired in 1973 and taught full-time for five years until 1978 when she resigned for personal reasons. She was rehired by the District as a full-time teacher in 1996, was placed on the salary schedule then with three years experience,<sup>1</sup> did not have any sick leave carry over from her previous employment with the District, completed probation after the 1998-1999 school year, and has been continuously employed as a teacher since then. As of the start of the 2007-2008 school year she had a combined total of 16 years of teaching for the District, with the 2007-2008 school year being the 17<sup>th</sup> year.

At the hearing in this matter the testimony of Melin and former District Superintendent Fred Stieg differed as to their recollections of whether early retirement was discussed when Stieg interviewed Melin on her return to the District in 1996. The District was interviewing for a teaching position. It has an interview process for candidates that was modified for Melin because Stieg knew her through an acquaintance at church, dealing with her family, and other things. Melin's recollection was that the issue of early retirement or eligibility for early retirement was not discussed. Stieg's recollection was that he indicated to Melin that the District had early retirement and if she stayed there for 15 years she would have it, from that point going forward.<sup>2</sup>

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<sup>1</sup> Under the applicable collective bargaining agreement an experienced teacher's placement on the salary schedule can vary depending on an evaluation of the qualifications of the teacher as determined by the Administrator with the teacher, subject to Board approval.

<sup>2</sup> As discussed below, it is not necessary to make a factual determination as to which recollection is the more accurate.

In January 2006 Melin attended a District retirement forum to gather information about possibly retiring. She had previously spoken with Association representatives, and she held the understanding that the 15 years of teaching requirement for early retirement eligibility did not need to be consecutive. At the 2006 forum she gathered some written information prepared by the District, including the topic of early retirement, none of which mentioned consecutive, without a break in service, or any similar condition as to the 15 years of teaching requirement. No such condition was mentioned at the forum. She also attended a District retirement forum in January 2007. There was no written or verbal mention of a consecutive or similar condition at that forum or in the materials provided then by the District. Thereafter, Melin contacted the District about early retirement benefits questions. She was informed then that the District would contact her as to her eligibility. On February 7, 2007 she received an email from the District's Assistant Superintendent of Human Resources which stated:

Betty forwarded your recent e-mail to me and asked that I respond to your question concerning years of service in the District and your retirement eligibility.

District records indicate that you worked as a teacher in our district for five years and then left the district. After several years of teaching elsewhere you applied for a teaching position in our district and were re-hired. At the conclusion of this year you will have completed ten years of teaching in our district since your most recent date of hire. You are wondering if the five years that you taught in our district prior to quitting to teach somewhere else will count towards the 15 years of District teaching experience which is required to be eligible for teacher early retirement under Article XI [sic] of the Master Agreement.

I am very sorry to have to inform you that the five years in question will not be applied towards the voluntary early retirement eligibility requirement of fifteen years of District teaching service. You were considered a new hire when you were rehired and your past years of service were forfeited when you resigned from the District. This conclusion is supported by your position on the seniority list, which does not recognize your prior service. Article XII,B,4)a., specifically states that seniority is calculated from "a teacher's most recent date of hire in the bargaining unit." Also, the early retirement language of the contract references the use of seniority as a method of selection who will be allowed to retire when there are more people wishing to retire at the same time than is allowed by the contract. To assert the early retirement contract language does not require the fifteen years of District teaching service to be consecutive years would be inconsistent with the seniority concepts found in the retirement language and elsewhere in the contract. The District has always interpreted Article XI [sic] as requiring the fifteen years of District teaching experience to be consecutive years.

. . .

(emphasis supplied)

Thereafter, a grievance was filed on May 8, 2007 alleging the District violated Article XIV – Early Retirement of the collective bargaining agreement because Melin’s prior years of service with the District were not counted toward her eligibility for contractual retirement benefits. The grievance was denied, leading to this arbitration.

After the grievance was filed the District changed it’s written materials used at retirement forums to add the word “continuous” to the 15 year teaching requirement to express what it then understood to be eligibility for early retirement.

The bargaining history of the parties reflects that in the 1981-82 and 1982-83 contracts the parties agreed to make recommendations for early retirements for subsequent contracts. The provision was intended to benefit the long-term teacher. The 1983-84 contract contained the first actual provision for early retirement. With one exception not relevant here, the provision was identical to what the Association proposed during bargaining. As to eligibility, it stated:

1. Eligibility

Teachers who have taught at least fifteen (15) years in the School District shall be eligible to receive early retirement benefits from the STRS as authorized by Wis. Stats., 43.245(2)(bm). This rule would begin in 1985 in the Howard-Suamico School District.

For the 1987-89 contract the eligibility language was changed to read:

1. Eligibility- Teachers who have taught at least fifteen (15) years in the school district shall be eligible to receive early retirement pursuant to this Article if they attain age 55 by June 30<sup>th</sup> in the year they retire. For each school year the number of teachers eligible to avail themselves of this provision shall be 14, but no more than 7 from one school building, with preference based upon District wide seniority. Teachers sharing time between schools shall be counted as an employee in the school at which they spend most of their time.

During negotiations for the 1981-82 contract and in each negotiation thereafter there was no discussion as to whether or not the years of teaching were to be continuous, consecutive, needed to be without a break in service, or in the aggregate. In negotiations and contract language there has never been any reference to administrative service being included in the determination of years of service for purposes of early retirement. In later contracts there were limitations added as to the date by which a teacher must attain the age of 55, and limits as to how many teachers can retire in a year. An attempt by the District to negotiate an increase in the minimum number of years from 15 to 20 was not agreed to by the Association. For the 2001-03 contract the parties negotiated other changes which produced the language dealing with eligibility requirements, the first sentence of which is essentially the same as currently in Article XIV with the exception of the date by which to attain the age of fifty-five (55).

In bargaining for the 2001-03 contract the main focus of negotiations in the early retirement area was to correct the language and provisions that the EEOC had determined were discriminatory in reference to age. The bargaining provided the parties an opportunity to redo parts of the early retirement package, and to put together a wage package on par with other districts in the conference. To move from concept to cost, the parties shared and used costings and information as to actuarial assumptions based on totals of past and projected retirees in considering financial and other implications for the early retirement provisions. Exhibit D-12 was among those, and listed as past retirees, including among others, Tom Stevens, Elmer Perala and MaryAnn Doucha.<sup>3</sup> Lists of projected retirees for 10 years, also in Ex. D-12, included, among other things, names, eligible retirement year, projected retirement year, employment start date, birth date, and age at eligible retirement. For start date the District used the last date of hire. Melin's name is not on that projected retirees list. Teacher Kathy Wingfield (d.o.b., 3/5/54) is on the list with a start date of 8/22/96, which is the same start date as Melin's second hire. Wingfield's eligible retirement year on that document is 2011. Other lists of teachers were used during the same negotiations as to the topic of early retirement. One list of projected retirees, Ex. D-3, lists Wingfield with a projected retirement year of 2011. Melin is not on that list. Another list used at that time in preparing projections, Ex D-7, has a retirement year for Melin of 2012, and Wingfield (identified there as Brenda), with a projected retirement date of 2012. In the preparation and use of the various lists, the individual teachers' data was not reviewed for accuracy. Individual people were not bargained.

Among former bargaining unit members who received the early retirement benefit was Thomas Stevens. He was hired for the 1969-70 school year as a full-time teacher and part-time Vice Principal. For 1971-72 he was a Principal and not a teacher. He was a full-time teacher for the following two years. He then provided the District with a letter of resignation as a teacher effective September 10, 1975, so that he could pursue outside employment. By letter of October 27, 1975 the District allowed him to engage in other full-time employment for a maximum of two years provided he accept a teaching contact with the District at the termination of the outside employment. His accumulated sick days carried forward when in 1977-78 he returned to full-time teaching for two and one-half years, when he ceased teaching and became as Assistant Principal and Athletic Director in March 1981. He worked for seven and one-half years as an Assistant Principal and did not teach during that time. In 1988-89 he returned to part-time teaching and part-time Athletic Director duties, and his seniority as a teacher started over at that time. He again began teaching full-time in 1989-90 and remained a teacher until retiring at the end of 1996-97. In letters from him to the District seeking Administrative positions he requested leaves of absences from his teaching positions. He lost his departmental seniority in the bargaining unit when he left the unit for administrative work, with his seniority in the bargaining unit starting over in 1988-89. At retirement he had a total of 16 years of teaching with 8 or 9 years of uninterrupted teaching immediately before retiring. He did not teach 15 consecutive years in the District. The District considered the two year outside employment as a leave of absence. When he applied for and was granted full early

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<sup>3</sup> Details of their retirements are discussed below.

retirement benefits there was no conversation with the administration about 15 consecutive years of teaching as a requirement, nor were any special arrangements or agreements made with the administration as to his retirement. At that time he was not told by the District that the District considered his entire employment history, teaching and administrative, in looking at his eligibility for retirement.

Elmer Perala received early retirement benefits as a member of the bargaining unit. He had been an administrator in the District for a number of years and then began teaching. He taught for six or seven consecutive years before applying for early retirement under the CBA. He did not have a break in employment with the District before retirement. His total years of service to the District when combining administrative and teaching years were at least 15. Before leaving administration, and without the Association's consent, he and the District made a special agreement or arrangement whereby his combination of administrative and teaching years would be considered years of service for early retirement benefits. At the time of his transfer to teaching the Association leadership was involved in some of the discussions concerning Perala's agreement with the District, but the record does not disclose what the nature of those discussions were or if there was any formal Association consent to it. When he notified the District of his intent to participate in the early retirement program as outlined in Article XIV, the District sent a memo to him dated January 30, 1997, stating:

Your request to participate in the early retirement program as provided by Article XIV of the 1995-97 HSEA Master Agreement has been received.

Your application of this early retirement provision is somewhat different than what normally occurs in the bargaining unit because your total number of years working in the district are a combination of your administrative and teaching experience in the district. However, upon your leaving the administration to transfer to a teaching position, it was agreed that your years of service also would be transferred not only for salary schedule placement, but also for early retirement.

Therefore, your request is approved to participate in the early retirement provision of the 1995-97 Master Agreement between the Howard-Suamico Board of Education and Howard-Suamico Education Association.

Full-time Administrators do not earn seniority in the bargaining unit. Perala's seniority in the bargaining unit started when he first became a teacher for the District.

MaryAnn Doucha was also listed on Ex. D-12 as having retired. She had been a substitute teacher for 11 years outside of the bargaining unit, and was a full-time teacher for 12 years in the bargaining unit. When she retired in about 2000 she was given the single health insurance plan for approximately 14 months, but no other benefits under the early retirement provisions of Article XIV. Her letter requesting health insurance benefits stated, among other things, that she did not qualify for the early retirement package. The District's memorandum to her of December 15, 1999 stated, among other things, that the approval of her request

. . . was based on the merits of your particular circumstances. It does not determine practice or set precedence for you or any other bargaining unit member.

Although one of the Association officers may have been aware of the arrangement, the record does not reflect any consent of the Association to that arrangement.

There were others who, at various times, inquired of the District as to their eligibility for early retirement under the collective bargaining agreement and the District took the position that they did not qualify. Tom Appel started employment with the District in administration and worked in that capacity for nine years. The District took the position that his initial administrative experience would not qualify for early retirement under the HSEA contract. He had left the District to take on a teaching role in the Green Bay School District for four years, and in approximately 2001 returned to the District as a teacher, serving a probationary period until the end of the 2003-04 year. By email of September 11, 2003, the District Director of Human Resources wrote to Appel with the District's position that he was not eligible for early retirement. At the time of that email the Director of Human Resources was not aware of the Stevens and Perala situations, and now feels that the part of his email concerning recognizing administrative service towards teacher retirement is not an accurate representation of the District's position. The email stated in pertinent part:

Your prior years of service do not count towards retirement eligibility as a teacher. The master agreement expressly states "Teachers who have taught at least (15) years in the school district" (emphasis added) are eligible for early retirement benefits. Your previous employment with the District was as administrative and not teaching and therefore does not qualify for teacher early retirement. In addition, had your prior service been as bargaining unit member, your break in service would have resulted in the loss of those nine years as a credit towards meeting the minimum years eligibility requirement.

Also, I have been told that you had a conversation on this issue with Superintendent Stieg at the time you were offered your current teaching position. Mr. Stieg informed you at that time that your years as an administrator would not count towards teacher early retirement.

(emphasis supplied)

Appel is still teaching for the District.

Chuck Templer is a former teacher for the District who, before accumulating 15 years of teaching service for the District, moved to an administrative position and then severed his employment with the District to become a principal in the Green Bay Schools. He then went to the Pulaski Schools and finally returned to the District as a principal. While interviewing for the District principal job he was informed by the District that it would not consider his previous employment at the District as an administrator for retirement benefits. The administrators also had a retirement plan in their handbook.



John Lerza was a teacher who at one point considered moving out of state. He spoke with the District Superintendent about benefits. He was counseled then to take a leave of absence rather than retiring in order to preserve benefits. He was told that if he were to sever his employment he would have lost his early retirement, what a break would do with the Wisconsin Retirement System, the difficulty he may have in finding another job if he chose to return, and other things. He requested and was granted a one year leave of absence, which he took before returning to the District.

Further facts appear as are in the discussion.

### **POSITIONS OF THE PARTIES**

#### **Association**

In summary, the Association argues that the contract language is clear and unambiguous and does not include a requirement for “continuous” or “consecutive” years service for early retirement. The arbitrator need only look at the four corners of the document and the plain meaning rule is to be applied where, as here, the contract language is clear and unambiguous. The District violates the language when it deems Melin ineligible to retire in 2007 with contractual early retirement benefits. It is clear that neither the word “consecutive” nor “continuous” appears in the language. It is also clear the District-wide seniority is referenced only as a means of determining eligibility in the event grade, departmental or total staff maximums are exceeded. Absence of the term “consecutive” defines “at least 15 years” as an aggregate reference. Melin taught more than 15 years in the District, 5 initially and 12 since her rehire. Teachers must “attain age fifty-five (55) by August 31” to be eligible, with Melin’s date of birth of October 12, 1951, she met the requirement for February, 2007. Only if District, grade and department percentages are exceeded does seniority become a determining factor. The District’s claim of consecutive and continuous seniority to be eligible is completely wrong. It makes no sense. Its own witnesses admit the word continuous does not exist in the contract. Arbitral authority supports the Association point that the total years do not have to be continuous if there is prior employment or more than one date of hire.

The Association argues that bargaining history supports the Association’s position. The Association’s bargaining proposals for the 1983-84 contract provided that “(t)eachers who have taught at least 15 years” would qualify. The fact the Association’s language was accepted by the District without substantive modification lends credence to the Association’s position that aggregate years is the determinative factor for eligibility. For the 2005-07 contract the requirements have remained essentially unchanged since 1983-84. The only modifications are the date to reach age 55 and limits on how many teachers can retire in a given year. Association negotiators were never involved in negotiations where the idea of consecutive years was discussed as a requirement. District negotiators testified that at no time did negotiations or discussions take place concerning continuous years of service as a requirement. The fact that such discussions never occurred fully supports the Association position.

The Association also argues the Tom Stevens' retirement supports the Association's position that consecutive years of service are not required. At no time during his career did he attain 15 consecutive years of teaching. He had periods of sprinkled administrative service between teaching and also a two-year break in service while he worked full-time for a Congressman. Although he had only 8 years of uninterrupted years of teaching, he taught a total of 16 years in the District. The fact that 16 years of teaching were not continuous was not considered when he spoke to Stieg about retiring. Stevens did not have a conversation with administration wherein "consecutive" years of teaching was mentioned as a requirement. There were no special arrangements made for him. And, the evidence showed that Steven's separated his employment to become fully employed elsewhere. His September 2, 1975 letter states he was resigning and paid a penalty for breaking his contract. Two months later the District formally determined he would be able to return. Any arrangement for a leave of absence was an afterthought. If he were truly on a leave of absence he would not have been required to pay a breach of contract penalty. His career is similar to Melin's. Both have interrupted years of teaching which total more than 15 years. The manner in which Steven's retirement was handled was consistent with the contract and supports the Association's position that all of Melin's teaching years must be considered, regardless of the fact they were not continuous.

The Association contends that Elmer Perala's retirement was the result of a special deal and does not support the District's position. The District purports that Perala's retirement, a long time administrator, supports its position. But this was a prearranged deal made while Perala was still an administrator and before he became a teacher in the bargaining unit. The District claims that he was eligible because of a combination of administrative and teaching years. But Stieg admitted Perala's combination of years was different that what occurs in the bargaining unit, and that there is nothing in the collective bargaining agreement which allowed inclusion of administrative years for eligibility. Attorney Rader concurred with Stieg and also acknowledged that administrative service had never been a determining factor for contractual benefits. Human Resources Specialist Freeman recognized that administrative service does not count toward eligibility. And, Perala's retirement fails to support the District because he did not have the requisite years of service as a teacher. He only taught 4 to 6 years. Arbitral authority holds that non-unit service could not be cited in a similar situation. Here the parties' agreement does not include administrators in the recognition clause and the early retirement Article refers to "teachers who have taught". It is illogical for the District to assert that Perala's consecutive years of service qualify him, and at the same time admit that administrative years do not count. Perala's special deal while an administrator did not have the Association's blessing, any suggestion that his retirement substantiates the District position in this case is without merit.

The Association further argues that the District is confused as to what constitutes a practice. The District witnesses testified that their interpretation of the contract had been the practice, but this mysterious interpretation is not a practice. Regarding work in an administrative capacity for Templer, the collective bargaining agreement has no bearing on

what terms are negotiated for individual administrators. Any so-called practice by virtue of administrative conversations with Templer is irrelevant to this case. The retirement forum documents demonstrate there was no suggestion of consecutive or continuous years as a requirement until after the instant grievance was filed. And Melin is admittedly the first bargaining unit member with two different dates of hire whose years of service are exclusively as a teacher and who has more than 15 years of service. As to the requirement that a past practice be unequivocal, regular and uniform, Melin is the first member with two dates of hire entirely in a teaching capacity. Stevens is the next closest example and that supports the Association position. The past practice requirement that it be over a reasonable period of time and clearly enunciated is not met because the District never expressed its interpretation of the contract to the Association prior to Melin's inquiries. A past practice cannot occur in secret. And the practice must be accepted and acted upon by parties through their authorized agents. Connivance between an individual and their supervisor is not a past practice unless recognized by those responsible for negotiating the contract. Perala's retirement was an individually bargained deal while he was an administrator, and nothing to do with the clear meaning and intent of the contract language. The District has failed to produce evidence supporting its continuous service theory, including administrative service, or that an alleged practice to that effect exists.

The Association contends that contractual years of service and seniority are two separate and distinct concepts. The District does not recognize that the very contract language that calculates seniority from a teacher's most recent date of hire in the bargaining unit actually recognizes the fact that teachers can have more than one date of hire. The District fails to recognize that the agreement uses seniority only as a means to weigh a teacher's retirement application, not eligibility, in the event contract maximums are exceeded. A teacher may have more than one date of hire, but preference lies with who has greater seniority. This balances the teacher interests, citing arbitral authority. And the contract does not condition eligibility on something like continuous service from original date of employment. A teacher does not forfeit entitlement if there is a break in employment and a teacher with more than one date of hire is eligible if they teach at least 15 years in the District. The Stevens case is illustrative of losing seniority but not eligibility.

The Association argues that the arbitrator cannot add words to the terms of the early retirement language. The language has been unquestioned since 1983-84. The issues of years of service was brought to the bargaining table once in the early 1990's, but has remained unchanged. This grievance is a result of the Human Resources Director applying his own interpretation to the contract language. To agree to the District's position would require the arbitrator to ignore the clear contract language. Reading the word "consecutive" or "continuous" into Article XIV would require that arbitrator go beyond the authority in the contractual grievance procedure which does not allow the arbitrator to add to, subtract from, modify or amend any terms. The language in this dispute is clear and unambiguous, which must be given effect, citing arbitral authority.

The Association further contends that the parties never agreed to discount prior employment for purposes of early retirement eligibility. At no bargaining session did the District attempt to add the word “consecutive” or “continuous” to the contractual years of service. The District’s assertion that the retirement benefit has been consistently applied is flawed. Administrators are not covered by the agreement, making the Templar and Appel circumstances irrelevant. Melin is sure there was no retirement discussion with Stieg. Zimdars, who purported at the hearing to know about the practice, had to defer to Freeman on the question when Melina inquired. The District’s arguments and actions are inconsistent in view of the Stevens retirement. The cost of a contractual provision is not a valid defense. The focus in 2001-03 was to avoid EEOC problems and the parties used lists to estimate total liability, not to review liability for each individual teacher. The costing has nothing to do with the requirements an individual must meet for retirement eligibility. Cost is not a defense for not complying with an agreement. The information used during the 2001-03 negotiations is irrelevant to the instant dispute and cannot be relied upon to decide the grievance. The data itself contains errors, and some retirees on the lists have administrative years counted. Key Association witnesses were present and testified at the hearing. There is nothing on record which demonstrates that Dennis Eisenberg would have offered any other testimony regarding the 2001-03 negotiations than that offered by the bargaining team members who did testify. The District’s reliance on other contractual provisions is misplaced. Probation periods are irrelevant to total years of service. Placement on the seniority list does not determine eligibility and Stevens lost his. There is no contractual connection to sick leave. The discretion on salary placement is not present with respect to retirement.

## **DISTRICT**

In summary, the District argues it never agreed to count prior employment upon rehire towards the eligibility requirement for early retirement benefits. Supported by the historical background of the early retirement language, in order to meet the eligibility requirements, teachers must serve 15 years without a break in employment as all contractual employment rights are effective from the most recent date of hire. Including prior years of service upon rehire was not a subject of negotiations because it was not contemplated by the parties. When discussed and implemented in 1983-84, the benefit was viewed as extremely costly and the District carefully reviewed liability. The 15 year requirement was referenced in the context of the STRS. There was never any discussion regarding a break in service or whether those years would be consecutive or aggregate in that context. In the 2001-03 bargains, language relating to prior service counting toward early retirement was never mentioned. Rader and Zimdars agree on this. And the District does not even keep track of prior employment with the District for purposes of liability for contractual benefits. Exhibit D-13 identifies the assumptions used, and incorporates the last date of hire. Association witness Britz admits that there were no proposals or other explanatory materials in reviewed files which showed that the 15 years did not have to be consecutive or would include years before a break in employment to count. In negotiations a break in employment was not discussed. The issue of prior service was never an

issue at the bargaining table. There is no contract provision which bootstraps in credit for prior employment. The District has consistently applied what it believes the parties' intentions were with respect to the 15 year eligibility requirement for calculating retirement benefits.

The District argues that it has consistently applied the early retirement benefit based upon its understanding of the contract language. The evidence supports the District's interpretation of the language. Based on Stieg's experience, the early retirement benefit was based on 15 years of continuous employment with the District commencing with an individual's last date of hire. He is not aware of any instances where eligibility took into account years prior to a break in employment. Lerza took a leave of absence after discussing eligibility with Stage. Templar's prior years would not count. Stevens had a leave of absence. He did not have a break in service. Freeman and Zimdars are not aware of any bargaining unit member who had two combined periods of service with a break in employment who received credit, or contract provisions allowing for such eligibility. In view of a past practice, the District has consistently applied the requirement of 15 consecutive years of service for purposes of early retirement benefits. Arbitrators require express language to accomplish what the Association seeks here, citing arbitral authority. Sick leave, layoff and recall seniority is based upon the most recent date of hire. Melon's sick leave, vacation and seniority did not carry over. There is no reasonable expectation, contract language or past practice which supports the Association position. The benefits should be accrued the same, citing arbitral authority. Melin's seniority date is her last date of hire, August 22, 1996. For purposes of consistent eligibility the countdown for early retirement benefits must be based on that date.

The District contends the Association fails to provide any instance where the language was applied as the Association seeks to apply it here. The files requested by the Association do not support its contentions. Mary Ann Douche had only 12 years as a full-time teacher and her letter to the Board admits she did not qualify for the early retirement package, even though she was granted 14 months of insurance. Perala's request was different because his prior administrative experience was acknowledged and he did not have a break in service. Appel has not turned in a retirement notice yet, and he has also been told by the District that his break in service resulted in the loss of nine years prior served as a bargaining unit member. The District response to Melin is consistent with these other situations, and is supported by arbitral authority. A job cannot be new for some purposes but not for others.

The District argues that the calculations relied upon by the parties in the negotiation of the early retirement benefits supports the District's application of the eligibility requirements. The 2001-03 negotiations were very complex, with early retirement the forefront of bargaining. Detailed costing and other data was passed back and forth between the parties, including names of projected retirees with start date, retirement year and retirement date. This was needed to determine the ultimate cost of early retirement proposals. Melin is not listed as a projected retiree within 10 years. This is consistent with the most recent date of hire. Had start dates been different or included others with service prior to a break in employment it would alter the calculations. Both parties had an opportunity to review and correct information

Melin was not in the documents because she had not met the eligibility requirements based upon the District's consistent application of those benefits. The Association should be stopped from asserting through this grievance a new class of eligible employees never previously identified in extensive bargaining. The Association failed to call a key witness. Eisenberg brought detailed costings to the 2001-03 negotiations and was a key figure who worked the numbers, developed proposals, and reviewed proposals of the District. The failure to call him permits the arbitrator to infer that had that witness been called, the testimony would have been adverse to the position of that party, citing arbitral authority.

The District further argues that the application of other contractual provisions supports the District's application of the retirement eligibility requirement. Appel and Melin served new probationary periods, while Stevens did not because he was on a leave of absence. Similar to probation periods, employees who are rehired begin with the date of rehire as the date for calculating early retirement benefits, not the date prior to the break in service. There is no contract language that provides for carryover in either area. Concerning seniority, lists are provided to the Association annually and the Association has never asserted an error for Melin. Stieg recalls discussing with Melin the 15 year requirement at the time she returned to the District and about seniority. Seniority is used to determine who can retire in a particular year depending on the number of retirees in a building or department. The District interprets the seniority clause in the early retirement provision to use the same, not two different criteria, within the same contract clause. Appendix E has only one start date and does not allow for different start dates in order to aggregate time. Employees are not given credit for prior years of employment upon rehire but are handled consistently with seniority dates. Accumulated sick leave benefits were not taken away from Stevens during his leave of absence. Melin's sick leave benefits were not carried over from her prior years of service because she was not on a leave of absence. Sick leave begins only with the most recent date of hire. Salary step placement has its own Article and Section. It provides there can be credit on the schedule for prior experience. Melin's placement on the salary schedule has no relevance to the issue at hand. By contract, there is no provision which permits such credit for early retirement benefits. Under the rule of *expressio unius est exclusio alterius*, by expressing certain exceptions implies there are no other exceptions, the parties could have noted prior service counts for early retirement, but did not. They therefore did not intend to do so.

The District further contends the contract language reflects the District's interpretation, practice and application of the early retirement benefits. The authority cited by the association is not on point and is distinguished by relevant facts including the inclusion of the word "continuous" in two other places in the contract as it related to service. In the instant contract the use of the word "continuous" modifies time and period of disability, not eligibility for early retirement in the context of years of service. "Continuous" is assumed in other parts of the agreement, with the same assumption for early retirement service. Besides the above points, other authority cited by the Association did not have a past practice which, by contract here, the parties have applied. Past practice would be helpful if the word "continuous" had been in the language, citing arbitral authority.

The District argues that the historical language in the contract does not support the Association position. Consecutive years of service for eligibility never came up, nor did break in service, consecutive or aggregate. Prior years of service were not discussed. There were no negotiations where something other than consecutive years of service would make one eligible. The Stevens retirement is not supportive of the Association argument. He had a two-year leave of absence, not a break in service as Melin did. Perala's retirement does not support the Association's case. He was both an administrator and teacher without a break in service whose application was thus different than Melin's which has a break in service. It appears that the Association has accepted the practice of recognizing administrative service as teacher service provided the service is consecutive. This is consistent with arbitral authority. Doucha is a good example, where she admitted she was not qualified for early retirement. There has been no granting of the retirement benefit in an instance similar to the one sought here. The evidence in the record reveals that the concept of a past practice has not been stretched. Association members were aware of the District's application of providing early retirement benefits, citing the Association members' Templer, Lerza and Appel situations. And the retirement forum packet change of language, which is not the contract itself, was a clarification of the District's consistent method. The practice has been proven and not disputed by Association members, it had existed for many years and has been mutually accepted by the Association. The District's interpretation of the seniority provision accurately portrays the practice and application of the early retirement benefit. Contract benefits are based upon an employee's last date of hire, not based upon previous periods of employment, citing arbitral authority. Melin's employment was treated as new for purposes of seniority, sick leave, probationary status and pay. There is nothing to suggest the parties agreed retirement eligibility should be selectively backdated.

The District argues that an award in favor of the District will not require the arbitrator to amend the agreement. The contract language is anything but clear. There was never a meeting of the minds as to the meaning of the first sentence of Article XIV. This is merely resolving a dispute on ambiguous language using clear past practice. And, the Association failed to address why it never objected to or corrected the information that was provided during negotiations or why it never called a key witness to testify on its behalf. For the 2001-03 negotiations, Melin's name is not on the pertinent documents for she would not meet the eligibility requirements within the period of review based on the District's consistent application of the benefits. The Association never presented alternative calculations and chooses to ignore this glaring inconsistency. The only consequence for failure to call Eisenberg as a witness is to infer that his evidence would have been unfavorable to the Association's case.

### **DISCUSSION**

The issues in this case require deciding if Donna Melin is entitled to early retirement benefits under Article XIV of the collective bargaining agreement. Her birth date is October 12, 1951. She worked full-time as a teacher for the District for five years, resigning in 1978, and again taught full-time for the District from 1996 until now. As of the start of the

2007-7008 school year she had a combined total of 16 years teaching for the District. This consists of 5 years during her first period of employment and the balance after her rehire. Article XIV A. provides in pertinent part:

**Eligibility for Paid Benefits**—Teachers who have taught at least fifteen (15) years in the school district shall be eligible to receive early retirement benefits pursuant to this Article if they attain age fifty-five (55) by August 31. For each school year, the number of teachers eligible to avail themselves of this provision shall be ten percent (10%) of staff, but no more than fifty percent (50%) of a grade in a school or fifty percent (50%) of a department (unless there is only one [1] teacher in the department), with preference based upon District-wide seniority. Teachers sharing time between schools shall be counted as an employee in the school at which they spend most of their time.

The Association contends that Melin meets the eligibility requirements of Article XIV because by adding her two periods of employment she has taught at least 15 years in the District and has attained age fifty-five. The District contends she is not eligible because her service must be continuous or without a break in service, and she had a break in service without yet completing at least 15 continuous years of service.

The best evidence of the intent of the parties is the words they used themselves in their collective bargaining agreement. The language of the eligibility provision expressed in the first sentence is plain and it is simple. It does not present an ambiguity. Applying these facts to the eligibility provision, Melin is a teacher. She has taught in the District. She has taught in the District at least 15 years. She has attained the age of 55 by August 31. Based on the plain and unambiguous language of the first sentence she is eligible for the early retirement benefits. Requiring the 15 years of teaching to be continuous, or without a break in service, would be to modify or add a provision to the sentence that is not there. An arbitrator cannot do that, particularly here, where the grievance procedure in Article IV specifically prohibits that. Generally, clear language reflects the parties' intent. Normally, when language is clear and unambiguous past practice and bargaining history are not needed in contract interpretation.

The remainder of the eligibility provision does not present an ambiguity. The District argues that the seniority reference in the provision must be used to determine eligibility in that seniority runs from the last date of hire, and it is consistent to use seniority to interpret the early retirement provision. Due to her break in service, using seniority leaves Melin with less than 15 years of teaching and thus not eligible. However, this does not create an ambiguity within the eligibility paragraph. The benefit is limited in terms of the number of eligible teachers who may take it. Seniority is clearly expressed as a preference. It is not expressed as a condition of eligibility. Seniority is a tie breaker between two or more teachers who are eligible to retire. The eligibility provisions do not say that at least 15 years of seniority is required. The District itself has not consistently required that. Perala did not have 15 years of seniority in the bargaining unit, yet the District granted him the benefits in an individual



agreement. Similarly, Stevens did not have 15 years of seniority in the bargaining unit based on his last date of hire as a teacher. And as the Association points out, there can be more than one date of hire. For example, placement on the salary schedule can be different from actual seniority, even if it is by a specific provision, Article VII-Section G, in the collective bargaining agreement. Contrary to the argument of the District, seniority from the last date of hire is not the only game in town or the only context in which to view contract provisions. Use of seniority in the early retirement provision is a ranking of bargaining unit members among themselves. Here, its application ranks who, among otherwise eligible teachers, can take the benefit. Fifteen years of seniority is neither a requirement for eligibility, nor does the seniority reference create an ambiguity.

There are no other provisions in the collective bargaining agreement which addressed eligibility for early retirement so no direct conflicts exist with Article XIV to create an ambiguity. Similarly, there is no ambiguity created by any tensions between the early retirement clause and other clauses in the collective bargaining agreement. As alluded to above, the salary scale placement does not create an ambiguity with early retirement. The District argues that the rule of *expressio unius est exclusio alterius* applies here, that contracts that specify certain exceptions imply that there are no other exceptions. Applied here, argues the District, the inclusion of a specific exception for placement on the salary schedule different than seniority implies that there are no other exceptions that provide the ability to reach back to prior service for retirement benefits if that were the parties' intent. But the existence of a particular benefit by itself in a part of the agreement does not mean that there are not other benefits with differing requirements to qualify. Had the parties intended the 15 years of teaching be continuous they could have stated that in the eligibility provisions, but they did not. The parties have used the word "continuous" in Article III A (The Association will be given one hour continuous time on the agenda of the orientation program to explain Association activities to any new interested teacher), in Article VII C (The Board shall provide a long term disability insurance. Sixty (60) calendar days of continuous disability are required before benefit payments may begin), and the word "consecutive" in Article VIII, A (If ten (10) or more sick days are used on consecutive work days, the teacher will be required to present certification from a doctor that he/she was incapable of performing normal teaching duties during the days absent) and Article VIII D (The Board shall provide a MDL leave of absence for any teacher who is required to be absent from work for more that thirty (30) consecutive days, due to medical disability provided the teacher complies with the following procedures, and subject to the following limitations). They knew how to use the words continuous or consecutive. Had they intended the word "continuous", "consecutive" or some similar adjective or qualifier to be included in the eligibility requirements for early retirement, they could have. But they did not. This is an indication that they did not intend "continuous" or a similar phrase to be included in the eligibility requirements. The fact that a specific salary placement provision is in the contract does not persuasively demonstrate that the parties intended to exclude prior service from being counted in early retirement eligibility. The District has not pointed to any other provision in the collective bargaining agreement which states that either contract provisions generally, or early retirement provisions specifically, require continuous service or must be without breaks in service.

On this point of contract interpretation both Parties contend their respective position is supported by the case of MILWAUKEE COUNTY FIRE FIGHTERS' ASSOCIATION, CASE 305, No. 45693, MA-6706 (Yaeger, 1992), and its reasoning is set out in some detail below. In that case some contractual benefits were described or modified by the word "continuous" while others, specifically an education bonus, were not. The grievant had been in the bargaining unit for several years before being promoted to a non-bargaining unit supervisory position. He then had a break in service for several years before being rehired into the bargaining unit. Arbitrator Yaeger found that the absence of the word required giving the requested credit for the prior service

The same analysis, however, cannot be made with regard to comparing the Educational Bonus language with the vacation language in Section 2.08. In the latter section the term "continuous" is used to modify "service". Clearly, this lends substance to the Union's contention that had the parties intended "continuous service" to be a condition to eligibility under the Educational Bonus clause they could have so stated inasmuch as they saw fit to do for Vacations. However, they did not include the use of the term continuous to modify County service in the language of the Educational Bonus provision. The eligibility requirements for the Educational Bonus entitlement specified in Section 2.02(2) are that the employee have five years of service with the County as a firefighter. The Arbitrator's responsibility in interpreting contract language is to where possible, insure all language has meaning. To disregard the use of the word "continuous" in Section 2.08 would violate this principle. Thus, the absence of the term "continuous" in the Educational Bonus clause must be read as also having some significance and not merely an oversight on the drafter's part. The significance is that an employe, such as the grievant, who has a break in service as a firefighter with the County will not be penalized for that break in service in calculating eligibility for the Educational Bonus. Consequently, the undersigned does believe that the absence of the use of the word continuous in Section 2.02 (2) of the Educational Bonus language requires the County to give the grievant credit for his service as a firefighter in his previous employment with the County in calculating his eligibility for the Bonus.  
(footnotes and citations omitted)

The analysis and reasoning in MILWAUKEE COUNTY FIRE FIGHTERS' ASSOCIATION thus appears to be more supportive of the Association's positions here than of the District's.

The District cites CITY OF CUDAHY, CASE 87, No. 55489, No. 55490 (Knudson, 1998) in support of its interpretation of the contract. In that case Arbitrator Knudson determined that the City did not violate the agreement when it denied the grievant five weeks of vacation and longevity pay after a break in service without a leave of absence. But in CITY OF CUDAHY the collective bargaining agreement provisions specifically based vacation benefits on seniority, which was also specifically defined as "an employee's length of continuous service with

employer since his date of hire”. The longevity benefit referred to “the anniversary date of hire.” The arbitrator was not convinced that the parties intended vacation eligibility to be computed in a different manner than longevity is computed. That contract specifically tied the benefits to “continuous service” and seniority. Different language exists in the collective bargaining agreement here and, as noted, seniority is not a condition on which eligibility is based.

Other clauses and provisions in the collective bargaining agreement do not render the early retirement provisions ambiguous. The District has referred to sick leave, layoff and recall seniority being based upon most recent date of hire, and also pointed to Melin’s vacation, sick leave and seniority not carrying over on her rehire. The seniority provisions have been dealt with above, and they are part of the layoff procedures under Article XII for staff reductions. The layoff and recall provisions use seniority. But, as explained above, seniority calculations do not create an ambiguity for early retirement. The sick leave provisions in Article VIII allow an accumulation of 10 days per year to a cumulative total of 90 days. The Article is silent on whether they carry over or not. On its face there is no ambiguity presented in view of early retirement. Vacation is not referenced in the collective bargaining agreement, so that cannot present an ambiguity in view of early retirement.

Even though there is no ambiguity in the early retirement provision which would require resort to bargaining history or past practice to resolve, sometimes bargaining history or past practice is used to fill in gaps in collective bargaining agreements or to see if clear language has been amended by practice. The parties do present arguments as to bargaining history and past practice. This will be looked at to see if it alters the plain reading of the early retirement provision.

The parties respectively point out that during the initial and all following negotiations concerning early retirement there was no discussion as to including credit for prior service, on one hand, or requiring teaching years to be continuous, consecutive, or without a break in service, on the other hand. While originally tied to the state teacher retirement system in 1983-84, the eligibility requirements have been basically, and effectively, the same since the 1987-89 bargain. The date by which age 55 must be attained has changed, as has the number of teachers eligible to retire in any given year have been changed. Although the parties have differed seriously as to whether early retirement saves the District any money, the intended beneficiary was the long-term teacher. As stated by the District’s negotiator, Attorney Rader:

Q Who was intended to be the beneficiary of the retirement provision?

A Well, the beneficiary of the retirement is the long-term teacher. That’s the person – that’s, of course, the argument we got. I mean, these people have, you know, given a portion of their lives and they need – you know, they put in their time here and if they want to retire early we should do something for

them. There were a number of different rationales, but that was the argument that was made. Nobody from the Association came in and said, Well, we want to do something for the guy that worked for us five years ago and is now coming back and working ten. We never heard anything like that, and quite frankly, if we had, I think it would not have been received well.

(Tr. p. 138)

Two important points are drawn from this. The first is that the long-term teacher is the intended beneficiary. The parties settled on 15 years as being long-term. There has been no explanation, particularly from the District, why an aggregate of 15 years is not long term service to the District even if it does have a break in service. It is still 15 years and long-term. The language as agreed to by the parties does not present a gap that needs to be filled by adding additional meaning to the plain language of the provision. Secondly, the example about working five years ago and now coming back and working ten not being heard is a simple restatement of the obvious – it was not discussed; neither was continuous or consecutive discussed. The remainder of the District's hypothetical reaction to the example is speculative.

Another important part of bargaining history argued by the parties is the 2001-03 bargain. The prior language had EEOC problems concerning potential age discrimination and the parties worked very hard to rectify that. They used several detailed lists of teachers and retirees, with projected retirement dates. These were based on last date of hire. However, there were at least a few mistakes in the raw data, and the parties were not focusing on individual teachers, such as Melin. And although Perala, whose eligibility was based in part on administrative years, appears on a retired list, there is no indication in the record as to whether any other administrative employees were included in the projected retiree list. The implication is that the projected retirees are all teachers. Doucha is also on the retired list. There is no argument that she did not meet the eligibility requirements for early retirement and was only granted limited insurance benefits. The parties were trying to estimate the costs of early retirement by use of surveys of potential retirees and estimated retirement dates. The parties realized that some of the retirement dates could change based upon later decisions of teachers as to when they would actually retire. Whether a benefit actually ends up costing more – or less - than a party may have anticipated does not change the language that they put into their agreement. The fact that Melin's name is not on the projected retiree lists cannot be dispositive because the parties were not focusing on individuals and they realized they were looking for an overall estimate of costs that would change with actual retirement decisions. They were not looking at that issue and the matter of consecutive or aggregate years of teaching service was not discussed during that or any other bargain. More importantly, the parties did not change the essential requirements for eligibility, those being teachers who have taught at least 15 years in the District attaining age 55 by a certain date.

The District criticizes the Association for not calling negotiator Eisenberg as a witness at the hearing and contends that his absence supports an inference that his testimony would have been negative towards the Association position on 15 years of total service. Everyone who testified, both Association and District witnesses, said the matter of continuous, break in

service, aggregate or other similar expressions were not discussed during any negotiations. The parties have not argued that there is any fact issue surrounding the inclusion of seniority in the 1987-89 contract and thereafter. Even assuming his testimony would not support the Association position, there is nothing to show how or what, if anything, his testimony would alter the otherwise clear and plain language the parties used.

The bargaining history shows an intended group of beneficiaries which Melin fits into and is not excluded. When the parties bargained their initial provisions for eligibility they set the requirements and conditions for early retirement in clear and plain language by at least 1987-89. Later bargains, including the 2001-2003 bargain, did not change or add any additional requirements or conditions such as the years being continuous or without a break in service. They never discussed adding additional requirements or conditions other than going from 15 years to 20 years. The bargaining history and intent behind the provision does not create an ambiguity, does not conflict with its clear language, and does not reveal any other mutually accepted meaning for the provision other than what it actually says in plain language.

There is the matter of how the provision has been applied in various situations since the early retirement provision was included in the agreement. The parties disagree as to whether these instances, or any of them, amount to a binding past practice. Normally, resort to past practice is not needed where contract language is not ambiguous. So far, that is the case here. However, it is possible that a recognized past practice of the parties may give a different meaning to language or words in an otherwise clear provision. The District argues that it has consistently applied the language to mean that the 15 years of service must be continuous, thus showing its understanding of the meaning of the language and the Association's recognition of that through past practice. It also argues that in applying past practice an arbitrator is not adding to or subtracting from the words of a contract provision. It cites Stevens and Perala as the instances where continuous service has been recognized as qualifying, and Appel, Templar and Lerza where a break, or potential break, in service was recognized as not qualifying.

In order for a past practice to become binding as part of a collective bargaining agreement, such practice must be well established. As set out in Elkouri & Elkouri, How Arbitration Works, (6<sup>th</sup> Ed.) pp. 605-609, a past practice, to be binding, must be unequivocal, clearly enunciated and acted on, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

In the Stevens matter, the District argues that he never had a break in service because he was on various leaves of absence while not teaching in the bargaining unit, and his combination of teaching and administrative service for 15 continuous years qualified him for early retirement under the collective bargaining agreement. The Association argues that his case does not support a past practice and, if anything, supports the Association position that it was his 16 years of teaching, consisting of two aggregate periods of actual teaching service, which qualified him for the benefit. The Stevens situation could arguably support both parties' position as to how he met the requirements for early retirement. The record does not

demonstrate that the Association understood this to be the District position in the Stevens case, especially where he would meet the requirements under the Association view. And Stevens did not have any discussions with the administration as to how he would be eligible or what service made him eligible. Thus, there could be no imputed knowledge to the Association that the District's view was being implemented. This cannot be seen as the Association recognizing a binding practice. The Stevens case cannot support a past practice from either point of view.

In the Perala case it is clear that his early retirement grant, even though a combination of administrative and teaching years, was arranged prior to his entry into the bargaining unit and while he was still in administration. There may have been some bargaining unit personnel who were aware of the circumstance when the arrangement was made, but the record does not reflect there was any actual agreement or recognition by the Association that this arrangement would be considered binding on the Association. The fact that the Association did not object or grieve an agreement between administrators does not persuade the undersigned that this was recognized by the Association as a binding practice. Given the ability of the Stevens situation to be viewed by both parties in a light more favorable to each respective side, the Perala situation does not then establish a practice that is clearly enunciated, readily ascertainable over a reasonable period of time as a fixed and established practice. Whether these requirements are established by including the Appel, Templer and Lerza cases must be examined.

Appel had been an administrator in the District for several years before resigning to work as a teacher in a different district, and then returned to the District as a teacher. Upon his inquiry of the administration as to whether his prior years as an administrator would count towards early retirement he received the September 11, 2003 email. That email set out two reasons why the District was not going to recognize his prior years as an administrator. First, he had not been a teacher who had taught at least 15 years in the school district. Secondly, he had had a break in service. At the time of that email the Director of Human Services for the District was not aware of the Stevens and Perla case. It is thus difficult to see that, as to the first reason, the District was engaging in a fixed or established practice recognized by both parties as binding. The first reason does appear to be a straightforward application of the clear and plain language of the provision. Also, the email set out two positions of the District. This is not unequivocal, clearly enunciated or readily ascertainable over a reasonable period of time. The email appears to be the first instance where the break in service concept was used, because that was not anything the District communicated to the Association in the Stevens or Perala cases.

Templer had been a teacher in the District and then went into administration. He then severed his employment with the District to become a principal in another district. He returned to the District as a principal. When being interviewed for this principal job there was some discussion about early retirement and he was told by the District that his prior time as an administrator would not count towards early retirement. He had left the District as an administrator and was returning as an administrator. Then superintendent Stieg felt, on Templer's return, that his years as an administrator would not count towards eligibility for

retirement under the collective bargaining agreement, and it would not count under the retirement plan that was in the administrator's handbook. Stieg testified:

Q So those years as an administrator would not count towards eligibility for retirement under the Collective Bargaining Agreement, would it?

A No. The administrators had a retirement plan also in their handbook and that's when I testified before that it was referring to those years of experience and I did not apply that to him either.

. . .

Q He wasn't covered under the Collective bargaining agreement, was he?

A No.

(Tr. pp. 128, 129)

Even though the meaning and interpretation of the provision is not the sole prerogative of the District's superintendent, in this instance the District is again discussing with an administrator, rather than with the Association, what it considered the requirements to be, which in this instance did not include administrative years. It is not clear from Stieg's entire testimony if he told Templer his prior years did not count because they had been administrative or because there had been a break in service. The strong inference from the record is that the break in service was a disqualifier in the District's view. Yet it is difficult to see how this is unequivocal, clearly enunciated or readily ascertainable to the Association when compared to Stevens and Perala, who the District now says can count administrative years towards the collective bargaining agreement provision for early retirement because they did not have a break in service.

Lerza was a teacher who discussed a pending out of state move with the administration, and was counseled to take a leave of absence, rather than simply resigning, so he would remain qualified for benefits, including early retirement. The lists used in the 2001-03 bargain indicate he was eligible to retire in 2004. The record is not clear when he had his leave of absence. There is no record of any grievance being filed over his early retirement eligibility. This appears to be the only instance, other than Melin, where a teacher solely in the capacity of teaching years had a discussion with the District as to eligibility for early retirement. There is nothing in the record to indicate that any bargaining unit member other than Lerza was aware of this discussion and the position taken by the District therein. Lerza has not been shown to be an officer in the Association. Even if knowledge to the Association could be attributed by Lerza's discussion, the fact that no grievance was filed would not mean that the Association agreed with the District position or that it was waiving any rights under the collective bargaining agreement. He had not actually applied for the benefits and there had been no denial for him to grieve. Failure to grieve a perceived violation does not waive future violations or prevent a labor organization from grieving a later perceived violation.

The District argues that it has consistently applied the provision in the above cases to require there be no break in service in order to qualify for the 15 years. But, as noted, only the Lerza years were clearly all teaching years. The others all involved some combination of administrative years which the District either did recognize because there were no breaks in service, or did not recognize because there were breaks in service. That does not present a persuasive argument that a binding past practice has been recognized by the parties. In many of the examples it is not even clear that the Association was aware of the discussions, either granting or not granting prior administrative service depending on a break in service.<sup>4</sup>

There has been no binding past practice established by which the parties recognize that the 15 years must be without a break in service or must be continuous. The District cites OCONTO COUNTY, CASE 88, No. 42285, MA-6706 (Knudson, 1989), in support of its argument that applying past practice as an aide in interpreting contract language is not adding to or subtracting from the contract language. Several important distinctions with the case at bar erodes any persuasive use of OCONTO COUNTY. The first distinction is that the longevity provision there, which did not contain language such as continuous or uninterrupted, did make a specific referral to the “employee’s date of employment in each year.” Having found “after five (5) years of service” to be ambiguous, arbitrator Knudson relied on wording in the same paragraph to find consistency with the County’s position that the service must be continuous or uninterrupted. The arbitrator reasoned that that was the only consistent interpretation of the Article. That is not the case here, where the date of hire provision as to seniority, a different clause, refers to the most recent date of hire in the bargaining unit - which implies there can be more than one date of hire. Then, because the arbitrator had found an ambiguity in this different language, he looked at past practice where several bargaining unit members who had resigned and then been rehired were not allowed the benefit by the County. That is not the case here, where Melin is apparently the first and only teacher to have actually resigned and been rehired. Moreover, as noted above, there is no binding past practice established in this case from which to apply the reasoning of OCONTO COUNTY. Even though there are some arguments as to sick leave, vacation and seniority in OCONTO COUNTY which may be supportive of the District’s arguments, the difference in the contract language and past practice facts of the case renders it significantly different than the case here.

There is a factual dispute about what was discussed, or not discussed, about early retirement when Melin was rehired. Stieg testified it was discussed and that early retirement would be considered from that point going forward. Melin denies that it was discussed. It is not necessary to determine which recollection of this 1996 discussion is the more accurate. That is because it is the written collective bargaining agreement which is being interpreted

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<sup>4</sup> See, CHEQUAMEGAN UNITED TEACHERS, CASE 55, No 63509, MA-12610 (EMERY, 2/2/05: The Union and the District are the parties to the agreement; the individual bargaining unit members are not. As many arbitrators have held, in such cases knowledge on the part of the employees does not constitute notice to the Union such that it can create a binding practice [Cf., BONDUEL EDUCATION ASSOCIATION, CASE1, No. 54685, MA-9760 (JONES, 6/19/97), JUNEAU COUNTY, CASE 99 No. 48894, MA-7754 and CASE 100, No. 48895, MA-7755 (McLAUGHLIN, 12/22/93)].



here. Melin and Stieg cannot change the agreement language or its meaning by later discussions between only themselves, even if Stieg's recollection were to be considered more accurate.

Similarly, the change in the written materials used at retirement forums to include the word "continuous" does not change the collective bargaining agreement itself. The handouts are not the agreement. What they say or said before the change does not supersede the collective bargaining agreement. If the change in the handouts was made to more accurately express what the District believes should be the reading of the agreement, then it must be admitted that the handouts prior to the change did not clearly express that position. This would make it even more difficult for the District to establish an unequivocal, clearly enunciated and readily ascertainable practice, as noted above. Likewise, Appendix E in the collective bargaining agreement is a form which does not control the language in the body of the agreement itself. Verbiage in the appendix as to benefits defers to the collective bargaining agreement.

The issue in this case concerns whether the work must be without a break in service. It does not. The early retirement provision is written in clear and unambiguous language. Melin's 15 years of teaching in the District and her age make her eligible for the benefit. Neither bargaining history nor past practice alters the provision. The District violates the collective bargaining agreement by its application of the 15 years eligibility criteria in Article 14, Section A to deem eligible those employees who have worked 15 years without a break in the employment relationship with the District. Accordingly, based on the evidence and arguments in this case I issue the following

#### AWARD

The grievance is sustained. As a remedy the District must count Melin's years of teaching service in the District from 1973 through 1978 towards eligibility for early retirement benefits.

Dated at Madison, Wisconsin, this 8<sup>th</sup> day of August, 2008.

Paul Gordon /s/

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Paul Gordon, Arbitrator